

## Tax Law Nonenforcement

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### Abstract

The Obama Administration has engaged in what some have characterized as an “unprecedented use of executive power” not to enforce certain laws, including immigration laws, federal marijuana laws, and even parts of the Obama Administration’s own Patient Protection and Affordable Care Act. In response to this nonenforcement, commentators have begun asking what would have happened if a President Romney, or a future Republican President, decided not to enforce the tax laws. Could a President decide not to enforce the estate tax, the income tax with respect to millionaires, or the income tax for anyone who has already paid a specified percentage of income in taxes? In answering this question, constitutional scholars have suggested that the President cannot declare categorical, or complete, prospective nonenforcement of some aspect of the law. Recent tax literature examining IRS pronouncements that it will not enforce particular aspects of the tax law has also determined that categorical tax law nonenforcement is troublesome from the perspective of the rule of law.

What has been missing in the existing discussion, especially in the preoccupation with flashy, and relatively infrequent, presidential nonenforcement of the tax law, is a broad based examination of what tax law nonenforcement looks like at the agency level and an accompanying examination of categorical nonenforcement through the lens of the legitimacy of the administrative state. And yet, focusing on agency directed nonenforcement through this lens is important. Agencies like the IRS must make nonenforcement decisions on a daily basis, which decisions inevitably end up shaping the law on the ground in important ways. A long and extensive literature regarding the legitimacy of the administrative state seeks to justify agencies making significant decisions about rights and obligations under the law, and this literature offers important insights about how certain nonenforcement decisions may increase or decrease the legitimacy of the agency’s nonenforcement. This Article brings this literature to bear by applying theories regarding the legitimacy of the administrative state to tax law nonenforcement directed by the IRS. This examination reveals that, for a number of reasons, categorical nonenforcement may actually help legitimate the tax law nonenforcement that is inevitably going to occur at the hands of the IRS. This conclusion underscores how agency directed

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nonenforcement and theories of the legitimacy of the administrative state should be a bigger part of the analysis in the broader, and ongoing, discussions regarding executive nonenforcement of the law.

## I. Introduction

The Obama Administration has engaged in what some have characterized as an “unprecedented use of executive power”<sup>2</sup> not to enforce certain laws, including immigration laws, federal marijuana laws, and even parts of the Obama Administration’s own Patient Protection and Affordable Care Act.<sup>3</sup> In response to these uses of nonenforcement, commentators have begun asking what would have happened if a President Romney, or a future Republican President, decided not to enforce the tax laws. Could a President decide not to enforce the estate tax, the income tax with respect to millionaires, or the income tax for anyone who has already paid a specified percentage of income in taxes?<sup>4</sup>

In answering this question, constitutional scholars have suggested that the President cannot declare categorical, or complete, prospective nonenforcement of some aspect of the law. Even commentators supportive of the Obama Administration’s initiatives have suggested as much, drawing a distinction between setting low enforcement priorities and categorical nonenforcement, and arguing that the former is permissible, while the latter, by negative implication, is not. Constitutional scholars have drawn a number of other distinctions to try to explain when nonenforcement is permissible, explaining that it may be permissible if motivated by enforcement resource limitations but not if it is motivated by policy, and it may be permissible if time limited. The implication of all of these distinctions is a presumption against categorical nonenforcement. Recent tax literature examining IRS pronouncements that it will not enforce very particular aspects of the tax law has also determined that categorical tax law nonenforcement is troublesome from the perspective of the rule of law.

What has been missing in the existing discussion, especially in the preoccupation with flashy, and relatively infrequent, presidential nonenforcement of the tax law, is a broad based examination of what tax law nonenforcement looks like at the agency level and an accompanying examination of categorical nonenforcement through the lens of the legitimacy of the administrative state. And yet,

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<sup>2</sup> See, e.g., Ben Shapiro, *Obama’s Criminal Activity on Immigration*, <http://www.breitbart.com/Big-Government/2014/06/09/Obamas-Criminal-Activity-on-Immigration> (June 10, 2014).

<sup>3</sup> For more details regarding these instances, see *infra* \_\_\_\_.

<sup>4</sup> See, e.g., Jonathan Chait, *Obama’s Immigration Plan Should Scare Liberals Too*, N.Y. MAG., Aug. 11, 2014 (asking, “What if a Republican President announced that he would stop enforcing the payment of estate taxes?”); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of the Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (asking “Can a President who wants tax cuts that a recalcitrant Congress will not enact decline to enforce the income tax laws?”); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 688 (2014) (asking whether a President lawfully could decline to enforce the capital gains or estate taxes).

focusing on agency directed nonenforcement through this lens is important. Agencies like the IRS must make nonenforcement decisions on a daily basis, which decisions inevitably end up shaping the law on the ground in important ways. A long and extensive literature regarding the legitimacy of the administrative state seeks to justify agencies making significant decisions about rights and obligations under the law, and this literature offers important insights about how certain nonenforcement decisions may increase or decrease the legitimacy of the agency's nonenforcement. This Article brings this literature to bear by applying theories regarding the legitimacy of the administrative state to tax law nonenforcement directed by the IRS. This examination reveals that, for a number of reasons, categorical nonenforcement may actually help legitimate the tax law nonenforcement that is inevitably going to occur at the hands of the IRS. This conclusion underscores how agency directed nonenforcement and theories of the legitimacy of the administrative state should be a bigger part of the analysis in the broader, and ongoing, discussions regarding executive nonenforcement of the law.

Reaching this conclusion requires examining at a detailed level the IRS's constant practice of nonenforcement. The IRS is tasked with administering many more tax laws as against many more taxpayers than its resources allow. As a result, like many other administrative agencies as well as prosecutors, the IRS must choose which tax laws to enforce or which taxpayers to enforce such laws against at any point in time. The IRS can make such decisions in a variety of ways. In the most straightforward fashion, the IRS can decide to engage in complete, prospective nonenforcement of certain aspects of the tax law for a period of time or until future notice ("categorical nonenforcement"). Alternatively, the IRS may decide to focus enforcement resources on particular tax issues or taxpayers ("setting priorities"). Finally, the IRS may nominally maintain a policy of enforcing all tax laws, leaving discretion to individual revenue agents to make enforcement decisions ("case-by-case" decisionmaking). In a world of insufficient enforcement resources, each of these methods of allocating enforcement resources results in nonenforcement of some aspects of the tax law, as against at least some taxpayers.

Moreover, the IRS must make at least some high-level decisions regarding tax law nonenforcement. As criminal and administrative law scholars have recognized for decades, high-level enforcement policies can be an essential means of rationally and transparently directing scarce enforcement resources toward the most pressing priorities. This is certainly true in the tax context as well, in which different types of taxpayers, vastly different costs / yields for different taxpayer types and tax issues, and a sprawling administrative agency all necessitate at least some amount of high-level, systematic control of limited enforcement resources. As a result, the IRS must rely on at least some

amount of either categorical decisionmaking or setting priorities to direct enforcement resources. The consequence is that nonenforcement of the tax law will not be spread evenly among taxpayers, but rather will be systematically concentrated on certain taxpayers and tax issues.

Accepting the above as the tax law nonenforcement landscape that is actually occurring every day on the ground at the hands of the IRS, the question is whether theories of agency legitimacy offer any reasons to support the IRS engaging in categorical tax law nonenforcement. This question is rooted in a deeper question about the legitimacy of the administrative state. As administrative law scholars have wrestled with for decades, administrative agencies play an uncomfortable role in United States constitutional democracy because their expansive role in the government is not contemplated in the Constitution and they make significant policy decisions about rights and obligations under the law even though they are not elected to do so. Administrative law scholars have developed a number of theories to help explain how agencies can legitimately play this role. Three prominent theories regarding the legitimacy of the administrative state, which will be set forth in further detail in this Article, are the political accountability theory, the civic republican theory, and the nonarbitrariness theory.

Applying these theories of agency legitimacy to the realities of tax law nonenforcement reveals that, in some circumstances, categorical nonenforcement may actually increase the legitimacy of the IRS's inevitable, systematic nonenforcement of the tax law. Categorical nonenforcement can serve as a particularly salient means of communicating enforcement decisions, which may lead to greater political accountability, thereby increasing agency legitimacy under the political accountability theory. Also owing to its ability to make enforcement decisions particularly salient, categorical nonenforcement may yield greater public deliberation, thereby increasing agency legitimacy under the civic republican theory. Categorical nonenforcement also can entrench high level decisions about nonenforcement, both in the existing, as well as in future tax administrations, which may yield more public-regarding law and thereby increase agency legitimacy under the nonarbitrariness theory. Categorical nonenforcement of course may not always be used in a way that increases agency legitimacy. At its worst, categorical nonenforcement may be used as a means of providing private giveaways in an unaccountable fashion. The claim of this Article is not that categorical nonenforcement always increases the legitimacy of an agency's inevitable nonenforcement, but rather that in some cases it may, and that viewing nonenforcement through the lens of agency legitimacy can offer new and nonintuitive insights.

While some of the nonenforcement discussed in this Article might be explained and justified by constitutional scholars as motivated by enforcement resource limitations, this Article does not rely on

the lens of constitutional law or the distinction it has made between nonenforcement motivated by policy and nonenforcement motivated by enforcement resource limitations. This Article does not do so because, as will be fleshed out in some detail through examples in this Article, this distinction underestimates the extent to which policy and enforcement resource limitations are going to be intertwined as reasons for making enforcement allocation decisions. Nor will this Article rely on the rule of law as a lens for evaluating nonenforcement, because, as will be discussed, the rule of law lens is also relatively indeterminate, failing to provide a clear guide regarding nonenforcement policies.

To be sure, the lens of agency legitimacy set forth in this Article does not provide a crystal clear alternative for determining when nonenforcement should be permissible. But it offers a new view that should be a bigger part of the analysis. Like the IRS, agencies across the federal government must decide on a daily basis when not to enforce the law. Their decisions substantially shape the law on the ground, raising questions about whether they are doing so in a legitimate way. The lens of administrative legitimacy applied in this Article is essential in answering these questions and therefore should be central to the ongoing conversation regarding executive nonenforcement of the law.

## II. Existing Analyses of Categorical Nonenforcement

Executive nonenforcement is a hot-button issue. Constitutional scholars have recently engaged in examinations of high-profile executive nonenforcement by focusing on presidential nonenforcement, such as: (1) the Obama Administration's Deferred Action for Childhood Arrivals "DACA" program, which dictated how the Department of Homeland Security ("DHS") should exercise its prosecutorial discretion with respect to the immigration laws for certain young immigrants who meet various requirements,<sup>5</sup> (2) its guidance regarding how the federal government should exercise its prosecutorial discretion with regard to the enforcement of federal marijuana laws,<sup>6</sup> and (3) various announcements that enforcement

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<sup>5</sup> See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>6</sup> See, e.g., Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; Memorandum from James M. Cole, Deputy Att'y Gen., Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), *available at* <http://perma.cc/M5A9-6A8C>; Memorandum from David W. Ogden, Deputy Att'y Gen., Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1-2 (Oct. 19, 2009), *available at* <http://perma.cc/JEV5-E7AQ>.

of certain provisions of the Patient Protection and Affordable Care Act<sup>7</sup> would be delayed as a means of providing transition relief for various requirements of the Act.<sup>8</sup> President Obama certainly is not the first President to make deliberate use of nonenforcement. As scholars have pointed out, prior presidential administrations have also systematically underenforced or not enforced various laws.<sup>9</sup> In any event, the recent constitutional scholarship has focused on executive nonenforcement largely based on the assumption that such nonenforcement is occurring at the direction of the President.

Through such analyses, constitutional scholars have cast doubt on the legitimacy of categorical nonenforcement of the law. Using various methodologies such as examinations of the Take Care Clause,<sup>10</sup> normative and structural analyses of the Constitution, and examinations of historical backgrounds of the Constitution prior to, at the time of, and after the Founding, constitutional scholars have suggested, to varying degrees, that while that failure to execute the law in certain cases may be excusable, complete, prospective nonenforcement is, at least at first blush, an unconstitutional aggrandizement of executive power.<sup>11</sup> To be sure, constitutional scholars have acknowledged that

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<sup>7</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 19 U.S.C., 20 U.S.C., 26 U.S.C. & 42 U.S.C.).

<sup>8</sup> Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs. (Nov. 14, 2013), *available at* <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf>; I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013); Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (Feb. 12, 2014).

<sup>9</sup> *See, e.g.*, Price, Enforcement Discretion, *supra* note \_\_, at 674, 686; Michael Sant' Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 355 (2014).

<sup>10</sup> U.S. Const. art. 2 § 3 (dictating that the President “shall take Care that the Laws be faithfully executed.”).

<sup>11</sup> Constitutional scholars have drawn the line in different places in reaching this conclusion. For instance, some scholars have argued that a “deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty.” Delahunty & Yoo, *Dream On*, *supra* note \_\_, at 785. Others have determined that there is “a presumption against presidential authority to license legal violations or categorically abstain from enforcement.” Price, Enforcement Discretion, *supra* note \_\_, at 689. Indeed, even those supportive of President Obama’s policies have implicitly cast doubt on the legitimacy of categorical nonenforcement by claiming that the Obama Administration has not engaged in categorical nonenforcement, but rather simply was “mak[ing] a list of priorities and devot[ing] its attention to law violations that, in its opinion, are the most serious.” Eric A. Posner, *Obama Is Legally Allowed to Enforce – or Not Enforce – the Law*, <http://www.newrepublic.com/article/118951/obamas-immigration-policy-lawful-he-can-enforce-what-he-wants> (Aug. 3, 2014); *see also* Brian Beutler, *The Liberal Fear of Obama’s Executive Action is Irrational*, NEW REPUBLIC, Aug. 12, 2014, <http://www.newrepublic.com/article/119057/obama-immigration-policy-critics-have-irrational-fear-precedent> (responding to Jonathan Chait in defense of President Obama’s rumored immigration policies by explaining that “Obama isn’t proposing to ‘suspend’ immigration law,” but rather is merely “proposing to direct resources toward enforcing the law against higher-priority offenders); Editorial Board, *Mr. Obama, Your Move*, Aug. 10, 2014, at SR10 (defending President Obama’s rumored immigration policy in part by explaining that using “the tools at hand to focus on high-priority targets — felons, violent criminals, public-safety and national-security threats — and to let many others alone would be a rational and entirely lawful exercise of discretion”); Sant’ Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_, at 396 (explaining that, through DACA, “the

certain circumstances may excuse nonenforcement and here they have drawn several other distinctions to explain how certain types of nonenforcement are more acceptable than others. First, scholars have reached a near consensus that policy based nonenforcement is impermissible, whereas nonenforcement resulting from enforcement resource limitations may be permissible.<sup>12</sup> Second, some scholars have suggested that time limited nonenforcement may be more permissible than nonenforcement that is not so limited.<sup>13</sup> In any event, by focusing on presidentially directed nonenforcement, constitutional

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Administration has identified a category of individuals as low priorities for removal under the Act and allocated the Executive's resources elsewhere.”).

<sup>12</sup> See, e.g., Rachel E. Barkow, *Clemency and the Unitary Executive* 39 (NYU Pub. Law & Legal Theory Research Paper Series No. 14-38), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2484586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484586) (“One consideration widely acknowledged as [a legitimate reason for nonenforcement] is a lack of resources.”); Mary M. Cheh, *When Congress Commands a Thing To Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 265 (2003) (“Politically inspired inaction is of special concern because it presents a direct challenge to the principle of legislative supremacy, the cornerstone of Marbury’s separation of powers construct.”); Delahunty & Yoo, *Dream On*, *supra* note \_\_, at 850 (“At the very least, respect for the constitutional mandate to enforce the laws implies that the Executive must shoulder the burden of persuading the public and Congress that a major nonenforcement decision such as this are due to spending constraints and considerations of efficiency; and conclusory statements to that effect, without detailed documentation and careful cost-benefit analysis, do not discharge that burden.”); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1216-17 (2014) (“When a president chooses to enforce a law below the statutory baseline, the presumption is that he has engaged in impermissible unilateral policymaking. But this presumption is rebuttable: there are many reasonable excuses for a failure to act. For example, resource constraints might require that the president under-enforce some laws, even below statutory baselines.”); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 119 (2000) (explaining that the President can “avoid the conclusion that his oath requires assuring faithful execution of such laws only by demonstrating one of the ordinary reasons for preferring the implementation of other laws to this one” including “the absence of resources.”).

Love and Garg take a slightly different view on this point than many others, in that they suggest that policy goals for nonenforcement are problematic to the extent that the President chose inaction to promote “his own policy goals at the expense of Congress’s.” Love & Garg, *Presidential Inaction*, *supra* note \_\_, at 1220. As a result, Love and Garg conclude that certain inaction, such as the delayed enforcement with respect to the Patient Protection and Affordable Care Act, are not unconstitutional because they were “prompted by a belief that a reasonable delay would enhance the effectiveness of the law.” *Id.* at 1222.

The Article that has least subscribed to this distinction between impermissible policy based nonenforcement and permissible nonenforcement motivated by enforcement resource limitations is that of Professor Sant’ Ambrogio. In a recent article, Professor Sant’ Ambrogio discusses some of the benefits of what he calls an extra-legislative veto, which includes, among many other things, the President’s ability not to enforce the law. Sant’ Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_, at 361. Professor Sant’ Ambrogio discusses some of the deliberation enhancing benefits of such nonenforcement, which implicitly would apply even in the case of policy based nonenforcement. *Id.* at 386. However, like other constitutional scholars as of late, Professor Sant’ Ambrogio focuses mostly on Presidential nonenforcement and therefore does not formally set forth a framework of nonenforcement through the lens of agency legitimacy, or provide detailed examples or analyses of agency directed nonenforcement. This Article engages in this project.

<sup>13</sup> Professor Sant’ Ambrogio has also subscribed to this view, explaining that “an executive order should require formal enforcement discretion policies to be time limited and periodically reviewed to ensure that they continue



scholars have in broad strokes set forth a presumption that categorical nonenforcement, and in particular policy-based categorical nonenforcement or categorical nonenforcement that is not time limited, represents an inappropriate, constitutionally suspect exercise of executive power.

Indeed, this view is so dominant that it seems to have motivated and shaped the Obama Administration's own framing of its nonenforcement policies. In the context of DACA, for example, the memo announcing the program repeatedly emphasizes that it is simply a means of setting priorities, for instance by stating that the memo is meant to ensure that "our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities."<sup>14</sup> The memo even tries to eschew any sense that it sets forth a policy of categorical nonenforcement by stating that any relief from enforcement pursuant to the memorandum will be decided "on a case by case basis."<sup>15</sup> President Obama has also emphasized that "[t]his is not a permanent fix, but rather a temporary stop-gap measure . . . ."<sup>16</sup> Similarly, the memos regarding federal marijuana enforcement also repeatedly use the language of setting enforcement priorities, for instance by stating that the information "serves as guidance to Department [of Justice] attorneys and law enforcement to focus their resources and efforts" on "certain enforcement priorities that are particularly important to the federal government."<sup>17</sup> The memos additionally provide the caveat that "nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest,"<sup>18</sup> and that local offices should "continue to review marijuana cases for

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to be appropriate ways of enforcing the statute." Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_\_, at 403. Professor Posner has suggested that time limitations on nonenforcement make a difference, explaining that, "The president cannot suspend or change the law: When he leaves office, the law will remain the same as it was, and the next president will be free to enforce it or not." Posner, *Obama*, *supra* note \_\_\_.

<sup>14</sup> Memorandum from Janet Napolitano, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> Barack Obama, *A Nation of Laws and a Nation of Immigrants*, *TIME*, June 17, 2012, <http://ideas.time.com/2012/06/17/A-NATION-OF-LAWS-AND-A-NATION-OF-IMMIGRANTS/>.

<sup>17</sup> Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) 1-2, *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>18</sup> *Id.* at 4.

prosecution on a case-by-case basis . . . .”<sup>19</sup> For its part, the enforcement delays for various provisions of the Patient Protection and Affordable Care Act were clearly time limited.<sup>20</sup> By at the very least couching such policies in the language of setting priorities or time limitations, the Obama Administration has implicitly reflected the view that uncabined categorical nonenforcement is particularly suspect.

There is a separate, recent line of literature in the tax context that has focused on categorical nonenforcement by the IRS, although it has not been in conversation with the constitutional dialogue regarding presidential nonenforcement. Most notably, in a series of articles, Professor Zelenak has explored “customary deviations,” which he defines as, “an established practice of the tax administrators (the IRS and the Treasury Department) that deviates from the clear dictates of the Internal Revenue Code.”<sup>21</sup> Professor Zelenak describes customary deviations as distinct from “simple underenforcement of the law without any indication (beyond the mere underenforcement) that the IRS acquiesces in widespread noncompliance with the Code,”<sup>22</sup> making Professor Zelenak’s customary deviations akin to the categorical nonenforcement discussed in this Article.<sup>23</sup> Professor Zelenak concludes that “[t]o anyone who takes the rule of law seriously, it is troubling to contemplate that the Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code.”<sup>24</sup>

For now, this Article will not attempt to engage each of these lenses. Instead, after taking a broad-based look at what tax law nonenforcement looks like on the ground, at the hands of the IRS, and examining such nonenforcement through the lens of agency legitimacy, this Article will return to

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<sup>19</sup> Memorandum from David W. Ogden, Deputy Att’y Gen., Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1-2 (Oct. 19, 2009), available at <http://perma.cc/JEV5-E7AQ>.

