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The Case for Categorical Nonenforcement

LEIGH OSOFSKY*

I. INTRODUCTION

Recent presidential administrations have engaged in high-profile nonenforcement of the law, including, in the current administration, nonenforcement of immigration laws, federal marijuana laws, and parts of the Patient Protection and Affordable Care Act.¹ In response to such nonenforcement, commentators have begun asking what would happen if a future President decided not to enforce the tax laws. Could a President decide not to enforce the estate tax, the income tax with respect to millionaires, or the income tax for anyone who has paid a specified percentage of income in taxes?²

Constitutional scholars have suggested that the President cannot declare categorical, or complete, prospective nonenforcement of some aspect of the law.³ Even commentators supportive of recent nonenforcement initiatives have suggested as much, drawing a distinction between setting low enforcement priorities and categorical nonenforcement, and arguing that the former is permissible, while the latter,

* Associate Professor of Law, University of Miami School of Law. Many thanks to Michael Froomkin, Pat Gudridge, Fran Hill, Leandra Lederman, Caroline Mala Corbin, Zachary Osofsky, Bernie Oxman, Zachary Price, Michael Sant'Ambrogio, Dan Shaviro, Peter Strauss, Alan Viard, Larry Zelenak, and workshop participants at NYU School of Law, the 2014 National Tax Association Annual Conference on Taxation, the 2014 Junior Tax Scholars Workshop.

¹ For more details regarding these instances, see text accompanying notes 7-11.

² See, e.g., Jonathan Chait, *Obama's Immigration Plan Should Scare Liberals, Too*, N.Y. Mag. (Aug. 11, 2014, 3:06 PM), <http://nymag.com/daily/intelligencer/2014/08/obamas-immigration-plan-should-scare-liberals.html> ("What if a Republican President announced that he would stop enforcing the payment of estate taxes?"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 *Tex. L. Rev.* 781, 784 (2013) ("Can a President who wants tax cuts that a recalcitrant Congress will not enact decline to enforce the income tax laws?"); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 *Vand. L. Rev.* 671, 688 (2014) (asking whether a President lawfully could decline to enforce the capital gains or estate taxes). Recently, George Stephanopoulos asked President Obama himself. Interview by George Stephanopoulos with President Obama (ABC television broadcast, Nov. 23, 2014), <http://abcnews.go.com/blogs/politics/2014/11/president-obama-defends-use-of-executive-action-on-immigration/>.

³ This conclusion has applied to criminal and civil law. See text accompanying notes 12-14.

by negative implication, is not.⁴ Scholars have drawn a number of other distinctions to try to explain when nonenforcement is permissible, arguing that it may be permissible if motivated by enforcement resource limitations but not if it is motivated by policy, and it may be permissible if time limited.⁵ The implication of these distinctions is a presumption against categorical nonenforcement. Recent tax literature examining IRS pronouncements that it will not enforce very particular aspects of the tax law has also concluded that categorical tax law nonenforcement is troublesome from the perspective of the rule of law.⁶

What has been missing in the existing discussion, especially in the preoccupation with flashy, yet relatively infrequent, presidential nonenforcement of the law, is a broad-based examination of the endemic nonenforcement that is directed by administrative agencies, and an accompanying examination of such agency nonenforcement through the lens of agency legitimacy. A long and extensive literature regarding agency legitimacy seeks to justify agencies making significant decisions about legal rights and obligations, and this literature offers important insights about agency nonenforcement decisions. This Article brings this literature to bear by applying theories regarding agency legitimacy to tax law nonenforcement directed by the IRS. This examination reveals that, for a number of reasons, when the IRS is inevitably going to be engaging in tax law nonenforcement, categorical nonenforcement may actually help legitimate the nonenforcement.

The IRS inevitably must make nonenforcement decisions on a daily basis because it is tasked with administering many more tax laws against many more taxpayers than its resources allow. As a result, like other administrative agencies, as well as prosecutors, the IRS must choose which tax laws to enforce or which taxpayers to enforce against at any point in time. The IRS can make such decisions in a variety of ways. It can decide to engage in complete, prospective nonenforcement of certain aspects of the tax law for a period of time or until future notice (“categorical nonenforcement”). Alternatively, the IRS may focus enforcement resources on particular tax issues or taxpayers (“setting priorities”). Finally, the IRS may nominally maintain a policy of enforcing all tax laws, leaving discretion to individual revenue agents to make enforcement decisions (“case-by-case” decision-making). In a world of insufficient enforcement resources, each method of allocating enforcement resources results in nonenforce-

⁴ See note 14.

⁵ See text accompanying notes 15-16.

⁶ See text accompanying notes 22-25.

ment of some aspects of the tax law against at least some taxpayers at any given time.

Moreover, the IRS must make at least some high-level decisions regarding tax law nonenforcement. Different types of taxpayers, vastly different costs/yields for different taxpayer types and tax issues, and a sprawling administrative agency all necessitate at least some high-level, systematic allocation of limited enforcement resources. As a result, the IRS must rely on some of either categorical decisionmaking or setting priorities to direct enforcement resources. The consequence is that nonenforcement of the tax law is not spread evenly among taxpayers, but rather is systematically concentrated on certain taxpayers and tax issues.

This tax law nonenforcement landscape that occurs every day on the ground at the hands of the IRS relates to a deeper question about agency legitimacy. Scholars have wrestled for decades with the uncomfortable role administrative agencies play in U.S. constitutional democracy, because agencies' expansive role in the government is not contemplated in the Constitution, and agencies make significant policy decisions about rights and obligations under the law even though they are not elected to do so. Scholars have developed a number of theories to help explain how agencies can legitimately play this role. Three prominent theories are (1) the political accountability theory, (2) the civic republican theory, and (3) the nonarbitrariness theory. These theories posit, respectively, that agency action is legitimate if: (1) it is subject to the control of the politically accountable branches, (2) it is the product of a deliberative process designed to reach consensus about the common good through reasoned deliberation, or (3) it is nonarbitrary, or rational, predictable, and fair. These theories attempt to apply core principles of democratic governance, which arguably are rooted in fundamental U.S. constitutional values, to the realities of the present day administrative state.

Applying these theories of agency legitimacy to the realities of tax law nonenforcement reveals that in some circumstances categorical nonenforcement may actually increase the legitimacy of the IRS's nonenforcement. Categorical nonenforcement can serve as a particularly salient means of communicating enforcement decisions, which may lead to greater political accountability, increasing the legitimacy of nonenforcement under the political accountability theory. Also owing to its ability to make enforcement decisions particularly salient, categorical nonenforcement may yield greater public deliberation, increasing the legitimacy of nonenforcement under the civic republican theory. Categorical nonenforcement also can serve as a practical (although perhaps not legally enforceable) means for high-level officials

to commit the agency to a policy of nonenforcement, which may increase the legitimacy of nonenforcement under the nonarbitrariness theory. Categorical nonenforcement, of course, may not always be legitimacy enhancing, nor does this Article claim that it is. Rather, this Article fundamentally claims that viewing nonenforcement through the lens of agency legitimacy may help apply core values of democratic governance, which are obscured or missed by the existing analyses, to agencies' inevitable, systematic nonenforcement of the law.

Moreover, focusing on the realities of agency nonenforcement reveals significant limitations of the existing constitutional and rule-of-law analyses of nonenforcement. In delineating what is acceptable executive nonenforcement, both the existing constitutional and rule-of-law lenses rely on formal distinctions (such as distinctions between categorical nonenforcement and setting priorities, or between nonenforcement motivated by enforcement resource limitations and nonenforcement motivated by policy) that do not hold up well against the realities of agency nonenforcement. In part by highlighting the limitations of the existing analyses, this Article hopefully underscores how the lens of agency legitimacy may help prompt a deeper consideration of the values of legitimate nonenforcement.

II. EXISTING ANALYSES OF CATEGORICAL NONENFORCEMENT

Recent, high-profile presidential nonenforcement initiatives have focused scholars' attention on executive nonenforcement. Such initiatives include: (1) the Obama Administration's Deferred Action for Childhood Arrivals program (DACA), which dictated how the Department of Homeland Security (DHS) should exercise its prosecutorial discretion with respect to the immigration laws for certain young immigrants who meet various requirements,⁷ (2) its expansion of such immigration policies in the form of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and an accompanying expansion of DACA,⁸ (3) its guidance regarding

⁷ Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁸ Transcript: Obama's Immigration Speech, Wash. Post (Nov. 20, 2014), http://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html; Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

how the federal government should exercise its prosecutorial discretion with regard to the enforcement of federal marijuana laws,⁹ and (4) announcements that enforcement of certain provisions of the Patient Protection and Affordable Care Act¹⁰ would be delayed as a means of providing transition relief for various requirements of the Act.¹¹

Focusing on such initiatives, constitutional scholars have cast doubt on the legitimacy of categorical nonenforcement in the case of both prosecutorial and administrative nonenforcement. Using various methodologies such as examinations of the Take Care Clause,¹² separation of powers principles, and the historical background of the Constitution prior to, at the time of, and after the founding, constitutional scholars have suggested, to varying degrees, that while abstention from executing the law in certain cases may be required,¹³ complete, prospective nonenforcement is an unconstitutional aggrandizement of executive power.¹⁴ To be sure, constitutional scholars have drawn sev-

⁹ E.g., Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter *Marijuana Enforcement Memo*]; Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1-2 (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

¹⁰ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 19 U.S.C., 20 U.S.C., 26 U.S.C. & 42 U.S.C.).

¹¹ Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, U.S. Dep't of Health & Human Servs., to Ins. Comm'rs (Nov. 14, 2013), <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf>; Notice 2013-45, 2013-31 I.R.B. 116; Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8569 (to be codified at 26 C.F.R. pts. 1, 54, 301) (Feb. 12, 2014).

¹² U.S. Const. art. II, § 3 (dictating that the President "shall take Care that the Laws be faithfully executed").

¹³ Scholars have often agreed that some amount of executive discretion regarding enforcement is inherent in the executive power. E.g., Price, note 2, at 675 (acknowledging that "some degree of enforcement discretion is a natural incident of the core executive function" and that such discretion is essential to protect liberty). The question of interest is whether categorical nonenforcement is a legitimate means of exercising such discretion.

¹⁴ Constitutional scholars have drawn the line in different places in reaching this conclusion. For instance, some scholars have argued that a "deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty." Delahunty & Yoo, note 2, at 785. Others have determined that there is "a presumption against presidential authority to license legal violations or categorically abstain from enforcement." E.g., Price, note 2, at 689. Indeed, even those supportive of President Obama's policies have implicitly cast doubt on the legitimacy of categorical nonenforcement by claiming that the Obama Administration has not engaged in categorical nonenforcement, but rather simply was setting priorities. See, e.g., Brian Beutler, *The Liberal Fear of Obama's Executive Action Is Irrational*, *New Republic*, Aug. 12, 2014, <http://>

eral other distinctions to explain how certain types of nonenforcement are more acceptable than others. First, scholars have reached a near consensus that policy-based nonenforcement is impermissible, whereas nonenforcement resulting from enforcement resource limitations may be permissible.¹⁵ Second, some scholars have suggested that time-limited nonenforcement may be more permissible than nonenforcement not so limited.¹⁶ In any event, constitutional scholars have set forth a general presumption that categorical nonenforcement, and in particular policy-based categorical nonenforcement or categorical nonenforcement that is not time limited, is deeply problematic.

Indeed, this view is so dominant that it seems to have motivated and shaped the Obama Administration's own framing of its nonenforcement policies. In the context of DACA, for example, the memo announcing the program repeatedly emphasizes that it is a simply a means of setting priorities, for instance, by stating that the memo is meant to ensure that "our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities."¹⁷ The memo even tries to eschew any sense that it sets forth a policy of categorical nonenforce-

www.newrepublic.com/article/119057/obama-immigration-policy-critics-have-irrational-fear-precedent; Eric A. Posner, *Obama Is Legally Allowed to Enforce—or Not Enforce—the Law*, *New Republic*, Aug. 3, 2014, <http://www.newrepublic.com/article/118951/obamas-immigration-policy-lawful-he-can-enforce-what-he-wants>.

Two constitutional scholars have provided some support for categorical nonenforcement. In a recent article, Michael Sant'Ambrogio discusses some of the benefits of what he calls an extra-legislative veto, which includes, among many other things, the President's ability not to enforce the law. Michael Sant'Ambrogio, *The Extra-legislative Veto*, 102 *Geo. L.J.* 351, 361 (2014). Addressing President Obama's immigration nonenforcement policies in passing in an even more recent article, Gillian Metzger briefly mentioned the benefits of categorical nonenforcement. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *Yale L.J.* 1836, 1928-29 (2015). Both Sant'Ambrogio and Metzger focus principally on presidentially directed nonenforcement and neither sets forth a framework for analyzing nonenforcement through the lens of agency legitimacy, or provides detailed examples or analyses of agency nonenforcement through such lens or through the alternative lenses. This Article engages in that project.

¹⁵ See, e.g., Rachel E. Barkow, *Clemency and Presidential Administration*, 90 *N.Y.U. L. Rev.* 802, 847-49 (2015); Mary M. Cheh, *When Congress Commands a Thing To Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 *Geo. Wash. L. Rev.* 253, 265 (2003); Delahunty & Yoo, note 2, at 850; Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 *Mich. L. Rev.* 1195, 1216-17 (2014); Peter L. Strauss, *The President and Choices Not To Enforce*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 119. Love and Garg take a slightly different view on this point than many others, in that they suggest that policy goals for nonenforcement are problematic to the extent that the President chose inaction to promote "his own policy goals at the expense of Congress's." Love & Garg, *supra*, at 1220.

¹⁶ Sant'Ambrogio, note 14, at 403. Eric Posner has suggested that time limitations on nonenforcement make a difference, explaining that, "[t]he president cannot suspend or change the law: When he leaves office, the law will remain the same as it was, and the next president will be free to enforce it or not." Posner, note 14.

¹⁷ Napolitano Memorandum, note 7, at 1.

ment by stating that any relief from enforcement pursuant to the memorandum will be decided “on a case by case basis.”¹⁸ President Obama has also emphasized that “[t]his is not a permanent fix, but rather a temporary stop-gap measure”¹⁹ In his announcement regarding his more expansive immigration initiative, President Obama similarly emphasized that “We’ll prioritize, just like law enforcement does every day,”²⁰ a sentiment echoed in the relevant DHS memorandum delineating the policies, which carefully used case-by-case and priorities language.²¹ By couching such policies in the language of setting priorities, the Obama Administration has implicitly reflected the view that uncabined categorical nonenforcement is particularly suspect.

There is a separate, recent line of literature in the tax context that has focused on the impropriety of categorical nonenforcement by the IRS, although it has not been in conversation with the constitutional dialogue regarding presidential nonenforcement. Most notably, in a series of articles, Lawrence Zelenak has explored “customary deviations,” which he defines as, “an established practice of the tax administrators (the IRS and the Treasury Department) that deviates from the clear dictates of the Internal Revenue Code.”²² Zelenak describes customary deviations as distinct from “simple underenforcement of the law without any indication (beyond the mere underenforcement)

¹⁸ *Id.* at 2.

¹⁹ Barack Obama, *A Nation of Laws and a Nation of Immigrants*, *Time*, June 17, 2012, <http://ideas.time.com/2012/06/17/A-NATION-OF-LAWS-AND-A-NATION-OF-IMMI-GRANTS/>.

²⁰ Obama’s Immigration Speech, note 8.

²¹ Johnson Memorandum, note 8, at 3 (“By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities”). The Office of Legal Counsel opinion repeatedly emphasizes that the new policy merely sets priorities and still allows case-by-case discretion. Memorandum from Karl R. Thompson, Principal Deputy Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* 28-29 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter OLC Opinion] (“And the case-by-case discretion given to immigration officials under DHS’s proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program.”). For similar caveats in other nonenforcement initiatives, see, for example, *Cole Marijuana Enforcement Memo*, note 9, at 1-2, 4; *Ogden Memorandum*, note 9, at 1-2; see also note 11 and accompanying text (delineating all of the temporary relief under the ACA as transitional and therefore time limited).

²² Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 *Duke L.J.* 829, 833 (2012) [hereinafter *Custom*]; see also Lawrence Zelenak, *Up in the Air Over Taxing Frequent Flier Benefits: The American, Canadian, and Australian Experiences*, 9 *Capital Markets L.J.* 420, 425 (2014) [hereinafter *Up in the Air*].

that the IRS acquiesces in widespread noncompliance,²³ making Zelenak's customary deviations akin to the categorical nonenforcement discussed in this Article.²⁴ Zelenak concludes that "[t]o anyone who takes the rule of law seriously, it is troubling to contemplate that the Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code. . . ."²⁵

III. INEVITABLE, SYSTEMATIC TAX LAW NONENFORCEMENT AT THE HANDS OF THE IRS

What existing analyses have not done is evaluate executive nonenforcement of the law by considering how theories of agency legitimacy apply to the realities of agency nonenforcement. This Article engages in this analysis, motivated by the belief that, while it is all well and good for commentators engaged in a high-stakes political debate to imagine the President slashing the income tax through nonenforcement, a comprehensive evaluation of executive nonenforcement should be rooted at least in part in the realities of agency nonenforcement that occur on a daily basis.

To delve into these realities, begin by indulging for a moment more in another imaginary exercise. Imagine that, at the Hogwart's School of Witchcraft and Wizardry, Hermione Granger faces the following question on a final exam in her Muggle (nonwizard human) studies class:²⁶ Would the following items have to be included in income for U.S. tax purposes: wages received by an employee of a large business, payments for services made to a large partnership by a subsidiary partnership, and frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes? Hermione is an extremely diligent student, particularly well known for her attention to detail. After doing a search to find the source of U.S. tax law, Hermione turns to the Internal Revenue Code enacted by Congress. The governing Code section dictates that "gross income means all income from whatever source derived."²⁷ Being the excellent student that she is, Hermione confirms that the Treasury Regulations affirm and expand on Congress' already expansive definition,²⁸ and

²³ Zelenak, Custom, note 22, at 834.

²⁴ Indeed, Zelenak focuses heavily on the example of frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes that also is discussed to some extent in this Article. See *id.* at 830-32.

²⁵ *Id.* at 851.

²⁶ Those who are not familiar with Hermione Granger and the Hogwart's School of Witchcraft and Wizardry can read the Harry Potter stories or find my son, who will recount them endlessly.

²⁷ IRC § 61.

²⁸ Reg. § 1.61-1(a).

even finds landmark cases interpreting the governing Code section such as *Glenshaw Glass*, which inclusively describes gross income as any “accessions to wealth, clearly realized . . . over which the taxpayers have complete dominion.”²⁹ Hermione, having done an impressive amount of due diligence, answers that all of the items have to be included in income for U.S. tax purposes.

Unfortunately, Hermione would be wrong. Well, not wrong, exactly. Technically, under the Code and all binding legal authorities, all of the items listed should be considered income for tax purposes. With respect to wages received by an employee of a large business and payments for services made to a large partnership by a subsidiary partnership, the Code section defining gross income (as “all income from whatever source derived”) controls, and there is no colorable claim for an exclusion. While there might be some claim that the frequent flier miles earned on business trips paid for by the taxpayer’s employer but used for personal purposes qualify for an exclusion from gross income as a “de minimis fringe,”³⁰ the general consensus of the many scholars that have weighed in on the question is that this exclusion does not apply and/or that the miles constitute gross income,³¹ and the IRS has not claimed otherwise.³² However, a particularly sophisticated answer to this tax question would have to consider the law on the ground as well as the law on the books. In practice some items, more than others, are likely to be included in income or be subject to challenge as a result of noninclusion. In other words, the IRS will not enforce inclusion in all cases that the Code at the very least arguably calls for it.

