Prosecutorial Discretion in the Age of Nondelegation: When Executive Decision-Making Amounts to Lawmaking

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Introduction

The attorney general exempts certain sex offenders from registration requirements.[1] The secretary of Homeland Security permits the legal presence of certain undocumented immigrants in the country.[2] The Securities and Exchange Commission ("SEC") chooses to pursue an adjudication in-house rather than through an Article III court.[3] All these actions seem executive in nature and may be characterized as exercises of prosecutorial discretion. However, as the nondelegation doctrine sees a revival, these actions have become battlegrounds for the fight between proper exercises of discretion and unconstitutional executive lawmaking.

The relationship between executive rulemaking and lawmaking has received much attention in the literature surrounding the nondelegation doctrine. Rightly so, given that rulemaking looks a lot like lawmaking. But this Comment seeks to shed light on the closer calls. Some actions—like exempting criminals from punishment, reclassifying immigrants, and selecting proper enforcement forums—look more executive in nature but may also cross the line into lawmaking. In *Gundy v. United States*,[4] Justice Neil Gorsuch argued in dissent that the attorney general's discretion under the Sex Offender Registration and Notification Act ("SORNA" or "the Act") amounted to lawmaking.[5] Commentators warned that President Barack Obama's enactment of Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") surpassed an exercise of discretion.[6] And the Court of Appeals for the Fifth Circuit recently held the SEC's ability to pursue litigation through an administrative forum rather than an Article III court was an

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1 Gundy v. United States, 588 U.S. 128, 133–34 (2019) (plurality opinion).

2 Texas v. United States, 787 F.3d 733, 744–45 (5th Cir. 2015), *aff'd*, 809 F.3d 134, *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (per curiam).

3 Jarkesy v. SEC, 34 F.4th 446, 450 (5th Cir. 2022), *aff'd and remanded*, 144 S. Ct. 2117 (2024).

4 588 U.S. 128 (2019) (plurality opinion).

5 *Gundy*, 588 U.S. at 171 (Gorsuch, J., dissenting).

6 Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759 (2014).

unconstitutional delegation.[7] These cases beg the question: What is prosecutorial discretion, and at what point does a discretionary decision become executive lawmaking?

Prosecutorial discretion has existed since the nation's founding to provide the executive branch flexibility in enforcing the nation's laws and addressing circumstances the legislature cannot anticipate.[8] The Constitution embeds discretion in the executive's duty to "take [c]are that [l]aws be faithfully executed."[9] At the same time, the Take Care Clause prevents the executive from suspending or dispensing with the laws of Congress.[10] When properly enforced, the nondelegation doctrine constrains executive discretion to prohibit executive lawmaking. But a court can also enforce the doctrine broadly to impede discretion and undermine the executive's ability to fulfill its constitutional duty.

This Comment proposes a test for distinguishing constitutionally recognized acts of prosecutorial discretion from improper executive lawmaking. Part I outlines the historical and constitutional framework for prosecutorial discretion. It describes the current state of the nondelegation doctrine and raises modern controversies in the separation of powers that display the tension between improper executive lawmaking and proper prosecutorial discretion. Part II identifies key characteristics that distinguish an act of prosecutorial discretion from improper lawmaking. Based on the history of prosecutorial discretion and the separation of powers, Part II argues an executive action is a proper act of prosecutorial discretion if it: (1) maintains the historically recognized qualities of a discretionary act; (2) is traditionally committed to executive authority; and (3) aligns with the enabling legislation's overall framework.[11] Finally, Part III applies this test to modern controversies in the separation-of-powers debate: the use of categorical prosecutorial discretion in immigration enforcement, drug enforcement, and administrative forum selection.

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[7] *Jarkesy*, 34 F.4th at 451.

[8] *See* Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765, 1768–69 (2021).

[9] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831–32 (1985); *see also* United States v. Nixon, 418 U.S. 683, 693 (1974).

[10] MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 118–19 (Stephen Macedo ed., 2020) (citing Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 612–13 (1838) ("[V]esting in the President a dispensing power, which has no countenance for its support in any part of the constitution[,] . . . would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.")).

[11] Comporting with Justice Robert Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

I. Background

The consequences of a failure to enforce the nondelegation doctrine rigorously are twofold[12]: a congressional abdication of legislative authority and an augmentation of executive authority.[13] Focusing on the latter, the nondelegation doctrine's longstanding dormancy has allowed executives across administrations to claim broad discretionary authorities, distorting the current view of prosecutorial discretion.[14] Prosecutorial discretion initially evolved out of a constitutional compromise aimed at preventing the executive from nullifying laws while permitting the executive flexibility to enforce laws equitably.[15] The Founders came to this balance by assessing British triumphs in the Glorious Revolution and recognizing prosecutorial discretion as a check on lawmaking rather than its own form of power.[16]

A. *The English Origins of Suspension, Dispensation, and Discretion*

To understand what the Founders intended prosecutorial discretion to be, one must understand what it is not. The Founders decisively rejected giving the executive the power to nullify laws.[17] The drafters of the Constitution framed the Take Care Clause as a duty, rather than a license, to prevent the dispensation and suspension of laws as occurred in English history.[18] Still, the English experience prior to the Glorious Revolution and the powers kings retained afterwards provide key insights into the American development of prosecutorial discretion.[19]

In the 1600s, English kings retained broad power to suspend and dispense with Parliament's laws.[20] The suspending power allowed kings to set aside a law's legal force for a time.[21] The dispensing power allowed kings to exempt certain entities from a law's obligations.[22] The powers were grounded in the king's administrative authority, "[f]or, it was agreed,

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12 At its heart, the nondelegation doctrine prevents the legislature from transferring to another branch "powers which are strictly and exclusively legislative." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

13 Gundy v. United States, 588 U.S. 128, 168–69 (2019) (Gorsuch, J., dissenting).

14 *See* Cary Coglianese & Christopher S. Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1589–90 (2016).

15 Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 499–500 (2017).

16 *Id.* at 500–01.

17 MCCONNELL, *supra* note 10, at 117.

18 *Id.* at 117–18.

19 *Id.* at 116–18.

20 *Id.* at 115–17.

21 *Id.* at 115–16.

22 *Id.*

though king and parliament enacted [a] statute, it was the king's responsibility alone to administer it."[23] These powers allowed the king to identify unjust, impractical, or mistaken aspects of the law and provide relief against enforcement.[24] Initially, the powers were limited to emergencies or special circumstances.[25] But Kings Charles II and James II used them far past these limits to promote their individual interests.[26] Their actions demonstrated that suspension and dispensation could be used as independent acts of law to override the legislature's will.[27] The Glorious Revolution in 1689 stripped the king of suspending and dispensing powers and restored Parliament's premier lawmaking authority.[28]

The Glorious Revolution ended the king's power to nullify laws, but it did not dispense with executive discretion entirely. The royally appointed attorney general retained a procedural device, the nolle prosequi ("nolle"), to terminate an ongoing criminal proceeding.[29] Because private citizens initiated and managed most prosecutions at the time, the only way for a public figure to exercise prosecutorial discretion was through the nolle.[30] Only the attorney general could execute the procedural power and often at the explicit direction of the Crown.[31]

Even today, the English attorney general can enter a nolle to terminate a proceeding.[32] Such a decision is not subject to court review; instead, the attorney general is solely accountable to the political system.[33] Still, the decision to enter a nolle is viewed as "independent[] of Government," done in the attorney general's capacity "as a guardian of the public interest."[34]

As the initial mode of prosecutorial discretion, the nolle provides the Crown an avenue to terminate enforcement of a law against a particular

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23 Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUD. 434, 435 (1977).

24 *Id.*

25 MCCONNELL, *supra* note 10, at 115.

26 *Id.* at 115–17 (explaining that King James II dispensed with an Act of Parliament excluding Catholics from government positions, and when Parliament complained of the king's attempts to bypass their legislative authority, the king disbanded Parliament and fired uncooperative judges until his dispensing power was upheld).

27 Edie, *supra* note 23, at 434.

28 *Id.* at 450.

29 Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 16 (2009).

30 *Id.*

31 *Id.*; s*ee also* J.C. Roberts, *Nolle Prosequi*, 1948 JAG J. 13, 13 (1948).

32 *Code for Crown Prosecutors: Termination of Proceedings* (*Including Discontinuance)*, CROWN PROSECUTION SERV. (Nov. 5, 2019), https://perma.cc/B7S2-28D8.

33 *Id.*

34 *Id.*

defendant.[35] The nolle differs markedly from the king's dispensation and suspension powers.[36] For one, exercises of prosecutorial discretion are ex post rather than ex ante.[37] While the suspending and dispensing powers legalized subsequent action, a nolle merely terminates enforcement of past acts.[38] This difference also distinguished the common-law pardon power from the dispensing power.[39] As English jurist Sir Matthew Hale explained, a pardon "dispenseth with the penalty, not the obligation" to comply with the law but the dispensation power "dispenseth both with the penalty and obligation of a law and is precedent."[40] Thus, prosecutorial discretion relies on an "executive decision not to prosecute a particular person," but it does not "give them the legal right to violate the law."[41] Consequently, while the suspending and dispensing powers allowed the Crown to broadly override Parliament's laws, prosecutorial discretion merely provided a check on unjust enforcement.[42]

B. *The Take Care Clause's Adoption of Prosecutorial Discretion*

While the U.S. Constitution deliberately rejected suspension and dispensation powers, it retained prosecutorial discretion.[43] This balance furthers the Constitution's separation of powers goals by checking executive power.[44]

The Take Care Clause requires the president to faithfully execute the nation's laws.[45] The initial Virginia Plan gave the executive "a general authority to execute the [n]ational laws."[46] Under this language, the executive may exercise authority to execute the law, or not.[47] The Constitutional Convention modified this language to grant the executive

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35 Krauss, *supra* note 29, at 16–17.

36 *Compare* CROWN PROSECUTION SERV., *supra* note 32 (explaining that "[a] nolle prosequi stops the case" after the case has begun), *with* MATTHEW HALE, THE PREROGATIVES OF THE KING 177 (D.E.C. Yale ed., Selden Soc'y 1976) (explaining that the monarch's dispensation power includes dispensing "both with the penalty and obligation of a law and is precedent").

37 *See* Krauss, *supra* note 29, at 16.

38 *See* CROWN PROSECUTION SERV., *supra* note 32.

39 *See* HALE, *supra* note 36.

40 *Id.*

41 MCCONNELL, *supra* note 10, at 119.

42 Markowitz, *supra* note 15, at 500–01.

43 *Id.*

44 MCCONNELL, *supra* note 10, at 118–19 (citing Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 612–13 (1838) (finding that a dispensing power would enable the executive to intrude in the lawmaking lane of the legislature).

45 *See id.* at 118–19.

46 *Id.* at 117 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1911).