<sup>20</sup> See *supra* note \_\_ (delineating all of the temporary relief as transitional and therefore time limited).

<sup>21</sup> Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 833 (2012); see also Lawrence Zelenak, *Up in the Air Over Taxing Frequent Flier Benefits: The American, Canadian, and Australian Experiences*, CAPITAL MARKETS L.J. (forthcoming), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6012&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6012&context=faculty_scholarship). Recently, Professors Abreu and Greenstein have responded to Professor Zelenak in a debate about whether Zelenak’s customary deviations are, in fact, just interpretations of the tax code. Alice G. Abreu & Richard K. Greenstein, *The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code* (Legal Studies Research Paper No. 2014-33) (forthcoming DUKE L.J. ONLINE 2014). This issue will be discussed at *infra* note \_\_. However, as will be discussed further, for the most part the distinction at the center of this debate is not central to the discussion in this Article.

<sup>22</sup> Zelenak, *Custom and the Rule of Law*, *supra* note \_\_, at 834.

<sup>23</sup> Indeed, Professor Zelenak focuses heavily on the example of frequent flier miles earned on business trips but paid for by the taxpayer’s employer but used for personal purposes. Zelenak, *Custom and the Rule of Law*, *supra* note \_\_, at 830-32.

<sup>24</sup> Zelenak, *Custom and the Rule of Law*, *supra* note \_\_, at 851.

examine how these existing lenses may or may not help evaluate the phenomenon. However, for now it is important to emphasize that the existing analyses offer particular lenses onto the phenomenon of categorical nonenforcement. Constitutional law scholars have looked at categorical nonenforcement through a constitutional lens. As a result, they have tried to use modes of constitutional analysis such as textual, historical, or structural limitations on the executive and legislative powers to analyze categorical nonenforcement. Professor Zelenak has instead relied on the rule of law as a means of thinking about the phenomenon. Whether such analyses should dominate depends ultimately on how useful the lenses are. Do the constitutional analyses really tell us something meaningful, and necessarily true from a constitutional perspective, about categorical nonenforcement? Does the rule of law dictate a particular outcome with respect to categorical nonenforcement? This Article will return to these questions after first setting up the background and analysis under an alternative lens, agency legitimacy.

### **III. Inevitable, Systematic Tax Law Nonenforcement at the Hands of the IRS**

It is all well and good to imagine a President Romney slashing the income tax by not enforcing the tax law. But, this, of course is an imaginary exercise (unless Romney experiences an unexpected reversal in political fortunes). What about reality? What does tax law nonenforcement look like in reality? To delve into reality, let us begin by indulging for a moment in another imaginary exercise. Imagine that, at the Hogwart's School of Witchcraft and Wizardry, Hermione Granger faces the following question on a final exam in her Muggle (*i.e.*: non-wizard human) studies class:<sup>25</sup> Would the following items have to be included in income for U.S. tax purposes: wages received by an employee of a large business, wages received by a nanny paid in cash, payments for services made to a large partnership by a subsidiary partnership, and frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes? Hermione is an extremely diligent student particularly well known for her attention to detail. After doing a quick search to find the source of U.S. tax law, Hermione turns to the tax code enacted by Congress. The governing code section dictates that "gross income means all income from whatever source derived."<sup>26</sup> Being the excellent student that she is, Hermione confirms that the relevant Treasury Regulations affirm and expand on Congress's already

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<sup>25</sup> Those who are not familiar with Hermione Granger and the Hogwart's School of Witchcraft and Wizardry can read the Harry Potter stories or find my son, who will recount them endlessly.

<sup>26</sup> I.R.C. § 61.

expansive definition,<sup>27</sup> and even finds landmark cases interpreting the governing code section such as *Glenshaw Glass*, which inclusively describes gross income as any “accessions to wealth, clearly realized . . . over which the taxpayers have complete dominion.”<sup>28</sup> Hermione, having done an impressive amount of due diligence, answers that all of the items have to be included in income for U.S. tax purposes.

Unfortunately, Hermione would be wrong. Well, not wrong, exactly. Technically, under the Code and all binding legal authorities, all of the items listed should be considered income for tax purposes. However, a particularly sophisticated answer to this tax question would have to parse what is meant by “has to be included in income for U.S. tax purposes,” and whether this is a technical or practical question. Despite the technical requirement of inclusion of each item, in practice some, more than others, are likely to be included in income or be subject to challenge as a result of non-inclusion in income. As a result, taxpayers making a practical decision about whether or not each such item “has to be included in income for U.S. tax purposes” might come to different answers for the different items.

After being docked some points for a technically correct but practically incomplete answer, Hermione, in a perfectionist’s rage, would demand to know the source of the disconnect between the law on the books and the law in practice. After being informed by a senior wizard that the Internal Revenue Service (“IRS”) is the enforcement agency responsible for administering the tax law, and that the administration of the tax law provides important texture to the law in practice, Hermione would quickly look for the mission statement of the IRS. Finding that the heart of such statement is the IRS’s mission to “enforce the law with integrity and fairness to all,”<sup>29</sup> Hermione would collapse in confusion. How can it be that the agency responsible for enforcing the tax law actually is responsible for the systematic *nonenforcement* of various aspects of the tax law on the books?

What poor Hermione couldn’t have understood from her research is that the tax law on the books is distinct from the tax law on the ground. The tax law on the books, which Hermione found all too well, includes numerous statements of varying levels of authority of what the tax law is. These are

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<sup>27</sup> Treas. Reg. § 1.61-1(a) (“Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, § 1.61-14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.”).

<sup>28</sup> *Commissioner v. Glenshaw Glass*, 438 U.S. 426, 431 (1955).

<sup>29</sup> *The Agency, Its Mission, and Statutory Authority*, <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> (last visited Sept. 24, 2014).

issued by Congress, the Treasury Department and the IRS, and courts. In tax, as in other areas of the law, Congress has the power to legislate the tax law,<sup>30</sup> and Congress primarily does so by issuing the tax law that comprises the Internal Revenue Code (“Code”).<sup>31</sup> Congress has delegated to the Secretary of the Treasury the authority to “prescribe all needful rules and regulations for the enforcement of [the Code].”<sup>32</sup> The Treasury Department therefore issues Treasury Regulations interpreting the Code, and the IRS Office of Chief Counsel participates by initially drafting Treasury Regulations.<sup>33</sup> Federal courts (including district courts, the Tax Court, the Court of Federal Claims, courts of appeals, the Supreme Court, and, to some extent, bankruptcy courts) weigh in on and shape the tax law by interpreting the Code and Treasury Regulations in the context of tax controversies.<sup>34</sup> The IRS also issues statements of procedure and its own views of various aspects of the tax law in the Internal Revenue Bulletin, which is comprised of various guidance documents such as revenue rulings, revenue procedures, notices, letter rulings, and a number of other forms of rulings and internal advice.<sup>35</sup>

A naïve observer of the tax law, like our fictional Hermione, may look only to the tax law on the books to determine what the tax law is. For instance, in the context of determining whether various items have to be included in income for U.S. tax purposes, Hermione looked to the Code, Treasury Regulations, and case law. Under these authoritative sources, all of the items Hermione researched would be included in income. With respect to wages received by an employee of a large business, wages received by a nanny paid in cash, and payments for services made to a large partnership by a

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<sup>30</sup> U.S. CONST. art. I, § 1.

<sup>31</sup> The Internal Revenue Code is Title 26 of the United States Code, and the vast majority of tax law can be found here. Some tax law can be found outside of the Internal Revenue Code, scattered in other titles of the United States Code.

<sup>32</sup> I.R.C. § 7805(a).

<sup>33</sup> LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES* § 1.03 (3d ed. 2009); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with the Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1729 n. 6 (2007); see I.R.S., Internal Revenue Manual § 32.1.1.4.4, (Aug. 11, 2004), <http://www.irs.gov/irm>.

<sup>34</sup> LEDERMAN & MAZZA, *supra* note 33, at § 20.02[C].

<sup>35</sup> See Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Interpretation*, 2009 MICH. ST. L. REV. 239, 242-52 (describing Internal Revenue Bulletin guidance); MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE*, ¶ 3.04[6] (2013); Scholars and courts alike are currently very focused on to what extent this informal Internal Revenue Bulletin guidance should be considered to have the force of law. See, e.g., *Mayo Found. for Educ. & Research v. U.S.*, 131 S. Ct. 704 (2011) (explaining the importance of the force of law determination for tax authority); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013) (analyzing force of law question for temporary Treasury Regulations and Internal Revenue Bulletin documents). This Article does not focus on this question. To the extent such guidance does have the force of law, it should be included in a discussion of the tax law on the books. To the extent such guidance does not have the force of law, taxpayers may still be well-advised to pay attention to it, even though it does not quite constitute the tax law on the books.

subsidiary partnership, the Code section defining gross income (as “all income from whatever source derived”<sup>36</sup>) controls, and there is no colorable claim for an exclusion. While there might be some claim that the frequent flier miles earned on business trips paid for by the taxpayer’s employer but used for personal purposes qualify for an exclusion from gross income as a “de minimis fringe,”<sup>37</sup> the general consensus of the many scholars that have weighed in on the question is that this exclusion does not apply and /or that the miles constitute gross income,<sup>38</sup> and the IRS has not claimed otherwise.<sup>39</sup>

And yet, despite the common, affirmative answer to whether all such items have to be included in income for U.S. tax purposes under the tax law on the books, the practice on the ground is disparate. Wages received by an employee of a large business are subject to both information reporting and withholding, meaning that the employer is required to report the wages as income on a Form W-2,

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<sup>36</sup> I.R.C. § 61.

<sup>37</sup> De minimis fringe “means any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer’s employees) so small as to make accounting for it unreasonable or administratively impracticable.” I.R.C. 132(e)(1).

<sup>38</sup> For a thorough cataloguing of the commentators reaching the conclusion that such frequent flier miles are includable in gross income, see Zelenak, *Up in the Air*, *supra* note \_\_, at 4-5 n. 8.

<sup>39</sup> The IRS has indicated that it will not “assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer’s business or official travel,” which is different than claiming that an exclusion from gross income applies. I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621. For discussion of this point, see Zelenak, *Up in the Air*, *supra* note \_\_, at 9; Zelenak, *Custom and the Rule of Law*, *supra* note \_\_, at 831-32. A recent article takes a different point of view. See Abreu & Greenstein, *The Rule of Law*, *supra* note \_\_ (exploring what Professor Zelenak treats as customary deviations as, instead, necessary interpretations of the Code). This Article does not turn on whether one accepts the view of Professors Abreu and Greenstein that the frequent flier miles decision by the IRS was an interpretation of gross income or the view of Professor Zelenak that it was a decision not to enforce (although this Article implicitly adopts the latter view). Rather, this Article focuses on the discretionary decisions which, under either view, the IRS makes with respect to the tax law and which shape the tax law in practice. Indeed, in this respect, this Article begins by taking a broader view than both Professors Abreu and Greenstein and Professor Zelenak, because this Article views unambiguous underenforcement and nonenforcement as a result of resource constraints together with decisions that are arguably pro-taxpayer interpretations. Cf. Abreu & Greenstein, *The Rule of Law*, *supra* note \_\_, at 23 (acknowledging that, like Professor Zelenak, they are not entertaining underenforcement or nonenforcement because of enforcement resources allocation). Starting from a very broad view of how the IRS inevitably makes all kinds of discretionary decisions that shape the tax law on the ground, this Article asks whether it is ever legitimate for the IRS to engage in categorical nonenforcement with respect to the tax law. While Professors Abreu and Greenstein might argue against the characterization of some of the examples in this Article as categorical nonenforcement, rather than as interpretations of the Code (such as, for instance, the frequent flier miles example), they presumably would agree with others (such as, for instance, a hypothetical IRS decision not to enforce the income tax as to large partnerships until a change in the law is made). The broader question of the legitimacy of categorical nonenforcement remains despite any potential questions about whether certain discretionary IRS decisions are best characterized as interpretive or as decisions not to enforce. Indeed, the dispute between Professors Abreu and Greenstein and Zelenak as to what is interpretive and what is nonenforcement suggests the utility of viewing together all discretionary decisions of the IRS that affect the tax law on the ground, as part of a broad interrogation of how the IRS can make legitimate tax enforcement decisions.

withhold taxes with respect to such income, and pay such taxes directly over to the IRS.<sup>40</sup> For a variety of reasons, large employers by and large comply with the information reporting and withholding requirements.<sup>41</sup> As a result, taxpayers receiving wages from large employers nearly always actually include such wages in income.<sup>42</sup> Wages received in cash by a nanny are also subject to information reporting and withholding regimes, although they are not as encompassing as those that apply in the case of large employers.<sup>43</sup> Regardless, for a variety of reasons, employers of nannies typically do not comply with these rules.<sup>44</sup> Enforcement of the rules and of the accompanying requirement of inclusion of the wages in income therefore is quite expensive and any IRS enforcement is sporadic at best.<sup>45</sup> The result is widespread failure to include such wages in income.<sup>46</sup> With respect to the payments for services received by a large partnership from a subsidiary partnership, recent evidence reveals that the

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<sup>40</sup> For the rules regarding collection of income tax by the employer, see I.R.C. § 3402.

<sup>41</sup> If the employer is not tax-exempt, the payments of the wages are typically deductible expenses to the employer, providing an incentive to report the wages correctly. Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 *FORDHAM L. REV.* 1733, 1739 (2010). Large employers also have bookkeeping systems in place and are typically regulated in many other ways that help ensure compliance. *Id.* at 1740. Finally, high norms of compliance within the group of large businesses may help promulgate compliance. *Cf.* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 *U. PA. L. REV.* 1643, 1674-75 (1996) (exploring tipping properties of norms); Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 *VAND. L. REV.* 77, 118 (2007) (discussing norm cascades); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 *OHIO ST. L.J.* 1453, 1509-10 (2003) (discussing norm tipping in the tax context); Leigh Osofsky, *Concentrated Enforcement*, Fla. Tax Rev. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366431](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366431) (manuscript at 28-29) (discussing concentrated enforcement as a means of activating norms).

<sup>42</sup> INTERNAL REVENUE SERV., OVERVIEW OF TAX GAP FOR TAX YEAR 2006, [http://www.irs.gov/pub/newsroom/overview\\_tax\\_gap\\_2006.pdf](http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf) [hereinafter OVERVIEW OF TAX GAP] (net misreporting percentage of 1% for income subject to substantial information reporting and withholding).

<sup>43</sup> Income tax withholding is generally permissible but not required. *See* Treas. Reg. § 31.3401(a)(3)-1(a)(1). Employment tax withholding applies if wages exceed a threshold. *See* I.R.C. 3121(a)(7)(B). Various other simplifications have been put in place in this context, relative to the large employer example. *See* Social Security Domestic Employment Reform Act (the “Reform Act”) of 1994, P.L. 103-387, 108 Stat. 4071 (1994) (allowing, for instance, reporting of a domestic employee’s employment taxes on a domestic employer’s own Schedule H).

<sup>44</sup> For a discussion of reasons for noncompliance, see, for example, Debra Cohen-Whelan, *Protecting the Hand that Rocks the Cradle: Ensuring the Delivery of Work Related Benefits to Child Care Workers*, 32 *IND. L.J.* 1187, 1193-1201 (1999). Reasons for noncompliance include, among other things, a widespread norm of noncompliance, the expense of noncompliance, difficulty in finding employees willing to comply, the complexity of compliance, and the lack of deduction for the employer for the payments.

<sup>45</sup> Cohen-Whelan, *Protecting the Hand*, *supra* note \_\_, at 1199-1200.

<sup>46</sup> *See* Catherine B. Haskins, *Household Employer Payroll Tax Evasion: An Exploration Based on IRS Data and on Interviews with Employers and Domestic Workers* (Feb. 1, 2010) (Pd.D. dissertation, University of Massachusetts, Amherst) (manuscript at 124), available at [http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1171&context=open\\_access\\_dissertations](http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1171&context=open_access_dissertations) (concluding, based on various data, that that “no fewer than three-quarters of all household employers are currently failing to pay their nanny taxes”).

IRS's audit rate of large partnerships (which are defined as partnerships having \$100 million or more in assets and 100 or more direct and indirect partners<sup>47</sup>) has recently been approximately .8%.<sup>48</sup> This rate is staggeringly low, especially in comparison to a 27.1% audit rate during the same time period for C corporations (an alternative choice of entity for conducting a large business) with \$100 million or more in assets.<sup>49</sup> Moreover, even those audits of large partnerships that did occur resulted in minimal findings of noncompliance.<sup>50</sup> IRS agents interviewed about the findings suggested that large partnerships have high tax noncompliance potential, and that the extensive complexity of large partnership structures and constraining auditing rules may explain the lack of assessed tax liability from large partnership audits.<sup>51</sup> In any event, these statistics mean that underinclusions of income by large partnerships are relatively unlikely to be examined or detected. Indeed, a major tax news publication has recently claimed, "These audit proof partnerships essentially shield the partner's income and deductions from challenge by the IRS – any partnership item claimed on the partner's individual return is essentially untouchable."<sup>52</sup> Finally, in the case of frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes, the IRS has stated that it will not "assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel."<sup>53</sup> In other words, there is complete, prospective, nonenforcement of the tax law requiring inclusion. The resulting taxpayer inclusion, presumably, is zero, or next to it.

The variation between the tax law on the books and on the ground in the examples above results, in large part, from the differing levels of difficulty and expense in enforcement. The high compliance of large businesses with information and withholding requirements for the wages paid to their employees provides the IRS with powerful and inexpensive means to ensure inclusion of such

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<sup>47</sup> U.S. GENERAL ACCOUNTING OFFICE, GAO-14-746T, LARGE PARTNERSHIPS: GROWING POPULATION AND COMPLEXITY HINDER EFFECTIVE IRS AUDITS, TESTIMONY BEFORE THE PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SECURITY & GOV'T AFFAIR, U.S. SEN., STATEMENT OF JAMES R. WHITE, at 2 (Jul. 22, 2014) [hereinafter LARGE PARTNERSHIPS].

<sup>48</sup> LARGE PARTNERSHIPS, *supra* note \_\_, at 10.

<sup>49</sup> LARGE PARTNERSHIPS, *supra* note \_\_, at 10.

<sup>50</sup> U.S. GENERAL ACCOUNTING OFFICE, GAO-14-732, LARGE PARTNERSHIPS: WITH GROWING NUMBER OF PARTNERSHIPS, IRS NEEDS TO IMPROVE AUDIT EFFICIENCY 20 (Sept. 2014) [hereinafter GROWING NUMBER].

<sup>51</sup> GROWING NUMBER, *supra* note \_\_, at 21, 25, 26, 30. Recently, in reference to a proposal to change the partnership audit regime, Kristine Roth, legislation counsel, Joint Committee on Taxation, also suggested that if auditing rules were changed for partnerships to make the auditing regime simpler, "taxpayers may not take the same aggressive positions as they would if there was not audit risk." William R. Davis, *Simplification and Compliance are Goals of Partnership Audit Reform*, 2014 TAX NOTES TODAY 204-3.

<sup>52</sup> *Audit Proof: The Other IRS Scandal*, 2014 TAX NOTES TODAY 66-69.

<sup>53</sup> I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621.



wages in income.<sup>54</sup> In contrast, the IRS has few cost-effective tools at its disposal for ensuring inclusion of cash income paid to a nanny. As discussed above, employers of nannies lack the incentives that large business have to comply with information reporting and withholding requirements.<sup>55</sup> The result is that the IRS has no paper trail to detect cash payments to nannies. While the IRS has some clues at its disposal that it might make better use of (such as tax returns with two full-time working parents claiming a dependent but reporting no payments for childcare<sup>56</sup>), tracking down when such situations actually involve the underreporting of income paid to nannies would require time-intensive, investigative reporting by IRS agents, which may have to border on sting operations in order to actually produce hard evidence of tax noncompliance. The low level of audits of large partnerships also can be explained, at least in part, by the expense and difficulty of such enforcement.<sup>57</sup> Large partnerships, by definition, are extremely complicated structures comprised of many partners (in some cases including more than a million partners).<sup>58</sup> Law put in place as part of the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”)<sup>59</sup> imposes very onerous requirements on the IRS for auditing such large partnerships, significantly limiting the IRS’s audit capacity for these entities.<sup>60</sup> Various other aspects of large partnership tax return filing create information deficits for the IRS.<sup>61</sup> On top of these difficulties, large partnerships easily can make extremely complicated even the most fundamental aspects of a tax audit (such as determining the tax partner responsible for working with the IRS to facilitate an audit).<sup>62</sup> As a result, much like with the inclusion of wages paid in cash to a nanny, the audit game will often not be worth the candle. Enforcement difficulties would also plague IRS attempts to force income inclusion for frequent flier miles earned on business trips paid for by the taxpayer’s employer but used for personal purposes. Indeed, the IRS’s statement of nonenforcement with respect to such frequent flier miles specifically indicates that the IRS had not “pursued a tax enforcement program with respect to

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<sup>54</sup> See OVERVIEW OF TAX GAP, *supra* note \_\_ (indicating strong link between information reporting and withholding and compliance); Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 J. ECON. PERSP. 25, 37 (2007) (discussing importance of information reporting to withholding).