Indeed, evidence of this nonenforcement exists. For example, recent evidence suggests the IRS underenforces the tax law applicable to large partnerships. The audit rate of large partnerships (which are defined as partnerships having \$100 million or more in assets and 100 or more direct and indirect partners³³) has recently been a staggeringly low .8%,³⁴ even though IRS agents and other knowledgeable parties suggest that these partnerships have high tax noncompliance

²⁹ *Commissioner v. Glenshaw Glass*, 348 U.S. 426, 431 (1955).

³⁰ IRC § 132(e)(1).

³¹ Zelenak, *Up in the Air*, note 22, at 422 n.8.

³² Announcement 2002-18, 2002-10 I.R.B. 621 (Mar. 11) (indicating that the IRS will not “assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer’s business or official travel.”).

³³ U.S. Gov’t Accountability Off., GAO-14-746T, *Large Partnerships: Growing Population and Complexity Hinder Effective IRS Audits*, Testimony Before the Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Gov’t Affairs, U.S. Sen., Statement of James R. White 2 (2014), <http://www.gao.gov/assets/670/664917.pdf>.

³⁴ *Id.* at 10.

potential³⁵ and engage in aggressive noncompliant behavior.³⁶ Indeed, *Tax Notes*' claim that "[t]hese audit-proof partnerships essentially shield the partner's income and deductions from challenge by the IRS"³⁷ echoes the case of IRS nonenforcement. In the case of frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes, the only evidence needed to demonstrate the IRS's nonenforcement is the agency's own statement.³⁸ Here, there is complete, prospective, nonenforcement of the tax law.

Undergirding the IRS's nonenforcement is the crucial fact that the Service has vastly insufficient resources to enforce the entirety of the tax law against all taxpayers at all times.³⁹ In light of the insufficient resources available to the IRS relative to the extent of its enforcement and other tasks, the tax law in practice must reflect a plethora of IRS decisions about when and how to enforce the tax law.⁴⁰ Indeed, in this

³⁵ U.S. Gov't Accountability Off., GAO-14-732, *Large Partnerships: With Growing Number of Partnerships, IRS Needs to Improve Audit Efficiency* 21, 25, 26, 30 (2014), <http://www.gao.gov/assets/670/665886.pdf>.

³⁶ See, e.g., William R. Davis, *Simplification and Compliance Are Goals of Partnership Reform*, 145 *Tax Notes* 373, 373-74 (Oct. 27, 2014) (quoting Kristine Roth, *Legislation Counsel, Joint Committee on Taxation*, who stated that if auditing rules were changed for partnerships to make the auditing regime simpler, "taxpayers may not take the same aggressive positions as they would if there was not audit risk"); Monte A. Jackel, *Potential Concerns with Auditing Large Partnerships*, 145 *Tax Notes* 855 (Nov. 17, 2014) (identifying large partnership issues). As part of a detailed study of TEFRA, Noel Brock recently concluded that an overhauled regime "can help increase not only the audit rates of large partnerships but also the change rates of the returns audited." Noel P. Brock, *Auditing Large Partnerships and TEFRA: Where We Are and Where We Are Going*, *The University of Chicago 67th Tax Conference* 52 (Nov. 7, 2014), <http://www.law.uchicago.edu/files/file/auditinglargepartnershipsandtefra.pdf>.

³⁷ *Audit Proof: The Other IRS Scandal* (Apr. 7, 2014), 2014 TNT 66-69, available at LEXIS, *Tax Analyst File*, video available at https://www.youtube.com/watch?v=ROTrgcD_n9g.

³⁸ See note 32.

³⁹ John A. Koskinen, *IRS 2015 Budget Cut Is "Troubling Development," Koskinen Says* (Dec. 17, 2014), 2014 TNT 243-12, available at LEXIS, *Tax Analyst File*; *Testimony of John A. Koskinen Before the Sen. Fin. Comm. 3* (Dec. 10, 2013), http://www.finance.senate.gov/imo/media/doc/JAK_Opening_statement_FINAL.PDF ("I have met with every IRS Commissioner from the past 20 years and the consensus was that a major challenge and constraint was the funding limitations they faced. This is a view shared today by the IRS Oversight Board, the Taxpayer Advocate and, most recently, the Treasury Inspector General for Tax Administration (TIGTA) and the Internal Revenue Service Advisory Council."); National Taxpayer Advocate, *2013 Annual Report to Congress, The IRS Desperately Needs More Funding to Serve Taxpayers and Increase Voluntary Compliance* 27 (2013), <http://www.taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/IRS-BUDGET-The-IRS-Desperately-Needs-More-Funding-to-Serve-Taxpayers-and-Increase-Voluntary-Compliance.pdf>.

⁴⁰ Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 *Utah L. Rev.* 317, 346 (2006) ("Congress has granted discretion to the Service by promulgating a set of revenue laws so voluminous as to be humanly unenforceable."); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99

regard, the IRS faces an enforcement dilemma of Congress' own making.⁴¹

To be sure, in some cases the nonenforcement may reflect not only enforcement resource limitations, but also other considerations, such as uncertainty regarding the scope of the law. Some might distinguish between nonenforcement decisions motivated by this uncertainty and nonenforcement decisions that instead are motivated by administrative or other difficulties. For instance, some might argue that in the case of frequent flier miles, the IRS's nonenforcement announcement may have reflected some uncertainty about the extent to which the definition of gross income really does cover such frequent flier miles.⁴² This Article does not distinguish between nonenforcement that is motivated by uncertainty about the scope of the law and nonenforcement that is motivated by administrative or other difficulties because, as explained in more detail later, this often will be an indeterminate line-drawing exercise.⁴³ Even more fundamentally, I do not attempt to draw this distinction because doing so would not change my central inquiry: In light of the fact that agencies must make nonenforcement decisions that shape the scope of the law on the ground, how can agencies make such decisions legitimately?

There are various means of making the inevitable nonenforcement decisions.⁴⁴ While this list is by no means inclusive, three principal ways to direct nonenforcement are categorical nonenforcement, setting priorities, and case-by-case decisionmaking. In the context of tax law nonenforcement, categorical nonenforcement involves a high-level decision not to enforce some aspect of the law for some specified period of time or until future notice. A prime example of categorical

Cornell L. Rev. Online 41, 41 (2013), <http://cornelllawreview.org/files/2013/09/99CLR0411.pdf> ("To perform its Augean task with constrained resources, the IRS must be allowed to exercise discretion.")

⁴¹ In the tax context the insufficient enforcement resources and procedural limitations on enforcement may even serve an ideological objective. See, e.g., Jared Bernstein, *Why the GOP Really Wants to Defund the IRS*, Wash. Post (July 1, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/07/01/why-the-gop-really-wants-to-defund-irs/> (arguing that congressional attempts to defund the IRS are "just a different way to try to shrink government, accommodate tax evasion and even undermine the implementation of health reform").

⁴² See, e.g., Alice G. Abreu & Richard K. Greenstein, *The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code*, 64 *Duke L.J. Online* 53, 54-55 & n.6 (2015), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?atycle=1005&context=DLj_online (disputing Zelenak's characterizations of customary deviations as, instead, necessary interpretations of the Code).

⁴³ See text accompanying notes 221-24.

⁴⁴ Cf. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *Yale L.J.* 1032, 1037-38 (2011) (describing different contributors to agency decisionmaking, with varying levels of influence or authority).

nonenforcement is the frequent flier miles example discussed above.⁴⁵ Other examples exist as well.⁴⁶

The IRS can also direct nonenforcement by setting priorities. Setting priorities allows high-level decisions to allocate enforcement resources toward one set of tax issues or taxpayers and away from others. Examples, and different iterations of setting priorities, abound. One particularly notable example was the tiering of issues in the large business and international division (LB&I) of the IRS, which occurred from 2006 through 2012 through the Industry Issue Focus (“IIF”) program.⁴⁷ Through this program, the IRS centrally created priorities for examination in LB&I as a means of directing enforcement resources toward the greatest, perceived compliance risks.⁴⁸ Setting priorities also can occur through centralized, though not necessarily controlling, advice to tax agents.⁴⁹ Centralized allocation of enforcement resources also can serve as a means of setting priorities. The allocation of enforcement resources as between large partnerships and corporations serves as an example of setting priorities as between different return categories.⁵⁰ All of these methods of allocating enforcement resources, whether at a high level of resource allocation among enforcement categories or at the lower level of resource allocation to particular returns or issues, direct tax enforcement toward certain taxpayers and away from others. Indeed, while setting priorities often takes the nominal form of directing tax enforcement resources toward certain taxpayers, in a world of insufficient enforcement resources this very direction has the impact of making other tax-

⁴⁵ Announcement 2002-18, 2002-10 I.R.B. 621 (Mar. 11).

⁴⁶ E.g., Notice 2011-89, 2011-46 I.R.B. 748 (providing for the nonenforcement of certain penalties related to “information returns and payee statements pertaining to reportable payments made in calendar year 2011,” stating that the IRS “will not impose penalties under sections 6721 and 6722 on payors that must file information returns and payee statements provided that they make good-faith efforts in filing accurate Forms 1099-K and furnishing the accompanying payee statements.”). This, of course, is an instance of transition relief, much like the delay of various provisions of the Patient Protection and Affordable Care Act mentioned earlier. Examining the extent to which transition relief raises unique issues is outside of the scope of this Article but may merit examination in future work.

⁴⁷ IRS, Internal Revenue Manual § 4.5.1, http://www.irs.gov/irm_04-005-001.html (last visited Oct. 26, 2015) (providing rules and procedures for IIF program).

⁴⁸ David B. Blair & George A. Hani, LMSB’s Industry Issue Focus Approach, Tax Executive, May-June, 2007, at 237, 237.

⁴⁹ For instance, in the context of medical expenses, the Internal Revenue Manual (which is a compilation of internal IRS guidelines) advises agents that examining “[h]igh medical expenses for large families, deceased taxpayers, or older taxpayers” is usually not productive. IRS, Internal Revenue Manual § 4.1.5.1.11.1.4, http://www.irs.gov/irm/part4/irm_04-001-005.html (last visited Oct. 26, 2015).

⁵⁰ In terms of individual tax return selection, perhaps the most notable example of setting priorities is the discriminant index function (DIF), “a mathematical technique used to score income tax returns for examination potential.” IRS, Internal Revenue Manual § 4.1.3.2, http://www.irs.gov/irm/part4/irm_04-001-003.htm (last visited Oct. 26, 2015).

payers less likely to be subject to review.⁵¹ To some extent, the reduced attention to certain taxpayers will map onto the likelihood of higher compliance exhibited by such taxpayers.⁵² However, the large difference between what taxpayers owe and what they pay, even after all IRS enforcement action, indicates that much tax law nonenforcement exists,⁵³ and that setting priorities allocates nonenforcement toward certain taxpayers, tax issues, or tax returns and away from others.

Finally, case-by-case decisionmaking can best be understood as the decisions made by individual tax agents. To use Dworkin's famous metaphor, case-by-case decisionmaking is the doughnut hole of discretion that exists as an area left open by surrounding restrictions.⁵⁴ In this case, the surrounding restrictions are the decisions made by categorical decisionmaking and setting priorities. Whatever discretion such higher level decisions leave open can be resolved by case-by-case decisionmaking.

Although some case-by-case decisionmaking will remain inevitable in the tax enforcement system,⁵⁵ the IRS must direct tax law nonenforcement at least to some extent through more high-level, centralized mechanisms such as categorical decisionmaking and setting priorities. The IRS must do so in order to efficiently direct its resources in the sprawling tax enforcement system, which includes approximately 85,000 employees spread across the country responsible for administering essentially all U.S. federal taxes owed by many different types of taxpayers.⁵⁶ As with any sprawling bureaucracy, high-level controls

⁵¹ Indeed, this is the intuition behind taxpayers trying to avoid "red flags" that will make them more likely to be subject to review. See, e.g., Joy Taylor, 15 Reasons You Might Get Audited, Kiplinger, <http://www.kiplinger.com/slideshow/taxes/T056-S001-irs-audit-red-flags-the-dirty-dozen-slide-show/> (last updated Mar. 2015).

⁵² See text accompanying notes 58-60 for a discussion of how high-level direction of enforcement resources helps direct tax enforcement most effectively.

⁵³ This (the difference between amount owed and amount paid, even after IRS enforcement) is known as the net tax gap. For the tax year 2006, the net tax gap was estimated to be \$385 billion. IRS, Tax Gap "Map" Tax Year 2006 (Dec. 2011), http://www.irs.gov/pub/newsroom/tax_gap_map_2006.pdf.

⁵⁴ Ronald Dworkin, *Taking Rights Seriously* 31 (1977).

⁵⁵ For example, the Internal Revenue Manual describes that, while DIF scoring is calculated by computer, "[e]ach selected DIF return will be screened by an experienced examiner to eliminate those returns not worthy of examination," and that such determination is made based on the examiner's "skills, technical expertise, local knowledge, and experience to identify hidden, as well as obvious, issues." IRS, Internal Revenue Manual § 4.1.5.1.5.1, http://www.irs.gov/irm/part4/irm_04-001_005.html (last visited Sept. 8, 2015); cf. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 43-44 (1969) (describing, with respect to administrative agencies generally, that "[t]o fix as the goal the elimination of all discretion on all subjects would be utter insanity").

⁵⁶ IRS Data Book tbl.30 (2014), showing an average of 84,133 employees used to conduct IRS operations in 2014 fiscal year, <https://www.irs.gov/uac/SOI-Tax-Stats-Personnel-Summary-by-Employment-Status-Budget-Activity-and-Selected-Type-of-Personnel-Data>

are essential to keep enforcement allocation in line with the priorities that high-level research determines are most important. The IRS therefore has an Office of Research that is responsible for, among many other things, “[d]eveloping, maintaining, and advising on methods for selecting taxpayers and issues for enforcement contact and for allocating IRS resources.”⁵⁷

In terms of determining what priorities are most important, the IRS has to take into account that it is responsible for enforcement of the tax laws for taxpayers with extremely different profiles and inclinations toward tax compliance. In terms of individual taxpayers, while some taxpayers are inclined to cheat on their taxes if given the opportunity, for a variety of reasons others pay their taxes despite the opportunity to cheat.⁵⁸ Abstracting up a level from individual differences to different sectors of taxpayers, differing opportunities for tax evasion as well as differing norms of compliance result in sectors of taxpayers having vastly different compliance rates.⁵⁹ And, perhaps most crucially, as a result of vastly different tax dollars at stake in various tax sectors with different relative costs of enforcement, the return on IRS enforcement resources varies widely among these taxpayer sectors. Most notably, the IRS uses approximately 20% of its resources for audits of the largest business taxpayers, but such audits yield approximately 66% of recommended tax from IRS audits.⁶⁰ The underlying point is that not all tax enforcement is likely to be equal. As a result, and motivated by a variety of considerations, the IRS has to use either categorical decisionmaking or setting priorities at least to some extent to direct its limited tax enforcement resources toward their preferred uses. While this high-level direction of tax law nonenforcement can serve a variety of salutary purposes, it also means that unelected tax administrators affect the tax law on the ground in important ways.

book-Table-30. Some limited exceptions apply to the IRS’s general responsibility for administering all federal taxes. For example, the Tobacco Tax and Trade Bureau (TTB) administers alcohol, tobacco, firearms, and ammunition taxes. Alcohol and Tobacco Tax and Trade Bureau, TTB’s Responsibilities—What We Do, <http://www.ttb.gov/consumer/responsibilities.shtml> (last visited Sept. 4, 2015).

⁵⁷ IRS, Internal Revenue Manual § 1.1.18.1.3.4B, http://www.irs.gov/irm/part1/irm_01-001-018.html (last visited Sept. 8, 2015).

⁵⁸ See, e.g., Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 *Colum. L. Rev.* 689, 694-701 (2009) (describing different types of taxpayers and inclinations towards compliance).

⁵⁹ IRS, *Tax Gap for Tax Year 2006: Overview 2* (Jan. 6, 2012), http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf (showing different rates of noncompliance with respect to different types of income, generated in different taxpayer sectors).

⁶⁰ See Michael I. Saltzman & Leslie Book, *IRS Practice and Procedure* ¶ 8.15[1] (2013).

IV. AGENCY LEGITIMACY AND CATEGORICAL NONENFORCEMENT

If unelected tax administrators affect the tax law on the ground in important ways through inevitable nonenforcement of aspects of the tax law, are there more or less legitimate ways for them to engage in this nonenforcement? One way to answer this question is by looking to modern theories of agency legitimacy and asking how different means of engaging in such nonenforcement of the law may be more or less legitimate.⁶¹ This approach may be particularly enlightening because, as is evident in the discussion below, the theories attempt to apply core principles of democratic governance, which arguably are rooted in fundamental U.S. constitutional values, to the realities of the current administrative state. As a result, wrestling with how the theories comport with categorical nonenforcement may bring to bear insights regarding core values of democratic governance that are obscured or missed by existing analyses. This Part sets forth the prominent, modern theories of agency legitimacy, and explores why, under such theories, categorical nonenforcement may help legitimize the IRS's inevitable nonenforcement of the tax law.

In this regard, it is helpful to clarify that claiming an agency action is legitimate or that certain action, such as categorical nonenforcement, promotes agency legitimacy does not mean that it is normatively desirable. In fact, the agency action, such as categorical nonenforcement, may be lamentable and problematic in that ideally the agency would not have to make systematic nonenforcement decisions. Rather, examining agency legitimacy requires first accepting as a given that U.S. governmental agencies will be exercising extensive power, such as systematically not enforcing the law. With that assumption, the examination of agency legitimacy asks how such power can be exercised in a manner that assures that there are adequate checks in place to ensure exercises of the power are consistent with democratic governance.⁶²

A. *Theories of Agency Legitimacy*

The central question for agency legitimacy is how to justify the extensive power and responsibilities of administrative agencies in U.S. constitutional democracy. While some scholars simply reject modern administrative agencies as unconstitutional,⁶³ the reality is that the extensive administrative bureaucracy responsible for running much of

⁶¹ This Article returns to alternative approaches, other than agency legitimacy, in Part V.

⁶² See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 490-91 (2003).

⁶³ E.g. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its

the U.S. government exercises significant power all the time, and such exercise is widely seen as crucial to the functioning of the government.⁶⁴ As a result, administrative and constitutional law scholars have developed theories to support agency legitimacy. While there are certainly many variations of the central question regarding agency legitimacy, each theory of agency legitimacy attempts to explain in its own way how administrative agencies can operate consistently with constitutional or democratic principles.⁶⁵

There are three principal modern theories of agency legitimacy, each of which is examined here: the political accountability theory, civic republicanism, and nonarbitrariness theory.⁶⁶ Political accountability theory relies on agencies being subject to the control of politically accountable, elected officials.⁶⁷ In standard accounts of political

validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).