47 *Id.* at 118.

the power "to carry into execution the national [l]aws."[48] The Convention adopted this language and passed it to the Committee of Detail.[49] In giving the executive the power to execute the law, the Convention maintained for the executive the implied ability to choose not to execute the law.[50] The Committee, on its third draft, amended the discretionary language to impose a duty on the president to take care that the laws are faithfully executed.[51] The Committee's notes did not detail the logic of this change; however, the Committee's explicit consideration of most royal prerogatives and familiarity with the English king's abuses indicate it adopted the language to remove dispensation and suspension powers.[52]

The Supreme Court soon confirmed the Take Care Clause is incompatible with dispensation and suspension under both the language of the Constitution and the separation of powers.[53] In the Court's first major case considering the Take Care Clause, *Kendall v. United States*,[54] the Court confirmed the clause imposes an obligation on the president to execute the law.[55] In finding the postmaster general must comply with a congressional command, the Court held that allowing the president to suspend or dispense with the law would provide the president "power entirely to control the legislation of congress."[56] Allowing such an encroachment is irreconcilable with the foundational notion that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[57]

Where the Constitutional Convention rejected dispensation and suspension, it accepted prosecutorial discretion. U.S. criminal procedure uncontroversially absorbed the nolle prosequi.[58] Despite there being no evidence of a direct conversation about prosecutorial discretion on the record during the Constitution's formation, it was nonetheless "an uncontroversial power of the President from the start."[59] In 1799, President John Adams decided against issuing a nolle to protect Jonathan Robbins from being extradited to Britain for participating in a mutiny.[60] In the face of public outcry and near congressional censure and

48 *Id.*

49 *Id.*

50 MCCONNELL, *supra* note 10, at 118.

51 *Id.*

52 *See id.*

53 *Id.* at 119.

54 37 U.S. (12 Pet.) 524 (1838).

55 *Id.* at 612–13.

56 *Id.*

57 THE FEDERALIST No. 47 (James Madison).

58 Krauss, *supra* note 29, at 16.

59 Markowitz, *supra* note 15, at 497 (noting that President Washington initiated and halted both criminal and civil prosecutions).

60 Krauss, *supra* note 29, at 17.

impeachment, then-Representative John Marshall fervently defended the president on the House floor:

> It is not the privilege, it is the sad duty of courts to administer criminal judgment. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the president expresses constitutionally the will of the nation; and may rightfully, as was done in the case at Trenton, enter a *nolle prosequi*, or direct that the criminal be prosecuted no further. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power.[61]

Marshall's defense of the executive's unreviewable authority to pursue or dismiss prosecutions relies on the president's core authority over directing prosecutions.[62] And in 1821, an attorney general's opinion similarly defended the president's discretion to enter a nolle.[63] The opinion found "[t]here can be no doubt of the power of the President to order a nolle prosequi in any state of a criminal proceeding in the name of the United States."[64]

The United States' adoption of the nolle differed in one key respect from the English power: the English reserved the power for the royal attorney general, while Americans conferred the power on both the executive and public prosecutors.[65] This distinction is largely a formality, since the English primarily relied on private prosecutions, so no formal public prosecutors aside from the royal attorney general existed.[66] Conversely, the United States adopted a system of public prosecutions.[67]

Cases through the mid-nineteenth century agree. During the *Confiscation Cases*,[68] the attorney general moved to dismiss an ongoing case confiscating property from Civil War insurrectionists.[69] Informants who stood to benefit from the prosecution opposed the dismissal.[70] The Supreme Court upheld the attorney general's power to dismiss a charge and clarified equal power for all public prosecutors.[71] The Court reasoned that a judge may only hear a case, civil or criminal, "if prosecuted in the name and for the benefit of the United States" by a representative of the United States.[72] The Court then recognized public prosecutors as agents

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61 *Id.* at 18 (quoting 10 ANNALS OF CONG. 615 (1800)); *see* 18 U.S. (5 Wheat.) app. (1820).

62 *Id.*

63 5 Op. Att'y Gen. 729 (1821).

64 *Id.*

65 Krauss, *supra* note 29, at 17.

66 *Id.* at 2.

67 *Id.*

68 74 U.S. (7 Wall.) 454 (1868).

69 *Id.* at 455–56.

70 *Id.*

71 *Id.* at 456–57.

72 *Id.* at 457.

of the executive.[73] Thus, "[p]ublic prosecutions . . . are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a nolle prosequi at any time before the jury is empaneled."[74]

In 1922, the Supreme Court shifted the justification for prosecutorial discretion from the common law nolle prosequi to the Take Care Clause.[75] In *Ponzi v. Fessenden*,[76] the Court grappled with the attorney general's decision to transfer a federal prisoner to state court to be tried for a crime.[77] The Court expressed "no doubt" in the attorney general's authority to exercise discretion in this way.[78] The decision relied on the language of the Take Care Clause, finding "[the attorney general] is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed."[79] This duty afforded the attorney general flexibility in "attend[ing] to the interests of the United States."[80]

While the Founders believed dispensation and suspension offend the separation of powers, they found prosecutorial discretion enhances our system of checks and balances. The Founders rejected an enforcement system so rigid it lacked exceptions for "unfortunate guilt."[81] Alexander Hamilton warned such rigidity would cause "justice [to] wear a countenance too sanguinary and cruel."[82] But an open question remains of *who* should decide when leniency is appropriate. An early court acknowledged "the court [sic] are not legally competent to give any advice on this subject."[83] And the Supreme Court more recently has made clear an enforcement decision "involves a complicated balancing of a number of factors which are peculiarly within [the executive's] expertise."[84] As the number of federal laws has grown, it has become impossible for the government to enforce every offense.[85] To take care that laws are faithfully

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73 *Id.*

74 *Confiscation Cases*, 74 U.S. (7 Wall.) at 457.

75 *See* Krauss, *supra* note 29, at 9; *see also* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922).

76 258 U.S. 254 (1922).

77 *Id.* at 261.

78 *Id.* at 262.

79 *Id.*

80 *Id.*

81 THE FEDERALIST NO. 74 (Alexander Hamilton) (discussing the necessity of a presidential pardon power).

82 *Id.*

83 Commonwealth v. Wheeler, 2 Mass. (2 Tyng) 172, 174 (1806).

84 Heckler v. Chaney, 470 U.S. 821, 831 (1985).

85 Hallett, *supra* note 8, at 1771 ("As the sheer number of criminal and civil laws has exploded over the past century, the importance of prosecutorial discretion has only increased. There is simply no way that the government can fully enforce all of the criminal and civil offenses on the books today;

executed, the executive must consider "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."[86] The duty to make such a decision is left principally to executive discretion.[87] As then-Representative Marshall expressed, the executive's decision not to pursue certain offenders must represent the "will of the nation."[88]

Thus, executive enforcement discretion represents a careful balance between the three branches of government. The executive branch may employ prosecutorial discretion to check unjust or impractical enforcement of a legislative act. The executive's decision is subject to public scrutiny and displaces judicial review. Still, the executive cannot expand the bounds of prosecutorial discretion to dispense or suspend the laws of Congress, for doing so would turn the executive's check on legislative action into encroachment on legislative authority.

C. *The Original Nondelegation Doctrine & Its Recent Return*

The Constitution vests "[a]ll legislative powers herein granted" to the legislature.[89] With this language, the Framers provided Congress the sole, non-delegable legislative authority.[90] The legislature's sole legislative authority is integral to the separation of powers.[91] The Framers feared excessive lawmaking.[92] A surplus of laws allows lawmakers to blur the lines of legality and impede on individual liberty "without any apparent necessity."[93] The Constitution establishes a deliberately cumbersome lawmaking process "calculated to restrain the excess of lawmaking."[94] And once a bill becomes law, the executive cannot rewrite, suspend, or

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doing so would require dedicating vastly more resources than are currently available for enforcement activities." (footnote omitted)).

86 *Heckler*, 470 U.S. at 831.

87 *See id.* at 832.

88 Krauss, *supra* note 29, at 18 (quoting 10 ANNALS OF CONG. 615 (1800)); *see* 18 U.S. (5 Wheat.) app. (1820).

89 U.S. CONST. art. I, § 1.

90 *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) ("To the legislature all legislative power is granted . . . ."); *see also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("Congress [cannot] delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

91 *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION ¶ 141, at 71 (J.W. Gough ed., Basil Blackwell Oxford 1948) (1690).

92 THE FEDERALIST NO. 48 (James Madison) (explaining the British history of excessive lawmaking to the detriment of individual liberty).

93 *Id.*

94 THE FEDERALIST NO. 73 (Alexander Hamilton).

dispense with it; the executive must execute it.[95] In addition to slowing the lawmaking process overall, the separation of powers prevents the "accumulation of all powers legislative, executive and judiciary, in the same hands," which James Madison viewed as "the very definition of tyranny."[96] Thus, confining lawmaking to the legislative branch and its process guards against excessive or improper lawmaking.[97]

At its heart, the nondelegation doctrine prevents the legislature from transferring to another branch "powers which are strictly and exclusively legislative."[98] Yet, only twice has the Supreme Court struck down a statute for improperly delegating legislative authority.[99] First, in *Panama Refining Co. v. Ryan*,[100] the Court found unconstitutional a law giving the president authority to determine if and how to prohibit the transportation of excess petroleum.[101] The Court held the delegation provided the president "unlimited authority to determine the policy and lay down the prohibition, or not lay it down, as he may see fit," and so violated the separation of powers.[102] Similarly, in *Schechter Poultry Corp. v. United States*,[103] the Court held unconstitutional a statute delegating to the president the unfettered discretion to approve "codes of fair competition" for select industries.[104] In both cases, Congress delegated lawmaking authority to the executive with no guidance, rules, or standards.[105] It was "delegation running riot."[106]

Against the backdrop of *Panama Refining* and *Schechter Poultry*, a gun manufacturer challenged the constitutionality of a law prohibiting the manufacturer from selling arms to a foreign nation.[107] In 1934, Congress approved a joint resolution allowing the president to prohibit the sale of arms and munition to countries engaged in armed conflict in the Chaco region of Bolivia and Paraguay upon making certain findings.[108] On the same day, the president prohibited the arms and munitions sales.[109] In contrast to *Panama* and *Schechter*, the Court in *United States v. Curtiss-*

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95 *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838).

96 THE FEDERALIST NO. 47 (James Madison).

97 *See* Gundy v. United States, 588 U.S. 128, 171 (2019) (Gorsuch, J., dissenting).

98 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

99 Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

100 293 U.S. 388 (1935).

101 *Id.* at 430.

102 *Id.* at 415.

103 295 U.S. 495 (1935).

104 *Id.* at 529, 541–42.

105 *Id.* at 541; *Panama Refining Co.*, 293 U.S. at 418.

106 *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 553.

107 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 311–12, 314 (1936).

108 *Id.* at 311–12.

109 *Id.* at 312–13.