<sup>55</sup> See *supra* note \_\_.

<sup>56</sup> See, e.g., Cohen-Whelan, *Protecting the Hand*, *supra* note \_\_, at 25-26 (suggesting as much).

<sup>57</sup> GROWING NUMBER, *supra* note \_\_, at 11, 39.

<sup>58</sup> LARGE PARTNERSHIPS, *supra* note \_\_, at 8-9.

<sup>59</sup> Pub. L. No. 97-248.

<sup>60</sup> JOINT COMMITTEE ON TAXATION, 112TH CONG. 2D SESSION, DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2013 BUDGET PROPOSAL 616-18, 624 (June 2012) (describing TEFRA audit rules and how they make it difficult to cost-effectively audit large partnerships).

<sup>61</sup> Jaime Arora, *GAO Calls on IRS to Improve Information for Partnership Audits*, 2014 TAX NOTES TODAY 115-6, at 2-3 (describing difficulties for IRS that create information deficits).

<sup>62</sup> LARGE PARTNERSHIPS, *supra* note \_\_, at 15; see also GROWING NUMBER, *supra* note \_\_, at 25 (citing focus group reports that complex large partnership structures were being used to hide income sources and tax shelters).

promotional benefits such as frequent flyer miles” as a result of “unresolved issues” which are “technical and administrative” in nature.<sup>63</sup> The principal administrative problem with including frequent flier miles in income is determining their value.<sup>64</sup> There is no clear, set value for the miles earned, taxpayers may reasonably argue that the value of the purchases they make with the miles exceeds what they would have been willing to pay, and there often is not one, fixed price for any trip or purchase that taxpayers make with their miles because pricing is constantly changing in the airline and travel industries.<sup>65</sup> These difficulties mean that if the IRS tried to force inclusion of the miles, IRS attempts to place an accurate value on the miles for each taxpayer may engender a nightmarish administrative hassle, resulting in significant and expensive controversy between the IRS and taxpayers.<sup>66</sup>

Undergirding all of the above discussion is a crucial fact. The IRS has vastly insufficient resources to enforce the entirety of the tax law as against all taxpayers at all times.<sup>67</sup> The IRS is notoriously underfunded, relative to the administrative and enforcement tasks it faces. Historically, the IRS has

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<sup>63</sup> I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621.

<sup>64</sup> There is also a question about when the frequent flier miles would be included in income (at the time the miles are earned or at the time they are used). For an example of differing views on this question, compare Zelenak, *Up in the Air*, *supra* note 38, at 27-33 (arguing for inclusion at time miles are earned), with M. Bernard Aidinoff, *Frequent Flyer Bonuses: A Tax Compliance Dilemma*, 31 TAX NOTES 1345, 1352 (1986) (arguing for inclusion when miles are used), and Joseph M. Dodge, *How to Tax Frequent Flyer Bonuses*, 48 TAX NOTES 1301, 1302 (1990) (same).

<sup>65</sup> For particularly extensive discussions of various potential valuations, see, for example, Sheldon I. Banoff & Richard M. Lipton, *Taxing Your Miles Won't Bring Smiles: What Value is Reportable?*, 116 J. TAX'N 173 (March 2012), and Darrell L. Oliveira, *The Taxability of Frequent Flyer Credits Earned by Employees: Why the IRS Has Remained Silent on the Issue*, 4 U. PA. J. LAB. & EMP. L. 643, 651-57 (2002).

<sup>66</sup> A number of commentators have suggested using a fixed value per mile to overcome the valuation difficulties. See, e.g., Dominic L. Daher, *The Proposed Federal Taxation of Frequent Flyer Miles Received From Employers: Good Tax Policy But Bad Politics*, 16 AKRON TAX J. 1, 7 (2001); Lee S. Garsson, *Frequent Flyer Bonus Programs: To Tax or Not To Tax--Is This The Only Question?*, 52 J. AIR. L. & COMMERCE 973, 989-92 (1987); Zelenak, *Up in the Air*, *supra* note \_\_, at 39. These suggestions would ease administration, but at the cost of accuracy in individual cases.

<sup>67</sup> Even with inordinate resources, some might be troubled by various instances of complete enforcement of the tax system. For instance, Joseph Bankman has posited that, “If we could costlessly enforce the law and bring criminal fraud charges against every guilty taxpayer [in the cash business tax sector] I do not believe we would do so.” Joseph Bankman, *Eight Truths About Collecting Taxes From the Cash Economy*, 117 TAX NOTES 506, 509 (2007). Bankman has suggested some explanations for this phenomenon, including consumers benefitting from the tax evasion, illegal activity being entwined with morally praiseworthy behavior, the low income of cash business taxpayers, the sense that tax evasion is a regulatory crime, and norms and laches. *Id.* at 509-11. Some people, such as tax protestors, object to any enforcement of the tax system at all. Cf. *The Truth About Frivolous Tax Arguments*, [http://www.irs.gov/pub/irs-utl/friv\\_tax.pdf](http://www.irs.gov/pub/irs-utl/friv_tax.pdf) (last visited Aug. 21, 2014) (cataloguing common tax protestor arguments and responses). The fact that various people would find complete enforcement of the tax system undesirable does not undermine the basic point that lack of resources is a central explanation for the existing difference between the tax law on the books and the tax law in practice. For more discussion of the possibility that the IRS may not be enforcing certain tax laws for non-resource based reasons, see *infra* \_\_\_\_.

labored with insufficient resources to complete all of the tasks at hand,<sup>68</sup> and the inadequacy of IRS resources seems only to be increasing. In recent years, the IRS has been faced with budget decreases despite an increasing number of tax returns, an increasing number of tax provisions (on top of an already dizzying number), and new responsibility for administering social programs (such as the Patient Protection and Affordable Care Act).<sup>69</sup> The decreasing IRS budget has forced the IRS to put in place hiring freezes and offer early retirements and buyouts to employees, even though the agency needs more, not fewer, employees in light of the increasing workload it faces.<sup>70</sup> The National Taxpayer Advocate has summarized, “The combination of more work and less funding has left the IRS stretched too thin, compromising its capacity to meet taxpayer needs.”<sup>71</sup> In light of the insufficient resources available to the IRS relative to the extent of its enforcement and other tasks, the tax law in practice must reflect a plethora of IRS decisions about when and how to enforce the tax law.<sup>72</sup> The exercise of IRS enforcement discretion then inevitably results in tax law nonenforcement, sometimes of particular categories of tax issues or taxpayers and sometimes just in particular cases.

There are different means of directing such nonenforcement, which vary principally in terms of the extent of their hierarchical control.<sup>73</sup> While this list is by no means inclusive, three principal ways to

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<sup>68</sup> Cf. Testimony of John A. Koskinen Before the Sen. Fin. Comm. 3 (Dec. 10, 2013), *available at* [http://www.finance.senate.gov/imo/media/doc/JAK\\_Opening\\_statement\\_FINAL.PDF](http://www.finance.senate.gov/imo/media/doc/JAK_Opening_statement_FINAL.PDF) (“I have met with every IRS Commissioner from the past 20 years and the consensus was that a major challenge and constraint was the funding limitations they faced. This is a view shared today by the IRS Oversight Board, the Taxpayer Advocate and, most recently, the Treasury Inspector General for Tax Administration (TIGTA) and the Internal Revenue Service Advisory Council.”).

<sup>69</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP’T OF THE TREASURY, REFERENCE NO. 2013-10-017, IMPROVEMENTS HAVE BEEN MADE TO ADDRESS HUMAN CAPITAL ISSUES, BUT CONTINUED FOCUS IS NEEDED 8 (2013), *available at* <http://www.treasury.gov/tigta/auditreports/2013reports/201310017fr.pdf>.

<sup>70</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP’T OF THE TREASURY, REFERENCE NO. 2013-10-017, IMPROVEMENTS HAVE BEEN MADE TO ADDRESS HUMAN CAPITAL ISSUES, BUT CONTINUED FOCUS IS NEEDED 6 (2013), *available at* <http://www.treasury.gov/tigta/auditreports/2013reports/201310017fr.pdf>.

<sup>71</sup> NATIONAL TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS, THE IRS DESPERATELY NEEDS MORE FUNDING TO SERVE TAXPAYERS AND INCREASE VOLUNTARY COMPLIANCE 27 (2013) *available at* <http://www.taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/IRS-BUDGET-The-IRS-Desperately-Needs-More-Funding-to-Serve-Taxpayers-and-Increase-Voluntary-Compliance.pdf>.

<sup>72</sup> Stephanie Hoffer, *Hobgoblins of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 346 (2006) (“Congress has granted discretion to the Service by promulgating a set of revenue laws so voluminous as to be humanly unenforceable.”); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 41 (2013) (“To perform its Augean task with constrained resources, the IRS must be allowed to exercise discretion.”)

<sup>73</sup> Cf. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 22 (2008) (describing how high level authority within an agency can make decisions about priorities and approaches, whereas low level agents can make decisions about whether or not to pursue a particular violation); Elizabeth

direct nonenforcement, in order from the most to the least hierarchical decisionmaking include categorical decisionmaking, setting priorities, and case-by-case decisionmaking. In the context of tax law nonenforcement, categorical nonenforcement involves a high-level decision not to enforce some aspect of the law for some specified period of time or until future notice. A prime example of categorical decisionmaking, or more specifically, categorical nonenforcement, is the frequent flier miles example discussed above. By releasing an official announcement that it would not “assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel,”<sup>74</sup> the IRS bound itself to nonenforcement of a particular aspect of the tax law until future notice. Other examples also exist. For instance, after natural disasters the IRS often declares that it will not enforce certain aspects of the tax law for a specified period of time. As one example, after the flurry of devastating hurricanes in the southeast in 2004, the IRS declared in a series of notices that it was suspending certain requirements of the Code for low-income housing credit properties, in order to allow owners of properties in the affected areas to provide housing to displaced persons without fearing the loss of valuable low-income housing tax credits.<sup>75</sup> In all cases, categorical nonenforcement is a declaration that the IRS will not be enforcing a particular aspect of the tax law, or a particular aspect of the tax law as against certain taxpayers, for some specified period of time (or until future notice).

The next means that the IRS can use to direct nonenforcement is setting priorities, which serves as an intermediate form of control in terms of the hierarchy of directing nonenforcement. Setting priorities occurs through high-level decisions to allocate enforcement resources toward one set of tax issues or taxpayers and away from others. Examples, and different iterations of setting priorities, abound in tax enforcement. One particularly notable example of setting priorities was the tiering of issues in the large business and international division (LB&I) of the IRS, which occurred from 2006 through 2012 through the Industry Issue Focus (“IIF”) program.<sup>76</sup> Through this program, the IRS tiered

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Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L. J. 1032, 1037 (2011) (describing different levels of control within an administrative agency).

<sup>74</sup> I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621.

<sup>75</sup> See, e.g., Notice 2004-74, 2004-48 I.R.B. 875; Notice 2004-75, 2004-48 I.R.B. 876; Notice 2004-76, 2004-48 I.R.B. 878.

<sup>76</sup> See generally I.R.S., Internal Revenue Manual § 4.51 (Apr. 1, 2007), <http://www.irs.gov/irm> (providing rules and procedures for IIF program).

issues for examination in LB&I<sup>77</sup> as a means of directing enforcement resources toward the greatest, perceived compliance risks.<sup>78</sup> Setting priorities also can occur through centralized, though not necessarily controlling, advice to tax agents. For instance, in the context of medical expenses, the Internal Revenue Manual (which is a compilation of internal IRS guidelines) advises agents that examining “[h]igh medical expenses for large families, deceased taxpayers, or older taxpayers” is usually not productive.<sup>79</sup> Centralized allocation of enforcement resources also can serve as a means of setting priorities. The allocation of enforcement resources as between large partnerships and corporations serves as an example of setting priorities as between different return categories. In terms of individual tax return selection, perhaps the most notable example of setting priorities is the discriminant index function (“DIF”), “a mathematical technique used to score income tax returns for examination potential.”<sup>80</sup> DIF is developed through research obtained by the National Research Program, which is designed to measure noncompliance comprehensively.<sup>81</sup> The higher the DIF score a particular return receives, the higher the likelihood of audit.<sup>82</sup> Numerous other methods are also used to make selection decisions.<sup>83</sup> All of these methods of allocating enforcement resources, whether at a high level of resource allocation among enforcement categories or at the lower level of resource allocation to particular returns, direct tax enforcement *toward* certain taxpayers and *away* from others.

A few points about the connection between setting priorities and tax law nonenforcement merit emphasis and elaboration. While setting priorities often takes the nominal form of directing tax enforcement resources toward certain taxpayers,<sup>84</sup> in a world of insufficient enforcement resources this

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<sup>77</sup> At the time that the program was put in place, the large business division was organized as, and referred to as, the Large and Mid-Size Business Division. Cf. IRS Realigns and Renames Large Business Division, Enhances Focus on International Administration (Aug. 4, 2010), *available at* <http://www.irs.gov/uac/IRS-Realigns-and-Renames-Large-Business-Division,-Enhances-Focus-on-International-Tax-Administration> (last visited Aug. 22, 2014) (explaining reorganization and name change, both of which occurred in 2010).

<sup>78</sup> David B. Blair & George A. Hani, *LMSB’s Industry Issue Focus Approach*, TAX EXECUTIVE, May-June 2007, at 237, 237.

<sup>79</sup> I.R.S., Internal Revenue Manual § 4.1.5.1.11.1.4 (Oct. 24, 2006), <http://www.irs.gov/irm>.

<sup>80</sup> I.R.S., Internal Revenue Manual § 4.1.3.2, (Aug. 10, 2012), <http://www.irs.gov/irm>.

<sup>81</sup> I.R.S., Internal Revenue Manual §§ 4.1.3.2, 4.1.3.1.1 (Aug. 10, 2012), <http://www.irs.gov/irm>.

<sup>82</sup> I.R.S., Internal Revenue Manual § 4.1.3.2, (Aug. 10, 2012), <http://www.irs.gov/irm>.

<sup>83</sup> To name just one, the Internal Revenue Manual indicates that “[t]he high income high wealth taxpayers workload is pre-identified at a national level from several specific selection models.” I.R.S., Internal Revenue Manual § 4.1.3.1.3, (Aug. 10, 2012), <http://www.irs.gov/irm>.

<sup>84</sup> Exceptions apply, in which setting priorities takes the direct form of directing resources away from certain issues. See, e.g., *supra* note \_\_\_\_\_. (describing IRS agents being directed away from certain timing issues).

very direction has the impact of making other taxpayers less likely to be subject to review.<sup>85</sup> To some extent, the reduced attention to certain taxpayers will map onto the likelihood of higher compliance exhibited by such taxpayers.<sup>86</sup> To the extent that taxpayers who are not subject to enforcement are actually compliant from a tax perspective, the lack of attention cannot readily be understood as tax law nonenforcement, because complete compliance would make enforcement unnecessary. However, the large difference between what taxpayers owe and what they pay, even after all IRS enforcement action, indicates that much tax law noncompliance is not met with effective enforcement.<sup>87</sup> The implication is that a fair amount of tax law nonenforcement does exist, and that setting priorities is systematically allocating it toward certain groups of taxpayers, tax issues, or tax returns and away from others.

Finally, case-by-case decisionmaking serves as the least hierarchical means of directing nonenforcement and, as a result, it leads to the least systematic concentration of nonenforcement on particular taxpayers or tax issues.<sup>88</sup> Case-by-case decisionmaking can best be understood as the enforcement decisions made by individual tax agents, after all of the categorical and priority rules have been applied. To use the famous Dworkinian metaphor, case-by-case decisionmaking is the doughnut hole of discretion that exists only as an area left open by the surrounding restrictions, which in this case are comprised of the more hierarchical means of directing tax law nonenforcement.<sup>89</sup>

Although some case-by-case decisionmaking will remain inevitable in the tax enforcement system,<sup>90</sup> the IRS also must direct tax law nonenforcement at least to some extent through more high-

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<sup>85</sup> Indeed, this is the intuition behind taxpayers trying to avoid “red flags” that will make them more likely to be subject to review. See, e.g., Kiplinger, *14 IRS Audit Red Flags*, <http://www.kiplinger.com/slideshow/taxes/T056-S001-irs-audit-red-flags-the-dirty-dozen-slide-show/> (last updated Feb. 2014) (advising of red flags that make a taxpayer more likely to be subject to audit).

<sup>86</sup> See *infra* \_\_\_ for a discussion of how high-level direction of enforcement resources helps direct tax enforcement toward the highest and best uses.

<sup>87</sup> This (the difference between amount owed and amount paid, even after IRS enforcement) is known as the net tax gap. For the tax year 2006, the net tax gap was \$385 billion. INTERNAL REVENUE SER., TAX GAP “MAP” TAX YEAR 2006, [http://www.irs.gov/pub/newsroom/tax\\_gap\\_map\\_2006.pdf](http://www.irs.gov/pub/newsroom/tax_gap_map_2006.pdf).

<sup>88</sup> Concentration of tax law nonenforcement could be as systematic if all of the individual case-by-case decisionmakers made decisions in the same way as a singular higher level of authority would. While interesting theoretically, this is almost certain never to occur, or at least not to occur all of the time.

<sup>89</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977).

<sup>90</sup> For example, as automated as the DIF scoring system sounds, it is only a first cut at selecting returns for examination. The Internal Revenue Manual describes that, while DIF scoring occurs by computer, “[e]ach selected DIF return will be screened by an experienced examiner to eliminate those returns not worthy of examination,” and that such determination is made based on the examiner’s “skills, technical expertise, local knowledge, and experience to identify hidden, as well as obvious, issues.” I.R.S., Internal Revenue Manual § 4.1.5.1.5.1, (Aug. 24, 2012), <http://www.irs.gov/irm>. Cf. \_\_\_ KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 43-44 (1969) (seminal work focusing

level, centralized mechanisms such as categorical decisionmaking and setting priorities. The IRS must do so in order to efficiently direct its extensive resources in the sprawling tax enforcement system, which is comprised of many different types of taxpayers and vastly different yields, relative to costs, for different tax issues and taxpayers. As an initial matter, the IRS is a massive, sprawling agency with an enormous enforcement task. It has approximately 85,000 employees spread across the country, and these employees, together, are responsible for administering essentially all U.S. federal taxes.<sup>91</sup> As with any sprawling bureaucracy, high-level controls are essential to keep enforcement allocation in line with the priorities that high-level research determines are most important. The IRS therefore has an Office of Research that is responsible for, among many other things, “[d]eveloping, maintaining, and advising on methods for selecting taxpayers and issues for enforcement contact and for allocating IRS resources.”<sup>92</sup>

In terms of determining what priorities are most important, the IRS has to take into account that it is responsible for enforcement of the tax laws for taxpayers with extremely different profiles and inclinations toward tax compliance. In terms of individual taxpayers, while some taxpayers are inclined to cheat on their taxes if given the opportunity, for a variety of reasons others pay their taxes despite the opportunity to cheat.<sup>93</sup> Abstracting up a level from individual differences to different sectors of taxpayers, differing opportunities for tax evasion as well as differing norms of compliance result in different sectors of taxpayers having vastly different compliance rates.<sup>94</sup> And, perhaps most crucially, as a result of vastly different tax dollars at stake in different tax sectors and different, relative costs of enforcement, the return on IRS enforcement resources is drastically different among different taxpayer sectors. Most notably, the IRS uses approximately 20% of its resources for audits of the largest business taxpayers, but such audits yield approximately 66% of recommended tax from IRS audits.<sup>95</sup> The

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on and highlighting problems with administrative and criminal discretion (describing, with respect to administrative agencies generally, that “[t]o fix as the goal the elimination of all discretion on all subjects would be utter insanity.”).

<sup>91</sup> INTERNAL REVENUE SERV. DATA BOOK 2013, tbl. 30, <http://www.irs.gov/pub/irs-soi/13databk.pdf> (detailing range of 83,613 employees at the close of the 2013 fiscal year through 90,280 average positions realized in 2012). Some limited exceptions apply to the IRS’s general responsibility for administering all federal taxes. For example, the Tobacco Tax and Trade Bureau (TTB) administers alcohol, tobacco, firearms, and ammunition taxes. <http://www.usa.gov/directory/federal/alcohol-and-tobacco-tax-and-trade-bureau.shtml> (last visited Oct. 2, 2014).

<sup>92</sup> I.R.S., Internal Revenue Manual § 1.1.18.1.3.4B, (May 9, 2012), <http://www.irs.gov/irm>.

<sup>93</sup> See, e.g., Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 694-701 (2009) (describing different types of taxpayers and inclinations towards compliance).

<sup>94</sup> See OVERVIEW OF TAX GAP, *supra* note 42, at 2 (showing different rates of noncompliance with respect to different types of income, which would be generated in different taxpayer sectors).