⁶⁴ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

⁶⁵ See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *Harv. L. Rev.* 1276, 1284 (1984) (“Each model of bureaucratic legitimacy is a story designed to tell its listeners: ‘Don’t worry, bureaucratic organizations are under control.’”); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 *N.Y.U. L. Rev.* 557, 577 (2003) (“In my view, legitimacy can be assessed by answering two component questions: (1) Can agency power be characterized as democratic, especially if Congress, the closest institution to the electorate, is not making key policy decisions, and (2) are agencies accountable for the power they exercise?”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1672-73 (1975) (“Coercive controls on private conduct must be authorized by the legislature, and, under the doctrine against delegation of legislative power, the legislature must promulgate rules, standards, goals, or some ‘intelligible principle’ to guide the exercise of administrative power.”).

⁶⁶ Judicial review is examined separately in the text accompanying notes 175-97. Other theories that do not hold as much current sway, such as the transmission belt model, the expertise model, and the pluralist model are not examined in detail. For discussions see, for example, James M. Landis, *The Administrative Process* 23-25 (1938) (describing the expertise model); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2253 (2001) (describing the transmission belt model); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 *Admin. L. Rev.* 343, 357 (2009) (describing the transmission belt model); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *Harv. L. Rev.* 1511, 1513 (1992) (describing the pluralist model). To some extent even these older theories of agency legitimacy have not gone away entirely, but rather have been subsumed to various degrees in the current, dominant theories.

⁶⁷ This theory has gone by many names (and, to some extent the differing names reflect slight, underlying differences). See, e.g., Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 *Geo. Wash. L. Rev.* 1397, 1400 (2013) (describing the “political control” model). I have adopted Lisa Bressman’s terminology of “political accountability,” although Bressman also includes in this term certain older theories of agency legitimacy that have been set aside in note 66. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 *N.Y.U. L. Rev.* 1657, 1675 (2004).

accountability theory, elections are important for two reasons. First, under the majoritarian paradigm popularized by Alexander Bickel, democratic legitimacy exists to the extent that government officials represent majority will, and elections are the means of ensuring such representation.⁶⁸ Second, and relatedly, elections are a means of checking government officials and voting out of office officials who did not, in fact, represent majority will.⁶⁹ At first glance, the power held by administrative agencies to substantially affect rights and obligations under the law is suspect because administrative officials are not elected and therefore lack the democratic legitimacy conferred by elections. Political accountability theory solves this problem by positing that administrative agencies are controlled by the President and/or Congress.⁷⁰ Subjecting agencies to such control legitimates them by positing that agencies are indirect representatives of majority will in the first instance and indirectly subject to electoral checks on the backend, because elected officials can be held accountable for decisions made by administrative agencies.⁷¹ Bickel even foreshadowed the application of the political accountability theory to the administrative state by defending delegations to administrators in part on the grounds that administrative decisions were reversible by officials elected by majorities.⁷²

While some scholars have focused on Congress' role in controlling administrative agencies,⁷³ in recent years the tide of political account-

⁶⁸ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (Yale Univ. Press 2d ed. 1986) (1962) (setting forth highly influential account of judicial review as countermajoritarian, which helped create a majoritarian paradigm of democratic legitimacy). For an influential account of the majoritarian paradigm, see Erwin Chemerinsky, *The Supreme Court, 1988 Term—Forward: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43, 61-96 (1989).

⁶⁹ Bickel, note 68, at 27.

⁷⁰ See, e.g., Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 *Am. U. L. Rev.* 557, 568 (1987) (“We vote for presidents, not secretaries or administrators White House oversight places accountability precisely where it should be, namely, where the electorate can do something about it”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 85-119 (1994) (arguing that administrative agencies have to be accountable and therefore subject to presidential control).

⁷¹ Bressman, note 62, at 490-91.

⁷² Bickel, note 68, at 19-20.

⁷³ For a small sample of this literature (and evaluations of it) see, for example, Joel D. Aberbach, *Keeping A Watchful Eye: The Politics of Congressional Oversight* 14, 34-37 (1990); Jack M. Beermann, *Congressional Administration*, 43 *San Diego L. Rev.* 61, 122-30 (2006); Kagan, note 66, at 2255-60 (describing views that Congress did not effectively control administrative policymaking, later political science literature suggesting the opposite, and why neither view in the extreme is likely to be correct); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431, 440-44 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as*

ability scholarship has favored a presidential control model, which looks principally to the President to control administrative agencies.⁷⁴ There were interrelated developments that led to the rise of the presidential control model. First, constitutional theorists made a variety of arguments in defense of a unitary executive, either based on a belief that the Framers themselves constitutionalized the unitary executive, or because the unitary executive was believed to be the best translation of the Framers' vision into modern context.⁷⁵ Second, and relatedly, scholars began looking to the modern presidency as a particularly good nexus of control for the administrative state as a result of the President representing a national constituency and having the position and energy to direct and control the widespread administrative state.⁷⁶ Finally, Presidents themselves began asserting their role as chief executives of the administrative state, a trend that helped explain scholars' increasing attention to the presidency as a source of control.⁷⁷ In any event, political accountability theory more generally looks to either or both of the two politically accountable branches, the President and/or Congress, to control, answer for, and thereby legitimize administrative agencies.⁷⁸

The second principal modern theory used to support agency legitimacy, often called civic republicanism, emphasizes an agency's delib-

Instruments of Political Control, 3 J.L. Econ. & Org. 243, 252 (1987); Mathew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 Am. J. Pol. Sci. 165, 174-75 (1984); Terry M. Moe, An Assessment of the Positive Theory of "Congressional Dominance," 12 Legis. Stud. Q. 475, 477-90 (1987); Barry R. Weingast & Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765, 766-75 (1983).

⁷⁴ Bressman, note 67, at 1677 ("All or nearly all scholars—whether originalists or pragmatists, Democrats or Republicans—now endorse the presidential control model as a critical means for enhancing agency legitimacy."); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 988 (1997) ("Increasingly, scholars (and, at times, the judiciary) look to the President . . . to supply the elusive essence of democratic legitimation.").

⁷⁵ See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 551-56 (1994) (for the former view); Lessig & Sunstein, note 70 (for the latter view).

⁷⁶ See, e.g., Jerry L. Mashaw, Greed, Chaos, & Governance: Using Public Choice to Improve Public Law 152 (1997) (describing "vague delegations to administrative agencies . . . as a device for facilitating responsiveness to voter preferences expressed in presidential elections"); Kagan, note 66, at 2253; Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81 (1985).

⁷⁷ For a particularly notable description of this trend, see Kagan, note 66, at 2272-319. Indeed, administrative law now deeply reflects the perceived importance of presidential control. See, e.g., *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that courts should defer to agency interpretations because "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .").

⁷⁸ Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 Yale L.J. 2, 35-37 (2009).

erative process as the source of its legitimacy.⁷⁹ Civic republicanism is borne out of a historical view of the Framers' dedication to deliberative democracy.⁸⁰ Although it is difficult to define as a result of differing accounts, as a general matter civic republican theory posits that government should enable consensus about the "common good," which can be "found at the conclusion of a well-functioning deliberative process."⁸¹ Civic republicanism rejects governance that merely seeks to satisfy or aggregate exogenous individual preferences,⁸² and instead heralds government that reaches the right outcomes through a reasoned process, informed by transformative public debate that extends beyond mere self-interest.⁸³ In such a process, government policies are "justified rather than simply fought for,"⁸⁴ and the government provides explanations for how its decisions further the common good.⁸⁵ The case for the application of civic republicanism to agencies specifically is that agencies are subject to checks by the judiciary, Congress, and the President that can help ensure politically informed discourse, agencies' bureaucratic structures can focus debate on the public interest, and many agency decisions are subject to procedures that can facilitate a reasoned process of deliberation.⁸⁶ As Mark Seidenfeld has described, "[t]he deliberative promise of the administrative state stems from the fact that agency decisionmaking can

⁷⁹ Mendelson, note 65, at 585. For a foundational work on civic republicanism, see Seidenfeld, note 66. This theory, too, has gone by different names that reflect, to some extent, different emphases. See, e.g., Mantel, note 66, at 362-65 (exploring what she calls the "trustee paradigm").

⁸⁰ See, e.g., Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *How Democratic Is the Constitution?* 102 (Robert A. Goldwin & William A. Schambra eds., 1980).

⁸¹ Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1554 (1988) [hereinafter *Republican Revival*]; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. Chi. L. Rev.* 1129, 1154-55 (1986) [hereinafter *Legal Interference*] (explaining that "one of the most important functions of politics is the selection, evaluation, and shaping of preferences, not simply their implementation"). There is extensive literature by prominent legal scholars regarding civic republicanism, and its role in the formulation of government in the U.S. Constitution. See, e.g., Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 191-246 (1988); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1016-23 (1984); Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1503-07 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 35-48 (1985) [hereinafter *Interest Groups*]. The legal literature builds on historical literature regarding the influence of republicanism on the U.S. constitutional scheme. See, e.g., Bessette, note 80.

⁸² Michelman, note 81, at 1526-28; Sunstein, *Republican Revival*, note 81, at 1548-49; Sunstein, *Interest Groups*, note 81, at 32; Sunstein, *Legal Interference*, note 81, at 1135.

⁸³ Sunstein, *Republican Revival*, note 81, at 1549.

⁸⁴ Sunstein, *Legal Interference*, note 81, at 1155.

⁸⁵ Seidenfeld, note 66, at 1530.

⁸⁶ *Id.* at 1541-62. This is certainly not to say that agencies are perfect at this task. Rather, the argument is that they are well-suited relative to alternatives.

be inclusive, knowledgeable, reasoned, and transformative.”⁸⁷ Indeed, Seidenfeld has claimed that “having administrative agencies set government policy provides the best hope of implementing civic republicanism’s call for deliberative decisionmaking informed by the values of the entire polity.”⁸⁸

Finally, the third principal modern theory of agency legitimacy may be called the nonarbitrariness theory. Nonarbitrariness theory is rooted in the concerns that prominent early administrative law scholars, such as Henry Friendly, Kenneth Davis, and Louis Jaffe, had about excessive agency discretion.⁸⁹ In controlling such discretion, nonarbitrariness theory departs from political accountability theory’s fixation on the majority will, arguing in part that the Framers did not believe that majority will was sufficient to ensure public-regarding law and individual rights, and instead worried about the deleterious effects of majority factions and tyrannous rule.⁹⁰

As one might expect, nonarbitrariness theory rejects arbitrary administrative action as an illegitimate exercise of government power. A quintessential example of arbitrary administrative action would be action that deviates from the application of a general, acceptable governance policy, and instead is explained by an improper motive such as disdain for the regulated party at hand, or a desire to provide beneficial treatment to a powerful special interest.⁹¹ In contrast to such illegitimate action, nonarbitrariness theory heralds administration of the law that ensures that individual agency decisions are made in accordance with public-regarding, generalizable policies and principles.

⁸⁷ Seidenfeld, note 67, at 1426.

⁸⁸ Seidenfeld, note 66, at 1515.

⁸⁹ For seminal works, see Davis, note 55; Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (1962); Louis L. Jaffe, *Judicial Control of Administrative Action* (1965).

⁹⁰ Bressman, note 62, at 493-94, 497-500; Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1531-35 (1991) (exploring how Framers’ concerns about tyranny can be understood as concerns about arbitrary government action). More generally, the literature regarding how best to understand the Framers’ concerns regarding factions and tyranny, and the resulting structure of government embodied in the Constitution, is extraordinarily vast. See, e.g., *The Federalist No. 10*, at 51 (James Madison) (J.R. Pole ed., 2005) (“[T]he majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”); *Id. No. 51*; M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127, 1132-46 (2000) (describing and critiquing extensive separation of powers literature and concern about tyranny); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 640-66 (1984) (providing seminal functionalist view of how separation of powers should be applied to the administrative state); Sunstein, *Interest Groups*, note 81, at 31-48 (exploring Framers’ concerns regarding factions).

⁹¹ See Friendly, note 89, at 19 (describing “the basic human claim that the law should provide like treatment under like circumstances”).

In this way, nonarbitrariness theory posits that nonarbitrary administrative action, which has qualities of being “rational, predictable, or fair,”⁹² is central not only to good governance but also to constitutionally legitimate governance.⁹³

The three theories of agency legitimacy laid out above are certainly far from unassailable. As one would expect from any theory that attempts to explain how modern government should accord with constitutional and democratic commitments, the theories of agency legitimacy set forth have been subject to a variety of significant counterclaims by scholars of all sorts.⁹⁴ Indeed, as alluded to in the discussion of nonarbitrariness theory, the theories themselves offer alternative, and sometimes conflicting, visions of legitimate governance and agencies’ place in it. On the other hand, the theories may also overlap in ways that provide mutually reinforcing support for agency legitimacy. For instance, oversight and boundary setting by the politically accountable branches are most relevant for political accountability theory, but these constraints may also help ensure the proper functioning of the deliberative process that supports agency legitimacy under civic republicanism.⁹⁵ In any event, I do not seek to debate the extent to which the theories set forth above can legitimize the administrative state, but rather posit as a working assumption that there are prominent theories, rooted in constitutional and democratic values, that are used to assess agency legitimacy, and evaluate categorical nonenforcement in light of them.

B. Application to Categorical Nonenforcement

This Section argues that, under these three principal modern theories of agency legitimacy, categorical nonenforcement in some circumstances may actually promote the legitimacy of the IRS’s inevitable, systematic tax law nonenforcement. Specifically, as a result of increasing the salience of nonenforcement decisions and by serving as a means of committing the agency to a policy of nonenforcement, cate-

⁹² Bressman, note 62, at 496.

⁹³ *Id.* at 494.

⁹⁴ For several examples of various counterclaims, see Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 *Mich. L. Rev.* 2073, 2083 (2005) (“Thus, control over the bureaucracy is exercised by the president according to the succession principle . . . but not according to the electoral accountability principle.”); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *Mich. L. Rev.* 53, 55 (2008) (arguing that “a moderate degree of bureaucratic insulation alleviates rather than exacerbates the countermajoritarian problems inherent in bureaucratic policymaking”). The critiques cannot easily be characterized, because they respond to different theories of agency legitimacy.

⁹⁵ Seidenfeld, note 67, at 1448-53.

gorical nonenforcement, under certain circumstances, may increase the accountability, deliberation, and nonarbitrariness of an agency's inevitable nonenforcement of the law.

As an initial matter, categorical nonenforcement can increase the salience of nonenforcement decisions, making it more likely that the politically accountable branches and the public will focus on them. In general, even significant instances of nonenforcement can be difficult for politically accountable actors and the public to monitor. Unlike when an agency decides to engage in a new enforcement project, or a new initiative, nonenforcement is much more likely to occur *sub rosa*, and thereby evade attention and review.⁹⁶ Categorical nonenforcement can buck this tendency by providing a particularly transparent statement of nonenforcement.⁹⁷ Even if it is clear, for example, that the IRS historically has not enforced and, in all likelihood, will not enforce the tax law with respect to a certain issue, the Service's categorical statement that it will not enforce the law with respect to such issue nonetheless spotlights its choice, providing a particularly salient notice of its nonenforcement.⁹⁸

Whereas setting a low priority can also indicate that enforcement is going to be low, categorical nonenforcement is likely to have a greater ability to focus attention on what, in any event, is a low likelihood of enforcement. Indicating that a particular enforcement task is a low priority may not communicate with precision the extent of the nonenforcement.⁹⁹ Indicating that a particular enforcement task is low priority can also provide cover to disguise what, in reality, is virtually no enforcement.¹⁰⁰ Even to the extent that the low priority is translated into a specific level of enforcement, the formality and extremity of a statement of complete, categorical nonenforcement nonetheless will tend to increase its salience.

Increasing the salience of a nonenforcement decision can serve as a means to increase the accountability, and therefore legitimacy, of agency nonenforcement.¹⁰¹ There are two mechanisms at work that

⁹⁶ Love & Garg, note 15, at 1235.

⁹⁷ See, e.g., text accompanying note 38.

⁹⁸ As Colin Diver has more generally remarked with respect to administrative rules, "[t]ransparent rules tend to spotlight a value choice." Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *Yale L.J.* 65, 106 (1983).

⁹⁹ For instance, the tiering program in LB&I by negative implication alerted taxpayers to issues that would not be high priorities for review. See text accompanying note 46. However, this guidance provided only very vague information that these other issues would be less likely to be reviewed. *Id.*

¹⁰⁰ This might be an intentional choice designed to protect compliance. See text accompanying note 248.

¹⁰¹ Cf. Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 *N.Y.U. L. Rev.* 795, 820 (2010) ("Binding enforcement directives, promulgated through rulemaking,

enable greater salience of nonenforcement to increase accountability of nonenforcement. First, more salient nonenforcement decisions can focus the politically accountable branches' attention on the nonenforcement, thereby increasing their likelihood of exerting control over the nonenforcement decision. Presidents in particular have a variety of means to monitor different agency action.¹⁰² For instance, the Office of Management and Budget (OMB) implements the President's vision across the Executive Branch, including through oversight of agency performance and review of all significant federal regulations by executive agencies.¹⁰³ However, agency enforcement decisions for the most part fall outside of centralized presidential review.¹⁰⁴ More salient statements of nonenforcement can overcome this tendency, thereby becoming more likely to trigger review by the President, Congress, or, perhaps more realistically, their central apparatuses responsible for monitoring administrative agencies.¹⁰⁵ The greater likelihood of control or review of the nonenforcement decisions by the politically accountable branches promotes legitimacy under the political accountability theory because the politically accountable branches may help ensure that even unelected agencies make decisions in accordance with majority preferences.¹⁰⁶

The second way that greater salience of a nonenforcement decision can increase accountability is by increasing the visibility of the decision to the public. Political accountability theory, after all, relies in part on the notion that government actors should be carrying out majority will, and that the public can hold politicians accountable for their failure to do so.¹⁰⁷ By making nonenforcement decisions more salient to the public, as well as to the politically accountable branches, categorical nonenforcement can increase the likelihood that the public

require agencies, and the administration to which they are accountable, to take a public stand on their enforcement priorities.”).

¹⁰² There is more debate about the extent to which Congress can effectively monitor administrative agencies. See note 73.

¹⁰³ Office of Mgmt. & Budget, *The Mission and Structure of the Office of Management and Budget*, http://www.whitehouse.gov/omb/organization_mission/ (last visited Sept. 8, 2015).

¹⁰⁴ Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1033 (2013).

¹⁰⁵ While OMB may be very much like another administrative agency, it nonetheless is charged with carrying out the President's vision more directly. *Id.* at 1104; Office of Mgmt. & Budget, note 103 (“The core mission of OMB is to serve the President of the United States in implementing his vision across the Executive Branch.”).

¹⁰⁶ Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127, 1137-38 (2010) (making this point with respect to presidential control); Metzger, note 14, at 44-45 (explaining that “internal administrative oversight is equally required to ensure that policies and priorities specified by elected leaders are actually followed on the ground.”).

