

# BUREAUCRATIC ADMINISTRATION: EXPERIMENTATION AND IMMIGRATION LAW

JOSEPH LANDAU†

## ABSTRACT

*In debates about executive branch authority and policy innovation, scholars have focused on two overarching relationships—horizontal tension between the president and Congress and the vertical interplay of federal and state authority. However, these debates have overlooked the role of frontline bureaucratic officials in advancing the laws they administer. This Article looks to immigration law—in which lower-level federal officers exercise discretion delegated down throughout federal agencies—to identify how bottom-up agency influences can inform categorical, across-the-board executive branch policy.*

*In this Article, I argue that decisions by frontline officers can and should be better harnessed to pair local laboratories of executive experimentation with opportunities for interchange throughout various levels of the administrative bureaucracy. Notwithstanding the predominant (and often accurate) view that on-the-ground enforcers resist innovation, many frontline immigration officers have demonstrated willingness, and an ability, to put their discretion toward creative ends.*

*By exploring the interplay between bottom-up and top-down policymaking, this Article provides a useful counterweight to a number of conventional theories regarding presidential*

---

Copyright © 2016 Joseph Landau.

† Associate Professor, Fordham Law School. I would like to thank Kate Andrias, Jon Bauer, Lenni Benson, David Braun, Tomer Broude, Jim Brudney, Ming Hsu Chen, Charlton Copeland, Nestor Davidson, Erin Delaney, Dave Farber, Joe Fitzgerald, Julia Fleekop, Amanda Frost, Maria Fufidio, Dora Georgescu, Caroline Gentile, Justin Giles, Jennifer Gordon, Bruce Green, Abner Greene, Bob Kaczorowski, Anil Kalhan, Andrew Kent, Tom Lee, Ethan Leib, Tanisha Massie, Eli Meltz, Henry Monaghan, Mark Noferi, Brian O'Toole, David Pozen, Joanna Rosenberg, David Rubenstein, Ted Ruthizer, John Sandweg, Jacob Sayward, Bijal Shah, Sayuri Shimoda, Matt Sorensen, Lou Virelli, Shoba Wadhia, Ian Weinstein, Emily Weissler, Anthony Zangrillo, and Ben Zipursky for their comments and suggestions.

*administration, offering insights into debates about agency design and administrative constitutionalism. The relationship between on-the-ground enforcement and across-the-board executive action can also lend greater legitimacy to the Obama administration's deferred action programs—both in the federal courts and the court of public opinion.*

#### TABLE OF CONTENTS

Introduction .....	1175
I. Discretionary Forces and Immigration Innovation .....	1180
A. Top-Down Influences in Immigration Law.....	1181
B. Bottom-Up Sources of Immigration Innovation .....	1185
II. The Structural Features of Immigration Experimentation .....	1187
A. Separation of Powers in Immigration Law.....	1188
1. <i>Prosecutorial Discretion</i> .....	1189
2. <i>Agency Redundancies</i> .....	1190
B. The Evolution of Frontline Discretion .....	1192
III. Immigration as a Laboratory for Executive Experimentation .....	1196
A. Caveats Regarding Ground-Level Discretion .....	1197
B. Immigration Innovation in Action .....	1199
1. <i>LGBT Immigrants in Binational Relationships</i> .....	1199
2. <i>Parole in Place for Military Spouses</i> .....	1205
3. <i>Gender-Based Asylum</i> .....	1209
4. <i>Bureaucratic Resistance to Mandatory Detention</i> .....	1214
C. Executive Deferred Action and Bottom-Up Innovation .....	1218
IV. Discretion and Agency “Common Law” .....	1221
A. Enforcement, Longstanding Practice, and Deference ....	1222
B. Agency Experimentation and “Common Law” .....	1225
V. The Normative Implications of Bottom-Up Innovation .....	1229
A. The Benefits of Top-Down Solutions—and Their Limits .....	1230
B. Executive Branch Initiatives and Bureaucratic Buy-In ..	1233
C. Bottom-Up Influences and Policy Learning .....	1235
Conclusion.....	1238

## INTRODUCTION

In the wake of the Obama administration's signature immigration initiatives,<sup>1</sup> commentators have taken a renewed interest in the function of presidential power in bringing innovation to immigration law.<sup>2</sup> Much of the literature has focused on two overarching relationships—horizontal tension between the president and Congress and the vertical interplay of federal and state authority. Scholars of administrative law have argued that administrative agencies tend to ossify and become resistant to change, requiring a series of top-down commands by the president and cabinet members<sup>3</sup>—“an injection of energy and leadership” that higher-level officials are best suited to provide.<sup>4</sup> Meanwhile, federalism scholars see state and local action as promoting policy innovation that cannot be forged on a national scale.<sup>5</sup>

---

1. The Obama administration's policies, discussed *infra* at notes 22–23 and accompanying text, would afford deferred action to millions of undocumented foreign nationals. The administration's 2014 deferred action policies have been halted nationwide by a federal court injunction. *See infra* note 25.

2. *See, e.g.*, SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 59 (2015); Michael W. McConnell, *Why Obama's Immigration Order Was Blocked*, WALL ST. J., Feb. 18, 2015, at A15; Eric Posner, *Faithfully Executed: Obama's New Immigration Program Is Perfectly Legal and Should Not Be Blocked*, SLATE (Feb. 19, 2015, 3:23 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/02/obama\\_s\\_dapa\\_immigration\\_program\\_is\\_legal\\_judge\\_hanen\\_s\\_injunction\\_will.single.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/obama_s_dapa_immigration_program_is_legal_judge_hanen_s_injunction_will.single.html) [<http://perma.cc/K7ZA-JQU4>]; Peter M. Shane, *Judge Hanen's Misconceptions and the Legality of Deferred Action*, ACS BLOG (Mar. 16, 2015), <http://www.acslaw.org/acsblog/judge-hanen's-misconceptions-and-the-legality-of-deferred-action> [<http://perma.cc/8J8N-T83T>].