<sup>95</sup> MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE, ¶ 8.15[1] (2013).

underlying point is that not all tax enforcement is likely to be equal. As a result, motivated by a variety of considerations, the IRS has to utilize either categorical decisionmaking or setting priorities at least to some extent to direct its limited tax enforcement resources toward their preferred uses.

The need for enforcement discretion in light of limited resources, and the accompanying, inevitable nonenforcement is certainly not unique to tax administration. Rather, the phenomenon is common across administrative agencies and exists perhaps even more notably in the context of the prosecution of the criminal law. Criminal law far surpasses prosecutorial capacity. This phenomenon has worsened over time, with increasing criminalization of all sorts of conduct, at a clip of approximately one new federal crime per week.<sup>96</sup> A common refrain is that “the proliferation of federal criminal statutes and regulations has reached the point where virtually every citizen, knowingly or not (usually not) is potentially at risk for prosecution.”<sup>97</sup> The result is that prosecutors exercise largely unchecked<sup>98</sup> enforcement discretion in deciding when not to enforce the criminal law on the books, a phenomenon widely-known as “prosecutorial discretion.”<sup>99</sup> The exercise of such discretion means that the criminal law on the books may “bear only a slight relation to the conduct that leads to a stay in the local house of corrections.”<sup>100</sup> This phenomenon has a clear analogue across many administrative agencies, in which administrative discretion is endemic.<sup>101</sup> Just like in the criminal context, agencies across the federal bureaucratic state have to administer sprawling legal regimes that far surpass their capacities.<sup>102</sup> The agencies therefore hold enormous power to make decisions about law enforcement and nonenforcement, a power which has been described as “nearly unfettered freedom from review.”<sup>103</sup>

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<sup>96</sup> Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 725 (2013) (describing Congress’s creation of approximately one new crime per week by 2000 through 2007).

<sup>97</sup> Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 104 (2013).

<sup>98</sup> Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1110 (2000) (“Absent the most egregious forms of police or prosecutorial misconduct, the criminal justice system provides no immediate check on discretionary judgment.”).

<sup>99</sup> Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 2 (1971); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981) (“As violations of existing criminal laws have increased and legislatures have created new crimes without providing resources for trial and punishment of all those who could be convicted, prosecutors increasingly have been forced to allocate resources by deciding whether to charge and whether to offer leniency in exchange for guilty pleas.”).

<sup>100</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506-07 (2001).

<sup>101</sup> One scholar has dubbed the phenomenon “administrative prosecutorial indiscretion.” Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877 (1989).

<sup>102</sup> Mariano-Florentino Cuellar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229 (2006).

<sup>103</sup> Cuellar, *Auditing Executive Discretion*, *supra* note \_\_\_\_, at 243.



Neither is the need for high-level controls of enforcement resources unique to the tax context. Rather, such a need is a phenomenon that is inevitable in any well-functioning organization that has insufficient resources relative to its enforcement task. Professor Biber has explained that as a result of limitations on resources, “[a]n administrative agency cannot function without setting priorities.”<sup>104</sup> The same is true for prosecutors as well. Scholars have observed how prosecutors’ offices can produce internal guidelines, policies, and practices that control their otherwise extensive discretion,<sup>105</sup> which practices can “produce the predictable and consistent choices, respectful of statutory and doctrinal constraints, that lawyers expect from traditional legal regulation.”<sup>106</sup> High-level controls for tax law nonenforcement similarly can be understood by appreciating how systematic control of nonenforcement is inherent, and even desirable, in any well-run, resource strapped organization. While high-level direction of tax law nonenforcement can serve a variety of salutary purposes, however, it also means that unelected tax administrators affect the tax law on the ground in important ways.

#### **IV. Administrative Legitimacy and Categorical Nonenforcement**

If unelected tax administrators provide significant texture to the tax law on the books, are there more or less legitimate ways to go about doing so? One way to answer this question is by looking to modern theories of agency legitimacy and asking how various types of nonenforcement may increase or decrease agency legitimacy under such theories.<sup>107</sup> This Part sets forth the prominent, modern theories of agency legitimacy. This Part then explores why, under such theories, categorical nonenforcement may actually promote the legitimacy of the IRS’s inevitable, systematic tax law nonenforcement.

##### **A. Theories of Agency Legitimacy**

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<sup>104</sup> Biber, *Importance of Resource Allocation*, *supra* note \_\_, at 17, 18; see also Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 75-76 (1983) (describing importance of internal rules “to establish priorities for the allocation of resources to the enforcement of facially absolute commands” and explaining the particular importance of rules in the highly decentralized tax enforcement regime).

<sup>105</sup> Cf. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1546-47 (1981) (likening the administrative and prosecutorial means of limiting discretion).

<sup>106</sup> Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008).

<sup>107</sup> As alluded to previously, there are certainly other ways to answer the question, for instance by asking what types of nonenforcement fit most comfortably within executive power, or what types of nonenforcement best accord with the rule of law. This Article will return to these approaches at \_\_.

The central question for agency legitimacy is how to justify the extensive power and responsibilities of administrative agencies in U.S. constitutional democracy.<sup>108</sup> Some scholars simply reject modern administrative agencies as unconstitutional. Perhaps most notably, Professor Lawson has declared, “The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”<sup>109</sup> However, the reality is that the extensive administrative bureaucracy responsible for running much of the U.S. government exercises significant power all the time, and such exercise is widely seen as crucial to the functioning of the government.<sup>110</sup> As a result, many constitutional scholars have developed creative justifications to defend the constitutionality of the administrative state,<sup>111</sup> a project that has been matched by administrative law scholars’ attempts to provide theories that legitimate the role of the administrative state in our constitutional system.<sup>112</sup> Administrative law scholars have developed different formulations

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<sup>108</sup> Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 314 (2013) (explaining that “agencies are uncomfortably positioned in the tri-partite constitutional structure.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) (“Over the past century, the powers and responsibilities of administrative agencies have grown to an extent that calls into question the constitutional legitimacy of the modern federal bureaucracy.”). Some might argue that a theory of agency legitimacy is only needed to the extent that the agency is exercising legislative, and not executive power, and that as long as the agency is only setting priorities it is acting within its executive power. In other words, some might argue that theories of agency legitimacy are irrelevant for enforcement, so long as the agency stays within the proper bounds of executive enforcement powers. For a description of concerns about agency legitimacy deriving from an agency’s exercise of legislative power, see, for example, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1672-73 (1975). The constitutional basis for this argument would be that the Take Care Clause clearly contemplates executive power being exercised by those other than the President, and that administrative agencies properly exercise this power in their capacity as executive agencies. See U.S. Const. art. 2 § 3 (stating that the President “shall take Care that the Laws be faithfully executed”); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 573 (2006) (“Today, we regard agencies as part of the executive branch, not the legislative branch, and hence as exercising ‘executive power.’”). As will be discussed further at \_\_\_, this Article rejects the sharp distinction between setting priorities and categorical nonenforcement. As a result, this Article posits that theories of agency legitimacy are generally relevant for analyzing an agency’s systematic nonenforcement, which cannot be easily cabined as either legislative or executive merely by looking to the categorical nature of the nonenforcement. Moreover, while early concerns about the administrative state concentrated on exercises of legislative power, later treatments have focused as well on the extent of agency power with respect to enforcement. See, e.g., Stewart, *The Reformation*, *supra* note \_\_\_, at 1681-82, 1687-88 (explaining phenomenon); Davis, DISCRETIONARY JUSTICE, *supra* note \_\_\_ (foundational work focusing on problem of agency enforcement discretion). Under such views, questions regarding agency legitimacy should be relevant whether the power is executive or legislative.

<sup>109</sup> Lawson, *The Rise and Rise*, *supra* note \_\_\_, at 1231.

<sup>110</sup> Cf. *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989) (“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

<sup>111</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 632 n. 112 (1996) (highlighting some of the notable, creative justifications).

<sup>112</sup> See *infra* \_\_\_.

of the fundamental question regarding agency legitimacy, but they all ask in one way or another: (1) on what ground do agencies legitimately derive their power to define and affect rights and duties under the law, and (2) how can such exercises of power be kept under legitimate controls?<sup>113</sup>

There are a number of modern theories used to support agency legitimacy.<sup>114</sup> The first, which may be called the political accountability theory, relies on agencies being subject to the control of politically accountable, elected officials.<sup>115</sup> Political accountability theory derives from the notion that democratic legitimacy exists to the extent that government officials are faithful to majority will.<sup>116</sup>

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<sup>113</sup> There are certainly many variations of the central question regarding agency legitimacy. See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984) (“Each model of bureaucratic legitimacy is a story designed to tell its listeners: ‘Don’t worry, bureaucratic organizations are under control.’”); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, N.Y.U. L. REV. 557, 577 (2003) (“In my view, legitimacy can be assessed by answering two component questions: (1) Can agency power be characterized as democratic, especially if Congress, the closest institution to the electorate, is not making key policy decisions, and (2) are agencies accountable for the power they exercise?”); Stewart, *The Reformation*, *supra* note \_\_, at 1672-73 (describing problems of consent for agencies to exercise coercive power and absence of meaningful controls on abusive exercises of agency power).

<sup>114</sup> Other theories that do not hold as much, current sway will not be examined in detail. Such theories include the transmission belt model, the expertise model, and the pluralist model. The transmission belt model viewed agencies as merely implementing Congress’s specific and clear directives through impartial, technical decisions. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 357 (2009); Seidenfeld, *A Civic Republican Justification*, *supra* note \_\_, at 1513; Stewart, *The Reformation*, *supra* note \_\_, at 1675. As a result, under the transmission belt model, agencies are mere agents of Congress and do not require a separate theory of legitimacy. Mendelson, *Agency Burrowing*, *supra* note \_\_, at 580. The transmission belt model at least partially failed because the extensive delegations to administrative agencies make it unrealistic and therefore insufficient as a means of legitimating most agency action. Mantel, *supra*, at 357; Mendelson, *Agency Burrowing*, *supra* note \_\_, at 580; Stewart, *The Reformation*, *supra* note \_\_, at 1677. The expertise model acknowledged the scope of substantive agency decisions but maintained that agencies made such decisions by relying on impartial expertise. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); Kagan, *Presidential Administration*, *supra* note \_\_, at 2253; Stewart, *The Reformation*, *supra* note \_\_, at 1678. However, the extent to which agencies actually have to make value-laden decisions, and the influence of politics on such decisions, also eroded the explanatory power of the expertise model. Seidenfeld, *A Civic Republican Justification*, *supra* note \_\_, at 1513; Stewart, *The Reformation*, *supra* note \_\_, at 1684. The pluralist model views agencies as broad-based aggregators of interest group preferences. Kagan, *Presidential Administration*, *supra* note \_\_, at 2265-66; Mendelson, *Agency Burrowing*, *supra* note \_\_, at 587; Stewart, *The Reformation*, *supra* note \_\_, at 1712. The principal danger of pluralist models is the potential for capture by powerful interest groups, and the inability to equalize influence. Kagan, *Presidential Administration*, *supra* note \_\_, at 2266-67; Mendelson, *Agency Burrowing*, *supra* note \_\_, at 587.

<sup>115</sup> This theory has gone by many names (and, to some extent the differing names reflect slight, underlying differences). See, e.g., Mantel, *Procedural Safeguards*, *supra* note \_\_, at 359-361 (discussing under the rubric of “majoritarianism”); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1400 (2013) (“political control” model). I have adopted Professor Bressman’s terminology of “political accountability.” Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1675 (2004).

<sup>116</sup> See, e.g., Mantel, *Procedural Safeguards*, *supra* note \_\_, at 359-60.

Elections are an essential means of ensuring such faithfulness, because officials who do not honor majority preferences can be voted out of office.<sup>117</sup> The political accountability theory focuses on the fact that administrative agencies are not subject to the electoral system.<sup>118</sup> Political accountability theory attempts to solve this problem by positing that administrative agencies are controlled by the President or Congress.<sup>119</sup> Subjecting agencies to the control of the President or Congress legitimates agencies by having them answer to a politically accountable branch, which, according to the theory, makes agencies become responsive to majority will.<sup>120</sup> In recent years, scholarship has favored a presidential control model, based on notions that the President is both accountable to a national constituency and in the best position to control administrative agencies.<sup>121</sup> Presidential control theorists argue that the President legitimates agency action because the President acts as a conduit for the public will.<sup>122</sup>

The second principal modern theory used to support agency legitimacy, which may be called civic republicanism, emphasizes an agency's deliberative process as the source of its legitimacy.<sup>123</sup> As a general matter, civic republican theory suggests that the government should enable citizens to reach consensus about the common good through a process of reasoned deliberation.<sup>124</sup> As applied to administrative agencies specifically, civic republicanism argues that agencies are well situated to facilitate the kind of reasoned decisionmaking that is central to well-functioning government by obtaining input from citizens, being comprised of bureaucrats whose goal is supposed to be furthering the public good, using procedures designed to facilitate a reasoned process of deliberation, and

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<sup>117</sup> See, e.g., Mantel, *Procedural Safeguards*, *supra* note \_\_\_, at 360.

<sup>118</sup> See, e.g., Bressman, *Judicial Review of Agency Inaction*, *supra* note \_\_\_, at 1675; Mantel, *Procedural Safeguards*, *supra* note \_\_\_, at 360.

<sup>119</sup> See, e.g., Mantel, *Procedural Safeguards*, *supra* note \_\_\_, at 361.

<sup>120</sup> Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 490-91 (2003).

<sup>121</sup> Bressman, *Judicial Review of Agency Inaction*, *supra* note \_\_\_, at 1677 ("All or nearly all scholars--whether originalists or pragmatists, Democrats or Republicans--now endorse the presidential control model as a critical means for enhancing agency legitimacy."). For key works, see Kagan, *Presidential Administration*, *supra* note \_\_\_ and Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

<sup>122</sup> Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 48 (2006); Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 581-83.

<sup>123</sup> Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 585. For a foundational work, see Seidenfeld, *A Civic Republican Justification*, *supra* note \_\_\_. This theory, too, has gone by different names, which reflect, to some extent, different emphases or placement under different umbrellas. See, e.g., Mantel, *Procedural Safeguards*, *supra* note \_\_\_, at 362-65 (exploring what she calls the "trustee paradigm").

<sup>124</sup> Seidenfeld, *A Civic Republican Justification*, *supra* note \_\_\_, at 1514.

subjecting the deliberative process to judicial review.<sup>125</sup> As Professor Seidenfeld has described, “[t]he deliberative promise of the administrative state stems from the fact that agency decisionmaking can be inclusive, knowledgeable, reasoned, and transformative.”<sup>126</sup> While civic republicanism focuses on the processes of agencies themselves, it also acknowledges that external, political actors can evaluate outcomes that agencies reach to make sure they are consistent with consensus values.<sup>127</sup>

Finally, more recently Professor Bressman has argued for a third conception of agency legitimacy, which may be called the nonarbitrariness theory. Professor Bressman has taken fault with political accountability theory’s fixation with majority will,<sup>128</sup> arguing in part that the Framers did not believe that majority will was sufficient to ensure public-regarding law and individual rights.<sup>129</sup> She argues that the structure of the Constitution was designed to ensure that law was made not just to serve majority will, which could easily devolve into control by factions and the service of private interests, but rather to make nonarbitrary law that served the public well.<sup>130</sup> As a result, she argues that nonarbitrary administrative action, which has qualities of being “rational, predictable, or fair,”<sup>131</sup> is central not only to good governance but also to constitutionally legitimate governance.<sup>132</sup>

## **B. Application to Categorical Nonenforcement**

Having set forth these three, principal modern theories of agency legitimacy, the next question is whether, under such theories, categorical nonenforcement may actually promote the legitimacy of the IRS’s inevitable, systematic tax law nonenforcement.<sup>133</sup> As will be discussed in detail below, in some

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<sup>125</sup> Seidenfeld, *A Civic Republican Justification*, *supra* note \_\_\_, at 1541-62. This is certainly not to say that agencies are perfect at this task. Rather, the argument is that they are well-suited relative to alternatives.

<sup>126</sup> Seidenfeld, *The Role of Politics*, *supra* note \_\_\_, at 1426.

<sup>127</sup> Seidenfeld, *A Civic Republican Justification*, *supra* note \_\_\_, at 1550-51.

<sup>128</sup> Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 493-94.

<sup>129</sup> Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 497-500.

<sup>130</sup> Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 499-500.

<sup>131</sup> Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 496.

<sup>132</sup> Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 494.

<sup>133</sup> Some scholars, of course, have questioned such theories. *See, e.g.*, Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2083 (2005) (“Thus, control over the bureaucracy is exercised by the president according to the succession principle, that is, his accession to the job through an election, and according to the representation principle, that is, the views that enabled him to be elected, but not according to the electoral accountability principle.”); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (arguing that “a moderate degree of bureaucratic insulation alleviates rather than exacerbates the countermajoritarian problems inherent in bureaucratic policymaking.”). This Article does not seek to add to the debate about the extent to which such theories can legitimate the administrative

circumstances categorical nonenforcement can play this role. Specifically, as a result of increasing the salience of nonenforcement decisions and by serving as a means of binding an agency's nonenforcement, categorical nonenforcement may, under certain circumstances, increase the accountability, deliberation, and nonarbitrariness of an agency's inevitable nonenforcement of the law.

First, categorical nonenforcement can serve as a particularly salient means of communicating enforcement difficulties to politically accountable branches, and thereby help legitimate the agency's nonenforcement under the political accountability theory. In general, nonenforcement can be difficult for politically accountable actors and the public to monitor. Unlike when an agency decides to engage in a new enforcement project, or a new initiative, nonenforcement is much more likely to occur *sub rosa*, and thereby evade attention and review.<sup>134</sup> Categorical nonenforcement can buck this tendency by providing a particularly transparent statement of nonenforcement. Even if it is clear, for example, that the IRS historically has not enforced and in all likelihood will not enforce the tax law with respect to frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes, the IRS's categorical statement that it will not enforce with respect to such frequent flier miles nonetheless spotlights the IRS's choice, providing a particularly salient notice of the nonenforcement.<sup>135</sup>

Whereas setting a low priority can also indicate that enforcement is going to be low, categorical nonenforcement nonetheless is likely to increase salience. Indicating that a particular enforcement task is a low priority may not communicate with precision the extent of the nonenforcement.<sup>136</sup> Indicating that a particular enforcement task is low priority can also provide cover to disguise what, in reality, is virtually no enforcement.<sup>137</sup> Even to the extent that the low priority is translated into a specific level of enforcement (for instance, imagine that the IRS announces that it is going to set a low priority for auditing large partnerships, such that large partnerships will be subject to a .8% chance of enforcement

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state. Rather, this Article accepts as a working assumption that there are theories that are currently used to legitimate the administrative state and assesses categorical nonenforcement in light of such theories.

<sup>134</sup> Love & Garg, *Presidential Inaction*, *supra* note \_\_, at 1235.

<sup>135</sup> As Professor Diver has more generally remarked with respect to administrative rules, "[t]ransparent rules tend to spotlight a value choice." Diver, *The Optimal Precision* *supra* note \_\_, at 106.

<sup>136</sup> For instance, the tiering program in LB&I by negative implication alerted taxpayers to issues that would not be high priorities for review. See *supra* text accompanying notes \_\_ for a discussion of this program. However, this provided only very vague information that these other issues would be less likely to be reviewed, rather than any firm information about the extent to which these other issues would not be subject to review.

<sup>137</sup> This might be an intentional choice designed to protect compliance. This issue is discussed at *infra* \_\_.

and a minimal likelihood of an assessment of noncompliance on audit), the formality and extremity of a statement of complete, categorical nonenforcement will nonetheless tend to increase its salience.

Increasing the salience of the nonenforcement can serve as a means to increase the accountability, and therefore legitimacy, of agency nonenforcement.<sup>138</sup> Presidents in particular have a variety of means to monitor different agency action.<sup>139</sup> For instance, the Office of Management and Budget (“OMB”) implements the President’s vision across the Executive Branch, including through oversight of agency performance and review of all significant federal regulations by executive agencies.<sup>140</sup> However, agency enforcement decisions for the most part fall outside of centralized presidential review.<sup>141</sup> As a result, decisions to set low priorities for enforcement tasks are unlikely to garner review by presidential administrations. By creating a more salient statement of nonenforcement, categorical nonenforcement is more likely to trigger review by the President or Congress, or, perhaps more realistically, their central apparatuses responsible for monitoring administrative agencies.<sup>142</sup>

The argument here is not that the President and / or Congress will weigh in on all enforcement decisions if only such decisions are framed in terms of categorical nonenforcement, but rather that in certain cases categorical nonenforcement can serve as a means of increasing the accountability and therefore the legitimacy of important nonenforcement decisions.<sup>143</sup> Take the example of auditing large

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<sup>138</sup> Cf. Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 820 (2010).

(“Binding enforcement directives, promulgated through rulemaking, require agencies, and the administration to which they are accountable, to take a public stand on their enforcement priorities. Informal norms regarding enforcement, whether set forth in an agency manual or not, lack this quality.”).