¹⁰⁷ See text accompanying notes 68-69.

registers nonenforcement decisions, expresses satisfaction or dissatisfaction with such decisions, and holds the politically accountable branches accountable for the actual implementation of the law (or lack thereof).¹⁰⁸

While the notion that the public actually holds politically accountable branches responsible for individual agency decisions (or nonenforcement decisions, in this case) is certainly highly contested,¹⁰⁹ it reflects a more deep-seated intuition that the politically accountable branches can and should be held responsible, at some level, for the actual implementation of the law. In this context, to the extent that the politically accountable branches do not respond to a statement of categorical nonenforcement, the categorical nonenforcement may at least force a politically accountable acknowledgement of the unwillingness to provide the means necessary to yield adequate enforcement. Categorical nonenforcement thereby may serve as a counter to one of the most troublesome, potential legitimacy threats of the administrative state: The ability of Congress and/or the President to garner the benefits of a public-regarding law that they ensure never actually comes to pass by putting in place low-visibility constraints on the implementing agency.¹¹⁰

As an example of salience triggering ultimate, accountable review of a nonenforcement decision, take the example of large partnerships. As described previously, the IRS has engaged in extremely low rates of audits of large partnerships.¹¹¹ These statistics can be explained, at least in part, by the difficulty in auditing large partnerships. The Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”) imposed very onerous requirements on the IRS for auditing large partnerships, significantly limiting the Service’s audit capacity for these entities and making the IRS hesitant to conduct large partnership audits.¹¹² Vari-

¹⁰⁸ Metzger, note 14, at 45 (explaining that political accountability also involves “allowing the public to be informed about administrative actions . . .”).

¹⁰⁹ See, e.g., Glen Staszewski, Reason-Giving and Accountability, 93 Minn. L. Rev. 1253, 1266 (2009) (“In short, the presumption that elected officials are politically accountable for their specific policy decisions is wildly unrealistic.”); Farina, note 74, at 997-1002 (describing how bundling and complexity make it difficult to know what citizens want on particular issues or to hold the President responsible for them).

¹¹⁰ See Eric Biber, The Importance of Resource Allocation in Administrative Law, 60 Admin. L. Rev. 1, 46 (2008) (“In essence, agencies and Congress can use the symbolic substantive statute, filled with public interest language that promises action on a particular issue, to ‘mask’ the actual implementation that betrays that promise—and thereby reduce or eliminate any political costs for failing to address the substantive question.”).

¹¹¹ See text accompanying notes 34-36.

¹¹² Staff of the Joint Comm. on Tax’n, 112th Cong., Description of Revenue Provisions Contained in the President’s Fiscal Year 2013 Budget Proposal 616-18, 624 (June 2012), www.gpo.gov/fdsys/pkg/CPRT-113JPRT85812/pdf/CPRT-113JPRT85812.pdf; Brock, note 36, at 42 (providing anecdotal evidence to this effect).

ous other aspects of large partnership tax return filing also created information deficits for the IRS.¹¹³ On top of these difficulties, large partnerships can make extremely complicated even the most fundamental aspects of a tax audit, such as determining the tax partner responsible for working with the IRS to facilitate an audit.¹¹⁴ For years, the IRS allocated insufficient enforcement resources to overcome such difficulties, which resulted in an extremely low audit rate for large partnerships.¹¹⁵

Recently, however, media coverage of the very low rate of partnership audits increased awareness of the issue, and even framed it in seemingly categorical terms. An example of such media coverage includes a You Tube video created by Tax Analysts, designed to explain the large partnership nonenforcement to the public, in a way that made it seem essentially categorical.¹¹⁶ The You Tube video explained, for example, that “the IRS is effectively giving a pass to certain business owners,” that large partnerships “essentially shield partners from challenge by the IRS,” that income from such businesses is “essentially untouchable,” and that such businesses are “audit-proof.”¹¹⁷ Following such characterizations in extensive media coverage, Congress and the President ultimately reformed the partnership audit regime to make it more effective.¹¹⁸ Still, such action occurred only after years of almost no enforcement, and insiders’ awareness of the systematic, virtual lack of enforcement.¹¹⁹ As a result, the large partnership audit example underscores (1) the possibility of an accountable response to nonenforcement decisions, (2) the importance of salience in focusing the politically accountable branches’ and public attention on the nonenforcement, and (3) how framing nonenforcement as categorical can help make salient what is, in any event, a very low likelihood of enforcement.

None of this is to say that politically accountable actors will necessarily ignore a nonenforcement problem in the absence of categorical nonenforcement. Indeed, the new large partnership audit rules dis-

¹¹³ Jaime Arora, GAO Calls on IRS to Improve Information for Partnership Audits (June 13, 2014), 2014 TNT 115-6, June 16, 2014, available in LEXIS, Tax Analysis File).

¹¹⁴ White Statement, note 33, at 2; see also GAO, Large Partnerships, note 35, at 25 (citing focus group reports that complex large partnership structures were being used to hide income sources and tax shelters).

¹¹⁵ See text accompanying notes 33-37.

¹¹⁶ https://youtu.be/roTrgcD_n9g.

¹¹⁷ Id.

¹¹⁸ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101 (Nov. 2, 2015).

¹¹⁹ See, e.g., Amy S. Elliott, Audit Proof? How Hedge Funds, PE Funds, and PTPs Escape the IRS, 136 Tax Notes 351, 351 (July 22, 2012) (explaining that “interviews with dozens of practitioners who have direct knowledge of the IRS’s large partnership audit practices” revealed that large partnerships are “effectively immune from audit.”).

cussed above are a useful counterexample to this extreme claim. Rather, the claim here is a marginal one: Relative to categorical nonenforcement, setting a low priority is a lower visibility way to hamper the law on the books.¹²⁰ As a result, by increasing the likelihood that politically accountable actors (or the staff to which they have delegated responsibility) and the public are aware of important nonenforcement decisions while they are happening rather than years later, categorical nonenforcement may increase the accountability and therefore the legitimacy of such decisions.¹²¹

Moving to the next theory of agency legitimacy, by increasing the salience of nonenforcement, categorical nonenforcement may also increase public dialogue about certain nonenforcement decisions. Categorical nonenforcement can thereby help legitimate the agency's nonenforcement under the civic republican theory.¹²² Nina Mendelson makes a similar point in the context of presidential administrations entrenching policy shortly prior to leaving power.¹²³ She analyzes one method of entrenching policy that, at first blush, seems particularly objectionable: Entrenching policy opposed by the President-elect in the form of a binding rule.¹²⁴ This tactic seems particularly objectionable for a number of reasons. First, it seems to undermine the President-elect's newly electorally granted power to sway policy in a particular direction and therefore may be a form of antidemocratic "nose-thumbing" at the public's choice of a new administration.¹²⁵ Second, since the flurry of entrenched policy by the outgoing administration occurs at a time when the President faces no future elections, the new policy may be unaccountable to electoral checks on political power.¹²⁶

Mendelson, however, explains that, somewhat ironically, the particularly objectionable nature of entrenchment can also benefit demo-

¹²⁰ See Amy S. Elliott, *Why It Matters That the IRS Has Trouble Auditing Partnerships*, 143 *Tax Notes* 7, 7 (Apr. 7, 2014) ("A problem needs to get very bad before it attracts congressional attention. That is especially true if some of the people who benefit from the problem—the investment fund managers who don't have to worry about IRS adjustments to their partnership items—are some of the biggest campaign contributors for both parties.").

¹²¹ Cf. Andrias, note 104, at 1093 ("By elevating responsibility of enforcement to the President in ways subject to public evaluation, we can both increase the degree to which presidential action is likely to track public preferences and the degree to which the public can understand the exercise of the enforcement power.").

¹²² In the context mostly of presidential nonenforcement, Sant'Ambrogio explores how what he calls a presidential extra-legislative veto may play a similar role, explaining that it can serve a "deliberation forcing and deliberation-enhancing role." Sant'Ambrogio, note 14, at 386.

¹²³ Mendelson, note 65, at 629-30.

¹²⁴ *Id.*

¹²⁵ *Id.* at 564-65, 604-05, 627.

¹²⁶ *Id.* at 566-67.

cratic governance.¹²⁷ The issuance of a rule and the new administration's attempts to reverse it will be more likely to garner media coverage as a result of the increased visibility.¹²⁸ The greater visibility is thereby more likely to spur the involvement of interest groups and voters, who therefore will engage in a debate and develop informed policy preferences.¹²⁹ The broader dialogue may then yield a more deliberative agency decision making process, since the agency will be better informed by public views and public debate.¹³⁰ In other words, the very controversial nature of the decision may help garner the attention necessary to engender dialogue and a deliberative decision about what otherwise may be an ignored bureaucratic rule.

The analogue found in categorical nonenforcement is that categorical nonenforcement also can serve as a means of highlighting significant nonenforcement decisions that otherwise may escape the public's attention. Categorical nonenforcement may thereby increase the public's dialogue and, crucially, the comprehensiveness of the agency's deliberation regarding the nonenforcement decision. By facilitating a more robust public debate, the agency may take into account a wider array of views and reach a more informed, deliberative decision.¹³¹ Importantly, the seemingly very objectionable nature of categorical nonenforcement may also be the key to increasing the legitimacy of the nonenforcement.

On the other hand, categorical nonenforcement is not the prototypical example of deliberative governance imagined by civic republicanism. Civic republicanism imagines deliberative debate that shapes agency policy *ex ante*,¹³² whereas categorical nonenforcement is an *ex post* statement of government policy. Categorical nonenforcement is also unlikely to be subject to judicial review,¹³³ even though judicial review can be an important means of ensuring the adequacy of agency deliberation.¹³⁴ Relatedly, a statement of categorical nonenforcement may, but need not, exhibit the type of reasoned explanation that can be central to civic republicanism.

¹²⁷ *Id.* at 629.

¹²⁸ *Id.*

¹²⁹ *Id.* at 629-30.

¹³⁰ *Id.* at 629.

¹³¹ See *id.* at 630.

¹³² See Seidenfeld, note 66, at 1529.

¹³³ See text accompanying notes 176-82. However, for reasons discussed elsewhere, see text accompanying notes 96-100, categorical nonenforcement is more likely than setting a low priority to gain the attention and feedback of the politically accountable branches. Political actors also can evaluate outcomes that agencies reach to make sure they are consistent with consensus values. See Seidenfeld, note 66, at 1550-51.

¹³⁴ See Seidenfeld, note 66, at 1547.

However, categorical nonenforcement need not be perfect in order to promote the legitimacy of agency nonenforcement. By making a statement of categorical nonenforcement, an agency may widen the circle of interested parties and counter what is otherwise a tendency for well-connected parties to dominate.¹³⁵ If the categorical nature of nonenforcement tends to increase the public dialogue regarding important nonenforcement decisions even after the fact, with such dialogue leading to greater deliberation by the agency regarding the nonenforcement policy and the possibility of changing the policy going forward, then categorical nonenforcement in some circumstances may promote the legitimacy of such nonenforcement decisions under a civic republican theory of agency legitimacy.¹³⁶

Categorical nonenforcement also can commit agencies to nonenforcement policies that, under certain circumstances, may lead to less arbitrary and more public-regarding law. One way to commit to a nonenforcement policy, or to any agency policy, is for the agency to be legally bound to such a policy. The extent to which an agency would be legally bound to a policy of nonenforcement depends on how such policy is characterized under the Administrative Procedure Act (APA).¹³⁷ To briefly summarize the possibilities, if the policy of nonenforcement is characterized as a legislative rule, the agency will be legally bound to the rule until the agency uses notice and comment to change the rule.¹³⁸ On the other hand, if the policy of nonenforcement is characterized as either a mere policy statement (“policy statement”) or an interpretation of the statute (“interpretive rule”), the agency is unlikely to be legally bound to the nonenforcement policy,¹³⁹ meaning that the agency can simply fail to abide by the nonen-

¹³⁵ See, e.g., Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 Fla. Tax Rev. 517, 524 (2012) (explaining the tendency of well-connected parties to prevail in the context of IRS guidance).

¹³⁶ See Stephen M. Johnson, *Good Guidance, Good Grief*, 72 Mo. L. Rev. 695, 735 (2007) (“[I]ncreased public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies.”); Mendelson, note 65, at 636 (explaining that “a visible public debate more likely would engage less organized segments of the public as well and help assure the agency’s fuller consideration of both the diversity of public views and their intensity”).

¹³⁷ Administrative Procedure Act, 5 U.S.C. § 551 et seq. (2012).

¹³⁸ 5 U.S.C. § 553(b) (2012); See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (stating that in order for a legislative rule to be amended, the agency must comply with the Act’s notice and comment provision).

¹³⁹ With respect to policy statements, see, for example, *Graham v. Ashcroft*, 358 F.3d 931, 935 (D.C. Cir. 2004) (suggesting agencies cannot bind themselves to rules that would undermine a comprehensive statutory scheme); *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (stating that a policy statement is necessarily a tentative expression of how an agency intends to exercise its power, and therefore, cannot be legally binding). With respect to interpretive rules, see *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015).

forcement policy or change it informally, although there are some arguments to the contrary.¹⁴⁰

While distinguishing between interpretive rules, legislative rules, and policy statements is a notoriously difficult task,¹⁴¹ if an agency's statement of nonenforcement indicates how the agency has exercised its discretionary enforcement (or in this case nonenforcement) authority, and this statement cannot reasonably be seen as the agency's interpretation of an ambiguous statute or an attempt to bind the public, then such statement may be a policy statement, rather than an interpretive or legislative rule.¹⁴² On the other hand, some courts may conclude that, even if not binding on the public, a nonenforcement policy should be treated by the agency as a legislative rule if the rule eliminates the agency's own enforcement discretion.¹⁴³ In any event, without engaging in a full-blown analysis, at least some courts would conclude that at least some nonenforcement policies are mere policy statements. As a result, at least as to these nonenforcement policies, the statements of nonenforcement may not actually bind the agency to nonenforcement as a legal matter.

Even assuming, however, that all the statements of nonenforcement discussed in this Article are mere policy statements, which are not le-

¹⁴⁰ See, e.g., *Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000), rev'd en banc on other grounds, 272 F.3d 1176 (9th Cir. 2001) (citations omitted) (“[E]stablished policies of an administrative agency may provide the law by which to judge an administrative action or inaction”); see also *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Before the [Bureau of Indian Affairs] may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.”). Later authority has undermined the rule described in *Morton v. Ruiz*. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (explaining that the Social Security Administration (SSA) Claims Manual does not bind the SSA). Then again, an agency may have some due process obligation to provide notice and a reasoned explanation for deviation from its policy, although this is far from clear if the policy conflicts with the statute. See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum*, 53 *Admin. L. Rev.* 803, 844-45 (2001) (fleshing out possibilities of action an agency may have to take with regard to deviations from its internal policies).

¹⁴¹ See, e.g., *Cnty. Nutrition Inst.*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted) (“The distinction between legislative rules and interpretative rules or policy statements has been described at various times as ‘tenuous,’ ‘fuzzy,’ ‘blurred,’ and, perhaps most picturesquely, ‘enshrouded in considerable smog.’”).

¹⁴² See *Conn. Dep’t of Children & Youth Servs. v. Dep’t of Health & Human Servs.*, 9 F.3d 981, 984 (D.C. Cir. 1993) (finding that a “new program instruction” is likely a policy statement, because it essentially sets forth enforcement criteria, rather than defining a statutory term); Tom C. Clark, U.S. Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 30 n.3 (1947) (explaining that policy statements set forth “the manner in which the agency proposes to exercise a discretionary power”); Daniel T. Shedd & Todd Garvey, *Cong. Research Serv.*, R43710, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion* 10 (2014) (“Because an agency’s decision to enforce a statute in a given situation is discretionary, an agency’s announcement of its enforcement policy would appear to qualify as a guidance document”).

¹⁴³ See *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-38 (1985) (examining the agency’s use of language to determine the possibility of an agency binding itself).

gally binding, such statements of nonenforcement can still serve as a practical means of committing the agency to the nonenforcement. From an internal perspective, by making an official statement of categorical nonenforcement, high-level officials can communicate the nonenforcement policy to lower-level officials to assure they act in accordance with the nonenforcement policy.¹⁴⁴ From an external perspective, even though the agency legally may be able to renege on its nonenforcement promise to regulated parties, doing so would subject the agency to significant ire, and therefore serves as a practical commitment mechanism for the agency. As a result, even if not legally enforceable, the nonenforcement promise can serve as an internal and external means of assuring nonenforcement, at least until the promise lapses or is publicly changed.¹⁴⁵

Internal and external commitments to nonenforcement can promote nonarbitrariness for a number of reasons. First, in deciding to commit to nonenforcement, rather than simply relying on ad hoc decisionmaking, high-level agency officials have to think through the contours of the policy, a process that can help ensure that the nonenforcement that does occur can be systemically justified.¹⁴⁶ Second, when enforcement in a particular area does not make sense, categorical nonenforcement can serve as an essential means of controlling lower-level officials and aligning their nonenforcement with the public-regarding policy.¹⁴⁷ As Friendly poignantly explained, the “definition of standards is required if the agency members are to be the masters of the staff rather than the slaves of anonymous Neros, each fiddling his own tune.”¹⁴⁸ Perhaps most importantly, when high-level officials have determined that enforcement does not make sense in a particular area, categorical nonenforcement can prevent individual agents from using enforcement as a tool to harass disfavored par-

¹⁴⁴ See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke L.J.* 1311, 1364 (1992) (“Staff members acting upon matters to which the guidance documents pertain will routinely and indeed automatically apply those documents, rather than considering their policy afresh before deciding whether to apply them.”); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 *Cornell L. Rev.* 397, 409 (2007); Metzger, note 14, at 1873.

¹⁴⁵ See, e.g., Zelenak, *Custom*, note 22, at 839-40 (discussing the IRS’s longstanding history of not abandoning well-established customary deviations); see also Elizabeth Magill, *Agency Self-Regulation*, 77 *Geo. Wash. L. Rev.* 859, 863 (2009) (describing how, even when agency decisions limiting discretion do not legally bind the agency, they may create “expectations and reliance that translate into meaningful pressure for the agency in the future”); Mendelson, note 144, at 401 (explaining that “despite the lack of formal legal binding effect, agencies increasingly state that they will endeavor to follow guidance document policies”).

¹⁴⁶ See Magill, note 145, at 887.

¹⁴⁷ See *id.* at 884-86.

¹⁴⁸ Friendly, note 90, at 24; Metzger, note 14, at 1896-97.

ties.¹⁴⁹ For these reasons, a number of scholars have argued that it makes sense to encourage agencies to promulgate centralized guidance about the law, thereby facilitating equal treatment, rather than forcing agencies to rely upon the discretion of individual agents, and the accompanying creation of a “secret law.”¹⁵⁰

Of course, an agency could commit to a categorical nonenforcement policy that is not public-regarding. Nonenforcement, like many agency decisions, can serve as a means of “giving rents to private parties,”¹⁵¹ and nonenforcement may actually be a particularly dangerous form of rent-giving, because simply not enforcing may be more likely to escape public review than an agency actively providing resources or beneficial regulation to a regulated party. While the close working relationship between the IRS, Treasury, and congressional tax committees, and the close scrutiny of these government actors by an active tax press and an extensive tax bar, in some circumstances may help ensure public-regarding decisions, this is not necessarily the case. Like other agencies, the IRS may be particularly swayed by powerful interest groups, groups that will tend to have particular influence on the government actors.¹⁵² Viewed from this perspective, an agency promising permanent (or semi-permanent) nonenforcement could promote particularly insidious agency giveaways. However, systematically setting a low enforcement priority, which essentially shields a sector of taxpayers from enforcement, can also serve as a form of rent-giving, and would be more likely than categorical nonenforcement to evade review, thereby making the private giveaway less transparent. As a result, while categorical nonenforcement certainly could serve as a particularly strong commitment to a non-public-regarding nonenforcement policy, because of its salience the very categorical nature of categorical nonenforcement may actually reduce this danger.