Wright[110] held the statute did not improperly delegate legislative authority to the president.[111] Writing for the Court, Justice George Sutherland distinguished the president's foreign affairs powers from the president's domestic affairs powers.[112] The Constitution vests the executive with "all the powers of government necessary to maintain an effective control over international nations"[113]—the president alone serves as the nation's "constitutional representative" in furtherance of this authority.[114] Thus, determinations about arms sales to countries engaged in an armed conflict falls squarely within the president's authority.[115] The delegation in the joint resolution was permissible based on the president's inherent role as the "sole organ of the nation in its external relations."[116]

For more than eighty years, the Court continued to reject nondelegation challenges.[117] It repeatedly held that, as long as Congress provided some "intelligible principle" to guide the executive's authority in legislative areas, the delegation was constitutional.[118] In response, the analysis shifted to statutory interpretation.[119] In the vein of *Curtiss-Wright*, the Court has also upheld broad delegations when an action is within the executive's authority over external affairs and Congress has not directly spoken on an issue.[120] Consequently, the nondelegation doctrine has become dormant.[121] In 2019, Justice Gorsuch set the stage for a revival in his *Gundy v. United States* dissent.[122] But the story starts seven years earlier, the first time the Court heard a challenge to SORNA, the statute at issue in *Gundy*.[123]

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110 299 U.S. 304 (1936).

111 *Compare id.* at 329–30, *with Panama Refining Co.*, 293 U.S. at 418, *and A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541.

112 *Curtiss-Wright*, 299 U.S. at 315–16.

113 *Id.* at 318 (quoting Burnet v. Brooks, 288 U.S. 378, 396 (1933)).

114 *Id.* at 316–19 (explaining that the colonies collectively separated from Great Britain and thus, as a single unit, retained "the powers of external sovereignty passed from the Crown").

115 *See id.* at 329–30.

116 *Id.* at 319 (quoting then-Representative John Marshall's "great argument" on the House of Representatives floor on March 7, 1800).

117 *See* Gundy v. United States, 588 U.S. 128, 146 (2019) (quoting Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989)).

118 *See id.* at 162–67; *see also Mistretta*, 488 U.S. at 372–73; *see also* Am. Power & Light Co. v. SEC, 329 U.S. 90, 104–05 (1946).

119 *Mistretta*, 488 U.S. at 373 n.7.

120 *See* Dames & Moore v. Regan, 453 U.S. 654, 660, 674 (1981) (upholding the president's authority to nullify attachments based on a broad delegation when done pursuant to a foreign hostage negotiation).

121 Ilaria Di Gioia, *A Tale of Transformation: The Non-Delegation Doctrine and Judicial Deference*, 51 U. BALT. L. REV. 155, 162 (2022) (arguing the Court's continued of approval of broad delegations has weakened the doctrine "to the point of becoming dormant").

122 Gundy v. United States, 588 U.S. 128, 171 (Gorsuch, J., dissenting).

123 Reynolds v. United States, 565 U.S. 432, 435 (2012).

In *Reynolds v. United States*,[124] the Court considered if SORNA's registration requirements apply to pre-Act offenders.[125] The Court held the requirements do not apply absent action by the attorney general because the Act directs the attorney general to create new requirements for pre-Act offenders.[126] In dissent, Justice Antonin Scalia argued the Act's requirements should apply to pre-Act offenders "without action by the Attorney General."[127] According to Justice Scalia, the Act is best understood as only granting the attorney general authority to make *exceptions* to its requirements.[128] The dissent's interpretation deliberately avoided constitutional concerns of an improper delegation.[129] By allowing the attorney general only "to *reduce* congressionally imposed requirements," the Act provides "little more than a formalized version of the time-honored practice of prosecutorial discretion."[130] Discretion to decline enforcement is routine, but "it [was] not entirely clear" to Justice Scalia "that Congress can constitutionality leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals."[131] Accordingly, construing the Act to provide the attorney general discretion to reduce requirements would have been constitutional, while construing it to give the attorney general latitude to create requirements would have been an improper delegation.[132]

Sure enough, after the Court upheld the statute's grant of latitude to the attorney general to create requirements for pre-Act offenders, the statute was challenged as an improper delegation.[133] The Court upheld SORNA, finding the statute sufficiently guided the attorney general's discretion in implementing the statute for pre-Act offenders.[134] Justice Elena Kagan, writing for a four justice plurality, argued the delegation must be constitutional to avoid finding "most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[135] But some immediately noted "the significance of *Gundy* lies not in what the

124 565 U.S. 432 (2012).

125 *Id.* at 434.

126 *Id.* at 439–40.

127 *Id.* at 448 (Scalia, J., dissenting).

128 *Id.*

129 *Id.* at 450.

130 *Reynolds*, 565 U.S. at 450 (Scalia, J., dissenting).

131 *Id.*

132 *Id.*

133 Gundy v. United States, 588 U.S. 128, 132 (2019).

134 *Id.* at 136.

135 *Id.* at 130–31; *see also id.* at 169 (Gorsuch, J., dissenting) (noting that "even highly consequential details [can be left to the executive branch] so long as Congress prescribes the rule governing private conduct," but in this case, Congress provided no rules).

Supreme Court did today, but in what the dissent and the concurrence portend for tomorrow."[136]

In dissent, Justice Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas, argued SORNA reaches far past traditional discretion and becomes an unconstitutional delegation.[137] The attorney general's discretion goes beyond the authority to issue case-by-case exceptions or merely fill up the details of the legislation.[138] Rather, the Act delegates to the attorney general "unfettered discretion to decide which requirements to impose" without Congress having made "a single policy decision concerning pre-Act offenders."[139] Additionally, Justice Gorsuch highlighted that SORNA "does not involve an area of overlapping authority with the executive."[140] Congress may assign broad authority over conduct within the president's inherent Article II powers.[141] But SORNA "prescribe[es] the rules by which the duties and rights of citizens are determined, a quintessentially legislative power."[142]

Justice Samuel Alito concurred with the plurality but expressed support for reconsidering the Court's approach "[i]f a majority of [the] Court [was] willing to reconsider."[143] Though it is unclear how new entrants onto the Court would view the doctrine, the *Gundy* opinion seems to indicate the nondelegation doctrine may not remain dormant for long.[144]

In all these cases, the Court's concerns center on congressional delegations of lawmaking authority to the executive.[145] But they also demonstrate the tension between prosecutorial discretion and the principles behind the nondelegation doctrine—namely, the challenge of identifying when executive action stretches beyond its proper discretion into improper lawmaking outside the legislature.[146]

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136 Di Gioia, *supra* note 121, at 183 (quoting Mila Sohoni, *Opinion Analysis: Court Refuses to Resurrect Nondelegation Doctrine*, SCOTUSBLOG (June 20, 2019, 10:32 PM), https://perma.cc/Z9BT-N5CR.

137 *Gundy*, 588 U.S. at 169–72 (Gorsuch, J., dissenting).

138 *Id.* at 169.

139 *Id.* at 169–70.

140 *Id.* at 170.

141 *Id.* at 159.

142 *Id.* at 171 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton) ("The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.").

143 *Gundy*, 588 U.S. at 148–49 (Alito, J., concurring).

144 Di Gioia, *supra* note 121, at 182–83.

145 *Gundy*, 588 U.S. at 132–33; Panama Refining Co. v. Ryan, 293 U.S. at 405–06, 420 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528–30 (1935); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318–20 (1936).

146 *Gundy*, 588 U.S. at 147. *But see id.* at 169–72 (Gorsuch, J., dissenting).

D. *Modern Issues Blurring the Line of Prosecutorial Discretion*

If the nondelegation doctrine exits dormancy, courts have a new occasion to consider whether executive actions bleed into improper executive lawmaking. Previously permissible executive actions may also face scrutiny as justices on the Court reconsider the bounds of executive lawmaking. Modern issues exploring the boundaries of prosecutorial discretion primarily appear in two areas: (1) categorical directives guiding prosecutorial discretion and (2) administrative forum selection.

1. Categorical Acts of Prosecutorial Discretion

Categorical acts of prosecutorial discretion have existed in some form since the nation's founding.[147] Most commonly, early presidents granted amnesty from prosecution or pardons to classes of offenders based on policy justifications.[148] Following the Civil War, the Supreme Court upheld categorical amnesty as constitutional under the president's pardon power.[149] Recent presidential administrations have issued broad nonenforcement guidelines related to immigration and drug enforcement.[150]

First, in the immigration context, President Obama issued two memoranda on Deferred Action for Childhood Arrivals ("DACA") and Deferred Actions for Parents of Americans ("DAPA").[151] As originally announced on June 15, 2012, the DACA program

> dictated that any person who (1) came to the United States before the age of sixteen, (2) had been present in the United States for at least five years on the date of the announcement, (3) was engaged in or had completed certain educational programs or military service, and (4) was under the age of thirty could be "considered for an exercise of prosecutorial discretion" if that person had not committed certain criminal offenses.[152]

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147 Markowitz, *supra* note 15, at 498 (finding Presidents Washington, Adams, Jefferson, Madison, Lincoln, and Johnson all engaged in categorical grants of amnesty to broad classes of individuals).

148 *Id.* (explaining the trend among early presidents to provide amnesty following armed domestic conflict to defeated combatants to restore civil order).

149 Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155–56 (1871). This Comment does not question the president's ability to make categorical amnesty or pardon determinations under the constitutional pardon power, but rather the modern use of categorical directives guiding lower-level prosecutorial discretion.

150 Markowitz, *supra* note 15, at 501–05.

151 *Id.* at 509; Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), https://perma.cc/5VF6-3R7U [hereinafter DAPA Memo]; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., and John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012), https://perma.cc/9F6C-BP28 [hereinafter DACA Memo].

152 Markowitz, *supra* note 15, at 509 (quoting DACA Memo, *supra* note 151, at 1).

The DAPA program extended deferred action along the same terms as DACA to "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."[153] The memoranda explicitly claimed not to confer any substantive rights on parties.[154] Analysis of the memos estimated that more than five million of the nation's approximately eleven million undocumented persons could qualify for the programs.[155] Litigation ensued.[156]

In 2015, the Court of Appeals for the Fifth Circuit held DAPA likely violated federal law in *Texas v. United States* (*Texas I*).[157] The court rejected viewing the program as an unreviewable act of prosecutorial discretion.[158] DAPA goes beyond a decision not to enforce the law, the court found.[159] It "affirmatively confer[s] 'lawful presence'" and its associated benefits—including eligibility for federal and state benefits—to a designated class of persons.[160] The DAPA memo claims to provide front-line employees the discretion to make status changes, but testimony conflicted on the *actual* level of discretion provided.[161] The memo is accompanied by 150 pages of specific "operating procedures" for granting and denying deferred action to applicants.[162] Employees cannot grant relief under DAPA to an individual who does not meet each requirement.[163] Ultimately, the court of appeals upheld the district court's finding that "[n]othing about DAPA '*genuinely* leaves the agency and its [employees] free to exercise discretion.'"[164]

Moreover, DAPA's procedures for redesigning a person's legal status directly contravene those of the Immigration and Nationality Act ("INA").[165] The INA establishes a specific and detailed legal designation system, "allowing defined classes of aliens to be lawfully present."[166] Congress deferred action on a narrow class of persons, and extended

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153 DAPA Memo, *supra* note 151, at 3.