<sup>139</sup> There is more debate about to what extent Congress can effectively monitor administrative agencies. See *infra* text accompanying note \_\_\_\_.

<sup>140</sup> The Mission and Structure of the Office of Management and Budget, [http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/) (last accessed Sept. 8, 2014).

<sup>141</sup> Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1033 (2013) (“While enforcement of law is at the very core of executive responsibility, the formal apparatus of presidential administration concerns itself little with it.”).

<sup>142</sup> While OMB may be very much like another administrative agency, it nonetheless is charged more directly with carrying out the President’s vision. Andrias, *The President’s Enforcement Power*, *supra* note \_\_\_, at 1104; The Mission and Structure of the Office of Management and Budget, [http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/) (last accessed Sept. 8, 2014) (“The core mission of OMB is to serve the President of the United States in implementing his vision across the Executive Branch.”).

<sup>143</sup> Indeed, for a variety of reasons, review of individual enforcement decisions or even run-of-the-mill enforcement decisions would be undesirable. Cf. Andrias, *The President’s Enforcement Power*, *supra* note \_\_\_, at 1071-72, 1101 (explaining problems with formal presidential review of important individual enforcement actions and explaining that “[t]he degree to which presidential administration actually establishes an electoral link between the public and the bureaucracy, or enables the public to understand better the sources and nature of bureaucratic power, depends in large part on whether the questions at issue are of concern to the public.”);

partnerships. As suggested previously, the IRS has particular difficulty auditing large partnerships.<sup>144</sup> Thus far, the IRS has dealt with the enforcement difficulties through setting priorities. The result has been that, in recent years, the IRS has audited only approximately .8% of large partnerships, with minimal findings of noncompliance in large partnership audits,<sup>145</sup> in comparison to a 27.1% audit rate and significantly higher audit determinations of noncompliance for similarly sized for C corporations during the same period.<sup>146</sup> Instead of setting a low priority, the IRS instead could categorically decide not to enforce the income tax system as to this particular sector of taxpayers, perhaps for some period of time or for some issues. The IRS may even indicate that it will not enforce the income tax system as against large partnerships until changes in the law are made enabling it to do so efficiently.

At first blush, the notion of the IRS announcing categorically that it will not enforce the income tax system as to large partnerships may seem anathema to legitimate tax administration and a severe abrogation of IRS duty to enforce the tax law. However, viewed in a different way, a categorical statement of nonenforcement might increase the accountability of the IRS's inevitable relative nonenforcement, thus increasing the legitimacy of the agency's decision. A statement by the IRS that, as a result of extreme enforcement difficulties, it would not enforce the income tax system as against the largest partnerships, would be likely to garner involvement of the presidential administration and various intervention by Congress. Granted, even without categorical nonenforcement, the low audit rate of large partnerships has garnered a fair amount of media coverage, at least in the tax world, and led to various Senators acknowledging the problem and indicating that it needs to be fixed.<sup>147</sup> However, such recognition occurred after years of almost no enforcement, and insiders' awareness of the systematic, virtual lack of enforcement.<sup>148</sup> It is harder to imagine that a statement of categorical

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Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 111-12 (discussing impossibility of President taking ownership of all of administration as a result of demands on the President's time); Love & Garg, *Presidential Inaction*, *supra* note \_\_\_, at 1235 ("Congress could not possibly choose to exercise its oversight powers to revisit every instance of executive inaction; this is a basic question of bandwidth.").

<sup>144</sup> See text accompanying notes \_\_\_.

<sup>145</sup> LARGE PARTNERSHIPS, *supra* note \_\_\_, at 10; GROWING NUMBER, *supra* note \_\_\_, at 20.

<sup>146</sup> LARGE PARTNERSHIPS, *supra* note \_\_\_, at 10; GROWING NUMBER, *supra* note \_\_\_, at 20.

<sup>147</sup> See, e.g., Wyden Statement on GAO Preliminary Report on IRS Audits of Large Partnerships, <http://www.finance.senate.gov/newsroom/chairman/release/?id=59155f87-739a-44e6-9519-a0726e3d4ef5> (Apr. 17, 2014) ("This is a real problem and serves as yet another example of why Congress needs to get serious about comprehensive, bipartisan tax reform.").

<sup>148</sup> As anecdotal evidence, in 2012 (two year prior to the statement above), the tax publication Tax Notes published an article indicating that large partnerships are "effectively immune from audit," a conclusion based on "interviews with dozens of practitioners who have direct knowledge of the IRS's large partnership audit practices." Amy S.



nonenforcement would escape media attention, and therefore the involvement of accountable, elected officials, or at least their central administrative apparatuses, for as long a period of time. The import of this example is that when an agency is engaging in relatively impotent enforcement for an important enforcement task, making a statement of categorical nonenforcement may serve as a particularly salient means of alerting the accountable branches of government, thereby getting accountable input about the decision, resources, or a change in the legal regime that would make enforcement tenable.<sup>149</sup>

If all else fails, categorical nonenforcement may at least force a politically accountable acknowledgement of the unwillingness to provide the means necessary to yield adequate enforcement. To underscore this point, in the case of auditing large partnerships, various changes in the law may be necessary in order to enable the IRS to cost-effectively audit large partnerships,<sup>150</sup> and various proposals have been made to change the law accordingly.<sup>151</sup> Yet, some commentators have suggested that Congress may not be inclined to adopt such changes because doing so would be costly to powerful constituencies.<sup>152</sup> By saliently underscoring the near impossibility of large partnership audits under the current rules through categorical nonenforcement, the IRS may force politically accountable actors to change the law in a manner that makes audit of these entities tenable, or else take more public responsibility for the essential lack of audit of many of the largest and wealthiest businesses in the country. Categorical nonenforcement may thereby serve as a counter to one of the most troublesome, potential legitimacy threats of the administrative state: the ability of Congress and / or the President to garner the benefits of a public-regarding law that they ensure never actually comes to pass by putting in

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Elliott, *News Analysis: Audit Proof? How Hedge Funds, PE Funds, and PTPs Escape the IRS*, 136 TAX NOTES 351, at 1 (2012).

<sup>149</sup> Cf. Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 451 (1999) (explaining how external monitors like the President or Congress or a crisis may be necessary in order to get an agency to alter decisionmaking norms).

<sup>150</sup> See Amy S. Elliott, *News Analysis: Why It Matters That the IRS Has Trouble Auditing Partnerships*, 143 TAX NOTES 7, at 5 (2014) (“The problem would be very expensive for the IRS to solve absent a change in the law . . .”).

<sup>151</sup> DEPARTMENT OF THE TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION’S FISCAL YEAR 2013 REVENUE PROPOSALS 155-56 (Feb. 2012) (proposing changes to make large partnership audits cost-effective); JOINT COMMITTEE ON TAXATION, 112TH CONG. 2D SESSION, DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2013 BUDGET PROPOSAL 624 (June 2012) (same); Arora, *GAO Calls on IRS*, *supra* note \_\_, at 3-4 (summarizing various proposals); see also GROWING NUMBER, *supra* note \_\_, at Highlights (explaining how various changes to audit procedures would reduce the IRS’s costs in auditing large partnerships, but how legislative changes were necessary).

<sup>152</sup> Elliott, *Audit Proof?*, *supra* note \_\_, at 7 (“Congress, meanwhile, may have little desire to enact legislation that could increase the tax bills of investment fund managers and investors, who are important campaign contributors for both parties in an election year. So it’s likely that another year will go by with widely held partnerships believing they’re audit proof.”).

place low visibility constraints on the implementing agency.<sup>153</sup> Fundamentally, in accordance with the political accountability theory of the administrative state, by increasing the likelihood that politically accountable actors, or their central delegates, are aware of and provide some response to important nonenforcement decisions, categorical nonenforcement may help legitimate such decisions.<sup>154</sup>

For similar reasons, categorical nonenforcement may in certain circumstances also increase public deliberation about nonenforcement, and thereby help legitimate the agency’s nonenforcement under the civic republican theory.<sup>155</sup> Just as categorical nonenforcement may serve as a particularly salient means of alerting politically accountable branches about enforcement difficulties or relatively impotent enforcement, so too is categorical nonenforcement likely to serve as a particularly salient means of alerting the public. Professor Mendelson makes a similar point in the context of presidential administrations entrenching policy shortly prior to leaving power.<sup>156</sup> Professor Mendelson analyzes one method of entrenching policy that, at first blush, seems particularly objectionable: entrenching policy opposed by the President-elect in the form of a binding rule.<sup>157</sup> This tactic seems particularly objectionable because it seems to undermine the President-elect’s electorally granted power to sway policy in a particular direction.<sup>158</sup> However, Professor Mendelson explains that, somewhat ironically, the

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<sup>153</sup> Cf. Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 682 (1992) (explaining that requirement for agencies to state reasons in rulemaking context “undermines the ability of Congress to use agency resources to stifle poorly organized interests’ efforts to monitor and control the behavior of administrative agencies.”). This is not to say that all accountable actors will ignore the nonenforcement problem in the absence of categorical nonenforcement. Indeed, in the case of large partnerships, eventually specific Senators requested the GAO to conduct an investigation of the issue and pronounced the findings problematic. See, e.g., Levin, Wyden, McCain Release GAO Report on Scant IRS Audit Coverage of Large Partnerships, [http://www.levin.senate.gov/newsroom/press/release/levin-wyden-mccain-release-gao-preliminary-report-on\\_scant-irs-audit-coverage-of-large-partnerships](http://www.levin.senate.gov/newsroom/press/release/levin-wyden-mccain-release-gao-preliminary-report-on_scant-irs-audit-coverage-of-large-partnerships) (Apr. 17, 2014). The claim here again is a marginal one: that, relative to categorical nonenforcement, setting a low priority or providing insufficient resources such that a low priority is set is a relatively low-visibility way to hamper the law on the books. Cf. Elliott, *Why It Matters*, *supra* note \_\_\_, at 2 (“A problem needs to get very bad before it attracts congressional attention. That is especially true if some of the people who benefit from the problem – the investment fund managers who don’t have to worry about IRS adjustments to their partnership items – are some of the biggest campaign contributors for both parties.”).

<sup>154</sup> Cf. Andrias, *The President’s Enforcement Power*, *supra* note \_\_\_, at 1093 (“By elevating responsibility of enforcement to the President in ways subject to public evaluation, we can both increase the degree to which presidential action is likely to track public preferences and the degree to which the public can understand the exercise of the enforcement power.”).

<sup>155</sup> In the context mostly of presidential nonenforcement, Professor Sant’ Ambrogio explores how what he calls a presidential extra-legislative veto may play a similar role, explaining that it can serve a “deliberation forcing and deliberation-enhancing role.” Sant’ Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_\_, at 386.

<sup>156</sup> Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 629-30.

<sup>157</sup> Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 629-30.

<sup>158</sup> Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 604-05, 627.

particularly objectionable nature of entrenchment can also benefit democratic governance. The issuance of the rule and the new administration's attempts to reverse it will be more likely to garner media coverage as a result of the increased visibility of the decision. The visibility and ensuing debate are thereby more likely to spur the involvement of interest groups and voters, who will be more likely to develop informed policy preferences.<sup>159</sup> The broader dialogue may then "increase the democratic and participatory quality of agency decisionmaking."<sup>160</sup> In other words, the very controversial nature of the decision may help garner the attention necessary to engender dialogue and a deliberative decision about what may otherwise be an ignored bureaucratic rule. The analogue to categorical nonenforcement is that categorical nonenforcement also can serve as a means of highlighting a nonenforcement decision that may otherwise escape attention, and thereby increase the deliberation regarding the decision. Importantly, the very seemingly objectionable nature of categorical nonenforcement may also be the key to increasing the legitimacy of the nonenforcement.

Although categorical nonenforcement is not the prototypical example imagined by civic republicanism (which imagines deliberative debate that shapes agency policy *ex ante*),<sup>161</sup> categorical nonenforcement need not be perfect in order to promote the legitimacy of agency nonenforcement. By making a statement of categorical nonenforcement, an agency may widen the circle of interested parties and counter what is otherwise a tendency for well-connected parties to dominate.<sup>162</sup> If the categorical nature of nonenforcement tends to increase the deliberation of concerned public interest groups, affected parties, and others regarding important decisions of nonenforcement even after the fact, with the possibility of such deliberation leading to changes in the law or enforcement policy, then categorical nonenforcement may in some circumstances promote the legitimacy of such nonenforcement decisions under a civic republican theory of agency legitimacy.<sup>163</sup>

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<sup>159</sup> Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 629-30.

<sup>160</sup> Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 629.

<sup>161</sup> Seidenfeld, *A Civic Republican Justification*, *supra* note \_\_\_, at 1529 ("First and foremost, the demand for deliberative government means that before the government acts, it must engage in public discourse about whether the action will further the common good.").

<sup>162</sup> See, e.g., Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 524 (2012) (explaining this dynamic in the context of IRS guidance).

<sup>163</sup> Stephen M. Johnson, *Good Guidance, Good Grief*, 72 MO. L. REV. 695, 735 (2007) ("[I]ncreased public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies."); Mendelson, *Agency Burrowing*, *supra* note \_\_\_, at 636 (explaining that "a visible public debate more likely would engage less organized segments of the public as well and help assure the agency's fuller consideration of both the diversity of public views and their intensity.").

Categorical nonenforcement also can bind agencies to nonenforcement policies, which may, under certain circumstances, lead to less arbitrary and more public regarding law, thereby increasing the legitimacy of nonenforcement under the nonarbitrariness theory of agency legitimacy. Categorical nonenforcement by its own terms promises nonenforcement for at least some specified period of time. While it is questionable whether an agency would be legally bound to its own categorical nonenforcement policy,<sup>164</sup> such a policy can obtain the force of law, which may inhibit an agency's ability to renege on its nonenforcement promise, or at the very least provide superior officials within an agency the means of dictating the nonenforcement of lower level officials. Professor Zelenak examines

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<sup>164</sup> As a general matter, agencies can bind themselves to their own rules, a principle that is best known as the *Accardi* principle. *Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954) (setting down foundational principle in the context of Board of Immigration Appeals being bound by regulations). However, the scope of this principle is unclear, and at least some commentators have suggested that the general principle applies only to legislative rules. Merrill, *The Accardi Principle*, *supra* note \_\_\_, at 603 (“First, the *Accardi* principle applies only to legislative regulations because only legislative regulations create binding legal duties on agencies and agency personnel.”). There is a line of authority that establishes that an agency's enforcement discretion guidelines may rise to the level of legislative rules, which therefore bind the agency. For the foundational case see *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987). However, the prototypical example of such an outcome occurs when the underlying statute or regulation is somewhat nuanced and calls for the agency to exercise its discretion, and the guidelines are a resulting attempt to regularize such discretion. *See, e.g., id.* (finding that FDA “action levels” for contaminants were legislative rules subject to notice and comment procedures, in a situation in which the statute called for FDA to deem unsafe any poisonous or deleterious substance added to food “except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice,” 21 U.S.C. § 346); *General Electric Co. v. Envtl. Prot. Agency*, 290 F.3d 377, 379, 381-85 (2009) (finding that Guidance Document providing “an overview of risk assessment techniques, and guidance for reviewing risk assessment documents submitted under the final PCB disposal rule” with respect to a statute that “prohibits the manufacture, processing, distribution, and use (other than in a ‘totally enclosed manner’) of polychlorinated biphenyls (PCBs) unless the EPA determines that the activity will not result in an ‘unreasonable risk of injury to health or the environment’” (and a similarly nuanced regulation) was a legislative rule). An agency's statement that it will not enforce the dictates of clear law, or that it will deprioritize such enforcement, seems somewhat unlikely to constitute a legislative rule under this line of authority. Such a statement therefore may fall outside of the *Accardi* principle, leaving an agency only with the potential, lesser obligation of providing a reasoned explanation for departure from its policy. Merrill, *The Accardi Principle*, *supra* note \_\_\_, at 598. Some courts have made broader statements suggesting that more informal policies might bind agencies, even in the context of agency inaction that would otherwise seemingly be nonreviewable. For instance, in holding that the Board of Immigration Appeals's (“BIA's”) decision denying reopening of deportation proceedings was reviewable, the Ninth Circuit explained that “established policies of an administrative agency may provide the law by which to judge an administrative action or inaction.” *Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000) (*rev'd en banc on other grounds*, *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (internal citations omitted); *see also* *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Before the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.”). Later authority has seemed to undermine *Ruiz* and similar cases to some extent. *See, e.g.,* *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (explaining that the Social Security Administration (“SSA”) Claims Manual does not bind the SSA). Other courts have cast doubt on agencies being able to bind themselves to rules in circumstances in which the rules would undermine a comprehensive statutory scheme. *See, e.g.,* *Graham v. Ashcroft*, 358 F.3d 931, 935 (2004) (“It is no answer to invoke the principle that agencies must follow their own regulations. That was, after all, the assertion in *Fausto*, and the Court held that it was trumped by the proposition that agencies cannot purport to confer rights undermining a comprehensive congressional scheme.”).

this force of law concept in his own treatment of customary deviations. He describes the force of law as “the sense that the tax administrators could not then abandon the deviation and begin to enforce the letter of the law” after sufficiently open and notorious nonenforcement, and he cites several cases that hint at the notion of the force of law, though they do not go quite so far as to definitively establish or recognize it.<sup>165</sup> Perhaps most notably, a very recent Tax Court case regarding frequent flier miles that postdates Professor Zelenak’s treatment seems to underscore the notion that a statement of nonenforcement can bind an agency.<sup>166</sup> In the case, the Tax Court addressed the inclusion in income of an airline ticket obtained pursuant to redemption of a bank’s grant of “thank you points,” an issue not addressed by the IRS’s categorical statement regarding frequent flier miles obtained through an employer’s purchase of an employee’s business travel.<sup>167</sup> Prior to determining that the amount had to be included in income in the case, the Tax Court stated, “We are not here dealing with the taxability of frequent flyer miles attributable to business or official travel, with respect to which the Commissioner stated in Announcement 2002-18, 2002-1 C.B. 621, he would not assert that a taxpayer has gross income because he received or used frequent flyer miles attributable to business travel.”<sup>168</sup> The Tax Court’s statement seems to imply, though does not state definitively, that the legal outcome might be different if the issue were one which the IRS had declared it would not enforce. This is puzzling because the IRS’s statement that it would not enforce should have no legal bearing on the outcome, unless the IRS’s statement of nonenforcement does, indeed, become binding in some fashion. By implying that the IRS’s statement may impact the outcome for frequent flier miles covered by the IRS’s announcement, the Tax Court gave some judicial credence to categorical nonenforcement binding the agency.

At first glance, entrenchment of nonenforcement seems like it may simply compound problems with nonenforcement. Nonenforcement, like many agency decisions, can serve as a means of giving rents to private parties.<sup>169</sup> Nonenforcement also can serve as a means of eroding public-regarding law at the hands of influential insiders. Perhaps most perversely, an agency may fail to act (for instance, by not enforcing a law on the books) in a relatively low-profile way, thereby allowing Congress and / or the President to garner the benefits of putting in place a public-regarding law that, in fact, never will come

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<sup>165</sup> Zelenak, *Custom and the Rule of Law*, *supra* note \_\_\_, at 839-40.

<sup>166</sup> *Shankar v. Comm’r*, 143 T.C. No. 5 (2014).

<sup>167</sup> *Id.* at 2, 4-5.

<sup>168</sup> *Id.* at 5.

<sup>169</sup> Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 901 (2009) (“Issuance of binding enforcement guidelines that provide safe harbors-- promises of nonenforcement--to segments of an industry would be an excellent way for an agency to provide rents to private parties.”)

to pass.<sup>170</sup> The public may thereby be deceived by the rhetoric of the law, with insiders apprised of the reality of its lack of administration. Being able to promise permanent (or semi-permanent) nonenforcement therefore seems like it could promote particularly insidious agency giveaways. Essentially, by making nonenforcement decisions stickier, entrenchment may serve as a means of perpetuating any legitimacy problems that underlie the original nonenforcement decision. Given these potential problems, what benefits, if any, might come from such binding?

Entrenchment of nonenforcement policy also can force agencies to make nonenforcement decisions in a less arbitrary,<sup>171</sup> more public-regarding manner. The key is that by serving as a mechanism of binding the agency to a policy of nonenforcement, categorical nonenforcement can force the agency to think through the impact of the rule over a longer term and a broader set of constituents, rather than just focusing on short-term benefits or costs to parties at hand.<sup>172</sup> As discussed previously, high-level officials within an agency may wish to allocate limited resources in a particular fashion in order to make most effective use of them.<sup>173</sup> Binding agency policies serve as a mechanism for high-level agency officials to control low level officials so that on the ground uses of resources match the uses that high-level officials determine are most pressing, and so that enforcement decisions are made consistently across regulated parties.<sup>174</sup> Formulating a binding policy can also force the agency to think through the policy and its implications in the future, thereby injecting some rational analysis of the policy into the process.<sup>175</sup> Binding the agency now and in the future can thereby move the agency to make more public regarding decisions.<sup>176</sup> Moreover, since self-binding by nature occurs only at the agency's own

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<sup>170</sup> Cf. Biber, *Importance of Resource Allocation*, *supra* note \_\_, at 46 (“In essence, agencies and Congress can use the symbolic substantive statute, filled with public interest language that promises action on a particular issue, to ‘mask’ the actual implementation that betrays that promise—and thereby reduce or eliminate any political costs for failing to address the substantive question.”); Bressman, *Judicial Review of Agency Inaction*, *supra* note \_\_, at 1689 (“If Congress crafts broad delegating statutes to create room for private interests to prevail in the administrative process, it then dodges blame for any non-public decisionmaking by placing the agency on the hook. Congress therefore cannot be relied upon to protect agency decisionmaking from improper influence. Indeed, Congress is a large part of the problem.”).