3. Andrias, *supra* note 2, at 1054–69; Cox & Rodríguez, *supra* note 2, at 135–42. For additional sources discussing presidential influences on agency action, see generally James F. Blumenstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851 (2001); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 103 (1994); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Matthew C. Stephenson, *Optimal Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).

4. Kagan, *supra* note 3, at 2344.

5. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1122 (2014); Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133, 1152 (2014); Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J., Spring 2012, <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=all> [<http://perma.cc/9B6C-PXWA>]; *see also* Thomas W.

Although commentators have noted how presidential administrations and state legislatures can fill a gap left by Congress,<sup>6</sup> they have generally not considered ways that frontline officers can advance the laws they administer. This Article assesses various sources of bottom-up lower-level innovation by analyzing immigration enforcement discretion—in particular the relationship between case-by-case exercises of discretion on the ground and categorical executive policies. Its account of bureaucratic administration offers alternatives to conventional analyses of the Obama administration’s 2012 and 2014 initiatives, which are generally couched in the president’s immigration power in particular,<sup>7</sup> or his constitutional enforcement power more generally.<sup>8</sup> And while most

---

Kelty, *Federalism: While the Stewards Slept* . . . New York v. United States, 29 URB. LAW. 529, 548 (1997) (noting that “states serve as laboratories for experimentation”); Clifford Larsen, *States Federal, Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429, 477–78 (1999) (“[T]he United States also looks to the concept of the ‘laboratory of the states’ as a method for increasing government efficiency.”); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 567 (2008) (explaining the significance of state and local actors).

6. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006) (“Publius’s view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet legislative abdication is the reigning *modus operandi*.”); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 19 (2014) (arguing that conditions of abject congressional failure can give rise to more permissible and broader invocations of presidential power).

7. See Cox & Rodríguez, *supra* note 2, at 130–35 (discussing presidential immigration power through the structure of immigration law as a whole); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510 (2009) (“In immigration law, there exists a broader basis than in many other areas of law for defending inherent authority as a matter of constitutional design.”).

8. See Robert J. Delahunty & John Yoo, *The Obama Administration, the DREAM Act and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (arguing that President Obama breached his constitutional duty to “enforce *all* constitutionally valid acts of Congress in *all* situations and cases” and that there was no such thing as a kind of “nonenforcement power” that can legitimate cross-the-board deferred action policies); John Yoo, Opinion, *Obama has Pursued a Dangerous Change in the Powers of the President*, FOX NEWS (Oct. 12, 2012), <http://www.foxnews.com/opinion/2012/10/12/obama-has-pursued-dangerous-change-in-powers-president> [<http://perma.cc/A4R2-AZCW>] (accusing President Obama of “push[ing] the executive power beyond all constitutional limits” and “deploy[ing] discretion to rewrite a federal law”); see also David B. Rivkin Jr. & Lee A. Casey, Editorial, *Obama’s Illegal Move on Immigration*, WASH. POST, Sept. 2, 2011, at A11 (noting that the president has crossed the line because although he “is entitled to establish enforcement priorities . . . the ultimate goal must always be” to execute the law as it was enacted by Congress); Kimberley A. Strassel, *Obama’s Imperial Presidency*, WALL ST. J., July 6, 2012, at A11 (arguing that DACA is one of many examples of the president granting himself “unprecedented power”); Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> [

scholarly treatments of the bureaucracy—both within immigration law<sup>9</sup> and administrative law more generally—focus on how frontline officers have resisted change and necessitated top-down constraints,<sup>10</sup> this Article posits that bottom-up influences can help create—and even legitimate—categorical exercises of executive action.<sup>11</sup>

Because the administrative process is predicated on “two different sorts of legitimacy[,] political (democratic will) and bureaucratic (expertise),”<sup>12</sup> the interplay between lower-level enforcement decisions and across-the-board immigration enforcement policy has important doctrinal and theoretical dimensions.<sup>13</sup> Although the variances that come with frontline discretion can raise difficult normative questions,<sup>14</sup> the relationship between on-the-ground decisions and large-scale categorical enforcement programs has important, legitimacy-conferring benefits for executive policy—especially as President Obama has endeavored to fill voids created by congressional abdication.<sup>15</sup>

---

LLPG] (noting that House Majority leader, Kevin McCarthy, has called the Obama administration’s action “a ‘brazen power grab’”).

9. See, e.g., Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama’s Immigration Actions*, 50 U. RICH. L. REV. 665, 667 (2016) (pitting “President [Obama] and his appointed agency heads, who have sought to use prosecutorial discretion to shield many unauthorized immigrants from deportation” against “frontline immigration enforcement officers and their union representatives who do not agree with the President’s agenda”); Kalhan, *supra* note 2, at 86–89 (describing how frontline officers “actively resisted” guidance from higher-up policymaking officials purporting to control and direct their enforcement discretion). Kalhan additionally notes that “[d]espite these efforts [to guide bureaucratic discretion], enforcement patterns in the field remained inconsistent and diverged significantly from priorities and guidelines established by policymaking officials.” *Id.* at 88.

10. Cf. Kagan, *supra* note 3, at 2344–45 (describing the bureaucracy as “encased in an inert political system” that “grind[s] inflexibly, in the face of new opportunities and challenges, toward (at best) irrelevance or (at worst) real harm”).

11. As argued in Part IV, *infra*, the idea that presidential action enjoys broad agency support and buy-in could be an important determinant for judicial (and congressional) deference to top-down immigration-enforcement decisions.

12. Katyal, *supra* note 6, at 2317; see *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (noting that “those with great expertise and charged with responsibility for administering the provision would be in a better position to do so”).