154 Markowitz, *supra* note 15, at 509; DACA Memo, *supra* note 151, at 3; DAPA Memo, *supra* note 151, at 5.

155 Markowitz, *supra* note 15, at 510.

156 Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (per curiam).

157 *Id.* at 146.

158 *Id.* at 166–68.

159 *Id.* at 166.

160 *Id.* (explaining the program allowed newly lawful permanent residents to receive federal benefits under the Social Security Act and state benefits such as driver's licenses and unemployment insurance).

161 *Id.* at 175–76.

162 *Texas*, 809 F.3d at 174–75.

163 *Id.*

164 *Id.* at 172, 176 (alterations in original).

165 *Id.* at 179–81.

166 *Id.* at 179.

deferment to family members only under certain conditions, such as the immediate family of lawful permanent residents ("LPRs") dying by terrorism.[167] DAPA provides deferred action to some 4.3 million persons not covered by Congress's scheme.[168] For example, the INA does not have a family-sponsorship process for parents of an LPR child.[169] DAPA establishes this process.[170] The INA authorizes cancellation of removal and adjustment of status for immigrants physically present in the country for "a continuous period of *not less than 10 years* . . . if 'removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States' or an [LPR]."[171] DAPA removes both requirements and grants lawful presence to any persons "who have continuously resided in the United States since before January 1, 2010."[172] DAPA's only textual basis within the INA is a "miscellaneous" definitional provision.[173] The court rejected the idea that Congress would bury the authority to make "4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits" in a miscellaneous definitional provision.[174] The Court of Appeals for the Fifth Circuit held that DAPA likely violated the law, finding it far beyond the bounds of prosecutorial discretion and the INA itself.[175] An equally divided Supreme Court affirmed.[176]

Following *Texas I,* the Trump administration moved to rescind DACA because it was likely unlawful as well.[177] The Supreme Court held the rescission violated procedural requirements in federal law, and DACA has remained intact since.[178] Texas challenged the legality of DACA in a second *Texas v. United States* (*Texas II*).[179] Once again, the Court of Appeals for the Fifth Circuit held "Congress's rigorous classification scheme forecloses the contrary scheme in the DACA Memorandum."[180] Congress, in the INA, established a process for determining when persons may obtain lawful

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167 *Id.*

168 *Texas*, 809 F.3d at 179.

169 *Id.* at 180.

170 *Id.*

171 *Id.* (quoting 8 U.S.C. § 1229b(b)(1)(A)).

172 *Id.* (quoting DAPA Memo, *supra* note 151, at 4).

173 *Texas*, 809 F.3d at 182–83.

174 *Id.* at 181.

175 *Id.* at 146.

176 United States v. Texas, 579 U.S. 547, 548 (2016).

177 BEN HARRINGTON & HILLEL R. SMITH, CONG. RSCH. SERV., LSB10625, THE LEGALITY OF DACA: RECENT LITIGATION DEVELOPMENTS 1 (2021).

178 *Id.*

179 Texas v. United States, 50 F.4th 498, 531 (5th Cir. 2022) (dismissing a pending final rule codifying DACA that the Department of Homeland Security promulgated during the litigation but ordering the district court to review the final rule).

180 *Id.* at 526.

presence, work authorization, and associated benefits.[181] DACA contravenes these processes with its own scheme, opening these benefits to a group of 1.7 million otherwise removable persons.[182] Like with DAPA, the court rejected arguments that DACA is an exercise of prosecutorial discretion.[183] Quoting *Texas I*, the court explained, "[a]lthough prosecutorial discretion is broad, it is not 'unfettered.' Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change."[184]

The DACA and DAPA programs represent a consistent struggle in the immigration realm to balance prosecutorial discretion with the congressional framework for handling immigration.[185] These cases emerge regularly as the executive engages in categorical efforts to address immigration priorities.[186]

Second, categorical prosecutorial discretion has risen to prominence in the drug realm, specifically in marijuana enforcement. Here, courts have continually upheld the discretionary authority of the executive.[187] For example, the Controlled Substance Act ("CSA") "creates a comprehensive, closed regulatory regime criminalizing" certain substances classified in any of the Act's five schedules.[188] The CSA organizes substances into their schedules based on a variety of other factors.[189] Marijuana is listed as a Schedule I controlled substance under the CSA.[190] Despite this carefully crafted schedule, "[t]he scheduling of controlled substances under the CSA is not static."[191] The CSA permits the attorney general to add or transfer a drug to a particular schedule upon finding the substance has a potential for abuse. The attorney general then

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181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.* (quoting Texas v. United States, 809 F.3d 134, 167 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (per curiam)).

185 *See Texas*, 50 F.4th at 526 (noting the tension between prosecutorial discretion and congressional commands).

186 *See id.* at 526–27 (considering whether a provision in the INA allows for prosecutorial discretion or requires deportation of certain persons); *see also* Biden v. Texas, 597 U.S. 785, 801–02 (2022) (holding the INA confers discretionary authority to return nonresidents to Mexico but does not require the president to do so, based on both the text and the president's inherent foreign relations power).

187 *See* United States v. Canori, 737 F.3d 181, 183 (2d Cir. 2013); United States v. White, 928 F.3d 734, 742 (8th Cir. 2019); United States v. Griffith, 928 F.3d 855, 866–67 (10th Cir. 2019); West v. Holder, 60 F. Supp. 3d 197, 203–04 (D.D.C. 2015), *aff'd sub nom.* West v. Lynch, 845 F.3d 1228 (D.C. Cir. 2017).

188 Gonzalez v. Oregon, 546 U.S. 243, 250 (2006).

189 LISA N. SACCO ET AL., CONG. RSCH. SERV., R44782, THE EVOLUTION OF MARIJUANA AS A CONTROLLED SUBSTANCE AND THE FEDERAL-STATE POLICY GAP 5 (2022).

190 21 U.S.C. § 812(c)(c)(10).

191 *Canori*, 737 F.3d at 183.

must make additional findings based on the proposed rescheduling.[192] The attorney general may also remove any drug from the schedule entirely upon finding it no longer meets the requirements for inclusion.[193]

As states began decriminalizing marijuana, the Department of Justice responded with several memoranda providing federal prosecutors in these states additional enforcement discretion.[194] First, a 2009 memorandum by former Deputy Attorney General David Ogden articulated that the central priority should be major drug trafficking, and federal resources should not focus "on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[195] In 2011, Deputy Attorney General James M. Cole clarified that enforcement under the CSA remained a priority and "[t]he Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."[196] In 2013, Cole issued an additional memorandum ("2013 Cole Memo") outlining eight marijuana enforcement priorities to focus resource allocation.[197] The memo did not bar prosecution.[198] In fact, it contained several explicit warnings that the memoranda are "intended solely as a guide to the exercise of investigative and prosecutorial discretion" and do "not alter in any way the Department [of Justice]'s authority to enforce . . . federal laws relating to marijuana, regardless of state law."[199] Federal law enforcement retained the authority to launch investigations and prosecutions outside the listed priorities "in particular circumstances where investigation and prosecution otherwise serves an important federal interest."[200]

Just as claimants argued DACA and DAPA violated the INA, claimants have argued these memos (collectively, the "Cole Memos"), violate the CSA.[201] Unlike with DACA and DAPA, courts have continually held the

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192 21 U.S.C. § 811(a)(1).

193 *Id.* § 811(a)(2).

194 SACCO ET AL., *supra* note 189, at 23.

195 *Id.* (quoting Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Just., to selected U.S. att'ys, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* 1–2 (Oct. 19, 2009), https://perma.cc/E5PX-Q3LX.

196 Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to all U.S. att'ys, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* 2 (June 29, 2011), https://perma.cc/5Y6U-LKX7 [hereinafter 2011 Cole Memo].

197 Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to all U.S. att'ys, *Guidance Regarding Marijuana Enforcement* 1–2 (Aug. 29, 2013), https://perma.cc/MX2A-S6MJ [hereinafter 2013 Cole Memo].

198 *Id.* at 4.

199 *Id.*

200 *Id.*

201 *See* United States v. Canori, 737 F.3d 181, 184 (2d Cir. 2013); United States v. White, 928 F.3d 734, 742 (8th Cir. 2019); United States v. Griffith, 928 F.3d 855, 867 (10th Cir. 2019); West v. Holder, 60 F. Supp. 3d 197, 199 (D.D.C. 2015), *aff'd sub nom.* West v. Lynch, 845 F.3d 1228 (D.C. Cir. 2017).

Cole Memos fall properly within the realm of prosecutorial discretion and do not contravene the CSA.[202] First, courts maintain that nonenforcement decisions are presumptively unreviewable.[203] Relying on *Heckler v. Chaney*,[204] courts note the executive branch's preeminent role in determining the proper allocation of executive resources.[205] In one instance, the Court of Appeals for the Eighth Circuit upheld the Cole Memos' reasoning that since the states authorized marijuana-related conduct, they likely have a "strong and effective regulatory and enforcement system that will address the threats those state laws could pose on public safety."[206] Thus, it lessened the need to dedicate limited federal resources to certain forms of enforcement in those states.[207] The court rejected a defendant's claim that he had been singled out for prosecution based on his state.[208] Instead, the court looked to the memos' various warning provisions and held "the Cole Memos do not create a policy by which residents of states where marijuana has been legalized are affirmatively treated differently from those of states where it has not."[209]

Second, courts have found the Cole Memos are proper acts of discretion under the CSA. Faced with a claim that the attorney general unilaterally rescheduled marijuana, the Court of Appeals for the Second Circuit held that a decision by the Justice Department to prioritize certain types of prosecutions "unequivocally does not mean that some types of marijuana use are now legal."[210] Rather, marijuana remains a Schedule I substance, and prosecutors may exercise their discretion to levy prosecutions under that schedule.[211] The Cole Memos do not bypass the CSA because, as the Court of Appeals for the Tenth Circuit similarly found, the CSA scheduling system remains in full effect.[212] The court of appeals pointed to the 2013 Memo's explicit clarification that it does not alter the Department of Justice's authority to enforce the law.[213] Consequently, the Cole Memos fit squarely within "the Executive

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202 *See Canori*, 737 F.3d at 184–85; *West*, 60 F. Supp. 3d at 199–200; *White*, 928 F.3d at 742–44; *Griffith*, 928 F.3d at 867–68.