<sup>171</sup> For a definition of “arbitrary” in this context, see Bressman, *Judicial Review of Agency Inaction*, *supra* note \_\_, at 1692 (explaining that allow[ing] regulated entities to skew enforcement decisionmaking at public expense” is “the very definition of arbitrariness.”).

<sup>172</sup> Cf. Manning, *Constitutional Structure*, *supra* note \_\_, at 655 (explaining how an agency can adopt rules that bind subsequent administrations).

<sup>173</sup> *Supra* \_\_.

<sup>174</sup> Magill, *Agency Self-Regulation*, *supra* note \_\_, at 884-86.

<sup>175</sup> Magill, *Agency Self-Regulation*, *supra* note \_\_, at 887-88.

<sup>176</sup> Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 152 (1992) (“An agency's own attempt to regularize and control its own prosecutorial

initiative, agencies have the ability to engage in it only when they determine that the benefits of more consistent and predictable enforcement policy outweigh the need for greater enforcement discretion.<sup>177</sup>

Indeed, in setting forth the theory of nonarbitrariness as essential to an agency's legitimacy, Professor Bressman explored how administrative standards that guide and limit agencies' own discretion can increase nonarbitrary administrative action by restricting otherwise unfettered agency discretion.<sup>178</sup> Professor Bressman has explained, "When agencies bind themselves to determinate standards, they inhibit requests for ad hoc departures [and thereby] decrease the potential for narrow interests to obtain special treatment."<sup>179</sup> Professor Bressman did not develop this idea alone. Rather, a long pedigree of scholars, dating back most notably to Professor Davis<sup>180</sup> and Judge Friendly<sup>181</sup> in the 1960s, has suggested that binding internal policies or publicized standards can helpfully decrease the otherwise potentially unfettered discretion of agencies and prosecutors.<sup>182</sup> A number of important court cases have also looked to administrative standards as an essential means of limiting what might otherwise be impermissibly excessive discretion.<sup>183</sup> More recently, on top of (and completely apart from) increasing the efficiency of decisionmaking,<sup>184</sup> scholars have explained that internal polices can lead to "predictable and consistent choices"<sup>185</sup> and serve as a means of constraining otherwise excessive

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discretion certainly goes a long way toward eliminating the randomness and arbitrariness of individual enforcement decisions by individual agency personnel.").

<sup>177</sup> Merrill, *The Accardi Principle*, *supra* note \_\_\_, at 570 (making this point with respect to the *Accardi* principle).

<sup>178</sup> Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 518-19, 529-33; Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452, 455-69 (2002).

<sup>179</sup> Bressman, *Judicial Review of Agency Inaction*, *supra* note \_\_\_, at 1691.

<sup>180</sup> DAVIS, *supra* note \_\_.

<sup>181</sup> HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962).

<sup>182</sup> Professor Stewart characterized these early proposals in his own discussion of what he called "structuring administration discretion." See Stewart, *The Reformation*, *supra* note \_\_\_, at 1698 ("Substituting general rules for ad hoc decision also tends to ensure that officials will act on the basis of societal considerations embodied in those rules rather than on their own preferences or prejudices, and increases the likelihood that the contents of the policies applied will be consistent with the preferences of a greater number of citizens.").

<sup>183</sup> *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999), *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd in part sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737, 758 (D.D.C. 1971). The Supreme Court ultimately disapproved of the D.C. Circuit's *American Trucking* look to administrative standards as a matter of constitutional law. *Am. Trucking*, 531 U.S. at 473 ("Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer."). However, such rejection does not foreclose reliance on such standards as a matter of administrative legitimacy and administrative law. Lisa Schultz Bressman, *Disciplining Delegation*, *supra* note \_\_.

<sup>184</sup> Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_\_, at 385.

<sup>185</sup> Miller & Wright, *The Black Box*, *supra* note \_\_ at 129.

prosecutorial power.<sup>186</sup> For example, Professor Strauss has explained, “Once the prosecutor has preferred, for example, prosecutions for the sale of narcotic drugs over those for the sale of contraceptives . . . any society might prefer that the shift in policy be publicly known and adhered to, rather than subject its citizens to the hazards of prosecution--prosecution for what might be political or even disreputable reasons.”<sup>187</sup> As applied to categorical nonenforcement, the more binding an agency decision, the less opportunity for an agency to favor particular constituents on an as-needed basis, or in an unsystematic way, and the more nonarbitrary the nonenforcement policy may be.

An example from the tax context helps illustrate how self-binding may be useful to an agency as a means of regularizing its discretion and producing nonarbitrary enforcement. The example comes from deep inside partnership tax, an extremely complex area of the tax Code, which is quite difficult for many tax practitioners, much less the average congressperson, to understand.<sup>188</sup> A perennial problem for partnership taxation is the taxation of a partnership interest received in exchange for the provision of services.<sup>189</sup> The problem reared its head in the early 1970s, when the Tax Court, in a case called *Diamond v. Commissioner*, determined that the receipt of a so-called profits interest (which is an interest in future profits) in exchange for the provision of services is includible in income at its fair market value at the time of the receipt by the service partner.<sup>190</sup> Commentators reacted fiercely to the decision, criticizing it as presenting valuation problems that would create great administrative difficulties.<sup>191</sup> The IRS Office of Chief Counsel agreed and advised the Assistant Commissioner (Technical) of the IRS to issue a revenue ruling indicating that, despite the *Diamond* case, the IRS would not attempt to include in income the receipt of a mere profits interest as compensation for services.<sup>192</sup>

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<sup>186</sup> Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 770 (1999) (citing publicly announced guidelines as one potential solution to excessive prosecutorial power).

<sup>187</sup> See, e.g., Strauss, *The President*, *supra* note \_\_\_\_, at 110.

<sup>188</sup> See, e.g., Terence Floyd Cuff, *Working with Target Allocations – Idiot-Proof or Drafting for Idiots?*, 35 WG-RETAX 116, 116 (describing that “[p]artnership taxation is an adventure in Wonderland . . .”).

<sup>189</sup> See Laura E. Cunningham, *Taxing Partnership Interests Exchanged for Services*, 47 TAX. L. REV. 247, 247 (1991) (describing “[t]he taxation of a partnership interest issued in exchange for services as “one of the most troublesome issues of partnership tax law.”). A plethora of articles has been written on the subject. See, e.g., Martin B. Cowan, *Receipt of an Interest in Partnership Profits in Consideration for Services: The Diamond Case*, 27 TAX L. REV. 161 (1972); Carolyn S. Nachmias, *Using Profits to Compensate a Service Provider-Potential Partnership Characterization*, 21 FLA. ST. U. L. REV. 1125 (1994); Leo L. Schmolka, *Taxing Partnership Interests Exchanged for Services: Let Diamond / Campbell Quietly Die*, 47 TAX L. REV. 287 (1991).

<sup>190</sup> 56 T.C. 530 (1971), *aff'd*, 492 F.2d 286 (7th Cir. 1974).

<sup>191</sup> See, e.g., A. WILLIS, PARTNERSHIP TAXATION § 11.04 (2d ed. 1976)

<sup>192</sup> G.C.M. 36346 (July 25, 1977). In most relevant part, the proposed ruling stated, “The Internal Revenue Service will not follow the decision in Sol Diamond to the extent that it holds that the receipt by a partner of an interest in future partnership profits as compensation for services results in taxable income.” *Id.*



Had the IRS released the ruling, it would have been foregoing enforcement that was at least arguably sanctioned under the relevant tax law at the time, as a result of the Tax Court's decision in *Diamond*. Rather than formally release the ruling, the IRS attempted to avoid the issue by more informally steering agents away from raising the issue.<sup>193</sup> This left advisors with the sense that nonenforcement was the IRS's informal position, but without any assurances that the IRS was bound to this position.<sup>194</sup>

This informal nonenforcement policy worked fairly well for some time, but ultimately the lack of a binding policy of nonenforcement meant that individual IRS field agents could wreak havoc for taxpayers and the IRS alike by raising the issue on their own accord. Following the *Diamond* case, the IRS rarely pressed the issue, and, as a result, for almost two decades few cases addressed the question.<sup>195</sup> As a result of a lack of official IRS policy against enforcement, however, an IRS field agent ultimately asserted that the receipt of profits interests as compensation for services should be included in the income of a married couple in Arkansas.<sup>196</sup> Rumors indicated that the field agent's pursuance of the case occurred without the approval of the IRS's national office, and that had such approval been sought the national office may have buried the case, indicating the arbitrariness of the individual field agent's decision.<sup>197</sup> Indeed, to add insult to injury, the IRS agent not only asserted that receipt of the profits interest should be included in income but even asserted that a negligence penalty should be imposed on the taxpayers for failing to include the receipt of such profits interests in income, heightening the arbitrariness of the IRS field agent's application of the law.<sup>198</sup> The assertion was contested by the surprised taxpayers (who had been advised otherwise by esteemed tax attorneys) in the case of *Campbell v. Commissioner*,<sup>199</sup> forcing the IRS into court in order to defend the inclusion in

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<sup>193</sup> MCKEE ET AL., FED. TAX'N PARTNERSHIPS & PARTNERS ¶ 5.02[3] at 9.

<sup>194</sup> See MCKEE ET AL., FED. TAX'N PARTNERSHIPS & PARTNERS ¶ 5.02[3] at 7 ("The revenue ruling proposed by General Counsel Memorandum 36346 was never published, but it was thought for some years that the Service would not take a litigating position contrary to it."); John A. Townsend, *The Controversy Over Campbell: Slicing the Bologna Too Thin*, 52 TAX NOTES 83 (July 1, 1991) ("[T]he IRS appeared to adopt a position that a 'pure' profits interest might escape taxation. The IRS failed, however, to acknowledge formally its apparent administrative largesse.").

<sup>195</sup> Cunningham, *Taxing Partnership Interests*, *supra* note \_\_, at 250-51.

<sup>196</sup> See Cunningham, *Taxing Partnership Interests*, *supra* note \_\_, at 247 (describing that the taxpayers in the case "learned that the Chief Counsel's disaffection with the *Diamond* decision was not shared by the local authorities in [the taxpayers'] district.").

<sup>197</sup> See Townsend, *The Controversy Over Campbell*, *supra* note \_\_, at n. 43.

<sup>198</sup> *Campbell v. Commissioner*, 59 T.C.M. (CCH) 236 (1990), *aff'd in part and rev'd in part*, 943 F.2d 815 (8th Cir. 1991).

<sup>199</sup> The taxpayer in the case had consulted with several tax attorneys about the matter, including a tax attorney who taught partnership tax at NYU School of Law. They both informed him that, despite *Diamond*, he should not be taxed, with the tax attorney who taught partnership tax at NYU School of Law indicating that "there was little or no chance that he would be taxed on the receipt of such interests." *Campbell*, 59 T.C.M. (CCH) 236 (1990).

income. The IRS's defense in *Campbell* was cagey. At the Eighth Circuit Court of Appeals, the IRS tried to preserve the tax result in the instant case while again dodging the central issue of taxability of profits interests by attempting to concede the issue in the case without actually creating a binding precedent for future taxpayers to rely upon to plan their affairs accordingly.<sup>200</sup> The IRS thereby again failed to strongly establish a policy against or for inclusion of profits interests in income, thus leaving the door open for continued arbitrary action in the future. The Eighth Circuit ultimately found in favor of the taxpayers in the case, but did not ultimately resolve the general question of whether the receipt of profits interests in exchange for the provision of services to a partnership may be included in income.<sup>201</sup>

In light of the controversy and the remaining uncertainty, the IRS finally stepped in after the Eighth's Circuit decision to issue a statement of nonenforcement. It did so in the form of Revenue Procedure 93-27.<sup>202</sup> Revenue Procedure 93-27 begins by summarizing the background of the controversy and the uncertainty it had engendered and then states that, unless certain clearly delineated exceptions apply, "if a person receives a profits interest for the provision of services to or for the benefit of a partnership in a partner capacity or in anticipation of being a partner, the Internal Revenue Service will not treat the receipt of such an interest as a taxable event for the partner or the partnership."<sup>203</sup> In other words, regardless of whether or not the IRS could do so, it was promising that it would not enforce the inclusion in income of profits interests received in exchange for services provided to a partnership, unless certain exceptions applied.<sup>204</sup> While the IRS has more recently

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<sup>200</sup> *Campbell*, 943 F.2d at 818.

<sup>201</sup> *Campbell*, 943 F.2d at 818-23.

<sup>202</sup> Rev. Proc. 93-27, 1993-2 C.B. 343.

<sup>203</sup> Rev. Proc. 93-27, 1993-2 C.B. 343. The exceptions are that the revenue procedure will not apply:

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

*Id.* at 1-2.

<sup>204</sup> The language of this statement of nonenforcement is remarkably similar to the IRS's announcement that "[t]he IRS will not assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel." I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621. The fact that the IRS would have faced a significant, uphill battle for inclusion on legal grounds in Rev. Proc. 93-27, 1993-2 C.B. 343 supports the contention of Professors Abreu and Greenstein that such statements of "nonenforcement" may be viewed just as easily, or perhaps better, as interpretations of the law. See *supra* note \_\_\_. However, this conclusion depends on how strong the law underlying the IRS's concession is, and the characterization as an interpretation therefore seems stronger

suggested that it will pursue a different set of legal rules in the form of regulations,<sup>205</sup> for over a decade Revenue Procedure 93-27 served as a source of certainty and uniformity. The proposed regulations, if finalized, would offer their own resolution of the issues and presentation of new issues.<sup>206</sup>

The saga regarding taxation of profits interests is instructive regarding the potential benefits of an agency binding itself through categorical nonenforcement. By failing to create an explicit and binding policy of nonenforcement after *Diamond*, the IRS opened the door for arbitrary administrative action. Having an unofficial, not transparent policy of nonenforcement left taxpayers uncertain about how to plan their affairs. Rather than being able to rely on a consistent policy determined for all taxpayers, individual taxpayers became vulnerable to the possibility of enforcement by lone revenue agents, motivated by their own, unsystematic sense of their enforcement duties. As described by a leading treatise, between *Diamond* and *Campbell* “millions of service-connected transfers of partnership profits interests went unchallenged, while only a few unfortunates found themselves dealing with the effects of *Diamond*.”<sup>207</sup> The idea of being one of the only taxpayers subject to enforcement for a particular issue, when high level officials have unofficially precluded such enforcement as a result of concerns about administrability and / or other misgivings is a quintessential example of arbitrary agency action. Had the IRS issued a well-reasoned statement of categorical nonenforcement after *Diamond*, it could have bound itself to less arbitrary and more public regarding policy, thereby increasing the legitimacy of its nonenforcement of the inclusion in income of profits interests received in exchange for services.

To be sure, a statement of categorical nonenforcement may not always meet the ideal standards of nonarbitrariness. While the IRS could have issued a well-reasoned statement of categorical nonenforcement after *Diamond* explaining why it would not enforce the inclusion in income of profits interests received in exchange for services, it also could have instead released a bald statement of nonenforcement without the well-reasoned explanation. Indeed, aside from averring to the controversy regarding the taxation of profits interests as background, Revenue Procedure 93-27 is just such a bald

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in the case of Rev. Proc. 93-27, 1993-2 C.B. 343 than in the case of I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621. Whether the IRS is promising nonenforcement because of its doubts about the law or because of administrative or other noninterpretive reasons, this Article generally views together IRS discretionary statements with respect to enforcement of the law that affect the law on the ground.

<sup>205</sup> Prop. Reg. § 1.721-1(b)(1) (2005); Prop. Reg. § 1.83-3(e) (2005) (applying § 83 to receipt of profits interest but providing elective safe harbor of liquidation value for partnership interest received in exchange for services).

<sup>206</sup> See *id.* For discussion of the proposed regulations, see MCKEE ET AL., FED. TAX’N PARTNERSHIPS & PARTNERS ¶ 5.02[8].

<sup>207</sup> MCKEE ET AL., FED. TAX’N PARTNERSHIPS & PARTNERS ¶ 5.02[3] at 6.

statement of nonenforcement.<sup>208</sup> To root this concern in the literature regarding arbitrariness, Professor Bressman has argued that “agencies must choose notice-and-comment procedures, to the extent possible, for issuing standards in advance of applying them to particular facts” because “[o]ther procedures, even if capable of binding, do not best promote the values of fairness, predictability, and participation important to a genuinely nonarbitrary administrative state.”<sup>209</sup> This argument, too, harkens back to Professor Davis who earlier argued that enforcement policy should be made through “rule-making procedure to give systematic and clear answers to all the major questions, thus reducing the power of selective enforcement in individual cases, and thereby reducing the injustice that results from uneven enforcement.”<sup>210</sup> For example, Professor Davis explained that if the police have a policy of not enforcing anti-gambling laws for church bingo games and social poker games, the police should formalize this policy through notice and comment rulemaking.<sup>211</sup> Professor Zelenak has similarly argued that when enforcement difficulties preclude enforcement, Congress should provide agencies the regulatory authority to alter the law so as to accommodate the enforcement difficulties, thereby allowing agencies to act through the transparent mechanism of notice of comment rulemaking, which would also increase accountability because the agency would be acting under Congress’s explicit authority.<sup>212</sup> For this reason, Professor Zelenak might argue that the correct course of action in the case of profits interests received in exchange for services was to issue regulations clarifying the law, and that when categorical nonenforcement is instead pursued through informal agency statements that it will not enforce the law, as occurred with both I.R.S. Announcement 2002-18 in the case of frequent flier miles and Rev. Proc. 93-27 in the case of partnership profits interests, such statements are illegitimate.

A few responses to this potential deficit of categorical nonenforcement are in order. This Article certainly does not mean to suggest that a mere statement of categorical nonenforcement is superior to a policy issued through notice and comment rulemaking. However, for a number of reasons, this Article also does not seek to limit the benefits of categorical nonenforcement to the context of notice and

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<sup>208</sup> Rev. Proc. 93-27, 1993-2 C.B. 343.

<sup>209</sup> Bressman, *Beyond Accountability*, *supra* note \_\_, at 533-34.

<sup>210</sup> DAVIS, *DISCRETIONARY JUSTICE*, *supra* note \_\_, at 92-93.

<sup>211</sup> DAVIS, *DISCRETIONARY JUSTICE*, *supra* note \_\_, at 93.

<sup>212</sup> Zelenak, *Custom and the Rule of Law*, *supra* note \_\_, at 852 (explaining that “perhaps the best approach would be for Congress to enact a new Code provision specifically authorizing the Treasury Department to issue regulations narrowing the statutory definition of gross income with respect to non-cash benefits received outside of an employment context, whenever the IRS decides that administrative concerns make such a narrowing advisable” and that “[i]f this approach worked well in the gross-income context, Congress might decide to give the Treasury Department similar authority to revise by regulation other specified Code sections . . .”).

comment rulemaking. A statement of categorical nonenforcement may be more or less well-reasoned even if it is made outside the context of notice and comment rulemaking. For the reasons fleshed out above, a well-reasoned statement of categorical nonenforcement issued outside of notice and comment rulemaking may help reduce the arbitrariness of nonenforcement. While less desirable, even a *poorly* reasoned statement of categorical nonenforcement can have benefits, such as preventing the arbitrary result of being the only taxpayer ever enforced against under an unadministrable aspect of the tax law.

These potential benefits of mere statements of categorical nonenforcement, rather than policies that are issued through notice and comment rulemaking, are relevant because notice and comment rulemaking simply may not be fruitful for many nonenforcement policies. When the nonenforcement policy clearly conflicts with the law on the books, it is unlikely that a court would uphold such a policy if the agency attempted to formalize the policy through notice and comment rulemaking.<sup>213</sup> As a result, at least when the agency's policy of nonenforcement cannot be explained by any ambiguity in the law, notice and comment procedures may not be a viable means of issuing the nonenforcement policy.

While Professor Zelenak's suggestion of providing explicit congressional authority for an agency to change the law on the books to accommodate various enforcement decisions may allow a court to uphold the agency's subsequent alteration of the law through notice and comment rulemaking, this solution has two practical problems. In many cases, Congress simply will not abide by this suggestion, perhaps because Congress does not know of the enforcement conundrums or perhaps because Congress for whatever reason does not get around to providing the authorization. The lack of authorization does not necessarily indicate a desire for full enforcement,<sup>214</sup> but rather leaves the agency at square one in terms of what to do when enforcement decisions have to be made. Additionally, even to the extent that Congress provides the agency with such authority, the agency may eschew the

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<sup>213</sup> Such a statement may run afoul of *Chevron's* step one, in which "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984). This conclusion is in some tension with the notion that the nonenforcement policy may be a reasonable means of communicating or setting enforcement policy in light of enforcement difficulties Congress did or could not have considered. While this notion, as explored in the text of this Article, is likely to be true in a number of situations, court doctrine thus far seems unlikely to consider it in determining whether a nonenforcement rule is consistent with congressional intent. *Contra* DAVIS, DISCRETIONARY JUSTICE, *supra* note \_\_, at 93 (explaining that, surprisingly, the police can "formally through rules provide that church bingo games and social poker games are not a crime" when "a statute flatly prohibits that gambling is a crime."). Davis reaches this conclusion based on its desirability, not an analysis of legality.