13. As discussed *infra* in notes 233–36, 240–50 and accompanying text, an inquiry into lower-level expertise has the benefit of refocusing analysis on a critical expertise rationale for administrative action that has tended to erode over time.

14. As explored *infra* in Part V, because lower-level discretion can interfere with progress, it requires careful review by top-level policy officials who not only have larger policy goals in mind, but also accountability for ensuring that discretion—subjective as it is—be dispensed as responsibly and equitably as possible.

15. See Pozen, *supra* note 6, at 24–26. Such congressional paralysis is hardly exclusive to the immigration arena; indeed, scholars have repeatedly remarked on how “the formal institutions

This Article highlights cases in which frontline officers have used their discretion to engage in problem solving that was later reinforced by, and reflected in, categorical resolutions at the highest levels of the executive. Although it does not offer empirical proof that lower-level bureaucrats actually influence higher-ups,<sup>16</sup> it documents remarkable correlations between certain groundswells of case-by-case exercises of discretion and executive branch policy enacted months or years later.<sup>17</sup> Thus, the case studies explored in this Article support enhancing existing mechanisms to promote greater coordination, learning, and deliberation among actors at all levels of the bureaucracy.<sup>18</sup> Given the frequency of categorical prosecutorial discretion programs and attendant concerns of presidential encroachment,<sup>19</sup> accords between higher-level officials and the bureaucratic corps could be a way of safeguarding executive policy against congressional or judicial override. In that regard, an

---

of U.S. constitutional government have become impotent to deal with the nation's most important challenges." Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 480 (2012). For a treatment of a similar phenomenon in the labor-law context, see James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 223 (2005).

16. *But see* Deborah Anker, *Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States*, in GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 46, 67 (Efrat Arbel et al. eds., 2014) ("[I]ndeed there is now a ground-level jurisprudence that is having significant impact on other aspects of refugee law and decision-making institutions including at higher levels.").

17. *See infra* Part III.B.

18. Although current immigration agency structures lack the formal qualities of purely "experimentalist" governance regimes, the mechanisms described in this Article indicate the possibility of an enhanced role for lower-level bureaucrats in reinvigorating immigration policy, supporting the idea that "under favorable conditions[,] the culture can coevolve with decision-making practice so that both decisions and the standards for evaluating decisions improve in the sense of fitting better with the demands placed on the organization." Charles F. Sabel, *Rethinking the Street-Level Bureaucrat: Tacit and Deliberate Ways Organizations Can Learn*, in ECONOMY IN SOCIETY: ESSAYS IN HONOR OF MICHAEL J. PIORE 113, 113–42 (Paul Osterman ed., 2012); *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 340 (1998) ("The principal role of the national government in domestic affairs . . . is to encourage and coordinate this decentralized decisionmaking, and to protect citizens against abuses of power—especially, and paradoxically, those abuses that may result from or be exacerbated by the pulverization of central authority itself."); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78 (2011) (calling regimes "experimentalist to the extent that they are designed to achieve local adaptation and aggregate learning by combining discretion with duties to report and explain, and by pooling information").

19. *See* Katyal, *supra* note 6, at 2316 (noting concerns raised by "an executive that subsumes much of the tripartite structure of government").

accounting of ground-level experiments could, over time, better serve top-down executive action.

This Article proceeds as follows. Part I examines the literature of top-down approaches to policy change that generally rely on a dichotomous framing of bottom-up versus top-down policymaking. Part II outlines the various roles that lower-level federal officers play in exercising prosecutorial discretion in removal proceedings—a core feature of immigration law that enables frontline officers to shape policy. Part III details four case studies that demonstrate the potential for bottom-up innovation—deportation relief for the spouses and partners of LGBT U.S. citizens and lawful permanent residents (LPRs); parole in place for the family members of military personnel; gender-based asylum protection; and bureaucratic resistance to draconian, top-down policies mandating detention at the conclusion of removal proceedings.

These first three Parts lay the groundwork for the normative arguments made in the balance of the Article. Part IV explores how frontline enforcement decisions could provide a partial response to the dwindling availability of statutory deportation relief and limited mechanisms for judicial review. Moreover, to the extent that case-by-case discretionary decisions coalesce around certain groups of individuals, categorical discretion policies derived from work on the ground could warrant greater deference by Congress and the courts. Part V explains why an analysis of bottom-up innovation complicates theoretical discussions about ideal administrative-law frameworks, which tend to favor top-down mechanisms. It argues that commentators should pay closer attention to bottom-up innovation, without which it may be difficult to identify who the next DREAMers will be.<sup>20</sup> The Article concludes with suggested reforms that would

---

20. The term “DREAMers” refers to those who would be eligible to take advantage of a path to citizenship created by the Development, Relief, and Education for Alien Minors (DREAM) Act. The DREAM Act—which was first introduced in 2001—would defer deportation of certain undocumented foreign nationals who came to the United States as children. See Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2268 n.116 (2013); Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/us/dream-act-gives-young-immigrants-a-political-voice.html> [<http://perma.cc/V7BP-YBBD>]. Since 2001, a version of the DREAM Act has been introduced either as a stand-alone bill or as part of other legislation numerous times, including in 2003, 2004, 2005, 2006, 2007, 2009, and 2010, but it has never received enough votes to pass both the House and the Senate. See Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631–36, 632 n.77 (2011); David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18,

improve ways for higher-level agency officials to learn from experiments taking place in the field.

### I. DISCRETIONARY FORCES AND IMMIGRATION INNOVATION

President Obama's second term has been defined by bold exercises of executive action, and nowhere is this truer than immigration.<sup>21</sup> The Obama administration's 2012 Deferred Action for Childhood Arrivals (DACA) program provides a reprieve from deportation and work authorization to nearly 1.2 million foreign-national youths who came to the United States as children.<sup>22</sup> The 2014 Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program would grant similar opportunities to four million undocumented parents of U.S. citizens and LPRs.<sup>23</sup> These programs have stirred controversy, with congressional Republicans raising the specter of impeachment proceedings,<sup>24</sup> and twenty-six

---

2010), <http://www.nytimes.com/2010/12/19/us/politics/19immig.html> [<http://perma.cc/4LUJ-3EPE>].