203 *West*, 60 F. Supp. 3d at 203 ("[The government's] broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." (quoting Wayte v. United States, 470 U.S. 598, 607 (1985) (alteration in original))); *Id.* ("In the ordinary case, the exercise of prosecutorial discretion . . . has long been held presumptively unreviewable." (quoting In re Sealed Case, 131 F.3d 208, 214 (D.C. Cir. 1997))).

204 470 U.S. 821 (1985).

205 *See, e.g.*, *West*, 60 F. Supp. 3d at 203.

206 *White*, 928 F.3d at 743 (quoting 2013 Cole Memo, *supra* note 197, at 2).

207 *Id.*

208 *Id.*

209 *Id.*

210 United States v. Canori, 737 F.3d 181, 185 (2d Cir. 2013).

211 *Id.*

212 United States v. Griffith, 928 F.3d 855, 867 (10th Cir. 2019).

213 *Id.* (quoting 2013 Cole Memo, *supra* note 197, at 4).

Branch['s] exclusive authority and absolute discretion to decide whether to prosecute a case."[214]

DACA, DAPA, and the Cole Memos tell two tales of prosecutorial discretion: one where a categorical executive nonenforcement decision expands executive power into the legislative realm and one where it remains squarely within the bounds of executive action.

2. Administrative Forum Selection

The claim that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" has come under fire as the nondelegation doctrine sees a revival.[215] In *Jarkesy v. SEC*,[216] the Court of Appeals for the Fifth Circuit held the nondelegation doctrine precluded Congress from allowing the executive to decide whether to bring an action in federal court or an administrative tribunal.[217] The dissent disagreed sharply, arguing the nondelegation doctrine was inapplicable given the executive's inherent prosecutorial discretion.[218] Currently, at least six agencies, including the SEC, have statutory discretion to bring cases before an Article Ill court or an administrative tribunal.[219] Under *Jarkesy,* it is hard to argue any of these statutes, written almost identically to the SEC's administrative forum selection statute, contain an intelligible principle guiding agency discretion.[220] Instead, litigators defending the SEC statute argue an intelligible principle is unnecessary because the authority is inherently an exercise of prosecutorial discretion.[221]

The *Jarkesy* court held that administrative forum selection is a legislative decision that cannot be delegated to the executive.[222] The court looked to *INS v. Chadha*[223] to conclude that "[g]overnment actions are 'legislative' if they have 'the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.'"[224]

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214 *Canori*, 737 F.3d at 185 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

215 Petitioners Reply Brief at 8, Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007) (quoting United States v. Nixon, 418 U.S. at 693).

216 34 F.4th 446 (5th Cir. 2022), *aff'd and remanded*, 144 S. Ct. 2117 (2024).

217 *Id.* at 459.

218 *Id.* at 474 (Davis, J., dissenting).

219 Matthew Chester, Lori Patterson, Michael E. Clark, Lindsay Ray & Chelsea Thomas, *5th Circuit Declares SEC's Quasi-Judicial Process Unconstitutional*, TEXAS LAW. (May 27, 2022, 6:49 PM), https://perma.cc/S6NC-92TF (finding the CFTC, EPA, FTC, Office of the Comptroller of Currency, and FDIC have similar administrative forum selection statutes).

220 *Id.*; *Jarkesy*, 34 F.4th at 461–62.

221 *Jarkesy*, 34 F.4th at 474 (Davis, J., dissenting).

222 *Id.* at 461 (majority opinion).

223 462 U.S. 919 (1983).

224 *Jarkesy*, 34 F.4th at 461 (quoting INS v. Chadha, 462 U.S. 919, 952 (1983)).

Consequently, bringing a case before an Article III court rather than an agency tribunal cannot be an act of prosecutorial discretion because it confers legal process rights onto parties.[225] This goes beyond a decision rooted in prosecutorial discretion about "whether to bring enforcement actions in the first place" or "where to bring a case among those district courts that [may] have proper jurisdiction."[226]

Dissenting to *Jarkesy* and in the denial of rehearing en banc, several judges argued administrative forum selection is an executive decision based on prosecutorial discretion.[227] Judge William Davis argued the majority misapplied *INS v. Chadha*.[228] That case addressed "whether Congress, *after validly delegating authority to the Executive*, can then alter or revoke that valid delegation" through action in a single chamber.[229] Judge Davis reasoned that to interpret *Chadha* as broadly as requiring legislative action whenever a legal right is at play would conflict with *United States v. Batchelder*,[230] another Supreme Court precedent.[231] In *Batchelder*, the Court held "it was constitutional for Congress to allow the [g]overnment, when prosecuting a defendant, to choose between two criminal statutes that 'provide[d] different penalties for essentially the same conduct.'"[232] In dissent to *Jarkesy*'s denial of rehearing en banc, Judge Catharina Haynes provided several "real-world examples of executive action that 'alter[s] . . . legal rights'" which have been upheld by the Supreme Court in alignment with *Batchelder*.[233] In *Batchelder*, the Court specifically noted that "[h]aving informed the courts, prosecutors, and defendants of the permissible punishment alternatives . . . , Congress has fulfilled its duty."[234] After that, the executive has discretion to decide which option to employ.[235]

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225 *See id.*

226 *See id.* at 461–62.

227 *Id.* at 474 (Davis, J., dissenting); Jarkesy v. SEC, 51 F.4th 644, 646 (5th Cir. 2022) (Haynes, J., dissenting from denial of rehearing en banc).

228 *Jarkesy*, 34 F.4th at 474–75 (Davis, J., dissenting).

229 *Id.* at 475 (emphasis added).

230 442 U.S. 114 (1979); *id.* at 116.

231 *Jarkesy*, 34 F.4th at 475 (Davis, J., dissenting).

232 *Id.* at 474 (quoting United States v. Batchelder, 442 U.S. 114, 116 (1979)).

233 *Jarkesy*, 51 F.4th at 646 (Haynes, J., dissenting) ("In its petition, the Government also gave as an example the fact that it may choose to charge a defendant with a misdemeanor as opposed to a felony—a decision that would deprive the defendant of a right to a jury trial and remove the requirement of a grand jury. Additionally, of course, agencies have the discretion *not* to enforce. Being required to defend yourself in an enforcement action certainly alters your legal rights and duties, but the Court has never defined such agency discretion as an exercise of legislative power." (citations omitted)).

234 *Jarkesy*, 34 F.4th at 474 (Davis, J., dissenting) (quoting *Batchelder*, 442 U.S. at 126).

235 *Id.* at 475.

The Supreme Court resolved *Jarkesy* on a Seventh Amendment question, declining to reach the nondelegation issue.[236] The Court held the SEC's use of civil penalties to enforce securities fraud violations entitles a defendant to a jury trial because the SEC's antifraud provisions replicate common law fraud, and a jury must hear common law claims.[237] Similarly, the Court found that civil penalties imposed by the SEC are "the prototypical common law remedy" and require enforcement through a court of law.[238] But the Court went on to find that the "public rights" exception to Article III jurisdiction—which permits Congress to assign certain matters to agencies for adjudication despite implicating the Seventh Amendment—did not apply.[239] The Court *could have* eliminated the public rights exception entirely, as some have advocated.[240] Instead, the Court distinguished the case from the "distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury."[241]

In keeping the public rights exception alive, the Court left open a host of instances where administrative forum selection statutes permit an agency to pursue adjudication in either an Article III court or an administrative forum—namely, when the claim lacks a clear common law analogue or imposes remedies other than civil penalties.[242] Administrative forum selection statutes exist for agency actions of this type across the federal government. For example, the Natural Gas Act empowers the Federal Energy Regulatory Commission to enforce natural gas blanket market certificates through either an Article III court or administrative adjudication.[243] Even at the SEC, the administrative forum selection statute at issue in *Jarkesy* still permits the agency to select administrative adjudication over an Article III court to enforce books-and-records violations and internal control violations.[244] Litigants have opined that the next legal battlefield under the Seventh Amendment will be whether administrative enforcement claims are more like *Jarkesy*, involving a common law analogue, or like *Atlas Roofing Co. v. Occupational Safety &*

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236 SEC v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024).

237 *Id.* at 2127.

238 *Id.* at 2129.

239 *Id.* at 2127.

240 Brief *Amicus Curiae* of the New Civil Liberties Alliance in Support of Respondents at 13–15, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859).

241 SEC v. Jarkesy, 144 S. Ct. at 2127.

242 *Id.* at 2138 (citing Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 453, 461 (1977) ("*Atlas Roofing* concluded that Congress could assign the OSH Act adjudications to an agency because the claims were 'unknown to the common law.' The case therefore does not control here, where the statutory claim is 'in the nature of' a common law suit." (citation omitted)).

243 15 U.S.C. § 717u; *see also* 18 C.F.R. § 284.402.

244 15 U.S.C. §§ 78m, 78d-6.

Health Review Commission,[245] involving true public rights.[246] So long as a statute lacks a common law analogue or involves a true public right, the agencies' administrative forum selection statute may also face a nondelegation doctrine challenge in kind to the *Jarkesy* challenge.

Political polarization and gridlock within Congress have made executive acts of discretion all the more common.[247] While the Supreme Court has previously recognized the executive's "absolute discretion" when it comes to enforcement,[248] as these modern issues in categorical discretion and administrative forum selection indicate, "the absoluteness of that discretion is being put up for debate."[249] Today, courts need to use history and precedent to distinguish proper acts of prosecutorial discretion from improper executive lawmaking.

II. Distinguishing Improper Executive Lawmaking from Prosecutorial Discretion

As the nondelegation doctrine departs from dormancy, questions about the bounds of proper prosecutorial discretion enter a new light of litigation. As illustrated by the debates surrounding categorical discretion and administrative forum selection, actions seemingly executive-in-nature may bleed into improper executive lawmaking. The boundaries are hardly well defined. A clear test is needed to distinguish improper executive lawmaking while maintaining the original understanding of prosecutorial discretion as a tool to permit flexibility and prevent nullification.[250] Based on the historical development of the nolle prosequi and the Court's precedents, this Comment proposes that an executive action is a proper exercise of prosecutorial discretion if it (1) maintains the historically recognized qualities of a discretionary act, (2) is traditionally committed to executive control, and (3) aligns with the enabling legislation's overall framework.

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245 430 U.S. 442 (1977).

246 Samuel B. Boxerman, Jack Raffetto, Timothy K. Webster & Lauren E. DeCarlo, Jarkesy*'s Potential Implications for EPA Administrative Proceedings*, SIDLEY (July 10, 2024), https://perma.cc/SH85-Y4G5.

247 Coglianese, *supra* note 14, at 1588–90.

248 *Id.* at 1590 (citing Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.")).

249 *Id.*

250 *See supra* Section I.A.