<sup>214</sup> *Cf. Sant' Ambrogio, The Extra-Legislative Veto, supra* note \_\_, at 378 (explaining how "congressional inaction is generally considered a weak indication of legislative intent").

invitation as a result of the cost of notice and comment procedures. A perennial objection to notice and comment procedures is that they are quite costly for agencies and a requirement that agencies use them may have the unintended consequence of simply causing agencies to engage in less transparent policymaking to avoid the costs of the procedures.<sup>215</sup> While this objection can simply be countered with the argument that the benefits of notice and comment procedures may outweigh the costs,<sup>216</sup> the objection has particular power in the nonenforcement context.<sup>217</sup> Whereas agencies will often bear the costs of notice and comment procedures in order to get regulated parties to abide by standards of behavior that the agency is charged with obtaining and in order to get courts to defer to the agency's interpretation of what standards of behavior bind the regulated parties,<sup>218</sup> nonenforcement is a standard of behavior that the agency would be voluntarily imposing on itself. Agencies may not have as strong of an incentive to ensure that they abide by their own standards of nonenforcement, and therefore may not be as willing to bear the costs of rulemaking to bind themselves to nonenforcement.

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

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<sup>215</sup> For seminal treatments of the widespread "ossification" thesis, see, for example, Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). For a recent challenge to this widespread and deeply influential thesis, see Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414 (2012).

<sup>216</sup> David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 304-05 (2010). While it is outside the scope of this Article, this pro versus anti notice and comment debate has the feel of opposite sides perpetually locked into their positions with no way out. Those who worry about ossification of the notice and comment procedures can posit that they are costly and that agencies may avoid them by issuing policy through more informal mechanisms, whereas those who focus on the value of the procedures can counter that they have value and that agencies may have reasons not to avoid them. Stating the opposing considerations does not help elucidate *when* agencies are likely to avoid the procedures as a result of the costs, or even which agencies are likely to do so in which situations. Determining when agencies are likely to avoid the procedures as a result of the costs is much like determining when taxpayers are likely to avoid taxes by changing behavior. Methodologies such as examining elasticity in the tax context might be useful in thinking about when agencies will change behavior to avoid the cost of the procedures. If methodologies like this provided particularized insights, the law could be molded to fit such insights. In any event, the text provides one examination of a situation in which agencies might be particularly likely to change behavior to avoid costly notice and comment procedures.

<sup>217</sup> Cf. Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_, at 403-04 (explaining that "requiring rulemaking to set enforcement policies might discourage agencies from adapting their enforcement policies to a changing environment or encourage them to conceal such adjustments").

<sup>218</sup> Yackee & Yackee, *Testing the Ossification Thesis*, *supra* note \_\_, at 1474-75 (explaining that an agency's compliance with notice and comment procedures is necessary to get judicial deference and that failure to comply "leads to excessive slippage between the behavior of regulatees and the agency's own regulatory goals").

for aflatoxin levels in feed corn violated a number of requirements.<sup>219</sup> The action levels were a statement of the FDA's nonenforcement policy, in that they indicated levels of contamination below which enforcement proceedings ordinarily would not occur.<sup>220</sup> After the case went up to the Supreme Court and back down the D.C. Circuit, the D.C. Circuit ultimately held that the action levels were invalid because they should have been issued via notice and comment procedures.<sup>221</sup> Instead of then complying with the procedures, the FDA simply announced that its action levels would not be binding, thereby denying regulated parties and the public reliable information regarding the FDA's nonenforcement policy.<sup>222</sup> As lamented by one commentator regarding the case, "[t]o the extent that the agency's own statement of prosecutorial policy is in some sense 'binding' on the agency, then the policy only serves the function of regularizing agency behavior and reducing case-specific arbitrariness all the more" and if an agency abandons statements of such policies as a result of notice and comment procedures being imposed, the agency also gives up "the assurances of predictability, fairness, openness, and agency personnel management that self-binding regulation may have provided."<sup>223</sup> The case serves as a cautionary tale of how forcing enforcement policy to abide by notice and comment procedures may simply drive the procedures deeper underground, away from public view.

The bottom line is that, although statements of categorical nonenforcement might not always serve as a procedurally ideal means of an agency limiting its discretion to ensure nonarbitrariness, it may nonetheless promote the nonarbitrariness of nonenforcement. As illustrated in this Part, then, in certain circumstances categorical nonenforcement can increase the accountability, deliberation, and nonarbitrariness of nonenforcement, all of which can legitimate inevitable nonenforcement of the law.

## V. Return to Alternative Lenses

Having examined the case for categorical nonenforcement through the lens of agency legitimacy, it is useful at this point to return to the alternative lenses recently used by other scholars in examining nonenforcement generally and tax law nonenforcement specifically. This Part does not attempt to grapple with these alternative lenses on their own terms. For instance, this Part will not offer an alternative, historical reading of the period after the Founding to suggest that, in fact,

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<sup>219</sup> *Community Nutrition Inst. v. Young*, 757 F.2d 354 (D.C.Cir.1985), *rev'd*, 476 U.S. 974 (1986), *on remand*, 818 F.2d 943 (D.C.Cir.1987).

<sup>220</sup> *Community Nutrition Inst.*, 476 U.S. at 977.

<sup>221</sup> *Community Nutrition Inst.*, 818 F.2d at 948-49.

<sup>222</sup> Food and Drug Administration Notice, 53 Fed.Reg. 5043 (Feb. 19, 1988).

<sup>223</sup> Thomas, *Prosecutorial Discretion*, *supra* note \_\_\_\_, at 152-53.

constitutional history supports the executive branch being able to engage in categorical nonenforcement. Nor does this Article necessarily subscribe to the views set forth in such analyses. Rather, this Part will suggest that the conclusions drawn from such analyses may not actually be that helpful in determining what nonenforcement is impermissible, especially when thinking about the inevitable, constant nonenforcement decisions made by an agency. For reasons discussed below, distinctions that constitutional scholars have relied upon, such as distinctions between categorical decisionmaking and setting priorities, or between nonenforcement motivated by policy and nonenforcement motivated by enforcement resource limitations, may be more illusory than real. As a result, such distinctions may not tell us something necessarily true or self-evident about categorical nonenforcement from a constitutional perspective.<sup>224</sup> In a similar vein, rule of law analysis does not yield clear conclusions. While Professor Zelenak has suggested that categorical nonenforcement may be problematic from a rule of law perspective, under some views categorical nonenforcement may actually promote the rule of law. As a result, the alternative lens of rule of law also does not necessarily serve as a clear guide, or tell us something necessarily true about the legitimacy of categorical nonenforcement. While dedicated adherents to these alternative lenses may counter that indeterminacy is no excuse for abandoning the inquiry, this Part will hopefully at least prompt a reckoning with the extent of the indeterminacy, and create some space for integrating the lens of agency legitimacy into the broader, and important, ongoing conversation regarding executive nonenforcement of the law.

To begin, the distinctions that constitutional law scholars have tried to draw between categorical nonenforcement and setting priorities may be more illusory than real.<sup>225</sup> To take an example from the tax context, as described previously, the IRS has been engaging in seemingly impotent enforcement of the tax code for large partnerships. The result has been an audit rate of only approximately .8% for large partnerships,<sup>226</sup> as compared to a 27.1% audit rate during the same time period for C corporations with \$100 million or more in assets,<sup>227</sup> and even those audits of large

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<sup>224</sup> A recent article has suggested that “[c]onstitutional law and politics . . . have no way to take into account [the inaction that] has become a fundamental aspect of modern American government.” Love & Garg, *Presidential Inaction*, *supra* note \_\_, at 1201. The struggles to define the problem in meaningful constitutional terms might reflect this reality.

<sup>225</sup> Indeed, even some proponents of the line have acknowledged its difficulties. *See, e.g.*, Price, *Enforcement Discretion*, *supra* note \_\_, at 677 (acknowledging that “this distinction will be more a matter of mindset and attitude than bright-line determination; the line between a priority and a policy will be unclear in many cases.”).

<sup>226</sup> LARGE PARTNERSHIPS, *supra* note \_\_, at 10.

<sup>227</sup> LARGE PARTNERSHIPS, *supra* note \_\_, at 10.



partnerships that did occur resulted in minimal findings of noncompliance.<sup>228</sup> Indeed, looking at large partnership audits on a net basis, in at least some recent years the total audit adjustments from large partnerships were negative, meaning that on a net basis the IRS actually ended up paying large partnerships money!<sup>229</sup> While this result has occurred under the formal guise of setting priorities rather than categorical nonenforcement, the notion that virtually impotent audit is clearly distinct from categorical nonenforcement just because it technically occurs through setting a low enforcement priority is untenable. As this example illustrates, setting priorities, like a formal policy of categorical nonenforcement, can have the result of a policy of essentially no enforcement, making any sharp distinction between the two enforcement mechanisms somewhat meaningless.

Outside of the tax context, the cases that constitutional law scholars themselves have been sparring over reflect the difficulty of drawing these distinctions. Referring to DACA, Professors Delahunty and Yoo have characterized the program as a “decision not to enforce the removal provisions of the Immigration and Nationality Act (INA) against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States,”<sup>230</sup> or, in other words, a case of categorical nonenforcement, and Professor Price has seconded that “this policy amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization.”<sup>231</sup> As previously alluded to, the Obama Administration did not actually frame the program as categorical nonenforcement, but rather took pains to indicate that it was merely setting priorities and even that particular decisions would be made on a “case-by-case” basis.<sup>232</sup> Other scholars and commentators have argued that President’s Obama’s immigration actions, far from categorical nonenforcement, are merely setting enforcement priorities, which they describe as a quintessentially executive role.<sup>233</sup> The differing characterizations by different people looking at the same, exact policy shines light on how the distinction itself at the very least does not lead to self-evident conclusions.

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

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<sup>228</sup> GROWING NUMBER, *supra* note \_\_, at 20.

<sup>229</sup> GROWING NUMBER, *supra* note \_\_, at 21.

<sup>230</sup> Delahunty & Yoo, *Dream On*, *supra* note \_\_, at 783.

<sup>231</sup> Price, *Enforcement Discretion*, *supra* note \_\_, at 760.

<sup>232</sup> See *supra* \_\_.

<sup>233</sup> See *supra* \_\_.

the same as a policy of categorical nonenforcement if such right is never, or even virtually never, exercised. Even to the extent that such right is exercised in an exceptional case, for the millions of individuals who will not be deported and gain the virtual assurance of nondeportation, a policy that formally sets priorities and leaves some technical space for case-by-case deviations, nonetheless provides assurances almost identical to that provided by categorical nonenforcement.<sup>234</sup> To elevate the very unlikely possibility that the executive will deviate from a policy of nonenforcement to a saving grace from a constitutional perspective pushes form over function to an unreasonable degree.

On the other hand, if we reject the formal terms of the policy as a means of distinguishing between categorical nonenforcement and setting priorities, the distinction itself becomes somewhat meaningless. If DACA, which was explicitly formulated as an exercise in setting priorities, should be considered for all intents and purposes an instance of categorical nonenforcement, then any supposed exercise in setting priorities may really be categorical nonenforcement, introducing the difficulty of distinguishing between a policy of setting priorities that is essentially the same as a policy of categorical nonenforcement and a policy that more veritably just sets priorities. This task will be factually intensive and almost certain to produce no intellectual coherence. If the constitutional text itself actually distinguished between categorical nonenforcement and setting priorities and explicitly made the constitutionality of nonenforcement turn on such distinction, we may have no choice but to grapple with this inquiry. But to rely on such a distinction as a means of assessing legality absent a textual mandate to do so seems unlikely to lead to conclusions that will be particularly satisfying.<sup>235</sup>

At least some constitutional law scholars might counter that, nonetheless, a distinction must be drawn between nonenforcement, and even categorical nonenforcement, that is motivated by enforcement resource limitations (which may be an acceptable exercise of executive power) and nonenforcement that is motivated by policy (which may not be an acceptable exercise of executive

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<sup>234</sup> Cf. Barack Obama, *A Nation of Laws and a Nation of Immigrants*, TIME, June 17, 2012, <http://ideas.time.com/2012/06/17/A-NATION-OF-LAWS-AND-A-NATION-OF-IMMIGRANTS/> (explaining that, through DACA, “DHS is lifting the shadow of deportation from these young people.”).

<sup>235</sup> Indeed, although it is outside the scope of this paper to delve into the recent court precedent regarding nonenforcement, the Supreme Court has relied on administrative law to establish a presumption against the reviewability of agency nonenforcement decisions, attributing this presumption in part to the difficulty of judicial evaluation of nonenforcement decisions and agencies’ superior abilities to balance factors to determine whether enforcement is appropriate. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). While the Supreme Court’s failure to entertain nonenforcement as a constitutional violation does not mean that it does not exist, *Price, Enforcement Discretion*, *supra* note \_\_\_, at 688, 748, the Supreme Court’s caution regarding the difficulty in judging nonenforcement decisions may nevertheless inform the wisdom of trying to do so under a constitutional lens.

power). Indeed, this Article has implicitly explored how much of the IRS's nonenforcement may be understood as a function of the IRS's limited resources. Constitutional scholars might argue, therefore, that all of the nonenforcement discussed in this Article falls under acceptable nonenforcement explainable by enforcement resource limitations, and that no new, administrative legitimacy lens is necessary for thinking about nonenforcement. However, the notion that there is such a clear divide, or that even all of the nonenforcement in this Article can be explained by such a divide, is overly simplistic.<sup>236</sup> When dealing with an agency that is perpetually underfunded, there often will be some sort of enforcement resource limitation that could explain why an agency has chosen not to enforce a particular aspect of the law. Indeed, in a resources strapped agency, any instance of nonenforcement could be explained, at least in part, by enforcement limitations.<sup>237</sup> However, various policy decisions are often going to be intermixed with enforcement considerations, making it difficult to disentangle them.

As discussed previously, for example, the decision to engage in categorical nonenforcement with respect to frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes can be explained in part by the difficulty for the IRS in enforcing the inclusion of such miles in income. However, it is quite difficult to enforce many aspects of the tax law, including, for example, inclusion of the cash wages received by a nanny.<sup>238</sup> Pointing solely to enforcement difficulties alone isn't an adequate way to understand why the IRS engaged in categorical nonenforcement with respect to frequent flier miles, but not with respect to cash wages paid to nannies. In addition to enforcement difficulties, there must be some other reason why the IRS chose categorical nonenforcement with respect to frequent flier miles. The additional reason is likely that there is an underlying sense that the frequent flier miles just do not feel like income in the same way as the cash wages, making it less palatable to tax them.<sup>239</sup> While the Code provides no explicit room for the IRS to

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<sup>236</sup> Even strong proponents of such a divide acknowledge the real difficulties. See, e.g., Love & Garg, *Presidential Inaction*, *supra* note \_\_, at 1215 (acknowledging that "resource constraints are ubiquitous, presidents are in the business of making decisions that serve their predetermined policy goals, and priorities and obligations will often conflict"), and 1229 (noting that courts might be unwilling or incapable of policing this divide).

<sup>237</sup> Of course, it might be possible to find an example of an agency that is not resource strapped, and in such cases the enforcement limitations explanation might be less plausible. See Love & Garg, *Presidential Inaction*, *supra* note \_\_, at 1218-20 (making such an argument with respect to the Bush administration's underenforcement of the Voting Rights Act). As they acknowledge at 1219 n. 114, their conclusions even in this case are not indisputable.

<sup>238</sup> See text accompanying notes \_\_\_\_.

<sup>239</sup> Cf. Zelenak, *Custom and the Rule of Law*, *supra* note \_\_, at 841 (explaining that "taxation of many in-kind benefits may be nonintuitive and objectionable in the minds of the general public").

make enforcement decisions based on underlying senses such as these, these underlying senses, which are really policy views, nonetheless inevitably motivate an agency's resource allocation decisions.

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Somewhat similarly, the extreme difficulty in auditing large partnerships discussed previously might make nonenforcement as to large partnerships a particularly good example of nonenforcement that can be explained by enforcement resource limitations. And yet, actually justifying such an extensive policy of nonenforcement based solely on enforcement resource limitations seems somewhat incredible. For example, if the IRS were to actually make a statement of categorical nonenforcement with respect to large partnerships, some level of policy laden value judgment would seem necessary to explain why the IRS had chosen categorical nonenforcement to address this particular enforcement difficulty but not others, again blurring the lines between enforcement resource limitations and policy.

Indeed, the cases that constitutional law scholars have been sparring over outside the tax context also underscore the difficulty of determining when nonenforcement can be explained by limitations on enforcement resources and when it can be explained by policy. In the context of DACA, for example, Professor Yoo has argued that DACA “represents a twisting of the Constitution's fabric for partisan ends,”<sup>240</sup> whereas Professor Wadhia has countered that “far from serving as a partisan tool for reelection, prosecutorial discretion programs like DACA reflect a reasonable administrative tool aimed at managing priorities and protecting those with compelling equities.”<sup>241</sup> Focusing explicitly on the question of whether DACA saves enforcement resources, Justice Scalia (among many others) has claimed that “the husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement.”<sup>242</sup> Others have countered the opposite, explaining, for instance, that “surely it would take more resources to proceed with deportation than to review an immigrant's file (which must be done in either case) for purposes of DACA.”<sup>243</sup>

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<sup>240</sup> *Obama Has Pursued a Dangerous Change in the Power of the President*, FOXNEWS.COM, <http://www.foxnews.com/opinion/2012/10/12/obama-has-pursued-dangerous-change-in-powers-president/> (Oct. 12, 2012).

<sup>241</sup> *In Defense of DACA, Deferred Action, and the Dream Act*, 91 TEX. L. REV. 59, 60 n. 8 (2013).

<sup>242</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting).

<sup>243</sup> Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_, at 396 n. 289.

Certainly, with enough effort a cost benefit analysis could be performed, indicating how much money is or is not saved by the DACA program. To the extent that such an analysis reveals that DACA actually costs, rather than saves, money the enforcement resource limitations explanation might be invalid. But what about in presumably the majority of cases that agencies face (and maybe even in the case of DACA), in which cutting enforcement in a particular area does in fact save scarce resources? Would the enforcement resources limitation then necessarily excuse the nonenforcement decision? Like with the categorical nonenforcement of frequent flier miles, even such an analysis would not necessarily explain why the particular nonenforcement was chosen as a means of saving enforcement resources. In deciding between different means of saving enforcement resources, value judgments not motivated solely by saving enforcement resources are inevitably going to come into play. For instance, an agency might very reasonably decide it should save resources by cutting enforcement of offenders that pose a low threat to the public. But once anything other than saving enforcement resources becomes a factor in determining how to allocate enforcement resources, the decision inevitably becomes motivated by a mix between policy and a desire to save enforcement resources. As a result, like the distinction between categorical nonenforcement and setting priorities, this distinction between nonenforcement motivated by policy and nonenforcement motivated by enforcement resource limitations may sound good in principle but is going to be very hard to apply in practice.

Indeed, accepting for the moment that there will at least very often be a mix of policy and enforcement limitations that explain nonenforcement decisions, categorical nonenforcement may provide Congress a better means of combatting undesirable policies, relative to alternatives available to the agency. As has been fleshed out previously, agencies can engage in impotent nonenforcement through setting priorities. As a result, agencies can accomplish many of their nonenforcement goals through setting priorities, and setting priorities may push the nonenforcement deeper underground, thereby potentially providing Congress less opportunity to change the policy. For much the same reasons that categorical nonenforcement itself can be accountability enhancing, then, even policy-motivated categorical nonenforcement may be preferable to less accountable alternatives.