An example from the tax context helps illustrate how categorical nonenforcement may be useful to an agency as a means of regularizing its discretion and producing nonarbitrary enforcement. The ex-

¹⁴⁹ See Bressman, note 67, at 1691.

¹⁵⁰ See, e.g., Metzger, note 14, at 1919-20 (arguing that “courts should give agencies more leeway to issue informal guidance without running afoul of the APA’s notice and comment requirements, on the grounds that such guidance is a crucial part of agency efforts to fulfill their internal oversight responsibilities and curtail lower-level discretion”); Strauss, note 140, at 808 (“Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law. Citizens are better off if they can know about these instructions and rely on agency positions, with the assurance of equal treatment such central advice permits, than if they are remitted to the discretion of local agents and to ‘secret law.’”).

¹⁵¹ Magill, note 145, at 901 (“[P]romises of nonenforcement—to segments of an industry would be an excellent way for an agency to provide rents to private parties.”).

¹⁵² See Book, note 135, at 524 (describing the phenomenon).

ample comes from deep inside partnership tax, an extremely complex area of the Code, which is quite difficult for many tax practitioners, much less the average congressperson, to understand.¹⁵³ A perennial problem for partnership taxation is the taxation of a partnership interest received in exchange for the provision of services.¹⁵⁴ The problem reared its head in the early 1970's, when the Tax Court, in a case called *Diamond v. Commissioner*, determined that the receipt of a so-called profits interest (which is an interest in future profits) in exchange for the provision of services is includible in income at its fair market value at the time of the receipt by the service partner.¹⁵⁵ Commentators reacted fiercely to the decision, criticizing it as presenting great administrative difficulties.¹⁵⁶ The IRS Office of Chief Counsel agreed and advised the Assistant Commissioner (Technical) of the IRS to issue a revenue ruling indicating that, despite the *Diamond* case, the IRS would not attempt to include in income the receipt of a mere profits interest as compensation for services.¹⁵⁷ Had the IRS released the ruling, it would have been forgoing enforcement that was at least arguably allowed under the relevant tax law at the time, as a result of the Tax Court's decision in *Diamond*. Rather than release the ruling, the IRS attempted to unofficially steer agents away from raising the issue.¹⁵⁸ This left advisors with the sense that non-enforcement was the IRS's position, but without any assurances that the IRS was bound to it.¹⁵⁹

¹⁵³ See, e.g., Terence Floyd Cuff, Working with Target Allocations—Idiot-Proof or Drafting for Idiots?, 35 Real Est. Tax'n 116, 116 (2008) (describing that “[p]artnership taxation is an adventure in Wonderland . . .”).

¹⁵⁴ See Laura E. Cunningham, Taxing Partnership Interests Exchanged for Services, 47 Tax. L. Rev. 247, 247 (1991) (describing “[t]he taxation of a partnership interest issued in exchange for services,” as “one of the most troublesome issues of partnership tax law”). Additionally, a plethora of articles have been written on the subject. See, e.g., Martin B. Cowan, Receipt of an Interest in Partnership Profits in Consideration for Services: The *Diamond* Case, 27 Tax L. Rev. 161 (1972); Carolyn S. Nachmias, Using Profits to Compensate a Service Provider-Potential Partnership Characterization, 21 Fla. St. U. L. Rev. 1125 (1994); Leo L. Schmolka, Commentary, Taxing Partnership Interests Exchanged for Services: Let *Diamond/Campbell* Quietly Die, 47 Tax L. Rev. 287 (1992).

¹⁵⁵ *Diamond v. Commissioner*, 56 T.C. 530, 545-48 (1971), aff'd, 492 F.2d 286 (7th Cir. 1974).

¹⁵⁶ See, e.g., Arthur B. Willis, Partnership Taxation § 11.04 (2d ed. 1976).

¹⁵⁷ G.C.M. 36,346 (July 25, 1977). In the most relevant part, the proposed ruling stated “[t]he Internal Revenue Service will not follow the decision in *Sol Diamond* to the extent that it holds that the receipt by a partner of an interest in future partnership profits as compensation for services results in taxable income.” *Id.*

¹⁵⁸ William S. McKee, William F. Nelson, Robert L. Whitmire, Gary R. Huffman & James P. Whitmire, *Federal Taxation of Partnerships & Partners* ¶ 5.02[3] (3d ed. 2005).

¹⁵⁹ See *id.* (describing a two decades “truce,” with no enforcement actions by the IRS, following the *Diamond* decision); see also John A. Townsend, The Controversy over *Campbell*: Slicing the Bologna Too Thin, 52 Tax Notes 83 (July 1, 1991).

This informal nonenforcement policy worked fairly well for some time, but ultimately the lack of an official policy of nonenforcement meant that individual IRS field agents could wreak havoc for taxpayers and the IRS alike by raising the issue on their own accord. Following the *Diamond* case, the IRS rarely pressed the issue, and, as a result, for almost two decades few cases addressed the question.¹⁶⁰ As a result of a lack of official IRS policy against enforcement, however, an IRS field agent ultimately asserted that the receipt of profits interests as compensation for services should be included in the income of a married couple in Arkansas.¹⁶¹ Rumors indicated that the field agent's pursuit of the case occurred without the approval of the IRS's national office, and that had such approval been sought, the national office may have buried the case, indicating how the individual field agent's decision did not accord with a high-level, systematic assessment.¹⁶² Indeed, to add insult to injury, the IRS agent not only asserted that receipt of the profits interest should be included in income but also asserted that a negligence penalty should be imposed on the taxpayers for failing to include the receipt of such profits interest in income.¹⁶³ The notion that an individual taxpayer could not only be subject to enforcement of a tax law that high-level officials had determined did not make sense systematically, but also affirmatively be penalized for failure to abide by a policy that had been rejected at high levels underscored how the lack of an official policy could result in unjustifiable unfairness in particular cases.

The IRS agent's assertion was contested by the surprised taxpayers,¹⁶⁴ forcing the IRS into court in order to defend the inclusion in income. At the Eighth Circuit, the IRS tried to concede the issue in the case (while still preserving the tax result in the case at issue on other grounds) without actually creating a precedent regarding the taxability of profits interests for taxpayers to rely upon to plan their affairs accordingly.¹⁶⁵ The Eighth Circuit found in favor of the taxpayers in the case, but did not ultimately resolve the general question

¹⁶⁰ Cunningham, note 154, at 250-51.

¹⁶¹ *Campbell v. Commissioner*, 59 T.C.M. (CCH) 236, 237-47 (1996), aff'd in part and rev'd in part, 943 F.2d 815 (8th Cir. 1991).

¹⁶² See Townsend, note 159, at 91 n.43.

¹⁶³ *Campbell*, 59 T.C.M. (CCH) at 237.

¹⁶⁴ The taxpayer in the case had consulted with several tax attorneys about the matter, including a tax attorney who taught partnership tax at New York University School of Law. *Id.* That attorney informed the taxpayers that, despite *Diamond*, he should not be taxed, indicating that "there was little or no chance that he would be taxed on the receipt of such interests . . ." *Id.*

¹⁶⁵ *Campbell*, 943 F.2d at 818.

of whether the receipt of profits interests in exchange for the provision of services to a partnership should be included in income.¹⁶⁶

In light of the controversy and the remaining uncertainty, the IRS finally stepped in after the Eighth's Circuit decision to issue a statement of nonenforcement. It did so in the form of Revenue Procedure 93-27.¹⁶⁷ According to the IRS, revenue procedures are publicly published "statements of practice and procedure issued primarily for internal use."¹⁶⁸ Revenue Procedure 93-27 begins by summarizing the background of the controversy and the uncertainty it had engendered and then states that, unless certain clearly delineated exceptions apply, "if a person receives a profits interest for the provision of services . . . the Internal Revenue Service will not treat the receipt of such an interest as a taxable event for the partner or the partnership."¹⁶⁹ In other words, regardless of whether or not the IRS could do so, it was promising that it would not enforce the inclusion in income of profits interests received in exchange for services provided to a partnership, unless certain exceptions applied. The language of this statement of nonenforcement is remarkably similar to the IRS's announcement about frequent flyer miles: "the IRS will not assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel."¹⁷⁰ While the IRS has more recently suggested that it will pursue a different set of legal rules in the context of partnership profit interests in

¹⁶⁶ *Id.* at 818-23.

¹⁶⁷ Rev. Proc. 93-27, 1993-2 C.B. 343.

¹⁶⁸ Rev. Proc. 55-1, 1995-2 C.B. 897.

¹⁶⁹ Rev. Proc. 93-27, 1993-2 C.B. 343. The exceptions are that the revenue procedure will not apply:

- (1) If the profits interest relates to a substantially certain and predictable stream of income from partnership assets, such as income from high-quality debt securities or a high-quality net lease;
- (2) If within two years of receipt, the partner disposes of the profits interest; or
- (3) If the profits interest is a limited partnership interest in a "publicly traded partnership" within the meaning of section 7704(b) of the Code.

Id.

¹⁷⁰ Announcement 2002-18, 2002-1 C.B. 621. The fact that the IRS would have faced a significant uphill battle for inclusion on legal grounds in Revenue Procedure 93-27 supports the contention of Alice Abreu and Richard Greenstein that such statements of "non-enforcement" may be viewed just as easily, or perhaps better, as interpretations of the law. See Abreu & Greenstein, note 42, at 54-55. This conclusion, however, depends on how strong the law underlying the IRS's concession is, and the characterization as an interpretation therefore seems stronger in the case of Revenue Procedure 93-27 than in the case of Announcement 2002-18. As discussed previously, whether the IRS is promising nonenforcement because of its doubts about the law or because of administrative or other noninterpretive reasons, this Article generally views together the IRS discretionary statements with respect to enforcement of the law.

the form of regulations,¹⁷¹ for over a decade Revenue Procedure 93-27 served as a source of certainty and uniformity. The proposed regulations, if finalized, would offer their own resolution of the issues and presentation of new issues.¹⁷²

The saga regarding taxation of profits interests is instructive regarding the potential benefits of an agency committing to a policy of non-enforcement through categorical nonenforcement. By failing to commit to a policy of nonenforcement after *Diamond*, the IRS opened the door for arbitrary administrative action. Having an unofficial, not transparent, policy of nonenforcement left taxpayers uncertain about how to plan their affairs. Rather than being able to rely on a consistent policy determined for all taxpayers, individual taxpayers became vulnerable to the possibility of enforcement by lone revenue agents, motivated by their own, unsystematic sense of their enforcement duties.¹⁷³ As described by a leading treatise, between *Diamond* and *Campbell* “millions of service-connected transfers of partnership profits interests went unchallenged, while only a few unfortunates found themselves dealing with the effects of *Diamond*.”¹⁷⁴ The idea of being one of the only taxpayers subject to enforcement for a particular issue, when high-level officials have unofficially precluded such enforcement as a result of concerns about administrability and/or other misgivings is a quintessential example of arbitrary agency action. This possibility also leads to the insidious threat of individual revenue agents using enforcement action, which is not in accordance with high-level policy, as a tool to harass individual taxpayers based on characteristics that the revenue agents dislike. Had the IRS issued a statement of categorical nonenforcement after *Diamond*, it could have committed to less arbitrary and more public-regarding policy, increasing the legitimacy of its nonenforcement.

In sum, viewing the realities of agency nonenforcement of the tax law through the lens of agency legitimacy shows how categorical non-enforcement, in certain circumstances, may actually increase the legitimacy of agency nonenforcement. Prior to leaving this lens of agency legitimacy, it is useful to address a number of lingering issues. First, would categorical nonenforcement withstand judicial review, should

¹⁷¹ See Prop. Reg. § 1.721-1(b)(1); see also Prop. Reg. § 1.83-3(l)(1) (applying § 83 to receipt of profits interest but providing elective safe harbor of liquidation value for partnership interest received in exchange for services).

¹⁷² See *id.* For discussion of the proposed regulations, see McKee et al., note 158, ¶ 5.02[8].

¹⁷³ Cf. Mendelson, note 144, at 413 (explaining that guidance documents “enable agencies to manage their numerous employees who have contact with the public, reducing the risk of arbitrary decisions and increasing the chances that individual agency employees will treat like cases alike”).

¹⁷⁴ McKee et al., note 158, ¶ 5.02[3].

it, and what, if anything, do these conclusions reveal about the legitimacy of categorical nonenforcement? To some, the lack of discussion of judicial review thus far might be striking. Judicial review is often discussed as an independent means of securing agency legitimacy, or as a means of promoting the theories of agency legitimacy discussed above.¹⁷⁵

Judicial review has not been discussed thus far, or set forth as an independent theory of agency legitimacy, because of practical constraints on judicial review of nonenforcement. As a general matter, and in the tax context in particular, a combination of restrictive standing doctrine and a general presumption against reviewability of agency nonenforcement decisions serves as a barrier to judicial review of agency nonenforcement.¹⁷⁶ As for standing, potential litigants do not have standing to challenge the tax liability (or nonenforcement of the tax liability) of others,¹⁷⁷ and taxpayers generally will not have an incentive to challenge nonenforcement of their own tax liability,¹⁷⁸ a set of circumstances that mirrors more generally the difficulty that regulatory beneficiaries face in challenging agency nonenforcement.¹⁷⁹ As for nonreviewability, the Supreme Court in *Heckler v. Chaney*¹⁸⁰ declared a general presumption against review of agency nonenforcement decisions, in part because an “agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise,” and outside of a court’s area of expertise.¹⁸¹ Indeed, while the case is very much a live issue currently, even a recent Fifth Circuit opinion denying the stay of the injunction of DAPA underscored that ordinarily standing and nonreviewability serve as barriers to challenging nonenforcement pol-

¹⁷⁵ See, e.g., M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1413 (2004) (“The dominant narrative of modern administrative law casts judges as key players who help tame, and thereby legitimate, the exercise of administrative power.”).

¹⁷⁶ See Bressman, note 67, at 1675; see also Zelenak, Custom, note 22, at 848-50.

¹⁷⁷ Justice Stewart famously indicated that he could not “imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring). For a foundational case, see *Allen v. Wright*, 468 U.S. 737, 740 (1984).

¹⁷⁸ Cf. Zelenak, Custom, note 22, at 848-50 (coming up with a very particularized example in which taxpayer subject to nonenforcement might challenge it but concluding that “[d]espite the theoretical possibility that a taxpayer could have motivation—and standing—to challenge the application to himself of a taxpayer-favorable customary deviation, in practice such litigation is vanishingly rare”).

¹⁷⁹ Cass R. Sunstein, What’s Standing After *Lujan*? Of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163, 186-88, 195-96 (1992) (discussing how standing and the nonreviewability doctrine disadvantage regulatory beneficiaries).

¹⁸⁰ 470 U.S. 821 (1985).

¹⁸¹ *Id.* at 831.

icies.¹⁸² Specifically, in finding that standing existed and nonreviewability was not a bar, the Fifth Circuit was very careful to repeatedly emphasize that “DAPA’s version of deferred action, however, is more than nonenforcement: It is the affirmative act of conferring ‘lawful presence’ on a class of unlawfully present aliens,” triggering “eligibility for federal and state benefits that would not otherwise be available.”¹⁸³ As a result, at least for now, the traditional bars of standing and nonreviewability apply for pure nonenforcement policies. Therefore, while judicial review may play an important role in legitimating many agency decisions, it generally does not serve as an effective means of legitimating agency nonenforcement decisions.¹⁸⁴

Notwithstanding these practical difficulties, some may point to hints in a number of cases that categorical nonenforcement may be particularly problematic, and therefore may, at least in the right case, be able to overcome the presumption against reviewability of agency nonenforcement (although, unless standing doctrine changes, in most cases review would still be barred by standing doctrine). In *Chaney*, in explaining why the presumption against judicial review made sense, the Supreme Court stated that the agency was better equipped to determine the “proper ordering of its priorities,”¹⁸⁵ and indicated in a footnote that the Court was not deciding a case where it could “justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”¹⁸⁶ In *Motor Vehicle Manufacturers Ass’ns v. State Farm Mutual Automobile Insurance Co.*,¹⁸⁷ albeit a case that dealt with regulation rather than nonenforcement, Justice Rehnquist indicated in his concurring opinion that, while an agency may “evaluate priorities in light of the philosophy of the administration,” it could “not refuse to enforce laws of which it does not approve, or to ignore

¹⁸² *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015).

¹⁸³ *Id.* at 757; see also *id.* at 757 n.65 (“The Cole Memo does not direct an agency to grant any type of affirmative benefit to anyone engaged in unlawful conduct, whereas the DAPA Memo directs an agency to grant lawful presence and provides eligibility for employment authorization and other federal and state benefits to certain illegally present aliens.”); *id.* at 765 n.112 (“Because DAPA is much more than a nonenforcement policy, which is presumptively committed to agency discretion . . . requiring it to go through notice and comment does not mean that a traditional nonenforcement policy would also be subject to those requirements, assuming that a party even had standing to challenge it.”).

¹⁸⁴ It is outside the scope of this Article to critique this result. Others have done so well in other work. See, e.g., Bressman, note 176, at 1675. Here, it is enough to say that the inability to challenge nonenforcement decisions is problematic, but also reflects the real difficulties courts would have in judging nonenforcement.

¹⁸⁵ *Chaney*, 470 U.S. at 832.

¹⁸⁶ *Id.* at 833 n.4.

¹⁸⁷ 463 U.S. 29 (1983).

statutory standards”¹⁸⁸ Other cases have provided similar hints, though certainly not controlling law, that complete failure to enforce the law may not be permissible.¹⁸⁹

The analysis above, however, does not provide a clear-cut case against categorical nonenforcement. For reasons discussed above, and in further detail below, in many cases setting a low priority can have a very similar effect to categorical nonenforcement. In light of this reality, perhaps setting a low priority, in appropriate cases, should not be treated differently than categorical nonenforcement. Moreover, it is not clear whether categorical nonenforcement always should be seen as “so extreme as to amount to an abdication of [the agency’s] statutory responsibilities,”¹⁹⁰ rather than a reasonable decision of the agency, in light of the various considerations it is balancing in a particular case. Categorical, in other words, is not necessarily the same as “so extreme as to amount to an abdication,”¹⁹¹ and this Article fundamentally posits that they should not be treated synonymously.

Indeed, the limited judicial authority regarding nonenforcement may speak more to the extensiveness of nonenforcement than to the categorical nature of nonenforcement. In *Chaney*, in suggesting that judicial review might be available where there has been an abdication of statutory responsibilities, the Supreme Court looked to a case in which the Department of Health, Education and Welfare (“HEW”) had engaged in extensive nonenforcement of Title VI of the Civil Rights Act of 1964 and had claimed that HEW’s enforcement of Title VI was completely discretionary.¹⁹² Even though HEW actually had not promised categorical nonenforcement of any specific aspect of Title VI, its claim nonetheless was notable presumably because of how sweeping the potential nonenforcement could be. In another context, Justice Scalia implied that agency discretion may be more acceptable for narrow questions, rather than substantial decisions.¹⁹³ In *Allison v. Block*, in concluding that the Secretary of Agriculture could not abdicate responsibility to implement an entire statutory program, the

¹⁸⁸ *Id.* at 59 n.* (Rehnquist, J., concurring).