A. *Acts with Historically Recognized Discretionary Qualities*

The lessons of the Glorious Revolution led the Framers of the Constitution to deliberately adopt the nolle prosequi rather than suspension or dispensation powers.[251] Once a bill becomes law, the executive cannot rewrite, suspend, or dispense with it; the executive must execute it.[252] A proper act of prosecutorial discretion parallels the nolle rather than suspension or dispensation. Accordingly, the historically recognized qualities of discretionary acts closely mirror the qualities of the nolle, namely acts that (1) provide post hoc relief and (2) permit front-line officers to engage in case-by-case leniency based on administrative priorities. When prosecutorial discretion reflects the nolle, it does not amount to lawmaking because it does not undermine the role of the legislature; rather, executive acts serve as a check on the law's enforcement based on the public interest.

First, acts of prosecutorial discretion must provide post hoc relief. While the suspending and dispensing powers legalized subsequent action proscribed by law, the nolle merely ends enforcement for past acts.[253] The nolle does not allow the executive to nullify a law entirely.[254] Instead, it allows an act of prosecutorial discretion to check the unjust or impractical enforcement of a law.[255] This also distinguished the common law pardon power from the dispensing power.[256] As Sir Matthew Hale explained, a pardon "dispenseth with the penalty, not the obligation" to comply with the law.[257] But the dispensation power "dispenseth both with the penalty and obligation of a law and is precedent."[258] Prosecutorial discretion must provide post hoc relief from enforcement to prevent the executive from dispensing with the laws passed by Congress.

Second, acts of prosecutorial discretion must permit front-line discretion. The nolle originally acted as an individualized decision to end a proceeding based on the interests of the Crown.[259] It provides a check on the law when the executive determines enforcement would be improper.[260] It does not allow the executive to rewrite the law, but merely

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251 *See supra* Section I.B; Markowitz, *supra* note 15, at 500–01.

252 Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838).

253 Markowitz, *supra* note 15, at 500.

254 MCCONNELL, *supra* note 10, at 117–18.

255 *See* THE FEDERALIST NO. 74 (Alexander Hamilton) (discussing the necessity of a presidential pardon power to prevent "unfortunate guilt"); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (highlighting the executive's premier role in determining if enforcement is practical).

256 Markowitz, *supra* note 15, at 500.

257 *Id.* (quoting HALE, *supra* note 36, at 177).

258 *Id.* (quoting HALE, *supra* note 36, at 177).

259 Krauss, *supra* note 29, at 16.

260 *See* 10 ANNALS OF CONG. 615 (1800) (describing that the executive's discretion to drop a criminal prosecution reflects the will of the nation).

to identify when enforcement is inappropriate.[261] Early decisions justifying prosecutorial discretion described the attorney general as "the hand of the [p]resident in taking care" that laws were executed "in protection of the interests of the United States."[262] Similarly, as agents of the executive, front-line prosecutors hold the authority to determine if a legal proceeding is within the public interest.[263] To do so, a prosecutor must determine whether applying the law in a specific instance is unwarranted; for example, if it would cause "justice [to] wear a countenance too sanguinary and cruel."[264] Accordingly, a binding rule requiring all government actors to exercise discretion in a certain way would rewrite the law rather than permit individualized determinations in the public interest. The nolle does not rewrite the law.[265]

Taken together, acts that provide post hoc relief and permit front-line officers to engage in case-by-case leniency mirror the early understanding of the nolle. These acts do not allow the executive to suspend or dispense with a law—doing so would amount to unconstitutional executive lawmaking.[266] Instead, acts that retain the historically recognized qualities of a discretionary act properly limit the executive's authority to what it was at the founding when the nolle was incorporated into the U.S. justice system.

B. *Acts Committed to Executive Authority*

The nondelegation doctrine has long contained an exception for areas traditionally committed to executive authority.[267] Most notably, the executive has the greatest discretionary authority in the areas of national security and external affairs.[268] In these areas, the executive alone acts as the nation's "constitutional representative."[269]

Similarly, the Court has generally viewed criminal process determinations as committed to executive authority when authorized by Congress.[270] Process determinations are more akin to "fill[ing] up the

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261 *See supra* Section I.B.

262 Ponzi v. Fessenden, 258 U.S. 254, 262 (1922).

263 Confiscation Cases, 74 U.S. (7 Wall.) 454, 456–57 (1868) (clarifying all public prosecutors hold the power to enter a nolle and the court may only hear a case "if prosecuted in the name and for the benefit of the United States").

264 THE FEDERALIST NO. 74 (Alexander Hamilton) (discussing the necessity of a presidential pardon power).

265 Markowitz, *supra* note 15, at 500.

266 *See infra* Section II.C.

267 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318–19 (1936).

268 *See id.* at 317–19 (describing the executive's vast discretion in conducting foreign affairs).

269 *See id.* at 316, 319 (explaining that the colonies collectively separated from Great Britain and thus, as a single unit, retained "the powers of external sovereignty passed from the Crown").

270 *See* United States v. Batchelder, 442 U.S. 114, 125–26 (1979).

details" of a law.[271] They may include deciding which charge to bring, in which court to bring it, and whether to bring a charge at all.[272] Process determinations do not offend the separation of powers because they reflect "a complicated balancing of a number of factors which are peculiarly within [the executive branch's] expertise."[273] These determinations only alter substantive rights when those rights are connected with procedural options provided by Congress.[274] Thus, the executive may "resolve even highly consequential details," but only when Congress prescribes the substantive rule guiding the executive's enforcement.[275]

Given the Founders' concerns about excessive lawmaking, prosecutorial discretion that permits the executive to create substantive legal rights disconnected from a process authorized by Congress would contravene the separation of powers.[276] Once Congress has "informed the court, prosecutors, and defendants of the permissible punishment alternatives[,] . . . Congress has fulfilled its duty."[277] At that point, the executive cannot rewrite, suspend, or dispense with Congress's scheme.[278] But the executive can employ prosecutorial discretion to decide which option to choose.[279] Process determinations that merely "fill up the details" of a law are a clear executive function.[280] And where authority has been traditionally committed to the executive, broad delegations of discretion are permissible and prosecutorial discretion should be viewed expansively.[281]

C. *Acts in Alignment with Enabling Legislation's Overall Framework*

An act of prosecutorial discretion cannot contravene the enabling legislation's overall framework. Nothing would revitalize the king's

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271 *Gundy*, 588 U.S. at 157 (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 33, 43 (1825)).

272 *See Batchelder*, 442 U.S. at 124 ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); *see also* Jarkesy v. SEC, 51 F.4th 644, at 646 (5th Cir. 2022) (Haynes, J., dissenting) ("In its petition, the Government also gave as an example the fact that it may choose to charge a defendant with a misdemeanor as opposed to a felony—a decision that would deprive the defendant of a right to a jury trial . . . .").

273 Heckler v. Chaney, 470 U.S. 821, 831 (1985).

274 *Gundy*, 588 U.S. at 169 (Gorsuch, J., dissenting).

275 *Id.*

276 *See* THE FEDERALIST NO. 48 (James Madison).

277 Jarkesy v. SEC, 34 F.4th 446, 474 (5th Cir. 2022) (Davis, J., dissenting) (quoting United States v. Batchelder, 442 U.S. 114, 126 (1979)), *aff'd and remanded,* 144 S. Ct. 2117 (2024).

278 *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838).

279 *Jarkesy*, 34 F.4th at 475 (Davis, J., dissenting).

280 *See* Gundy v. United States, 588 U.S. 128, 157–58 (2019) (Gorsuch, J., dissenting).

281 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936); *Gundy,* 588 U.S. at 169–72 (Gorsuch, J., dissenting).

dispensation and suspension powers more than allowing the executive to act contrary to the laws of Congress in an area outside the executive's authority.[282] The Founders rejected providing these powers.[283] The Supreme Court has held allowing such actions would provide the president "power entirely to control the legislation of congress."[284] Since the Take Care Clause imposes a duty on the president to faithfully execute Congress's laws, the scope of prosecutorial discretion is generally limited by the law itself.[285]

Moreover, the separation of powers is rooted in the notion that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[286] Accordingly, if the executive can circumvent the lawmaking process by using discretion to enact a policy fundamentally at odds with Congress's ordered scheme, it would impose the exact harms the separation of powers fights against: a consolidation of lawmaking power in one branch.[287] Once Congress has affirmatively spoken on an issue, the executive's discretion is bound by the law itself unless based on the president's own inherent power.[288]

III. Applications to Modern Controversies

As the nondelegation doctrine sees a revival, this test—requiring executive actions (1) maintain the historically recognized qualities of a discretionary act, (2) be traditionally committed to executive control, and (3) align with the enabling legislation's overall framework—can clarify existing case law and provide insight into emerging issues surrounding prosecutorial discretion. First, the test reveals why courts approve of categorical discretion in drug cases, but not in the DACA and DAPA cases. Second, administrative forum selection presents a unique case, stretching the bounds of executive authority. However, with proper congressional authorization, the test indicates the decision to bring a case in an administrative tribunal remains properly committed to prosecutorial discretion. Working through both categories of modern controversies, this Part illustrates how the test can distinguish improper executive lawmaking from constitutionally sound prosecutorial discretion.

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282 *See Kendall*, 37 U.S. (12 Pet.) at 613.

283 MCCONNELL, *supra* note 10, at 118.

284 *Kendall*, 37 U.S. (12 Pet.) at 613.

285 MCCONNELL, *supra* note 10, at 119.

286 THE FEDERALIST NO. 47, at 94 (James Madison).

287 *See Kendall*, 37 U.S. (12 Pet.) at 613; THE FEDERALIST NO. 47 (James Madison).

288 *See* Dames & Moore v. Regan, 453 U.S. 654, 677 (1981) (upholding a presidential action loosely based on statutory authorization when related to external affairs). In such instances, the president's power is "at its lowest ebb." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

A. *Categorical Prosecutorial Discretion*

Under the three-factor test, DACA and DAPA are acts of improper executive lawmaking while the Cole Memos are proper acts of prosecutorial discretion. DACA and DAPA go beyond the traditionally recognized scope of prosecutorial discretion to become executive lawmaking.[289] While the Cole Memos assert executive policy, the policy aligns with congressional authorization and retains the key qualities of prosecutorial discretion.[290]

Applying the first element, DACA and DAPA do not retain historically recognized qualities of discretionary acts.[291] DACA and DAPA provide ex ante relief from the law's obligations.[292] The programs "affirmatively confer lawful presence" and its associated benefits to qualified persons.[293] A nolle is limited to ex post relief from punishment.[294] DACA and DAPA not only defer removal, but also provide a new legal status and confer eligibility for federal and state programs.[295] Conversely, the Cole Memos do not provide ex ante relief.[296] They explicitly disclaim creating a defense for those violating federal law and warns of continued federal enforcement at the discretion of front-line law enforcement.[297] Based on these provisions, courts have consistently held the memos "unequivocally do[] not mean that some types of marijuana use are now legal."[298] Instead, they provide guidance on how prosecutors should navigate relief after the crime has been committed, such as deciding how to charge and investigate an offense.[299] Like the nolle, the Cole Memos merely provide an avenue to terminate enforcement for past acts.[300]

Front-line discretion is the second historically recognized quality of prosecutorial discretion. The Cole Memos outline priorities, but repeatedly maintain they do "not alter in any way the Department [of Justice]'s authority to enforce . . . federal laws relating to marijuana,

289 *See supra* Section I.D.1 (explaining DACA and DAPA defer removal proceedings for eligible persons).