21. See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html> [<http://perma.cc/9D6P-WQ3W>] (describing President Obama's "We Can't Wait" campaign "to more aggressively use executive power to govern in the face of Congressional obstructionism").

22. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enf't (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/LBJ4-Q5N5>].

23. The 2014 reforms also include provisions expanding the parameters of DACA relief. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Leon Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<http://perma.cc/33X6-GWS4>]. The 2014 reforms have been halted nationwide under a federal court injunction. See *infra* note 25.

24. See Jackie Calmes, *Some in G.O.P. Fear that Their Hard-Liners Will Alienate Latino Voters*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/politics/in-immigration-fight-some-in-gop-fear-alienating-latinos.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article> [<http://perma.cc/SUHC-US5N>]. Although Congress did not follow through with the impeachment threat, the House of Representatives passed a number of measures that, if enacted, would invalidate the Obama administration's executive actions regarding immigration. See Greg Sargent, *GOP Deportation Priorities, in the Raw*, WASH. POST: PLUM LINE (Jan. 14, 2015), <http://www.washingtonpost.com/blogs/plum-line/wp/2015/01/14/gop-deportation-priorities-in-the-raw> [<http://perma.cc/QL3N-QDMS>].



states securing a nationwide district court injunction blocking the 2014 reforms.<sup>25</sup>

### A. *Top-Down Influences in Immigration Law*

The scholarly discussion of large-scale categorical programs tends to revolve around top-down presidential approaches via *ex ante*<sup>26</sup> or *ex post*<sup>27</sup> presidential control of bureaucratic action. Although these accounts vary in their assessment of its effectiveness, the overriding narrative is frequently one of presidential efforts to overcome administrative ossification, insulation, and inefficiency via an “injection of energy and leadership” into agency action.<sup>28</sup> This discussion often relies on a dichotomous framing of bottom-up versus top-down policymaking that explicitly or implicitly tracks a discussion

---

25. On February 16, 2015, a federal district judge in the Southern District of Texas granted a nationwide preliminary injunction halting the 2014 deferred action initiatives based on a theory that the plaintiffs are likely to prevail in arguing that the Obama administration violated the Administrative Procedure Act by failing to subject the programs to notice-and-comment rulemaking procedures. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015). A divided panel of the Fifth Circuit affirmed the preliminary injunction. *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). On January 19, 2016, the Supreme Court granted certiorari. *United States v. Texas*, No. 15-674, 2016 WL 207257 (U.S. Jan. 19, 2016). The president’s deferred action policies have been the source of other litigation as well. *See infra* note 93 and accompanying text.

26. *Ex ante* controls are those created when “government authorities and institutional designers delegate authority to an agent but at the same time set up a structure that constrains and channels how the agent exercises her discretion.” Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1439 (2011). They function by specifying, via various substantive and procedural mechanisms, “windows” of agency discretion—“the set of actions that an agent is allowed to select and the corresponding set of prohibited actions.” *Id.* at 1439–46. The president’s appointment of agency leaders with like-minded policy preferences and issuance of administrative directives are examples of *ex ante* controls. *See* Blumenstein, *supra* note 3, at 895–97 (regarding presidential administrative directives); Nou, *supra* note 3, at 1765 (appointments).

27. *Ex post* controls are those measures by which the president oversees the decisions of agencies, usually to ensure their compliance with *ex ante* controls or other policy goals. *See* Nou, *supra* note 3, at 1766–67. Presidential review of agency rulemaking through the Office of Information and Regulatory Affairs (OIRA) and the broader Office of Management and Budget (OMB) is probably the most well-known example, but discretionary removal of agency heads is also a form of *ex post* control. *See id.* *See generally* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013) (describing the structure and application of OIRA review); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003) (analyzing the effectiveness of review of agency action).

28. Kagan, *supra* note 3, at 2344; *see also* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265 (2009) (noting that “[s]cholars have devoted a great deal of energy to thinking about whether and how Congress or the President should control administrative agencies”).

in administrative law about the centralization of authority in the Office of the President and the tools available to that office to control vast portions of the administrative state.<sup>29</sup>

In contrast to this more conventional, top-down approach, a number of scholars have highlighted the importance of involving the bureaucracy through interagency review, coordination among different levels of actors among various agencies, and opportunities for filtering up comments from lower-level officers.<sup>30</sup> Although these accounts have important implications for immigration enforcement, they may not adequately speak to the detailed and specific ways that frontline decisionmakers can affect agency reform. For example, frontline officers within the immigration bureaucracy have for decades made use of the president's enforcement authority in their ordinary immigration enforcement decisions—at times putting those powers to creative ends. Although even the president's most forceful adversaries do not dispute the validity of this source of bureaucratic power,<sup>31</sup> there is little scholarly inquiry into how expertise at lower

---

29. See Blumenstein, *supra* note 3, at 895–97; Kagan, *supra* note 3; Lessig & Sunstein, *supra* note 3; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

30. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1173–81 (2012) (noting the executive's "well-established coordination instruments" such as its appointment powers, OIRA review, policy memoranda, and ability to create high-level task forces and councils in order to bring about meaningful agency coordination); Terry Moe & Scott A. Wilson, *Presidents and Politics of Structure*, 57 LAW & CONTEMP. PROBS. 2, 16–18 (1994) (discussing how the executive branch "is not a hierarchy of [individuals,] but, more than perhaps any other major political institution, a team" where decisionmaking is delegated to lower-level actors, subject to various top-level control mechanisms (emphasis added)); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213 (2015) (arguing that executive "pooling" of administrative resources "augments [administrative] capacity by mixing and matching resources dispersed across the bureaucracy"); cf. Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. (forthcoming 2016) (manuscript at 16), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2656498](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2656498) [<http://perma.cc/8ULH-XRAU>] (reorienting bureaucratic control around "three constitutional branches working with, and against, three administrative rivals—which are simultaneously engaged in their own exercises of horizontal checking, balancing, and collaborating" and promoting a "two-dimensional understanding of vertical and horizontal engagement [that] illuminates a far more complicated set of connections, alliances, and conflicts," exposing "the existence of a tripartite system of separated and checked administrative power that opens, forecloses, strengthens, and alters opportunities for constitutional actors to intervene").