¹⁸⁹ See, e.g., *Allison v. Block*, 723 F.2d 631, 638 (8th Cir. 1983); *Texas v. United States*, 86 F. Supp. 3d 591, 636-43 (S.D. Tex. 2015) (suggesting that DAPA and expansion of DACA may be an example of abdication).

¹⁹⁰ *Chaney*, 470 U.S. at 833 n.4.

¹⁹¹ *Id.*

¹⁹² *Id.* at 833, 839, 850 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)).

¹⁹³ *Whitman v. Am. Trucking Ass’ns., Inc.*, 531 U.S. 457, 475 (2001) (“While Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators,’ which are to be exempt from new-stationary-source regulations governing grain elevators, see 42 U.S.C. § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy.”).

Eighth Circuit suggested that it was the extensiveness of the nonenforcement that was particularly problematic.¹⁹⁴

In any event, while reasonable minds certainly may differ on how *Chaney* should be read, this Article does not adopt the perspective that even particularly extensive categorical nonenforcement should necessarily be impermissible. For instance, rather than being seen as simply a problem from the perspective of judicial review, categorical nonenforcement perhaps should be viewed as a benefit. By being transparent about nonenforcement, categorical nonenforcement may help facilitate judicial review of the appropriateness of the nonenforcement,¹⁹⁵ and thereby help legitimate it. How and when a court would or should actually strike down a categorical nonenforcement policy, in light of the difficult decisions that must be made in making enforcement decisions (which courts are arguably particularly ill-suited to judge), remains quite unclear. But by transparently communicating nonenforcement, categorical nonenforcement could at least offer courts the ability to judge when such decisions are being made in a reasonable fashion, or consistently with what Congress would have wanted had it examined the difficult question, or in accordance with whatever other inquiry courts decide is relevant.¹⁹⁶ In sum, while the combination of standing and nonreviewability generally will prevent judicial review of pure nonenforcement policies, this Article implicitly posits that judicial review should not single out categorical nonenforcement as impermissible. Moreover, the very lack of judicial review of agency nonenforcement makes the theories of agency legitimacy discussed above all the more important.¹⁹⁷

Finally, it is also worth making explicit something that was implicit in the discussion of the theories of agency legitimacy. Categorical

¹⁹⁴ *Allison v. Block*, 723 F.2d 631, 635-36 (8th Cir. 1983) (distinguishing cases in which nonenforcement of entire program was not at issue). The recent OLC opinion regarding the Department of Homeland Security's discretion to enforce immigration laws was also sensitive to this question of whether extensiveness of nonenforcement affects its legality. OLC Opinion, note 21, at 30-31; see also *Texas v. United States*, 86 F. Supp. 3d 591, 654 (S.D., Tex. 2015) (emphasizing the "wide-reaching" nature of DAPA and the expansion of DACA in deciding that *Chaney* did not bar judicial review of these immigration nonenforcement initiatives). As mentioned previously, on review, the Fifth Circuit emphasized principally that DAPA was not a mere nonenforcement policy, but rather also an affirmative act of conferring lawful presence and eligibility for associated benefits. See text accompanying note 183.

¹⁹⁵ See *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994) (citing *Edison Elec. Inst. v. EPA*, 996 F.2d 326 (D.C. Cir. 1993)) ("[A]n agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has . . . articulated it in some form of universal policy statement.") (emphasis in original).

¹⁹⁶ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁹⁷ Cf. Metzger, note 14, at 1895 (stressing that internal supervision becomes even more important as a means of "guarding against arbitrary use of governmental power . . . when judicial review is lacking").

nonenforcement may work differently in different situations, and thereby may increase accountability, deliberation, or nonarbitrariness, without necessarily increasing all three. For instance, in a situation in which the agency nonenforcement deals with a question, such as a relatively obscure partnership tax question, that would be perceived as technical, categorical nonenforcement may be unlikely to increase widespread accountability and deliberation (at least by the public at large). Nonetheless, categorical nonenforcement may still increase nonarbitrariness, and therefore increase the legitimacy of the nonenforcement. Similarly, one could subscribe to a particular theory of agency legitimacy and reject the others, and categorical nonenforcement could still increase the legitimacy of nonenforcement, to the extent that it increases legitimacy under the relevant theory of agency legitimacy. In this regard, it is worth emphasizing that conceptions of the administrative state have tended to swing back and forth between two poles over time: one that emphasizes that agencies are engaging in political, policymaking decisions,¹⁹⁸ and the other that emphasizes that agencies are engaging in decisions that rely on technical expertise.¹⁹⁹ The first pole will tend to look to some form of political accountability theory to legitimate agency action, whereas the second will tend to look to some form of nonarbitrariness theory. An underlying assumption of this Article is that agencies do not engage in just one type of decisionmaking, but rather do a mix of both. For instance, the IRS may make policy-laden decisions about whether to pursue business taxes aggressively or not, as well as expertise-laden decisions about whether administrative concerns preclude enforcement of a very technical tax provision. A comprehensive evaluation of executive nonenforcement should take into account the different types of decisions that agencies make, as fleshed out in the examples above, and how categorical nonenforcement can impact such decisions, and, in some circumstances, increase the accountability, deliberation, and/or nonarbitrariness of agency nonenforcement.

V. ALTERNATIVE LENSES

Having examined the case for categorical nonenforcement through the lens of agency legitimacy, it is useful to return to the alternative lenses of constitutional law and rule of law that other scholars have

¹⁹⁸ See, e.g., Lessig & Sunstein, note 70, at 97-101 (describing “large-scale shifts in the nature of our understanding of what the administrators’ power is” and characterizing the then-predominant view of agencies engaging in political, policy-laden decisions).

¹⁹⁹ See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 88 (describing recent pendulum swing back to concern for agency expertise).

used in examining nonenforcement generally and tax law nonenforcement specifically. As discussed below, in delineating what is acceptable executive nonenforcement, both the existing constitutional and rule of law lenses rely on formal distinctions, such as distinctions between categorical nonenforcement and setting priorities, or between nonenforcement motivated by limitations on enforcement resources and nonenforcement motivated by policy, that do not hold up well against the realities of agency nonenforcement. Especially in light of such limitations, the agency legitimacy lens has much to offer to the ongoing contemplation of executive nonenforcement.

To begin, the distinctions that constitutional law scholars have tried to draw between categorical nonenforcement and setting priorities may be more illusory than real.²⁰⁰ To take an example from the tax context, as described previously, the IRS has been engaging in seemingly impotent enforcement of the Code for large partnerships.²⁰¹ While this result has occurred under the formal guise of setting priorities rather than categorical nonenforcement,²⁰² the notion that virtually impotent audit is clearly distinct from categorical nonenforcement just because it technically occurs through setting a low enforcement priority is untenable. Indeed, Tax Analysts' ability to frame such nonenforcement as essentially categorical underscores the lack of a clear distinction from setting priorities.²⁰³ While other instances of tax law nonenforcement have not received as much recent attention as the large partnership example (and, to a lesser degree, the frequent flier miles example), the same point could be made with respect to many other aspects of the tax law that go essentially unenforced. For instance, in 2009 the (then) IRS Commissioner explained, "The current law [regarding inclusion in income of personal use of an employer-provided cellphone], which has been on the books for many years, is burdensome, poorly understood by taxpayers, and difficult for the IRS to administer consistently. The passage of time, advances in technology, and the nature of communication in the modern workplace have rendered this law obsolete."²⁰⁴ While the Commissioner's statement certainly falls short of a statement of categorical nonenforcement (and while the IRS in fact had tried to enforce the law in

²⁰⁰ Indeed, even some proponents of the line have acknowledged its difficulties. See, e.g., Price, note 2, at 677 ("[T]he line between a priority and a policy will be unclear in many cases.").

²⁰¹ See text accompanying notes 37-39.

²⁰² For a discussion of how failure to reallocate resources to partnerships has in part led to the current state of affairs with partnership audits, see Brock, note 36, at 55-60.

²⁰³ See text accompanying notes 116-17.

²⁰⁴ Stephen Ohlemacher, IRS, Treasury Want Cellphone Tax Repealed, http://usatoday30.usatoday.com/money/workplace/2009-06-16-cell-phone_N.htm (June 16, 2009).

certain high profile cases²⁰⁵), to the extent that the IRS has abandoned enforcement in almost all cases, and taxpayers have essentially abandoned reporting of income, the distinction between categorical nonenforcement and setting priorities becomes somewhat meaningless. Indeed, in reporting on the Commissioner's statements, one newspaper described the requirement to include in income personal use of an employer-provided cellphone as "[a] widely ignored law," which the "IRS thinks [is] a stupid law, too."²⁰⁶

Moreover, for reasons described in Part III, impotent enforcement of at least some aspects of the tax law at least some of the time is an inevitable part of modern tax administration. From a practical perspective, therefore, the IRS cannot avoid setting low priorities, nor would it make sense to attempt to force the IRS to do so. Accepting low priorities as inevitable, and often virtually indistinguishable from categorical nonenforcement, suggests the disutility of singling out categorical nonenforcement as impermissible.

While not the focus of this Article, the high-profile cases that constitutional scholars have themselves been sparring over illustrate this point as well. Referring to DACA, Robert Delahunty and John Yoo have characterized the program as a "decision not to enforce the removal provisions of the Immigration and Nationality Act (INA) against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States,"²⁰⁷ or, in other words, a case of categorical nonenforcement, and Zachary Price has seconded that "this policy amounts to a categorical, prospective suspension of [the law]."²⁰⁸ In contrast, as previously alluded to, the Obama Administration actually took pains to indicate that it was merely setting priorities and even that particular decisions would be made on a "case by case" basis.²⁰⁹ Other scholars and commentators have argued that President Obama's immigration actions, far from categorical nonenforcement, are merely setting enforcement priorities, which they describe as a quintessentially executive role.²¹⁰ The differing characterizations by different people looking at the exact same policy shines light on how the distinction itself at the very least does not lead to self-evident or particularly satisfying conclusions.

On the one hand, a statement that reserves the right to deport particular individuals if circumstances merit the deportation, despite a general policy against it, is for all intents and purposes the same as a

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Delahunty & Yoo, note 2, at 783.

²⁰⁸ Price, note 2, at 760.

²⁰⁹ See text accompanying notes 17-19.

²¹⁰ See note 14.

policy of categorical nonenforcement if such right is never, or even virtually never, exercised. Even to the extent that such right is exercised in an exceptional case, for the millions of individuals who will not be deported and gain the virtual assurance of nondeportation, a policy that formally sets priorities and leaves some technical space for case-by-case deviations nonetheless provides assurance almost identical to that provided by categorical nonenforcement.²¹¹ To elevate the very unlikely possibility that the executive will deviate from a policy of nonenforcement to a saving grace from a constitutional perspective pushes form over function to an unreasonable degree.

On the other hand, if we reasonably reject the terms of the policy as a means of distinguishing between categorical nonenforcement and setting priorities, the distinction itself becomes somewhat meaningless. If DACA, which was explicitly formulated as an exercise in setting priorities, should be considered for all intents and purposes an instance of categorical nonenforcement, then any supposed exercise in setting priorities may really be categorical nonenforcement. The task, then, of distinguishing between a policy of setting priorities and a policy of categorical nonenforcement will be factually intensive and almost certain not to produce intellectual coherence or clearly important values.

At least some constitutional law scholars might counter that, nonetheless, a distinction must be drawn between nonenforcement (even categorical nonenforcement) that is motivated by enforcement resource limitations (which may be an acceptable exercise of executive power) and nonenforcement that is motivated by policy (which may not be an acceptable exercise of executive power). However, the notion that there is such a clear divide is also untenable.²¹² When dealing with an agency that is perpetually underfunded, there often will be some sort of enforcement resource limitation that could explain why an agency has chosen not to enforce a particular aspect of the law. Indeed, in a resources-strapped agency, any instance of nonenforcement could be explained, at least in part, by enforcement limitations.²¹³ However, various policy decisions are often going to be

²¹¹ See Obama, note 19 (explaining that, through DACA, “DHS is lifting the shadow of deportation from these young people”).

²¹² Even strong proponents of such a divide acknowledge the real difficulties. See, e.g., Love & Garg, note 15, at 1225 (“Resource constraints are ubiquitous, presidents are in the business of making decisions that serve their predetermined policy goals, and priorities and obligations will often conflict.”); *id.* at 1229 (noting that courts might be unwilling or incapable of policing this divide).

²¹³ Of course, it might be possible to find an example of an agency that is not resource-strapped, and in such cases the enforcement limitations explanation might be less plausible. See *id.* at 1218-20 (making such an argument with respect to the Bush administration’s

intermixed with enforcement considerations, making it difficult to disentangle them.

For example, the decision to engage in categorical nonenforcement with respect to frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes can be explained in part by the difficulty for the IRS in enforcing the inclusion of such miles in income.²¹⁴ The IRS's statement of nonenforcement with respect to frequent flier miles specifically indicates that the IRS had not "pursued a tax enforcement program with respect to promotional benefits such as frequent flyer miles" as a result of "unresolved issues" which are "technical and administrative" in nature.²¹⁵ Principally, IRS attempts to value the miles for each taxpayer may engender a nightmarish valuation hassle.²¹⁶ This valuation hassle would not prevent the IRS from enforcing the law. However, it may very well force the IRS to engage in a very resource-intensive valuation battle with taxpayers, which would make enforcement quite costly and difficult. And yet, it is quite difficult to enforce many aspects of the tax law, including, to take just one of many examples, inclusion of the cash wages received by a nanny.²¹⁷ Pointing solely to enforcement difficulties alone is not enough to understand why the IRS engaged in categorical nonenforcement with respect to frequent flier miles, but

under-enforcement of the Voting Rights Act). However, even the conclusion in this very specific instance is not indisputable. *Id.* at 1219 n.114.

²¹⁴ See Announcement 2002-18, 2002-10 I.R.B. 621 (Mar. 11); notes 37-38 and accompanying text.

²¹⁵ Announcement 2002-18, 2002-10 I.R.B. 621 (Mar. 11).

²¹⁶ A number of commentators have suggested using a fixed value per mile to overcome the valuation difficulties. See, e.g., Dominic L. Daher, *The Proposed Federal Taxation of Frequent Flyer Miles Received from Employers: Good Tax Policy But Bad Politics*, 16 *Akron Tax J.* 1, 18 (2001); Lee S. Garsson, *Frequent Flyer Bonus Programs: To Tax or Not To Tax—Is This the Only Question?*, 52 *J. Air. L. & Com.* 973, 989-92 (1987); Zelenak, *Up in the Air*, note 22, at 441. These suggestions would ease administration, but at the cost of accuracy in individual cases. There is also a question about when the frequent flier miles would be included. For an example of differing views, compare M. Bernard Aidinoff, *Frequent Flyer Bonuses: A Tax Compliance Dilemma*, 31 *Tax Notes* 1345, 1352 (June 29, 1986) (inclusion when miles are used), and Joseph M. Dodge, *How To Tax Frequent Flyer Bonuses*, 48 *Tax Notes* 1301, 1302 (Sept. 3, 1990) (same), with Zelenak, *Up in the Air*, note 25, at 434-38 (inclusion at time miles are earned).

²¹⁷ See, e.g., Debra Cohen-Whelan, *Protecting the Hand that Rocks the Cradle: Ensuring the Delivery of Work Related Benefits to Child Care Workers*, 32 *Ind. L. Rev.* 1187, 1193-200 (1999); Catherine B. Haskins, *Household Employer Payroll Tax Evasion: An Exploration Based on IRS Data and on Interviews with Employers and Domestic Workers* (Feb. 1, 2010) (unpublished Ph.D. dissertation, Univ. of Massachusetts, Amherst) (manuscript at 124), http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1171&context=open_access_dissertations ("[N]o fewer than three-quarters of all household employers are currently failing to pay their nanny taxes."). Indeed, as pointed out in these and other sources, the lack of compliance in this instance has more profound, negative consequences than mere reduction in revenue, because of the implications for worker benefit entitlement. See, e.g., *id.* at 5; Cohen-Wheelan, *supra*, at 1203.

not with respect to cash wages paid to nannies. In addition to enforcement difficulties, there must be some other reason why the IRS chose categorical nonenforcement with respect to frequent flier miles. The additional reason is likely that there is an underlying sense that the frequent flier miles just do not feel like income in the same way as the cash wages, making it less palatable to tax them.²¹⁸ Or, perhaps more cynically (or just realistically, depending on one's perspective), the IRS may simply be wary of incurring political backlash from taxing popular fringe benefits, even though the tax law requires taxing them. While the Code does not provide explicit room for the IRS to make enforcement decisions based on underlying senses or motivations such as these, these senses and motivations, which are really policy decisions about the law, inevitably motivate an agency's resource allocation decisions.

The cases that constitutional law scholars have been sparring over outside the tax context also underscore the difficulty of determining when nonenforcement can be explained by limitations on enforcement resources and when it can be explained by policy. Focusing explicitly on the question of whether DACA saves enforcement resources, Justice Scalia (among many others) has claimed that "[t]he husbanding of scarce enforcement resources can hardly be the justification for this"²¹⁹ Others have countered the opposite.²²⁰ Certainly, with enough effort a cost benefit analysis could be performed, indicating how much money is or is not saved by the DACA program. To the extent that such an analysis reveals that DACA actually costs, rather than saves, money, the enforcement resource limitations explanation might be invalid. But what about in presumably the majority of cases that agencies face (and maybe even in the case of DACA), in which cutting enforcement in a particular area does save scarce resources? Would the enforcement resources limitation necessarily excuse the nonenforcement decision? Like with the categorical nonenforcement of frequent flier miles, even such an analysis would not necessarily explain why the particular nonenforcement was chosen to save resources.²²¹

²¹⁸ Cf. Zelenak, Custom, note 22, at 841 ("Taxation of many in-kind benefits may be nonintuitive and objectionable in the minds of the general public."). Somewhat similarly, the IRS's decision in Revenue Procedure 93-27 addressing taxation of partnership profits interest received in exchange for services provided to the partnership may be explained by the underlying sense that, even if the receipt of a profits interests has some value, it just does not feel like income when the profits interest has not yet produced any profits. Rev. Proc. 93-27, 1993-2 C.B. 343.

²¹⁹ *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting).

²²⁰ See, e.g., Sant'Ambrogio, note 14, at 396 n.289.

²²¹ Indeed, in opining regarding DACA, the Office of Legal Counsel does not rely solely on a distinction between nonenforcement motivated by enforcement resource limitations

At bottom, in deciding between different means of saving enforcement resources, value judgments not motivated solely by saving enforcement resources are inevitably going to come into play. For instance, an agency might very reasonably decide it should save resources by cutting enforcement against offenders that pose a low threat to the public. But once anything other than saving enforcement resources becomes a factor, the decision becomes motivated by a mix between policy and a desire to save enforcement resources. As a result, like the distinction between categorical nonenforcement and setting priorities, this distinction between nonenforcement motivated by policy and nonenforcement motivated by enforcement resource limitations often is not going to map onto reality in a satisfying way.