290 *See supra* Section I.D.1 (explaining the Cole Memos guide marijuana enforcement in states where some form of marijuana is decriminalized).

291 *See supra* Section II.A.

292 *See* Texas v. United States, 809 F.3d 134, 166 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (per curiam).

293 *Id.*

294 Markowitz, *supra* note 15, at 500.

295 Texas v. United States, 809 F.3d at 166.

296 2013 Cole Memo, *supra* note 197, at 4.

297 *Id.* at 2.

298 *See, e.g.*, United States v. Canori, 737 F.3d 181, 184–85 (2d Cir. 2013).

299 2013 Cole Memo, *supra* note 197, at 4.

300 Markowitz, *supra* note 15, at 500.

regardless of state law."[301] The Memos do not bar prosecution.[302] Federal law enforcement explicitly retain the authority to launch investigations and prosecutions "even in the absence of any one of the factors" outlined in the memos "in particular circumstances where investigation and prosecution otherwise serves an important federal interest."[303] Prosecutorial discretion is rooted in enabling prosecutors to identify unique circumstances relevant to the public interest that warrant a differing application of the law.[304] The Cole Memos explicitly retain these qualities and simply provide factors to guide front-line agents in determining if a unique circumstance applies.[305]

Conversely, 150 pages of specific "operating procedures" for granting and denying deferred action to applicants accompanied the DACA and DAPA memoranda.[306] Employees cannot grant DACA or DAPA status to an individual who does not meet the required criteria.[307] While both documents claim to root themselves in prosecutorial discretion, only the Cole Memos actually retain discretion throughout enforcement.[308] Thus, of the three, only the Cole Memos allow individualized determinations based on "the interests of the United States."[309] In providing ex ante relief from the law absent individual discretion based on public interest, DACA and DAPA fail to reflect traditionally recognized acts of prosecutorial discretion.

Applying the second element of the test, nonenforcement decisions are generally committed to executive authority. However, when nonenforcement confers substantive legal rights, it interferes with legislative authority.[310] Under DAPA and DACA, "4.3 million otherwise removable aliens [are] eligible for lawful presence, employment authorization, and associated benefits."[311] With their new status as LPRs, these individuals became eligible to receive federal benefits, such as those available under the Social Security Act, and state benefits, such as driver's

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301 2013 Cole Memo, *supra* note 197, at 4.

302 *Id.*

303 *Id.*

304 *See supra* Section I.B; *see* Confiscation Cases, 74 U.S. (7 Wall.) 454, 456–57 (1868).

305 2013 Cole Memo, *supra* note 197, at 3–4.

306 Texas v. United States, 809 F.3d 134, 174–75 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (per curiam).

307 *Id.* at 175.

308 2013 Cole Memo, *supra* note 197, at 4; *see also* Texas v. United States, 809 F.3d at 175–76.

309 Ponzi v. Fessenden, 258 U.S. 254, 262 (1922).

310 *See* West v. Holder, 60 F. Supp. 3d 197, 203 (D.D.C. 2015) ("[The government's] broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))), *aff'd sub nom.* West v. Lynch, 845 F.3d 1228 (D.C. Cir. 2017); *Id.* ("In the ordinary case, the exercise of prosecutorial discretion . . . has long been held presumptively unreviewable." (quoting In re Sealed Case, 131 F.3d 208, 214 (D.C. Cir. 1997))).

311 Texas v. United States, 809 F.3d at 181.

licenses and unemployment insurance.[312] Thus, DACA and DAPA are not mere nonenforcement or process determinations authorized by Congress with collateral substantive impacts.[313] The programs provide independent substantive rights.[314] Allowing the executive to create substantive rights, rather than merely fill up the details of enforcement, usurps the legislature's authority.[315]

At the same time, DACA and DAPA primarily relate to immigration, an issue impacting external affairs. Still, a *Curtiss-Wright* exception[316] to the nondelegation doctrine cannot justify DACA and DAPA.[317] The two programs deal primarily with persons *inside* the United States.[318] In domestic cases where the Court has upheld broad delegations under the executive's foreign affairs power, a predominantly foreign element was at play. In *Dames & Moore v. Regan*,[319] for example, the Court upheld the president's authority to nullify attachments based on a broad delegation when done pursuant to a foreign hostage negotiation.[320] Similarly, the Court in *Biden v. Texas*[321] affirmed discretionary authority under the INA to return nonresidents to Mexico based in part on the president's inherent discretion in diplomatic relations.[322] There is no indication DACA and DAPA have a vital external impact providing the executive expanded authority to act in furtherance of the executive's sovereign control over external affairs.[323]

On the other hand, the Cole Memos are rooted in the executive branch's preeminent role in determining the proper allocation of

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312 *Id.* at 166.

313 *See* Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (holding that an agency decision not to initiate an enforcement action was within the agency's unreviewable discretion); United States v. Batchelder, 442 U.S. 114, 125–26 (1979) (holding process determinations fall within the executive's discretion even if they result in substantive changes to the party's position).

314 Texas v. United States, 809 F.3d at 166.

315 *Heckler*, 470 U.S. at 831; *see also* THE FEDERALIST NO. 48 (James Madison) (explaining how the separation of lawmaking power in the legislature guards against excessive and unnecessary lawmaking).

316 *See supra* Section I.C (finding that the Supreme Court has provided significant deference to the executive in issues dealing with foreign affairs).

317 *See* Markowitz, *supra* note 15, at 509–10 (describing the domestic focus and impact of DACA and DAPA).

318 *Id.* at 510 (finding DACA and DAPA impact roughly five million undocumented persons living within the United States).

319 453 U.S. 654 (1981).

320 *Id.* at 660, 674.

321 597 U.S. 785 (2022).

322 *Id.* at 806–07.

323 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936) (explaining the colonies collectively separated from Great Britain and as a single unit, retained "the powers of external sovereignty passed from the Crown").

enforcement resources.[324] The Court has held that, to take care that laws are faithfully executed, the executive must consider "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."[325] The Cole Memos recognize that states with legal marijuana likely have a "strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety."[326] Thus, existing state regulatory regimes lessen the need to dedicate limited federal resources to certain forms of enforcement in those states.[327] These resource-allocation determinations are properly within the control of the executive.[328]

Further, an enforcement decision "involves a complicated balancing of a number of factors which are peculiarly within [the executive branch's] expertise."[329] In providing nonbinding factors for consideration, the Cole Memos merely guide that balancing.[330] For example, the 2013 Cole Memo outlined new evidence that large-scale commercial enterprises, when under proper state regulation, may not be a federal drug trafficking priority.[331] It went on to amend previous guidance directing prosecutors to review the size of the venture when considering priorities for federal prosecution.[332] Instead, the 2013 Cole Memo explained that "compliance with a strong and effective state regulatory system" was a better indicator for assessing if a venture undermined a particular enforcement priority.[333] In a world of many federal laws and few federal resources, sharing information to accomplish and guide enforcement priorities falls within the proper role of the executive.[334]

Similarly, the Cole Memos do not confer substantive rights. Even in states where marijuana is legal, courts have held "the Cole Memos do not

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324 West v. Holder, 60 F. Supp. 3d 197, 204 (D.D.C. 2015) (citing Heckler v. Chaney, 470 U.S. 821, 831 (1985)), *aff'd sub nom.* West v. Lynch, 845 F.3d 1228 (D.C. Cir. 2017).

325 *Heckler*, 470 U.S. at 831.

326 United States v. White, 928 F.3d 734, 743 (8th Cir. 2019) (quoting 2013 Cole Memo, *supra* note 197, at 2).

327 2013 Cole Memo, *supra* note 197, at 2.

328 *See Heckler*, 470 U.S. at 831.

329 *Id.*

330 2013 Cole Memo, *supra* note 197, at 1–2.

331 *Id.* at 3.

332 *Id.*

333 *Id.*

334 *See Heckler*, 470 U.S. at 831; Hallett, *supra* note 8, at 1771 ("As the sheer number of criminal and civil laws has exploded over the past century, the importance of prosecutorial discretion has only increased. There is simply no way that the government can fully enforce all of the criminal and civil offenses on the books today; doing so would require dedicating vastly more resources than are currently available for enforcement activities." (footnote omitted)).

create a policy by which residents of [these] states . . . are affirmatively treated differently from those of states where it has not."[335] Again, the memos do not bar prosecution.[336] In summary, DACA and DAPA confer substantive rights and do not fall within an area traditionally committed to executive authority. Meanwhile, the Cole Memos do not confer substantive rights and do fall within an area traditionally committed to executive authority. DACA and DAPA lean toward legislative actions while the Cole Memos lean discretionary.

Finally, applying the third element of the test, DACA and DAPA contravene the express process of the INA, while the Cole Memos retain the system established by the CSA. The INA "allow[s] defined classes of aliens to be lawfully present."[337] DACA and DAPA provide a new process.[338] The INA does not have a family-sponsorship process for parents of an LPR child.[339] DAPA establishes this process.[340] The list goes on.[341] These examples indicate Congress has established a specific and comprehensive legal designation system.[342] DACA and DAPA dispense with this established scheme to develop its own process for conferring lawful presence, employment authorization, and other benefits to undocumented persons.[343] In replacing this system with DACA and DAPA, the executive took "power entirely to control the legislation of congress."[344]

This is different from the Cole Memos, under which the CSA scheduling system remains in full effect.[345] Marijuana is not legal; it remains a Schedule I substance, and prosecutors may still bring charges under the schedule at their discretion.[346] As the Court of Appeals for the Tenth Circuit concluded, the 2013 Cole Memo explicitly refuses to provide a legal defense for a violation of the law and does not alter the

335 United States v. White, 928 F.3d 734, 743 (8th Cir. 2019).

336 2013 Cole Memo, *supra* note 197, at 4.

337 Texas v. United States, 809 F.3d 134, 179 (2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (per curiam).

338 *Id.* at 180.

339 *Id.*

340 *Id.*

341 *Id.* (citing 8 U.S.C. § 1229b(b)) (explaining the INA authorizes cancellation of removal and adjustment of status for aliens physically present in the country for "a continuous period of *not less than 10 years*" and "if 'removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States'" or an LPR, while DAPA removes these requirements and imposes new ones); *see also* Texas v. United States, 809 F.3d at 181–82 (explaining how DAPA contravenes the INA's work authorization goals and procedures).

342 Texas v. United States, 809 F.3d at 181–82.

343 *Id.* at 180–81.

344 Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838).