31. Notably, the plaintiff states in the Texas litigation did not challenge the Obama administration's enforcement priority guidelines, nor did the district court's preliminary injunction alter or address those enforcement priorities. See *Texas v. United States*, 809 F.3d 134, 166 (5th Cir. 2015); see also Delahunty & Yoo, *supra* note 8, at 784 ("It is true that

levels of the immigration bureaucracy might enhance across-the-board executive action.<sup>32</sup> Commentators have instead focused primarily on the top-down nature of executive discretion as exemplified by the Obama administration's 2012 and 2014 initiatives.

The wrangle over executive deferred action programs provides a useful entrée into policy innovations that emerge and take shape in the field, where agency officers have at times exercised their delegated powers in new and creative ways. Although scholars of administrative law and political science have described the effect of lower-level policy implementation on public perception of administrative policy goals,<sup>33</sup> the expansiveness of executive prosecutorial discretion programs has produced little inquiry into internal separation of powers within the executive or the role of the bureaucracy in promoting policy innovation.<sup>34</sup> Yet ordinary bureaucrats can promote innovation, and there are good reasons, particularly in immigration, for “public administration [to] integrate

---

enforcement cannot occur in all circumstances. The ordinary, efficient administration of the law requires discretionary decision making on the part of enforcers.”).

32. For empirical investigations into the bases upon which frontline officers have exercised favorable discretion, see Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345, 347 (2013) [hereinafter Wadhia, *Great FOIA Adventure*]; Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 820 (2004). Both articles are discussed *infra* in Part III.C.

33. See, e.g., MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY, at xii (1980) (“[T]he decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out.”); see also Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1129 (2000) (noting a “new administrative paradigm . . . characterized by a return to discretionary forms of administration and an increase in the power that ground-level administrators wield over benefit recipients”); Susan S. Silbey, *Case Processing: Consumer Protection in an Attorney General’s Office*, 15 LAW & SOC’Y REV. 849, 850 (“[C]hoosing among courses of action and inaction, individual law enforcement officers become the agents of clarification and elaboration of their own authorizing mandates. Bureaucrats become lawmakers, ‘freely’ creating . . . law beyond written rules or courtroom practices.” (citations omitted)).

34. For an exception, see Sabel, *supra* note 18, at 117 (arguing for “the existence of formal institutions” in which frontline ingenuity would drive “organizational learning”). Cf. Diller, *supra* note 33, at 1130 (“[A]dministration cannot be separated easily from policy. The way that welfare offices are structured and operate becomes as much an instrument of welfare policy as eligibility rules and requirements [set by high-level administrators].”); Silbey, *supra* note 33, at 850 (“By choosing among courses of action and inaction, individual law enforcement officers become agents of clarification and elaboration of their own authorizing mandates. Bureaucrats become lawmakers . . . [creating] ‘law in action.’” (citations omitted)).

frontline discretion and stake-holder participation in a disciplined, accountable manner.”<sup>35</sup>

In the deportation context, frontline officers have been directed to utilize their vast enforcement discretion to make accommodations in meritorious cases, and they have, at times, used their discretion creatively, addressing problems that higher-level officials were unable or unwilling to resolve—at least at first. In some cases, categorical decisions made at the upper echelons of the agency have reflected lower-level enforcement decisions that appeared to reach a saturation point. Although supporters and detractors of the president’s policies remain locked in debate—with critics accusing the president of failing to properly execute the law,<sup>36</sup> and supporters positioning the president’s actions within a long and established historical pedigree<sup>37</sup>—commentators have not considered ways that categorical executive policies might draw support from case-by-case decisions made on the ground. A more sustained treatment of the latter could yield valuable insights into across-the-board prosecutorial discretion programs both as a matter of theory and doctrine. The Supreme Court has explicitly recognized the “broad discretion exercised by *immigration officials*” who “as an initial matter[] must decide whether it makes sense to pursue removal at all.”<sup>38</sup> An appreciation of case-by-case discretion and its relationship to categorical programs such as DACA and DAPA could become an important aspect of the

---

35. Sabel & Simon, *supra* note 18, at 56.

36. *See supra* note 8.

37. *See, e.g.*, David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012) (arguing that congressional intent and consistent agency practices support the Obama administration’s 2012 prosecutorial discretion program for childhood arrivals); Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 60 (2013) (noting that “prosecutorial discretion actions like DACA have been pursued by other presidents and part of the immigration system for at least thirty-five years”); Letter from Immigration Law Professors to President Barack Obama (May 28, 2012), <http://www.nilc.org/document.html?id=754> [<http://perma.cc/8ZVY-52E8>] (noting that deferred action is “one of many forms of prosecutorial discretion available to the Executive Branch”); Ilya Somin, *Obama, Immigration, and the Rule of Law [Updated with Additional Material on Precedents for Obama’s Action, and a Response to Timothy Sandefur]*, WASH. POST: THE VOLOKH CONSPIRACY (Nov. 20, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law> [<http://perma.cc/N8AD-BT ML>] (noting “past presidents such as Ronald Reagan and George H.W. Bush have systematically exempted large numbers of illegal immigrants from deportation”).

38. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (emphasis added) (citations omitted).

conversation about the legitimacy of executive branch prosecutorial discretion programs.

*B. Bottom-Up Sources of Immigration Innovation*

Most of the discussion surrounding the Obama administration's prosecutorial discretion policies focuses on the horizontal separation of powers between Congress and the president. Adam Cox and Cristina Rodríguez, building on their seminal work in this area, have provided a theory of "presidential policymaking" predicated largely on a top-down theory of executive action.<sup>39</sup> This latest account, focusing on President Obama's expanded deferred action programs, treats bureaucratic officers with understandable skepticism given the resistance to 2010 and 2011 enforcement memoranda directing favorable exercises of prosecutorial discretion in meritorious cases.<sup>40</sup> Other commentators who favor top-down approaches discuss how White House involvement can enhance the legitimacy of executive branch deferred action programs. For example, Kate Andrias argues in favor of a more high-level regulatory process for enforcement decisions akin to the role of Office of Information and Regulatory Affairs (OIRA) in the rulemaking process.<sup>41</sup> She argues that this additional overlay of White House review should be formalized to promote coordination and transparency in other administrative arenas in which agencies exercise enforcement discretion.<sup>42</sup>

This Article instead focuses on lower-level bureaucratic officers, who have exercised the president's law-enforcement discretion for decades and whose decisions can be informative and influential on higher-level policymakers. On a macro level, this dynamic plays out between the agencies and subagencies that administer immigration law. These institutions have a wealth of regulatory experience and expertise that can not only inform the work of other executive departments,<sup>43</sup> but also influence the president to support broad

---

39. See Cox & Rodríguez, *supra* note 2, at 224 (endorsing "presidential policymaking through enforcement . . . in the immigration context").

40. *Id.* at 191–92.

41. Andrias argues that enforcement policies such as DACA can be evaluated based on the amount of transparency the White House brings to the policy. Andrias, *supra* note 2, at 1066–67 (noting, as features of executive transparency, a presidential Rose Garden speech and White House blog entry).

42. *Id.* at 1067.

43. See Katyal, *supra* note 6, at 2345–48 (describing how bureaucratic overlap can provide an internal checking function).

executive action or induce Congress to take legislative action. On a micro level, the dynamic involves the influence of frontline expertise in a conversation with higher-level officials about the appropriate use of enforcement resources. Bureaucratic officers, exercising discretion delegated down through the immigration agencies and memorialized within decades of top-down directives, can shape longstanding agency practices and “administrative common law” to influence and help drive across-the-board action throughout the agency.<sup>44</sup>

Although these kinds of bottom-up influences would not approximate a purely experimentalist regime,<sup>45</sup> they could foster some of the benefits associated with experimentalism, including the type of reflexive dynamic, or feedback loop, that can develop in the interplay between exercises of frontline enforcement and decisions by upper-echelon officials. Such a process would allow for additional experimentation, bottom-up influence, and across-the-board policymaking.<sup>46</sup> Recognizing the benefits of such a dynamic would bring into sharper focus the critical role of dedicated frontline officers in shaping innovative policies. Although the president assuredly “use[s] the] powers expressly delegated to him by Congress to advance

---

44. See *infra* Part IV. For a broader discussion of higher-level consideration by the White House and the Office of Legal Counsel (OLC) in using precedent to create more articulated standards of conduct, see generally Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259 (2015).

45. Under a truly experimentalist regime, varied approaches taken by actors within the agency would be compiled and assessed by higher-ups. The agency would analyze this data to see what advantages and disadvantages are associated with each experiment as the basis for implementing new policies. See Charles F. Sabel & Jonathan Zeitlin, *Experimentalism in the EU: Common Ground and Persistent Differences*, 6 REG. & GOVERNANCE 410, 411 (2012) (“[E]xperimentalist decisionmaking . . . is in effect an acknowledgment that no one at the center can have a panoramic view of the situation, but local actors cannot rely exclusively on their immediate experience. The best way to correct the limitations of each vantage point is to view it from the other.”).

46. Cf. Charles F. Sabel & Jonathan Zeitlin, *Experimentalist Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE 169, 169–70 (David Levi-Faur ed., 2011). As Sabel and Zeitlin explain, “[e]xperimentalist governance in its most developed form involves a multi-level architecture” with four key features that “are linked in an iterative cycle.” *Id.* That cycle includes “broad framework goals and metrics . . . established by some combination of ‘central’ and ‘local’ units, in consultation with relevant civil society stakeholders”; “local units [that] are given broad discretion to pursue these goals in their own way”; routine reporting by local units “on their performance,” subject to “a peer review in which their results are compared with those of others employing different means to the same ends”; and periodic review of “the goals, metrics, and decision-making procedures themselves . . . by a widening circle of actors in response to the problems and possibilities revealed by the review process,” after which “the cycle repeats.” *Id.*

his own immigration agenda,”<sup>47</sup> that agenda—not to mention that of cabinet and other high-level agency officials—should also be informed by the expertise of frontline officers who exercise discretion in their daily enforcement of immigration law.<sup>48</sup>

## II. THE STRUCTURAL FEATURES OF IMMIGRATION EXPERIMENTATION

The undertheorized power of the immigration bureaucracy begins with a discussion of two mechanisms for innovation within the immigration arena. First, frontline immigration bureaucrats have been delegated the executive’s discretionary law-enforcement power, which they can put toward creative ends;<sup>49</sup> second, multiple and overlapping agencies often possess jurisdiction over the same immigration issues. Although frontline discretion and overlapping agency jurisdiction are not entirely unique to immigration—they can be found in areas as disparate as environmental law,<sup>50</sup> criminal enforcement,<sup>51</sup> corporate governance,<sup>52</sup> and national security<sup>53</sup>—the

---

47. Cox & Rodríguez, *supra* note 2, at 116.

48. CORNELL G. HOOTON, EXECUTIVE GOVERNANCE 5–6 (1997) (“[C]areer officials . . . are the people who most directly interpret, administer, and embody policies on a day-to-day basis, who determine in large part the policy alternatives that are immediately available to presidential appointees, and who provide continuity of government from one set of political executives to the next.”).

49. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Directors, Special Agents in Charge, and Chief Counsel 3 (June 17, 2011) [hereinafter Morton, *Exercising Prosecutorial Discretion*] (stating that “[p]rosecutorial discretion in civil immigration enforcement matters . . . may be exercised, with appropriate supervisory oversight, by [a range of] ICE employees according to their specific responsibilities and authorities”); *id.* (“ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before [the Executive Office for Immigration Review (EOIR)], on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS.”).

50. Todd Aagaard has examined overlaps between the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA), noting in particular the “significant regulatory overlap between the two agencies with respect to occupational risks that arise from workplace exposure to contamination.” Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 242 (2011); see *id.* (“OSHA regulates pursuant to its authority under the Occupational Safety and Health Act, whereas the EPA regulates occupational risks pursuant to various environmental statutes.”).

51. See generally Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (noting ways that the overlap between state and federal courts helped to advance the development of constitutional criminal procedure).

52. Robert Ahdieh has examined overlap between the Securities and Exchange Commission (SEC) and other regulatory bodies. See Robert B. Ahdieh, *Dialectical Regulation*,

immigration arena illustrates ways that internal separation of powers can produce a dialogue between experts at the highest and lowest echelons of the executive branch.

### A. *Separation of Powers in Immigration Law*

The first feature of bottom-up innovation concerns the ability of frontline officers to exercise prosecutorial discretion—the authority to decide whether and to what extent to enforce the law against someone.<sup>54</sup> Under current resource constraints,<sup>55</sup> prosecutorial discretion is a critically important tool in immigration enforcement, and it is used in a wide variety of contexts. As scholars have noted, the term “prosecutorial discretion” is actually a slight misnomer because the power is broader than its name implies; prosecutorial

---

38 CONN. L. REV. 863, 865–66, 875, 923 (2006) (discussing the benefits of overlapping enforcement jurisdictions between the SEC and New York Attorney General’s office); *id.* at 879 (“[T]he SEC is increasingly less and less alone in its regulatory pursuits. Rather, its jurisdiction increasingly overlaps with that of its subnational, foreign, and transnational counterparts.”). Jill Fisch has also noted ways that federal and state officials compete to regulate corporate governance. See Jill E. Fisch, *Institutional Competition to Regulate Corporations: A Comment on Macey*, 55 CASE W. RES. L. REV. 617, 619–23 (2005).

53. See Katyal, *supra* note 6, at 2324.

54. See Morton, *Exercising Prosecutorial Discretion*, *supra* note 49 at 2 (defining prosecutorial discretion as the decision “not to assert the full scope of the enforcement authority available to the agency in a given case”); see also U.S. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE FACT SHEET ON PROSECUTORIAL DISCRETION GUIDELINES (2000) (“Prosecutorial discretion is the authority that every law enforcement agency has to decide whether to exercise its enforcement powers against someone.”); Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Servs., to Comm’r, Immigration & Naturalization Servs. 3 (July 11, 2000), <http://shusterman.com/pdf/prosecutorialdiscretiomemo-cooper.pdf> [<http://perma.cc/R3TZ-NFZ5>] (“Because . . . the INS does not have the resources fully and completely to enforce the immigration laws against every violator, it exercises prosecutorial discretion thousands of times every day . . . . [T]he removal of criminal aliens and the deterrence of alien smuggling, are examples of discretionary enforcement decisions.”); Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Servs., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, Reg’l and Dist. Counsel 1 (Nov. 17, 2000) (on file with the *Duke Law Journal*) (“Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process.”).

55. See, e.g., Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 6 (2012) [hereinafter Wadhia, *Sharing Secrets*] (“According to the agency’s own statistics, [the government] has the resources to remove less than 4% of the total undocumented population.”); see also The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C. 9 (2014) [hereinafter OLC Opinion], <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<http://perma.cc/F4ZC-8UQW>] (noting “striking” resource constraints and “the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals”).



discretion encompasses a broad spectrum of discretionary enforcement decisions well beyond those made during an immigration proceeding or by a prosecuting attorney. For example, it includes prioritizing certain conduct or offenses for enforcement; deciding whom to stop, question, and arrest; deciding to detain and charge an individual, or to release the individual on bond, and the conditions of such release; granting deferred action, stays of removal orders, parole, voluntary departure, or other actions in lieu of removing a noncitizen; deciding whether to pursue an appeal; and executing a removal order.<sup>56</sup>

1. *Prosecutorial Discretion.* Executive enforcement power in immigration rests with the president, the attorney general, the Department of Homeland Security (DHS), and three of DHS's enforcement subagencies—Immigration and Customs Enforcement (ICE), United States Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP).<sup>57</sup> Prosecutorial discretion provides important flexibility in cases where the costs of deportation far outweigh the benefits,<sup>58</sup> and frontline officers have been delegated the power to grant favorable exercises of discretion on a case-by-case

---

56. See Morton, *Exercising Prosecutorial Discretion*, *supra* note 49, at 2–3; see also Wadhia, *Great FOIA Adventure*, *supra* note 32, at 346 (“There are at least 25 different forms of prosecutorial discretion that DHS may employ to protect a noncitizen from removal including: not bringing removal charges against a noncitizen, not arresting or detaining a noncitizen, and granting parole to a noncitizen.”).

57. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT'L L.J. 243, 257 (2010) [hereinafter Wadhia, *Prosecutorial Discretion*]; Kelly Mannion, Note, *International Law, Federal Courts, and Executive Discretion: The Interplay in Immigration Detention*, 44 GEO. J. INT'L L. 1217, 1232 (2013).