Finally, I also do not rely on the distinction between time-limited nonenforcement policies and nonenforcement policies that are not so limited, even though some constitutional scholars have suggested that this formal distinction might be important.²²² Scholars who have provided some support for the distinction have not provided much explanation as to why such time limitations may remedy potential constitutional violations, nor does this Article put forth a vigorous counterargument.²²³ It is enough for now to say that if a nonenforcement policy did somehow breach the limits on executive power and therefore pose constitutional problems, it is hard to see why limiting such breach to a specified period of time would remedy, rather than limit, the constitutional breach.²²⁴

Moving to the other, prominent existing lens for examining categorical nonenforcement, Laurence Zelenak has suggested in the tax context that categorical nonenforcement may upset the rule of law.²²⁵ This claim in some ways is difficult to evaluate because it is notoriously unclear what, exactly, the rule of law means.²²⁶ Notwithstanding

and nonenforcement motivated by policy, instead shifting to an analysis of whether the policy-based reasons are consistent with congressional intent. See OLC Opinion, note 21, at 26. While an examination of congressional intent is outside the scope of this Article, it is enough for now to say that arguments regarding congressional intent are going to be malleable and highly contested, especially when examining nonenforcement that explicitly fails to fulfill the actual law enacted.

²²² E.g., Sant'Ambrogio, note 14, at 358.

²²³ For one explanation, see *id.*, at 403 (explaining that time limitations “would lend legitimacy to the President’s actions by showing that the Executive is not permanently rewriting the law”).

²²⁴ See Love & Garg, note 15, at 1239; Price, note 2, at 706.

²²⁵ See text accompanying note 25.

²²⁶ Margaret Jane Radin, *Reconsidering the Rule of Law*, 89 B.U. L. Rev. 781, 781 (1989) (presenting the rule of law as a “deeply contested” ideology lacking any widely accepted formulation). Indeed, in some accounts, rule exploitation (or violation) itself threatens the rule of law by increasing public awareness of those instances where the rules diverge from “widely held views of substantive justice.” Edward A. Morse, *Reflections on the Rule of Law and “Clear Reflection of Income”: What Constrains Discretion?*, 8 Cor-

this ambiguity, however, rule of law accounts tend to emphasize consistency and notice of how the government intends to use its powers.²²⁷ The strongest rule of law argument against categorical nonenforcement would begin by asserting that Congress' law is supreme²²⁸ and therefore the relevant body of law for notice and consistency. If Congress' law is the relevant body of law in terms of notice and consistency, so the argument would go, then applications of the law, including categorical nonenforcement, that do not comport with Congress' law violate the rule of law. Relatedly, some might argue that separating lawmaking from law execution is an important constitutional value that is essential to promote the rule of law because lawmakers, foreclosed from the natural temptation to make bad law and then exempt themselves from it on an ad hoc basis, will instead be forced to create general rules that will apply to all.²²⁹ Since, as some argue, categorical nonenforcement changes the effective scope of the law and thereby may look a lot like lawmaking,²³⁰ having an executive agency, like the IRS, engaging in such practice may blur the lines between lawmaking and execution and thereby undermine the rule of law the Constitution arguably meant to protect. This line of argument, of course, relies on the malleable terminology of rule of law to find another way of worrying about the potential problems with an agency overriding Congress.

Prior to accepting and addressing this argument, it is worth pushing back and suggesting that the concept of rule of law may not be the best lens for worrying about an agency's ability to override Congress. Rule of law accounts may as reasonably (or even more reasonably) look to the agencies themselves to evaluate how administration of the law comports with the rule of law. When the law on the ground inevitably will differ systematically from the law on the books, the agency making clear rules about how the law will actually apply can at least

nell J.L. & Pub. Pol'y 445, 461-62 (1999). To the extent that categorical nonenforcement raises overall compliance, it might be possible to argue that categorical nonenforcement actually enhanced the rule of law. See Leigh Osofsky, Concentrated Enforcement, 16 Fla. Tax Rev. 325, 344-46 (2014) (examining how announcing concentrated enforcement, with implicit indication of reduced enforcement in some areas, may increase overall compliance in certain circumstances).

²²⁷ See, e.g., Lon L. Fuller, *The Morality of Law* 209-10 (rev. ed., 1969); Morse, note 226, at 453.

²²⁸ U.S. Const. art. I, § 1.

²²⁹ John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 646 (1996); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 434 (1987); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 Wm. & Mary L. Rev. 301, 317-18 (1989). This has roots in the ideas of Locke, Montesquieu, and Blackstone, among others. Manning, *supra*, at 646.

²³⁰ See, e.g., Price, note 2, at 705.

theoretically best promote the asserted, important constitutional values of notice of general rules and their consistent application.²³¹ For example, to the extent that the IRS has informally decided on nonenforcement with respect to partnership profits interests, making a categorical statement of nonenforcement may provide the notice and guarantee the consistency that are arguably among the hallmarks of the rule of law. As to the concern that blurring lawmaking and execution can lead to bad law and the exemption of lawmakers from it, categorical nonenforcement simply seems unlikely to lead to this outcome. Rather than making law that will apply to others, categorical nonenforcement is an express commitment to general nonenforcement.

Accepting for the sake of argument, however, that the rule of law concern appropriately seeks to protect Congress' law, the most pressing objection to categorical nonenforcement would be as follows. Imagine that Congress disagrees with an IRS announcement that it is engaging in categorical nonenforcement of the income tax as to large partnerships. By its nature, the fact that the agency is engaging in categorical nonenforcement means that the law already indicates that enforcement should be occurring. In response to the offensive categorical nonenforcement, then, what could Congress do to protect its prerogative? Could it pass the "we really mean it" law?²³²

While this question implicates an expansive inquiry into how and whether Congress can control agencies, this Article need not delve deeply into the extensive literature about this inquiry²³³ in order to posit that Congress has tools at its disposal to respond to categorical nonenforcement it dislikes. As an initial matter, in at least some instances Congress will be able to respond to disapproved-of categorical nonenforcement decisions by using various levers at its disposal, such as oversight hearings, appropriations control, informal influence, and even the threat of legislation reigning in the agency.²³⁴ In one case study in the tax context, a congressional mandate to crack down on

²³¹ Cf. Davis, note 55, at 94 ("A common kind of confused thinking is to prefer the secret ad hoc policies to the open uniform policies on the ground that the enacted law should be respected!").

²³² I thank Michael Froomkin for posing this colorful inquiry.

²³³ See, e.g., sources cited in note 73.

²³⁴ Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. Rev. 727, 727 (2009) ("Congress engages in an extensive and ever-increasing level of oversight of the activities of the executive branch."); Kagan, note 66, at 2258 ("The legislative sanctions backing up the system include new legislation, budget cuts, and embarrassing oversight hearings."); Richard J. Pierce, Jr., *Administrative Law* 133 (2d ed. 2012) ("Congress has more power over agencies than any other institution."); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L.J. 1059, 1076 (2001) (describing threat of legislation).

earned income tax credit (EITC) noncompliance and Congress' appropriation of funds to carry out this task caused the IRS to subject the EITC to particularly high rates of enforcement, despite concerns about the low revenue dollars per audit at stake in EITC audits and the hardship such audits impose on the working poor.²³⁵ Indeed, the IRS's willingness to dutifully crack down on the EITC as a result of Congress' intervention, even in the face of such concerns, serves as a good example of Congress' ability to direct enforcement when it wants to and bear political responsibility for doing so.²³⁶ There are other examples of Congress responding to enforcement it did not like in the tax area and beyond. For instance, as Zelenak points out, beginning in the late 1970's, Congress prevented the IRS from carrying out its threat of asserting inclusion of a variety of fringe benefits in income by imposing a moratorium and then enacting legislation narrowing the scope of the law and the resulting enforcement.²³⁷ More recently, Congress has cut the IRS's budget, seemingly in at least partial response to disagreement with certain IRS enforcement practices and the threat of the IRS enforcing tax provisions that some lawmakers view as regulatory overreach, such as various aspects of the Patient Protection and Affordable Care Act.²³⁸ Of course, these last two examples illustrate the threat of enforcement, rather than nonenforcement, activating Congress. Perhaps more relevantly with respect to nonenforcement, Congress' response to President Nixon's impoundment of funds is an additional, useful example of congressional response to executive inaction.²³⁹

If Congress does not respond to categorical nonenforcement, that failure may itself be valuable. As discussed previously, a particularly troubling aspect of the extensive administrative state is that it offers Congress the opportunity to pass public-regarding law that it ensures

²³⁵ See, e.g., Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 *Or. L. Rev.* 351, 373-74, 373 n.71 (2002) (detailing the higher audit rates for low-income taxpayers in light of increased EITC enforcement); *Taxing the Poor* (PBS NewsHour television broadcast Apr. 15, 2004), transcript available at http://www.pbs.org/newshour/bb/business-jan-june04-taxes_04-15/; Liz Pulliam Weston, *Low Incomes More Prone to Audits by IRS*, *L.A. Times*, Apr. 16, 2000, at A1. The EITC audit literature is extensive. See, e.g., Book, *supra*.

²³⁶ See also Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 *Wash. & Lee L. Rev.* 1679, 1739 (2013) (explaining, in context of proposed measured enforcement regime in which the IRS would have substantial discretion to set the tax rates, that Congress could "respond to those rates with statutory changes if it found them warranted").

²³⁷ Zelenak, *Custom*, note 22, at 843-44.

²³⁸ See, e.g., Rachael Bade, *Republicans Seek to Cripple IRS*, *Politico* (Dec. 11, 2014, 5:33 AM), <http://www.politico.com/story/2014/12/republicans-irs-regulations-113484.html>.

²³⁹ See Transcript of President's News Conference, *N.Y. Times*, Feb. 1, 1973, at 20, § 13 (demanding explanation from President Nixon in response to criticism that impoundment of funds is an overreach of the executive power).

never comes to pass, for example by providing insufficient enforcement funding.²⁴⁰ Congress' failure to respond to an enforcement difficulty that was great enough to merit an agency's categorical nonenforcement may play the valuable role of forcing Congress to take public responsibility for failed implementation of the law.

On the other hand, some might object that forcing Congress to respond to categorical nonenforcement or take public responsibility for failure to respond is inherently inappropriate. While Congress may theoretically respond to categorical nonenforcement in a number of ways, it may be quite difficult for Congress to mobilize to do so.²⁴¹ Some might argue that, even if Congress could mobilize to respond, it should not have to. The law says what it says and Congress should not have to say it twice. Perhaps most problematically, some might worry that even if Congress does mobilize to declare its disapproval, there is nothing to stop the agency from nonetheless again failing to enforce, motivated by the same beliefs about the reasons for nonenforcement. At its worst, then, categorical nonenforcement may serve as a limitless tool for runaway, unelected administrative agencies to violate Congress' lawmaking supremacy.

The difficulty with this concern, however, is that setting low priorities also can violate Congress' law when setting priorities has essentially the same impact as categorical nonenforcement. In this regard, the rule of law objection to categorical nonenforcement also relies on the formal distinction between categorical nonenforcement and setting priorities that in many circumstances may be more illusory than real. In such circumstances, categorical nonenforcement's virtue of being transparent may very well outweigh any formal, greater infringement on Congress' law. Indeed, by making nonenforcement more salient and specific, categorical nonenforcement may actually increase the ability of Congress to respond.²⁴²

²⁴⁰ See text accompanying note 110.

²⁴¹ Cf. Andrias, note 104, at 1084-85 (exploring reasons why, "while Congress could theoretically address coordination and prioritization issues, it is unlikely to do so in any effective or sustained way"); Seidenfeld, note 234, at 1075-76 (cataloguing reasons why it is difficult for Congress to override an agency rule).

²⁴² Cf. Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1423-24 (2000) (exploring, in the regulatory context, how an administrative-standards requirement for agency exercises of delegated power "may enhance congressional oversight by providing an additional piece of information for Congress to consider in evaluating a controversial agency proposal"); Love & Garg, note 15, at 1236-37 ("Congress has only stepped in where the president's decision not to act was particularly public and thus where it was relatively easy for Congress to identify the issue and generate support for a legislative response.").

Relatedly, it is important to realize that neither of the alternative lenses, at least at present,²⁴³ offers a judicially enforceable means of policing nonenforcement to ensure that it stays within perceived, acceptable boundaries (and, for the reasons suggested previously, it is not even necessarily clear whether policing the boundaries along the lines set forth by the existing lenses would necessarily be desirable). Rule of law is an aspirational concept not subject to legal doctrines or judicial enforcement. While constitutional law is very much the business of courts, as discussed above, the difficulty of courts policing nonenforcement has caused the Supreme Court to declare a general presumption against review of agency nonenforcement under administrative law.²⁴⁴ Even constitutional scholars concerned about categorical nonenforcement have suggested, for similar reasons, that executive branch officials may have to police themselves to ensure that nonenforcement comports with proper conceptions of executive power.²⁴⁵ Even if courts could police the lines of acceptable nonenforcement (and decided to do so), restrictive standing doctrine would make it difficult to find parties who could challenge the nonenforcement, making the likelihood of judicial review remote.²⁴⁶ To make this point most sharply, imagining that the alternative lenses offer a judicially enforceable means of delineating acceptable nonenforcement requires imagining a different judicial review regime than the one that exists at present. If one is imagining such a regime, one should just as well imagine a regime in which categorical nonenforcement could be evaluated to ensure it promotes agency legitimacy.

All of this is to say that the alternative lenses offered by scholars are best understood as abstract contemplations of when and how nonenforcement is acceptable.²⁴⁷ The lens of agency legitimacy offered in this Article is no different in this regard. I have argued that, under

²⁴³ Of course, it is possible that judicial review of nonenforcement may evolve in the future. Cf. Freeman & Vermeule, note 198, at 95 (describing landmark administrative law case finding that EPA had failed to adequately justify denying a rulemaking petition as “one in a series of rebukes to the Bush administration’s generous vision of executive power”). Even if courts revisit judicial review of presidentially directed nonenforcement, for reasons expressed in *Heckler v. Chaney*, it is unlikely judicial review will apply routinely to agency nonenforcement decisions. 470 U.S. 821, 831-32 (1985). In any event, to the extent any evolution in judicial review occurs, hopefully the interaction between nonenforcement and agency legitimacy examined in this Article is considered.

²⁴⁴ See text accompanying notes 177-79.

²⁴⁵ See, e.g., Price, note 2, at 747-48.

²⁴⁶ See text accompanying notes 181-83.

²⁴⁷ The argument for administrative agencies to police themselves when judicial enforcement is too difficult has been made in other contexts. See, e.g., Anthony, note 144, at 1372 (“To induce agency observance of proper rulemaking procedures, it is not efficient to rely upon judicial review, which is uncertain and spasmodic and at best a belated curative. It would seem much more productive to set forth for the agencies a clear and comprehensive statement of the precepts they should obey.”).

certain circumstances, agencies like the IRS may use categorical non-enforcement in order to increase accountability for, deliberation regarding, and nonarbitrariness of inevitable agency nonenforcement of the law. Moreover, if agencies do so only as a particularly salient means of communicating difficult enforcement decisions (accompanied by a willingness to respond to cues to change such decisions), or as a means of regularizing their enforcement decisions, the agencies' uses of categorical nonenforcement may not threaten Congress' law-making supremacy. While this Article cannot ensure that nonenforcement will stay within these bounds, it nonetheless posits that scholars and administrative officials may benefit from integrating agency legitimacy into the analysis of executive nonenforcement of the law. Doing so may help prompt a deeper consideration of how important values of democratic governance apply to the realities of agencies' systematic nonenforcement of the law.

VI. POTENTIAL OBJECTIONS

In addition to the possible arguments that an alternative lens might be a better mode of analysis for categorical nonenforcement, a number of other potential objections to my argument can be made. Before addressing some of the more pressing objections, it is worthwhile to emphasize the scope of the argument being made. I certainly am not making an affirmative, normative case that categorical nonenforcement is appropriate in all instances of nonenforcement. Rather, I seek to sketch with clarity how an examination of categorical nonenforcement through the lens of agency legitimacy can offer a more nuanced view than what has been suggested recently by commentators and scholars. The key point to recognize is that this Article argues how agencies, under certain circumstances, can use categorical nonenforcement in a manner that will increase accountability, deliberation, and/or nonarbitrariness regarding inevitable nonenforcement, not that they always will use categorical nonenforcement to meet these objectives.

Perhaps most pressingly, a powerful objection to categorical nonenforcement might be that, even to the extent that it promotes certain values, it can pose a significant threat to compliance. The argument might go as follows. Categorical nonenforcement might increase the legitimacy of an agency's nonenforcement decision. However, categorical nonenforcement also all but ensures that regulated parties will ignore the law, and the erosion of deterrence may be a significant

agency failing.²⁴⁸ To use the large partnership example again, to the extent that a low rate of audit (as compared to no audit) yields some tax compliance, perhaps any benefits of formal, categorical nonenforcement would not be worth the cost. Instead of categorically not enforcing, therefore, perhaps the IRS should simply maintain a low enforcement priority and make a lot of noise about the constraints preventing it from doing more.

There are a number of responses to this set of concerns. One is that there are counterbalancing factors at work. Compliance with the law (which, in the tax context, results in tax revenue) has some value, but so does the legitimacy of an agency's nonenforcement decisions. Hopefully focusing on the latter opens the door to a consideration of how to balance values, even if it does not complete the task.

A more pointed, and necessarily preliminary, response is that these values may not necessarily always be in clear tension. For instance, as suggested previously, insiders were purportedly aware of the enforcement difficulties with auditing large partnerships prior to the issue becoming a subject of public awareness and debate.²⁴⁹ This example underscores a more general point, which is that sophisticated, regulated parties are often more aware of informal policies of nonenforcement than the general public.²⁵⁰ As a result, in many circumstances, increasing agency legitimacy or promoting other values through categorical nonenforcement may not come at much of a price at all in terms of reduced compliance of the parties subject to the law at issue. In such cases, categorical nonenforcement may score legitimacy gains without raising significant, counterbalancing concerns regarding compliance.

Finally, in regard to the argument that perhaps what the IRS should do is make noise about its enforcement difficulties without actually making nonenforcement categorical, I do not reject making noise as a potentially productive means of responding to a significant enforcement difficulty. Making noise may increase accountability and delib-

²⁴⁸ Elliott, note 120, at 5 (2014) ("Telling taxpayers that the IRS can't audit them won't encourage compliance."). Indeed, even if the compliance of the taxpayers at issue does not fall, voluntary compliance of other taxpayers may fall if the announcement of nonenforcement reduces norms of compliance. On the other hand, an announcement of nonenforcement as to certain taxpayers or tax issues may cause taxpayers to believe that the probability of enforcement has increased elsewhere, thereby raising compliance. See Price, note 3, at 738 (providing examples throughout U.S. history where presidential administrations have utilized nonenforcement power as "part of a broader effort to achieve full compliance with congressional statutes"). In any event, a close examination of the impact of categorical nonenforcement on compliance is outside the scope of this Article.