345 United States v. Griffith, 928 F.3d 855, 867 (10th Cir. 2019).

346 United States v. Canori, 737 F.3d 181, 184–85 (2d Cir. 2013).

Department of Justice's authority to enforce the law.[347] Appellate courts have universally held that the Justice Department's decision to prioritize certain types of prosecutions "unequivocally does not mean that some types of marijuana use are now legal."[348] And for the attorney general to reschedule marijuana, the attorney general must still follow the process established under the CSA.[349] Still, the CSA was never meant to be static.[350] The law itself provides the attorney general authority outside Congress to alter the scheduling of substances upon making certain findings.[351] Ultimately, the memos fall within the permissible bounds of discretion established by the statute and the CSA's overall framework remains intact.

The Cole Memos do not amount to improper executive lawmaking because they neither extinguish the historically recognized qualities of discretion, nor expand executive power beyond its traditionally recognized limits, nor usurp Congress's framework. The memos fit squarely within "the Executive Branch['s] exclusive authority and absolute discretion to decide whether to prosecute a case."[352] The DACA and DAPA programs do the exact opposite. They differ from the historically recognized qualities of discretion by providing ex ante relief to immigrants and eliminating front-line discretion. Front-line executive agents cannot make individualized determinations based on public interest. By creating these programs, the executive expands its power to confer substantive rights on parties and commandeers the lawmaking power of Congress, contradicting Congress's express framework in the INA. In warping the roles of the executive and Congress, the programs strike the exact concern of the nondelegation doctrine: the consolidation of lawmaking power in a single branch.[353] For these reasons, DACA and DAPA cannot be proper acts of prosecutorial discretion. They were created outside the deliberately cumbersome lawmaking process "calculated to restrain the excess of law-making" and, therefore, are improper acts of the executive.[354]

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347 *Griffith*, 928 F.3d at 867 (quoting 2013 Cole Memo, *supra* note 197, at 4).

348 *Canori*, 737 F.3d at 185.

349 *Id.* at 184.

350 *Id.* at 183; *see supra* Section I.D.1 (explaining the structure of the CSA allowing for the attorney general to reschedule or remove from the schedule substances that no longer pose identified risks).

351 21 U.S.C. § 811(a)(1).

352 *Canori*, 737 F.3d at 184–85 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

353 LOCKE, *supra* note 91, ¶ 141, at 71 ("[T]he legislature cannot transfer the power of making laws to any other hands. It was delegated to them from the people, and they aren't free to pass it on to others.").

354 THE FEDERALIST NO. 73 (Alexander Hamilton).

B. *Administrative Forum Selection*

For administrative forum selection, the first and third elements are straightforward. First, these decisions maintain the historically recognized qualities of a discretionary act.[355] The discretionary decision is a post hoc determination for parties already subject to an administrative investigation, and allows agency officials to make an individualized determination about how to bring a case.[356] On the third element, the enabling statutes explicitly provide this decision-making authority, so using it does not contravene the legislative framework.[357] Thus, the dispute surrounds the second factor: whether forum selections are committed to executive authority or a legislative prerogative that require an intelligible principle.[358]

Forum selection may be viewed as a criminal process determination.[359] Indeed, the *Jarkesy* dissent points to several analogous determinations, including a prosecutor's decision of what charge to levy and when to charge at all.[360] These determinations result in substantive effects—if a prosecutor brings a misdemeanor instead of a felony, it deprives the defendant of the right to a jury trial and removes the requirement for a grand jury.[361] But these effects are uniquely related to the criminal *process*. These process questions do not offend the separation of powers because they reflect "a complicated balancing of a number of factors which are peculiarly within [the executive's] expertise."[362]

Still, as the majority opinion in *Jarkesy* pointed out, administrative forum selection may stretch beyond the impact of traditional criminal process determinations because it allows the executive to deprive a party of access to an Article III court entirely.[363] With such an outsized impact, the court found, administrative forum selection cannot be compared to a discretionary decision about "whether to bring enforcement actions in the first place" or "where to bring a case among those district courts that might have proper jurisdiction."[364] For this reason, the court held, "[s]uch a decision—to assign certain actions to agency adjudication—is a power that Congress uniquely possesses."[365] Essentially, the court argued the substantive right at issue—access to an Article III court—cannot be

355 *See supra* Section II.A.

356 Jarkesy v. SEC, 34 F.4th 446, 459 (5th Cir. 2022), *aff'd and remanded,* 144 S. Ct. 2117 (2024).

357 Chester, *supra* note 219.

358 *Jarkesy*, 34 F.4th at 473–75 (Davis, J., dissenting).

359 *See supra* Section II.B.

360 *Jarkesy*, 34 F.4th at 474–75 (Davis, J., dissenting).

361 *See* Baldwin v. New York, 399 U.S. 66, 69–70 (1970).

362 Heckler v. Chaney, 470 U.S. 821, 831 (1985).

363 *Jarkesy*, 34 F.4th at 461–62.

364 *Id.*

365 *Id.* at 462 (citing Crowell v. Benson, 285 U.S. 22, 50 (1932)).

deprived by the agency alone.[366] Congress must address the issue.[367] Thus, the majority would require the same intelligible principle any other delegation requires.[368] Congress cannot merely provide options for adjudication, it must provide a "principle by which to exercise that power."[369]

But because the court underestimated the executive's inherent power over process determinations, it erred in demanding Congress provide more than merely options for adjudication. Congress's role is narrow in an area of inherent executive power, and the executive's discretion is broad.[370] The decision to bring an action through administrative adjudication certainly implicates substantive rights—the party loses access to all Article III safeguards.[371] But these substantive rights are inherently tied to a process determination authorized by Congress.[372] Criminal process determinations are committed to the executive.[373] In *Batchelder*, the Court found that "[h]aving informed the courts, prosecutors, and defendants of the permissible punishment alternatives . . . , Congress has fulfilled its duty."[374]

Thus, the executive is not determining an individual's eligibility for substantive rights; the executive is merely "fill[ing] up the details" of a law based on the options provided by Congress[375]—an inherent authority of the executive.[376] As Justice Gorsuch noted in *Gundy*,[377] the executive may "resolve even highly consequential details," but only when Congress prescribes the substantive rule guiding the executive's enforcement.[378] Thus, putting aside constitutional and policy-driven concerns about administrative adjudication, once Congress has informed an agency of the option to assign certain actions to agency adjudication, Congress has fulfilled its duty.[379] Then, the executive has prosecutorial discretion.[380]

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366 *Id.* at 461.

367 *Id.* (citing INS v. Chadha, 462 U.S. 919, 952 (1983)).

368 *Id.* at 462.

369 *Jarkesy*, 34 F.4th at 462.

370 *See supra* Section II.B.

371 *Jarkesy*, 34 F.4th at 461–62.

372 *Id.* at 462.

373 *See* United States v. Batchelder, 442 U.S. 114, 126 (1979).

374 *Jarkesy*, 34 F.4th at 474 (Davis, J., dissenting) (quoting *Batchelder*, 442 U.S. at 126).

375 Gundy v. United States, 558 U.S. 128, 157–58 (2019) (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 31, 43 (1825)).

376 *See id.*

377 *See supra* Section I.C; *Gundy*, 558 U.S. at 169 (Gorsuch, J., dissenting).

378 *Gundy*, 558 U.S. at 169 (Gorsuch, J., dissenting).

379 *See Batchelder*, 442 U.S. at 126; *see also* Crowell v. Benson, 285 U.S. 22, 50 (1932).

380 Jarkesy v. SEC, 34 F.4th 446, 475 (5th Cir. 2022) (Davis, J., dissenting), *aff'd and remanded,* 144 S. Ct. 2117 (2024).

Therefore, administrative forum selection does not surpass the bounds of prosecutorial discretion. With proper congressional authorization, the executive has authority to execute the law, including by deciding among congressionally provided options. Consequently, administrative forum selection authorized by Congress does not amount to improper lawmaking even when the decision touches upon substantive rights.

Recent executives have not been shy about taking significant and consequential actions in the name of prosecutorial discretion.[381] This trend has only grown in the face of congressional stagnation.[382] Through assessing if an action (1) maintains the historically recognized qualities of a discretionary act, (2) is traditionally committed to executive authority, and (3) aligns with the enabling legislation's overall framework, courts can determine if an action truly passes from prosecutorial discretion into the realm of improper executive lawmaking.

Conclusion

Prosecutorial discretion represents a careful balance of executive and legislative authority. The balance maintains the president's principal authority over administration while maintaining the legislature's principal authority over lawmaking. As the revitalization of the nondelegation doctrine reins in executive actions that pushed the boundaries of discretionary authority, the line between improper executive lawmaking and proper prosecutorial discretion is coming back to light.

The history of executive power reveals the importance of keeping prosecutorial discretion truly discretionary and post hoc, as the nolle prosequi does. For if the executive can expand discretion to rewrite or dispense entirely with the law, the abuses the Glorious Revolution sought to repel may wash up on U.S. shores. Indeed, the analysis shows DAPA and DACA resemble suspension more than discretion. With this history in mind, acts of prosecutorial discretion must (1) maintain the historically

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[381] Recently, the Department of Justice issued a charging memorandum for all federal prosecutors urging them to take steps to "promote the equivalent treatments of crack and powder cocaine offenses" based on the Justice Department's support for legislation that would remove the current sentencing disparity enacted by Congress. *See* Memorandum from Merrick Garland, Att'y Gen., Off. of Att'y Gen., to all fed. prosecutors, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* (Dec. 16, 2022), https://perma.cc/C4EQ-R6P6. The memo sparked outcry from Senators actively working on legislation to address the disparity, with Senator Chuck Grassley claiming "our nation's chief law enforcement official is pushing his subordinates to flagrantly disregard our laws. The first duty of the Department of Justice is to faithfully execute the laws passed by Congress." Press Release, Sen. Chuck Grassley, Grassley Statement on Justice Department's Usurpation of Legislative Authority, Disregard for Statutes as Written on Cocaine Prosecutions (Dec. 16, 2022), https://perma.cc/4UEV-5TER.

[382] Coglianese & Yoo, *supra* note 14, at 1590.

recognized qualities of a discretionary act, (2) be traditionally committed to executive control, and (3) align with the enabling legislation's overall framework.

Prosecutorial discretion originated from the Take Care Clause to allow the executive and its agents to represent the "will of the nation" and reject rigidity that dilutes trust in the justice system.[383] As the courts signal a return to strict enforcement of the separation of powers, separating and protecting prosecutorial discretion is as important to protecting liberty as combatting improper executive lawmaking. Only when each branch properly operates within its constitutional sphere of authority can the nation combat the accumulation of power in one branch that Madison pronounced "the very definition of tyranny."[384]

383 Krauss, *supra* note 29, at 18 (citing 10 ANNALS OF CONG. 615 (1800)).

384 THE FEDERALIST NO. 47 (James Madison).