Finally, this Article also does not rely on the distinction between time limited nonenforcement policies and nonenforcement policies that are not so limited, even though some constitutional scholars have suggested that this distinction might be important. Scholars who have provided some support for the distinction have not provided much explanation as to why such time limitations may remedy

potential constitutional violations, nor will this Article put forth a vigorous counterargument.<sup>244</sup> It is enough for now to say that if a nonenforcement policy did somehow breach the limits on executive power and therefore pose constitutional problems, it is hard to see why limiting such breach to a specified period of time would remedy, rather than limit, the constitutional breach.<sup>245</sup>

Moving to the other, prominent existing lens for examining categorical nonenforcement, Professor Zelenak has suggested in the tax context that categorical nonenforcement may create rule of law problems.<sup>246</sup> However, it is hard to know what, exactly, the rule of law means in the context of an agency's enforcement task, in which it has vastly insufficient resources to pursue all nonenforcement. As a general matter, it is notoriously difficult to say what, exactly, the rule of law means. As Professor Radin explains, there is no canonical meaning, and some argue the idea should be jettisoned altogether.<sup>247</sup> In the context of enforcement of the law, the ambiguity may be even greater. There are certainly accounts that view enforcement discretion as anathema to the rule of law.<sup>248</sup> Indeed, if the rule of law seeks only to ensure that *Congress's* rules provide transparency and notice, then any deviation from them by an agency would violate the rule of law. However, in some accounts, rule exploitation (or violation) also threatens the rule of law.<sup>249</sup> It is therefore unclear from a rule of law perspective how to evaluate an agency using certain methods that might otherwise violate rule of law principles, if such methods garner compliance. Moreover, while various accounts of the rule of law emphasize consistency<sup>250</sup> and notice of how the government intends to use its powers,<sup>251</sup> it is not

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<sup>244</sup> For one explanation, see Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_, at 403 (explaining that time limitations "would lend legitimacy to the President's actions by showing that the Executive is not permanently rewriting the law."). This explanation does not seem to offer a satisfying explanation, in that it defends the time limitations by arguing that they increase legitimacy because they show that the action is time limited.

<sup>245</sup> For support for this point, see Love & Garg, *Presidential Inaction*, *supra* note \_\_, at 1239 ("Furthermore, even if every decision not to enforce the law were eventually reversed, the period during which a law is not enforced would amount to a unilateral four- or eight-year repeal . . ."); Price, *Enforcement Discretion*, *supra* note \_\_, at 706 ("[E]ven if enforcement suspension is only temporary, it still strips the law of practical effect for a certain period, thus violating the principle of legislative supremacy in policymaking").

<sup>246</sup> See *supra* note \_\_.

<sup>247</sup> Margaret Jane Radin, *Reconsidering the Rule of Law*, 89 B.U. L. REV. 781, 781 (1989).

<sup>248</sup> See, e.g., Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1759 (2006) (exploring enforcement discretion "as a species of normlessness and lawlessness at the center of the struggle to maintain a fair criminal system consistent with the rule of law" and prosecutorial discretion as "the antithesis of the rule of law").

<sup>249</sup> Edward A. Morse, *Reflections on the Rule of Law and "Clear Reflection of Income": What Constrains Discretion?*, 8 CORNELL J.L. & PUB. POL'Y 445, 461-62 (1999).

<sup>250</sup> Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 593 (2010) ("Government treating similarly-situated citizens similarly is itself often identified as a component of the rule of law.").

<sup>251</sup> Morse, *Reflections on the Rule of Law*, *supra* note \_\_, at 453.

obvious at what level of government these requirements have to be met. Indeed, IRS directed categorical nonenforcement provides some measure of consistency and notice regarding the agency's enforcement, thereby potentially *promoting* the rule of law.<sup>252</sup> For example, to the extent that the IRS has informally decided on a policy of nonenforcement with respect to frequent flier miles or partnership profits interests, making a categorical statement of nonenforcement may provide the notice and guarantee the consistency of government policy that are hallmarks of the rule of law. Professor Luna has provocatively made this point in the prosecutorial context by posing the following thought experiment: "Imagine an elected district attorney conveying to his constituency the rules or principles that will be used in exercising prosecutorial discretion, stating with a degree of specificity the conditions under which his office will not prosecute particular crimes or seek certain punishments," and concluding that such overt prosecutorial decriminalization can be a valuable means of "guiding law enforcement, communicating honestly with the citizenry, and allowing individuals to conform their behavior to the effective scope of the law."<sup>253</sup> Along these lines, important court authority has intimated that setting administrative standards that limit otherwise excessive discretion may be inherent in the rule of law.<sup>254</sup> In short, the rule of law is an amorphous concept that may mean different things to different people in different contexts, and what, exactly it says about categorical nonenforcement is not entirely clear.

To be sure, the lens set forth in this Article does not offer a clear litmus test for determining when categorical nonenforcement is desirable and when it is not. Determining when categorical nonenforcement is being used to increase accountability, deliberation, and nonarbitrary decisionmaking, rather than simply as a means of subverting the law put in place by Congress, is no easy task. This Article is not arguing that the lens of administrative legitimacy is superior to the alternative lenses that have been offered, but rather that it should be a bigger part of the story.

As this Part has hopefully displayed, neither the constitutional nor the rule of law lenses that have been prominently offered thus far provide a necessarily satisfying or self-evident answer regarding when and how agency directed nonenforcement that is occurring every day is permissible. Even the

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<sup>252</sup> Cf. DAVIS, DISCRETIONARY JUSTICE, *supra* note \_\_, at 94 ("A common kind of confused thinking is to prefer the secret ad hoc policies to the open uniform policies on the ground that the enacted law should be respected!"). Indeed, in examining nonenforcement that Professor Zeleank finds particularly problematic, Professors Abreu and Greenstein state that "the exercise of enforcement discretion can be consistent with the rule of law," and they root such statement in the notion that "the IRS is not acting in a way that differs materially from that of other administrative agencies that routinely exercise 'prosecutorial discretion.'" Abreu & Greenstein, *supra* note \_\_, at 24, 29.

<sup>253</sup> Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 801, 816 (2012).

<sup>254</sup> *Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737, 758 (D.D.C. 1971).

scholars who suggest that categorical nonenforcement presents constitutional or rule of law problems do not necessarily suggest that these lenses provide courts with a reasonable means of policing nonenforcement.<sup>255</sup> Rather, even under such lenses, executive branch officials may have to police themselves to ensure that nonenforcement comports with proper conceptions of executive power.<sup>256</sup> This Article argues that, when agencies and scholars are evaluating what the proper conception of executive power is with respect to agency directed nonenforcement, the lens of agency legitimacy should be part of the analysis. Indeed, as Professor Bressman has suggested in another context, focusing on administrative law and legitimacy may yield meaningful constraints on agencies in situations in which relying on constitutional law proves to be more problematic.<sup>257</sup> As this Article has illustrated, the lens of administrative legitimacy may provide a useful new layer in thinking about both inevitable agency nonenforcement as a general matter and about categorical nonenforcement specifically.

## VII. Potential Objections

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

Perhaps most pressingly, a powerful objection to categorical nonenforcement might be that, even to the extent that it promotes certain values, it can pose a significant threat to compliance. The argument might go as follows. Categorical nonenforcement might increase the legitimacy of an agency's

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<sup>255</sup> See, e.g., Love & Garg, *Presidential Inaction*, *supra* note \_\_, at 1225-30 (discussing difficulties with courts policing inaction); Zelenak, *Custom and the Rule of Law*, *supra* note \_\_, at 847-51 (same).

<sup>256</sup> See, e.g., Price, *Enforcement Discretion*, *supra* note \_\_, at 747-48.

<sup>257</sup> Bressman, *Disciplining Delegation*, *supra* note \_\_ (arguing for a turn to administrative law, rather than constitutional law, as a means of requiring agency standards).



nonenforcement decision. However, categorical nonenforcement also all but ensures zero compliance with the law, and the erosion of deterrence may be a significant agency failing.<sup>258</sup> One answer to this concern is to respond that there are counterbalancing factors at work. Compliance with the law (which, in the tax context, results in tax revenue) has some value, but so does the legitimacy of an agency's nonenforcement decisions. Hopefully focusing on the latter opens the door to a consideration of how to balance values, even if it does not complete the task. A more pointed, and necessarily preliminary, response is that these values may not necessarily always be in clear tension. For instance, as suggested previously, insiders were purportedly aware of the enforcement difficulties with auditing large partnerships prior to the issue becoming a subject of public awareness and debate.<sup>259</sup> This example underscores a more general point, which is that sophisticated, regulated parties are often more aware of informal policies of nonenforcement than the general public.<sup>260</sup> As a result, in many circumstances, increasing agency legitimacy or promoting other values through categorical nonenforcement may not come at much of a price at all in terms of reduced compliance of the parties subject to the law at issue. In such cases, categorical nonenforcement may score legitimacy gains without raising significant, counterbalancing concerns regarding compliance. In any event, while future analysis certainly should try to refine when compliance is going to be a significant, counterbalancing factor, it is but one factor to consider in a broader evaluation of categorical nonenforcement. Focusing on the factors discussed in this Article is a necessary step in order to ultimately reach this broader, comprehensive evaluation.

Next, at least in discussing how categorical nonenforcement may in some instances increase accountability, the Article has implicitly assumed that the politically accountable branches can actually do something in response to the categorical nonenforcement. In particular, an implicit assumption in the accountability discussion was that if an agency is engaging in policy-motivated nonenforcement that conflicts with Congress's will, then Congress can actually respond and reverse the decision. This assumption begs the question: Can Congress necessarily reverse categorical nonenforcement? By nature, the fact that the agency is engaging in categorical nonenforcement means that the law already indicates that enforcement should be occurring. In response to categorical nonenforcement, then, what

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<sup>258</sup> Amy S. Elliott, *News Analysis: Why It Matters That the IRS Has Trouble Auditing Partnerships*, 143 TAX NOTES 7, at 5 (2014) ("Telling taxpayers that the IRS can't audit them won't encourage compliance.").

<sup>259</sup> See *supra* note \_\_\_\_.

<sup>260</sup> Andrias, *The President's Enforcement Power*, *supra* note \_\_\_\_, at 1098.

can Congress do to protect its prerogative? Can it pass the “we really mean it” law?<sup>261</sup>

While this question implicates an expansive inquiry into how and whether Congress can control agencies, this Article need not delve deeply into the extensive literature about this inquiry<sup>262</sup> in order to posit that categorical nonenforcement, under certain circumstances, can increase accountability. As an initial matter, in at least some instances Congress will be able to respond to disapproved of categorical nonenforcement decisions by using various levers at its disposal, such as oversight hearings, appropriations control, informal mechanisms of influence, and even the threat of legislation reigning in the agency.<sup>263</sup> Indeed, at its best, categorical nonenforcement serves as a particularly salient means of communicating an agency’s resolution of a difficult enforcement decision, which actually invites Congress to resolve the problem with legislative changes, or to at least take ownership of the problem by refusing to make such changes.<sup>264</sup> To be sure, categorical nonenforcement may not always call for or result in this sort of feedback from Congress, and instead, at its worst, may be used in some circumstances as a means of thwarting Congress’s will in a manner that may be quite difficult for

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<sup>261</sup> I thank Michael Froomkin for posing this colorful inquiry.

<sup>262</sup> For just a very small sample of this extensive literature (and some evaluations of it), see, for example, JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 14, 34-37 (1990); Kagan, *Presidential Administration*, *supra* note \_\_\_, at 2255-60 (describing early views that Congress did not effectively control administrative policymaking, later political science literature suggesting the opposite, and the reasons that neither view in the extreme is likely to be correct); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 252 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance’*, 12 LEGIS. STUD. Q. 475 (1987); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

<sup>263</sup> Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 727 (2009) (“Congress engages in an extensive and ever-increasing level of oversight of the activities of the executive branch.”); Kagan, *Presidential Administration*, *supra* note \_\_\_, at 2258 (explaining view that “[t]he legislative sanctions backing up the system include new legislation, budget cuts, and embarrassing oversight hearings”); RICHARD J. PIERCE, ADMINISTRATIVE LAW 133 (2d ed. 2012) (“Congress has more power over agencies than any other institution. Congress controls agency decisionmaking through its use of formal mechanisms like statutes, as well as through its use of informal mechanisms like oversight hearings, confirmation hearings, budget hearing, and jawboning by individual members.”); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1076 (2001) (describing how Congress can use threat of legislation).

<sup>264</sup> As Professor Zelenak points out, there is some precedent for Congress responding to tax enforcement policy with a legislative response. Beginning in the late 1970s and ending in the early 1980s, Congress prevented the IRS from carrying out its threat of asserting inclusion of a variety of fringe benefits in income by first imposing a moratorium and then enacting legislation that narrowed the scope of the law and the resulting enforcement. Zelenak, *Custom and the Rule of Law*, *supra* note \_\_\_, at 843-44. Of course, this fringe benefits example is an example of a threat of positive enforcement activating Congress, rather than a threat of nonenforcement.

Congress to overcome.<sup>265</sup> Nonetheless, the fact that Congress may not always be able to respond to categorical nonenforcement to protect its prerogative suggests that categorical nonenforcement may not always increase accountability through the potential responsiveness of Congress, not that the very categorical nature of nonenforcement makes such responsiveness and accountability impossible. Moreover, as is hopefully clear by now, Congress's difficulty in responding to agencies' enforcement decisions certainly is not isolated to categorical nonenforcement, and may even be greater for the less transparent mechanism of setting priorities.<sup>266</sup> By making nonenforcement more salient and specific, categorical nonenforcement may actually increase the ability of Congress to respond.<sup>267</sup>

Additionally, some might object that categorical nonenforcement poses a threat to the ability of the President and Congress to set their own agendas. Both politically accountable branches face significant limits on their time and political capital,<sup>268</sup> and being forced to address an instance of categorical nonenforcement may distract them from other concerns they view as more pressing.<sup>269</sup> Categorical nonenforcement certainly may distract the President and / or Congress from other, preferred issues. However, it need not do so. As scholars have fleshed out, one major way that Congress can monitor agencies is by so-called "fire alarm" oversight, whereby individuals and interest groups sound a metaphorical fire alarm when the agency is engaging in problematic behavior.<sup>270</sup>

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<sup>265</sup> Cf. Andrias, *The President's Enforcement Power*, *supra* note \_\_\_, at 1084-85 (exploring reasons why, "while Congress could theoretically address coordination and prioritization issues, it is unlikely to do so in any effective or sustained way."); Seidenfeld, *Psychology of Accountability*, *supra* note \_\_\_, at 1075-76 (cataloguing reasons why it is difficult for Congress to override an agency rule).

<sup>266</sup> Cf. Lisa Schultz Bressman, *Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1423-24 (2000) (exploring, in the regulatory context, how an administrative-standards requirement for agency exercises of delegated power "may enhance congressional oversight by providing an additional piece of information for Congress to consider in evaluating a controversial agency proposal," which may thereby spur calls for oversight hearings and other forms of congressional involvement and intervention).

<sup>267</sup> Love & Garg, *Presidential Inaction*, *supra* note \_\_\_, at 1236-37 (noting that "Congress has only stepped in where the president's decision not to act was particularly public and thus where it was relatively easy for Congress to identify the issue and generate support for a legislative response.")

<sup>268</sup> See, e.g., Love & Garg, *Presidential Inaction*, *supra* note \_\_\_, at 1235 ("Congress could not possibly choose to exercise its oversight powers to revisit every instance of executive inaction."); Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_\_, at 361, 391 (explaining that "presidents have a finite amount of time to devote to a seemingly infinite number of matters under their supervision and must focus their attention on their most important priorities" and exploring how responding to extra-legislative vetoes consumes congressional time that could be spent elsewhere); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 255 (1998) (citing the "limited resources of time and effort Congress has available to it for its legislative agenda").

<sup>269</sup> Bressman, *Beyond Accountability*, *supra* note \_\_\_, at 512 (describing problem with proposals that envision heavy involvement of the President or Congress in details of regulatory policy).

<sup>270</sup> McCubbins & Thomas Schwartz, *Congressional Oversight*, *supra* note \_\_\_.

Categorical nonenforcement is a fire alarm of sorts, but it is rung by the agency itself, rather than other constituents. Like with the fire alarms that other constituents ring, Congress and / or the President can respond to the fire alarm, but need not do so.<sup>271</sup> To the extent that the categorical nonenforcement fire alarm is meant to alert Congress, the President, and the public of important enforcement decisions or severe enforcement difficulties, failure to respond at least forces a politically accountable acknowledgement of the unwillingness to respond, even if it is justified by the need to focus on other concerns. Additionally, agencies ringing a fire alarm in situations that merit attention may lower the costs that the President and / or Congress might otherwise expend monitoring enforcement.<sup>272</sup>

Finally, some might ask whether there might be better ways to go about getting some of the benefits of categorical nonenforcement that have been fleshed out in this Article. For instance, Professor Andrias has set forth an extensive proposal to institutionalize presidential involvement in enforcement, a proposal that she argues will make nonenforcement more accountable.<sup>273</sup> Two responses to this suggestion are in order. First, as is hopefully clear by now, this Article does not seek to prove that categorical nonenforcement is superior, relative to all alternatives. Rather, it seeks to explore whether, in any circumstances, categorical nonenforcement might play a legitimate role as part of an agency's inevitable nonenforcement. As a result, the analysis set forth in this Article is not fundamentally inconsistent with these and other alternatives, but rather seeks to evaluate the categorical nonenforcement that does exist and may continue to exist. Nonetheless, it is worth pointing out that this alternative is itself no panacea. While institutionalizing presidential control over enforcement may have a number of virtues, it has not happened yet, and there are certainly a variety of barriers to such a system being put in place.<sup>274</sup> Even to the extent that it is put in place, presidential

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<sup>271</sup> Cf. Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_\_\_, at 386 (explaining how Congress "is not obligated to reconsider a vetoed bill and frequently does not" and how Congress may respond similarly to other instances of executive override of Congress's laws).

<sup>272</sup> Cf. Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_\_\_, at 391 (explaining that the "extra-legislative veto obviates the need for Congress to anticipate every circumstance in which the law might be applied poorly . . ."). Indeed, the potential time and cost savings contributed by fire alarm oversight was central to its original conception. See McCubbins & Thomas Schwartz, *Congressional Oversight*, *supra* note \_\_\_\_, at 168.

<sup>273</sup> Andrias, *The President's Enforcement Power*, *supra* note \_\_\_\_, at 1090-94. Similarly, Professor Sant' Ambrogio has suggested that "an executive order might require agencies to submit proposed enforcement policies, like proposed rulemakings, to the White House and Congress in advance of their implementation." Sant' Ambrogio, *The Extra-Legislative Veto*, *supra* note \_\_\_\_, at 403.

<sup>274</sup> As suggested previously, presidential administrations may prefer not to own deregulatory efforts that could happen less saliently at the agency level. See *supra* note \_\_\_\_ and text accompanying note \_\_\_\_; see also Andrias, *The President's Enforcement Power*, *supra* note \_\_\_\_, at 1107 (acknowledging as much); Bressman & Thompson,

administrations will never have enough time and resources to exert control over all of every agency's enforcement agenda, nor does Professor Andrias suggest that presidential administrations should exert such plenary control.<sup>275</sup> As a result, Professor Andrias's proposal, if put in place, may help yield greater accountability for some nonenforcement, but does not preclude questions regarding the legitimacy of the nonenforcement that would remain outside of institutionalized presidential control.<sup>276</sup> This is not to say that the proposals by Professor Andrias and others are not valuable; quite the opposite. As this Article has displayed, systematic nonenforcement is routine for agencies. This is certainly true for tax enforcement, and is true for many other agencies and prosecutors as well. Continued, deep study of the phenomenon is necessary in order to evaluate the legitimacy of the nonenforcement of the law. This Article does not seek to promote categorical nonenforcement as an ideal solution, but rather to offer a nuanced evaluation of the role it may play as part of agencies' inevitable nonenforcement of the law.

## VII. Conclusion

This Article has taken a close look at categorical nonenforcement of the tax law through the lens of administrative legitimacy. This Article has displayed that in some circumstances agencies can use categorical nonenforcement in a manner that increases accountability, deliberation, and nonarbitrariness of agency nonenforcement, thereby increasing the legitimacy of the nonenforcement. Examining and evaluating categorical nonenforcement decisions made by agencies through this lens is important. As the Obama Administration and future Presidents increase the use of presidentially directed nonenforcement as a means of setting policy, the reality of the nonenforcement decisions that agencies must make on a daily basis is more and more likely to get lost in the analysis. Even if a Republican President never comes along and attempts to slash the income tax through nonenforcement, the IRS will be making decisions every day about when and how not to enforce the tax law. Indeed, this Article has hopefully persuaded readers that IRS's mission to "enforce the law with

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*supra* note \_\_\_, at 646 ("No President has used directives on any more than a selective basis as to executive-branch agencies. The White House has picked its battles, acting only when an issue is particularly salient.").

<sup>275</sup> Andrias, *The President's Enforcement Power*, *supra* note \_\_\_, at 1038 ("In short, the argument is not for making White House involvement in enforcement policy decisions plenary; rather, it is for facilitating coordination and for increasing disclosure of enforcement policy decisions.").

<sup>276</sup> See also Price, *Enforcement Discretion*, *supra* note \_\_\_, at 755 n. 360 (noting that Professor Andrias's proposal "largely sidesteps the question of whether categorical nonenforcement policies should be permissible in the first place.").

integrity and fairness to all,”<sup>277</sup> inevitably implies an accompanying responsibility *not to enforce* the law with the greatest possible integrity and fairness to all. The latter portion of the mission might not make for as great of a slogan, but it is nonetheless an inextricable part of what the IRS does. Considering how agencies’ nonenforcement does or does not square with agency legitimacy should be an important part of the broader, ongoing conversation regarding executive nonenforcement of the law.

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<sup>277</sup> The Agency, Its Mission and Statutory Authority, <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> (last visited Sept. 24, 2014).