²⁴⁹ See Brock, note 36, at 42 (reporting based on interviews that "practitioners generally know that the Service does not want to conduct TEFRA partnership audits"); text accompanying note 201.

²⁵⁰ Andrias, note 104, at 1098.

eration, even if it does less to ensure nonarbitrariness. To the extent that making noise creates a real possibility of an accountable and/or deliberative response, and to the extent that arbitrary enforcement is not a particular concern in a given situation, making noise while maintaining a low enforcement priority can serve as a legitimate means of nonenforcement. To the extent that such noise does not engender an accountable and/or deliberative response, or to the extent there is a particular concern about arbitrary exercises of limited enforcement in a given situation, categorical nonenforcement is the better solution. In other words, I do not suggest that categorical nonenforcement is the optimal solution, but rather argue that it is a tool that agencies may employ to increase the legitimacy of essential nonenforcement when simply making noise about the essential nonenforcement is unlikely to yield accountability and/or deliberation regarding a significant enforcement failing, or when arbitrary enforcement is a particular concern.

Additionally, some might object that categorical nonenforcement poses a threat to the ability of the President and/or Congress to set their own agendas. Both politically accountable branches face significant limits on their time and political capital,²⁵¹ and being forced to address an instance of categorical nonenforcement may distract them from other concerns they view as more pressing.²⁵² Categorical nonenforcement certainly may distract the President and/or Congress from other, preferred issues. However, it need not do so. As scholars have fleshed out, one major way that Congress can monitor agencies is by so-called “fire alarm” oversight, whereby individuals and interest groups sound a metaphorical fire alarm when the agency is engaging in problematic behavior.²⁵³ Categorical nonenforcement is a fire alarm of sorts, but it is rung by the agency itself, rather than other constituents. As with the fire alarms that other constituents ring, Congress and/or the President can respond to the fire alarm, but need not

²⁵¹ See, e.g., Love & Garg, note 15, at 1235 (“Congress could not possibly choose to exercise its oversight powers to revisit every instance of executive inaction.”); Sant’Ambrogio, note 14, at 361, 391 (explaining that “presidents have a finite amount of time to devote to a seemingly infinite number of matters under their supervision and must focus their attention on their most important priorities” and exploring how responding to extra-legislative vetoes consumes congressional time that could be spent elsewhere); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 *Colum. L. Rev.* 242, 255 (1998) (citing the “limited resources of time and effort Congress has available to it for its legislative agenda”).

²⁵² See Bressman, note 62, at 511-12 (describing problem with proposals that envision heavy involvement of the President or Congress in details of regulatory policy).

²⁵³ McCubbins & Schwartz, note 73, at 166.

do so.²⁵⁴ To the extent that the categorical nonenforcement fire alarm is meant to alert Congress, the President, and the public of important enforcement decisions or severe enforcement difficulties, failure to respond at least forces a politically accountable acknowledgement of the unwillingness to respond, even if it is justified by the need to focus on other concerns. Additionally, agencies ringing a fire alarm in situations that merit attention may lower the costs that the President and/or Congress might otherwise expend monitoring enforcement.²⁵⁵

Finally, some might ask whether there might be better ways to go about getting some of the benefits of categorical nonenforcement fleshed out in this Article. For instance, Kate Andrias has set forth an extensive proposal to institutionalize presidential involvement in enforcement, including by having the President's central apparatus involved to a greater extent in shaping, coordinating, and publicizing enforcement policy.²⁵⁶ Accordingly, some might argue that institutionalizing presidential involvement in enforcement might produce accountability benefits without the same costs in terms of potential infringement on Congress' legislative prerogative. While institutionalizing presidential control over enforcement may have a number of virtues, it has not happened yet, and there are certainly a variety of barriers to such a system being put in place.²⁵⁷ Even to the extent that it is put in place, presidential administrations will never have enough time and resources to exert control over all of every agency's enforcement agenda, nor does Andrias suggest that presidential administrations should exert such plenary control.²⁵⁸ As a result, Andrias' proposal, if put in place, may help yield greater accountability for some nonenforcement, but does not preclude questions regarding the

²⁵⁴ Cf. Sant'Ambrogio, note 14, at 387 (explaining how Congress "is not obligated to reconsider a vetoed bill and frequently does not" and how Congress may respond similarly to other instances of executive override of Congress' laws).

²⁵⁵ See *id.* at 391 ("The extra-legislative veto obviates the need for Congress to anticipate every circumstance in which the law might be applied poorly . . ."). Indeed, the potential time and cost savings contributed by fire alarm oversight was central to its original conception. See McCubbins & Schwartz, note 73, at 168.

²⁵⁶ Andrias, note 104, at 1077-103. Similarly, Sant'Ambrogio has suggested that "an executive order might require agencies to submit proposed enforcement policies, like proposed rulemakings, to the White House and Congress in advance of their implementation." Sant'Ambrogio, note 14, at 403.

²⁵⁷ See text accompanying note 110; see also Andrias, note 104, at 1107 (acknowledging the executive branch's resistance to politically disadvantageous disclosure); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *Vand. L. Rev.* 599, 646 (2010) ("No President has used directives on any more than a selective basis as to executive-branch agencies. The White House has picked its battles, acting only when an issue is particularly salient.").

²⁵⁸ Andrias, note 104, at 1038.

legitimacy of the nonenforcement that would remain outside of institutionalized presidential control.²⁵⁹

Alternatively, some might argue that, rather than making mere statements of categorical nonenforcement, agencies should use the APA's notice and comment procedures²⁶⁰ to the extent possible to issue their nonenforcement policies. This idea is rooted in deep-seated beliefs that the APA's notice and comment procedures for rulemaking serve important purposes in a "fair and effective" system of limited government, such as providing notice to affected parties of the rules being considered, increasing the quality of the rules by requiring the agency to gather and take into account comments from the public, increasing public acceptance as a result of the openness of the process, and providing a record that can facilitate judicial review.²⁶¹ Mere statements of categorical nonenforcement that are not promulgated subject to APA notice and comment may lose these valuable benefits. Indeed, proponents of nonarbitrariness theories of agency legitimacy have tended to support the use of notice and comment to the extent possible. Davis argued that enforcement policy should be made through notice and comment "to give systematic and clear answers to all the major questions, thus reducing the power of selective enforcement in individual cases, and thereby reducing the injustice that results from uneven enforcement."²⁶² Bressman has similarly argued that "agencies must choose notice-and-comment procedures, to the extent possible, for issuing standards in advance of applying them to particular facts" because "[o]ther procedures . . . do not best promote the values of fairness, predictability, and participation important to a genuinely nonarbitrary administrative state."²⁶³

There are several responses to this proposed alternative. While I certainly do not mean to suggest that a mere statement of categorical nonenforcement is superior to rules issued through notice and comment, I also argue that for a number of reasons categorical nonenforcement nonetheless may play a salutary role. First, notice and comment rulemaking may not be an available vehicle for many nonenforcement policies. When the nonenforcement is a policy statement that the agency will not be enforcing clear law on the books, as a legal

²⁵⁹ See Price, note 2, at 755 n.360 (noting that Andrias' proposal "largely sidesteps the question of whether categorical nonenforcement policies should be permissible in the first place").

²⁶⁰ 5 U.S.C. § 553 (2012).

²⁶¹ Robert A. Anthony & David A. Codevilla, Pro-ossification: A Harder Look at Agency Policy Statements, 31 Wake Forest L. Rev. 667, 677 (1996); Anthony, note 144, at 1314, 1373-74; Mendelson, note 144, at 409.

²⁶² Davis, note 55, at 92-93.

²⁶³ Bressman, note 62, at 533-34.

matter it is unlikely that a court would uphold such a policy if the agency attempted to issue it through notice and comment.²⁶⁴ And yet, despite the likely unavailability of notice and comment, for the reasons fleshed out previously, a well-reasoned statement of categorical nonenforcement issued outside of notice and comment may provide a number of valuable benefits. While less desirable, even a poorly reasoned statement of categorical nonenforcement can have benefits, such as preventing the arbitrary result of being the only taxpayer ever enforced against under unadministrable aspects of the tax law.

Zelenak has argued that when enforcement difficulties preclude enforcement, Congress should provide agencies the regulatory authority to alter the law so as to accommodate the enforcement difficulties, thereby allowing agencies to act through the transparent mechanism of notice and comment rulemaking.²⁶⁵ This proposal faces difficulties. In many cases, Congress simply will not accept this suggestion, perhaps because Congress does not know of the enforcement conundrums or because Congress simply does not get around to providing the authorization. The lack of authorization does not necessarily indicate a desire for full enforcement, but rather leaves the agency at square one in terms of what to do when enforcement decisions have to be made. Additionally, the seemingly unlimited delegation may create a nondelegation problem, even under the extremely limited application of such doctrine,²⁶⁶ although standing considerations may prevent such a challenge.

Indeed, and perhaps more controversially, even in situations in which notice and comment procedures may be a viable means of issuing the nonenforcement policy, making mere statements of categorical nonenforcement may still have some benefits. To provide some context, an agency may be able to use notice and comment procedures to issue a nonenforcement policy if either (1) the nonenforcement policy is an interpretation of the statute, or (2) the nonenforcement policy actually binds the public (for instance by setting enforcement or non-enforcement standards, which then serve conclusively as the basis for enforcement action).²⁶⁷ The former may, but is not required to, be

²⁶⁴ Such a statement may run afoul of *Chevron's* step one, in which “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Contra Davis*, note 55, at 93 (explaining that, surprisingly, the police can “formally through rules provide that church bingo games and social poker games are not a crime” when “a statute flatly provides that gambling is a crime.”). *Davis* reaches this conclusion based on its desirability, not an analysis of legality.

²⁶⁵ Zelenak, *Custom*, note 22, at 852.

²⁶⁶ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001).

²⁶⁷ See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (finding that FDA “action levels” for contaminants, which indicated levels of contamination below

issued through notice and comment,²⁶⁸ and the latter must be issued through such procedures.²⁶⁹

Notwithstanding the availability (or even the requirement) of notice and comment in such cases, an agency may not actually use notice and comment. A perennial objection to notice and comment procedures is that they are quite costly for agencies and a requirement that agencies use them may have the unintended consequence of causing agencies to engage in less transparent policymaking to avoid the costs of the procedures (and/or less policymaking altogether).²⁷⁰ While this objection can be countered with the argument that the benefits of notice and comment procedures may outweigh the costs and that agencies may abide by notice and comment if they have no alternative means of issuing the guidance,²⁷¹ the objection nonetheless has particular power in the nonenforcement context.²⁷² Whereas agencies will often bear the costs of notice and comment in order to get regulated parties to abide by standards of behavior that the agency is charged with obtaining and in order to get courts to defer to the agency's interpretation of what standards of behavior bind the regulated parties,²⁷³ nonenforcement is a standard of behavior that the agency would voluntarily impose on itself. Agencies may not have as strong of an incentive to ensure that they abide by their nonenforcement, and therefore may not be as willing to bear the costs of notice and comment in such circumstances.

Indeed, at least one interesting case study illustrates the dangers of forcing an agency to abide by notice and comment rulemaking with respect to an enforcement policy or a nonenforcement standard. In a protracted litigation in the 1980's, plaintiffs argued that the FDA's establishment of "action levels" for aflatoxin levels in feed corn violated

which enforcement proceedings ordinarily would not occur, were subject to notice and comment procedures).

²⁶⁸ Anthony, note 144, at 1376-77 (explaining that, although not required to do so, agencies may use notice and comment to issue interpretive rules, and discussing benefits of doing so).

²⁶⁹ 5 U.S.C. § 553 (2012).

²⁷⁰ For seminal treatments of this widespread "ossification" thesis, see, e.g., Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 *Duke L.J.* 1385 (1992); Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 *Admin. L. Rev.* 59 (1995). For a recent challenge to this widespread and deeply influential thesis, see Jason Webb Yackee & Susan Webb Yackee, Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990, 80 *Geo. Wash. L. Rev.* 1414 (2012).

²⁷¹ David L. Franklin, Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut, 120 *Yale L.J.* 276, 303-05 (2010); Mendelson, note 144, at 403.

²⁷² Cf. Sant'Ambrogio, note 14, at 403-04 ("Requiring rulemaking to set enforcement policies might discourage agencies from adapting their enforcement policies to a changing environment or encourage them to conceal such adjustments.").

²⁷³ Yackee & Yackee, note 270, at 1474-75.

a number of requirements.²⁷⁴ The action levels indicated levels of contamination below which enforcement proceedings ordinarily would not occur.²⁷⁵ After the case went up to the Supreme Court and back down the D.C. Circuit, the D.C. Circuit ultimately held that the action levels were invalid because they should have been issued via notice and comment procedures.²⁷⁶ Instead of then complying with the procedures, the FDA simply announced that its action levels would not be binding, thereby denying regulated parties and the public reliable information regarding the FDA's nonenforcement policy.²⁷⁷ As lamented by one commentator regarding the case, "[t]o the extent that the agency's own statement of prosecutorial policy is in some sense 'binding' on the agency, then the policy only serves the function of regularizing agency behavior and reducing case-specific arbitrariness all the more" and if an agency abandons statements of such policies as a result of notice and comment procedures being imposed, the agency also gives up "the assurances of predictability, fairness, openness, and agency personnel management that self-binding regulation may have provided."²⁷⁸ The case serves as a cautionary tale of how forcing nonenforcement policy to abide by notice and comment procedures may simply drive the procedures deeper underground, away from public view. The bottom line is that, although statements of categorical nonenforcement might not always serve as a procedurally ideal means of an agency limiting its discretion, it may play an essential role in situations in which agencies cannot use notice and comment procedures, and it may even have benefits in situations in which agencies could use notice and comment procedures but will not do so in practice. In sum, despite potential objections, categorical nonenforcement has a role to play in legitimating agencies' inevitable, systematic nonenforcement of the law.

VII. CONCLUSION

This Article has taken a close look at categorical nonenforcement of the tax law through the lens of agency legitimacy. It has shown that in some circumstances agencies can use categorical nonenforcement in a manner that increases accountability, deliberation, and nonarbitrariness of agency nonenforcement, thereby increasing the legitimacy of

²⁷⁴ *Cnty. Nutrition Inst. v. Young*, 757 F.2d 354, 357 (D.C. Cir. 1985), rev'd, 476 U.S. 974 (1986), on remand, 818 F.2d 943 (D.C. Cir. 1987).

²⁷⁵ *Cnty. Nutrition Inst.*, 476 U.S. at 977.

²⁷⁶ *Cnty. Nutrition Inst.*, 818 F.2d at 948-49.

²⁷⁷ Action Levels for Added Poisonous or Deleterious Substances in Food, 53 Fed. Reg. 5043 (Food and Drug Admin. Feb. 19, 1988).

²⁷⁸ Richard M. Thomas, Prosecutorial Discretion and Agency Self-Regulation: *CNI v. Young* and the Aflatoxin Dance, 44 Admin. L. Rev. 131, 152-53 (1992).

the nonenforcement. In some ways this claim is quite controversial and faces significant pressure on a number of fronts. On the one hand, to the extent that the nonenforcement is clearly in conflict with Congress' law, categorical nonenforcement may run afoul of Congress' lawmaking supremacy. On the other hand, to the extent the nonenforcement may be an interpretation of or consistent with the law, a mere statement of categorical nonenforcement may undercut the important values of notice and comment rulemaking. Focusing on the difficult nonenforcement decisions that agencies must make on a daily basis nonetheless reveals that in some circumstances mere statements of categorical nonenforcement may be the most realistic means of communicating important nonenforcement decisions to politically accountable officials and/or the public, or to regularize nonenforcement decisions within the agency. Moreover, these nonenforcement decisions do not necessarily represent the final say regarding the law, but rather may be a step toward a more accountable, deliberative, nonarbitrary set of rules. While in an ideal world agencies may not face hard choices about when not to enforce the law, in reality they do, and, in light of such realities, categorical nonenforcement may help increase the legitimacy of at least some of those choices.

This Article certainly does not examine every facet of nonenforcement. Notably, it does not directly examine whether the values of accountability, deliberation, and/or nonarbitrariness can save presidentially directed categorical nonenforcement, although these values may very well be important in evaluating such nonenforcement. For instance, one could view presidentially directed categorical nonenforcement as increasing the visibility of what would otherwise be an agency nonenforcement decision, meaning that agency legitimacy would remain central to the analysis. To take a prominent example, to the extent that the capital gains or estate tax (hypothetically) is already being impotently enforced at the hands of the IRS, presidential direction of categorical nonenforcement may provide valuable accountability and public deliberation, as well as possibly increase nonarbitrariness by committing IRS agents not to enforce in a uniform fashion. Alternatively, if the President is directing categorical nonenforcement in a manner that does not map onto the agency's own choices, the analysis may be somewhat different. Depending on one's perspective (and the nature of the decision, along with the relevant theory of agency legitimacy), such direction may raise concerns about the President overriding considered agency judgment.²⁷⁹ However, in such a case, presidentially directed categor-

²⁷⁹ For discussions of concerns about presidential direction of agency decisions (primarily in the rulemaking context), see, e.g., Freeman & Vermeule, note 199, at 54-64; Thomas

ical nonenforcement really raises two, separate issues. The first is whether categorical nonenforcement by the agency is legitimate. The second is whether it is appropriate for the President to direct the agency nonenforcement policy. By starting from the premise that categorical nonenforcement can be evaluated from the perspective of agency legitimacy, this Article helps clarify the potentially competing values at stake, and helps clear the way for a conversation focused on presidential direction.

Moreover, completely aside from how this Article contributes to recent debates about presidentially directed categorical nonenforcement, its framework for examining the legitimacy of agency nonenforcement is crucial. Even if a President never comes along and attempts to slash the income tax through nonenforcement, the IRS will be making decisions every day about how not to enforce the tax law. Indeed, this Article has hopefully persuaded readers that the IRS's mission to "enforce the law with integrity and fairness to all,"²⁸⁰ inevitably implies an accompanying responsibility when it refrains from enforcing the law to do so with the greatest possible integrity and fairness to all. The latter portion of the mission might not make for as great of a slogan, but it is nonetheless an inextricable part of what the IRS and many other agencies do. Examining the IRS's, as well as other agencies', nonenforcement decisions at least in part through the lens of agency legitimacy is essential to ensure that when agencies across government refrain from enforcing the law they do so in a manner that is consistent with democratic governance for all.

O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 *Am. U. L. Rev.* 443, 454-63 (1987); Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696, 714-15 (2007). Even proponents of the political accountability theory may argue that that the President should have supervisory authority, but should not necessarily direct or override a considered agency decision. For an argument that presidential influence should be disclosed and, in certain cases, afforded some respect, see Watts, note 78. For a related argument that agency action potentially should be treated differently than presidential action, see Strauss, note 90, at 636 ("It is the potential powerfulness of those heads of government that gives special meaning to the formalities of the [Constitution]. For the inferior parts of government, subject to law and the webs of control woven by all three of the named heads, the same risks do not arise; agency actions are of lesser concern than the President's for just this reason."). But see *id.* at 642 (suggesting that the President plays an appropriate role in setting enforcement priorities).

²⁸⁰ Internal Revenue Serv., *The Agency, its Mission and Statutory Authority*, <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> (last visited Sept. 24, 2014).