58. See *Executive Immigration Enforcement Limitations: Hearing Before the Subcomm. on Immigration Policy and Enforcement and the H. Comm. on the Judiciary*, 112th Cong. 10–11 (2011) [hereinafter *Immigration Enforcement Limitations Hearing*] (statement of Prof. Margaret D. Stock), [http://judiciary.house.gov/\\_files/hearings/pdf/Stock07262011.pdf](http://judiciary.house.gov/_files/hearings/pdf/Stock07262011.pdf) [http://perma.cc/QW4D-NVC9]. In that hearing Margaret D. Stock stated,

The costs of deporting someone are substantial; deportation costs include the expenses of arrest, detention, hearings, and physical removal. Congress has not provided the Department of Homeland Security with the funding or resources to deport every immigration law violator. When faced with a choice of allocating limited enforcement dollars between, for example, undocumented aliens engaged in criminal activities and individuals who were brought to this country illegally as young children through no fault of their own, who have subsequently succeeded in school, and who now enjoy, extensive community (and often Congressional delegation support) for their remaining in the country, DHS has reasonably prioritized enforcement action against the undocumented aliens engaged in criminal activity.

*Id.*

basis to advance a number of humanitarian goals.<sup>59</sup> As discussed below, there are other, nonprosecutorial immigration personnel who also possess discretion, and exercise it, to produce bottom-up influences on agency higher-ups.<sup>60</sup>

2. *Agency Redundancies.* A second attribute of immigration innovation concerns overlapping authority across various subagencies that exercise enforcement discretion, creating novel opportunities for dialogue and enhancing the potential for different actors—with their respective interests, perspectives, and pedigrees—to influence agency policy. Overlapping agency structures within DHS and DOJ bring enhanced checks and balances that deepen the possibilities for dialogue and debate.<sup>61</sup>

Officers within three different DHS subagencies have a role in prosecutorial discretion. First are the DHS trial attorneys within ICE—prosecutors who appear before immigration judges and the Board of Immigration Appeals (BIA) and who can exercise discretion by making recommendations to administratively close removal cases.<sup>62</sup> ICE also houses a contingent of ground-level officers on the frontline of enforcement who are often the last resort for foreign nationals seeking to avoid the execution of a removal order.<sup>63</sup> Second are benefits administrators within USCIS, the subagency charged with adjudicating nonadversarial affirmative petitions and applications,<sup>64</sup> who can also exercise prosecutorial discretion by

---

59. See *infra* Part II.B.

60. See *infra* notes 67–68 and accompanying text.

61. See Katyal, *supra* note 6. The Homeland Security Act of 2002 abolished the former Immigration and Naturalization Service (INS) and divided its responsibilities among the newly created DHS and Department of Justice (DOJ). Under the Homeland Security Act, the adversarial adjudicatory functions of immigration courts and the BIA are housed within DOJ and overseen by the Attorney General. The prosecutorial and enforcement functions, as well as the nonadversarial adjudicatory functions, are housed within DHS and are overseen by the Secretary of Homeland Security. See 6 U.S.C. §§ 275, 291, 521 (2012); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 483–84 (2007).

62. See OFFICE OF THE GENERAL COUNSEL, U.S. DEP'T OF HOMELAND SEC., <http://www.dhs.gov/office-general-counsel> [<http://perma.cc/RG6A-NHZV>].

63. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS (2011), <http://www.ndaa.org/pdf/tool-kit-for-prosecutors%20v.2%20linked%2005.02.11.pdf> [<http://perma.cc/VM32-46JF>]; see also *Overview*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview> [<http://perma.cc/S3PK-ZJ85>].

64. A leading example is the marriage-based adjustment of status application—the process by which an eligible individual already in the United States can obtain permanent resident

holding cases in abeyance or granting deferred action.<sup>65</sup> Third are officers within CBP, who handle border-related enforcement actions, such as border patrol and airport inspections, and who can exercise discretion regarding whether or not to bring truncated, or so-called expedited, removal proceedings for those caught attempting to enter the United States.<sup>66</sup>

Other, nonprosecutorial immigration officers (within other agencies) also possess important discretionary authority that can contribute to executive branch experimentation. Officers within the Department of Justice's Executive Office for Immigration Review (EOIR)—including the BIA and the complement of immigration judges who decide removal cases,<sup>67</sup> as well as the attorney general, who oversees the BIA—possess numerous discretionary powers ranging from granting continuances to administratively closing cases. Additionally, officers within the Department of State have the discretion to grant visas.<sup>68</sup> As the following case studies indicate, these nonprosecutorial officers can bring to bear important considerations—based in humanitarian concerns and resource constraints—that DHS officers consider when granting favorable exercises of prosecutorial discretion.

Owing to these overlapping institutions at both the agency and subagency level, oftentimes more than one (sub)agency possesses authority over the same immigration issue, subject matter, or foreign national.<sup>69</sup> Consequently, foreign nationals interfacing with the

---

status without having to return to his or her country of origin to complete immigrant visa processing. See *Adjustment of Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-status> [<http://perma.cc/X22C-6X2Q>].

65. *Visa Retrogression*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/visa-retrogression> [<http://perma.cc/KP4L-ACLQ>] (last updated June 14, 2011).

66. See *About CBP*, CUSTOMS & BORDER PROT., <http://www.cbp.gov/about> [<http://perma.cc/JF4N-BE89>]. Those proceedings, as well as CBP's exercise of discretion, are beyond the scope of this Article.

67. The EOIR is composed of immigration courts, the Office of the Chief Immigration Judge, and the BIA, which hears appeals of most immigration decisions. This bifurcated system of immigration functions is described *supra* at note 61.

68. See *Ineligibilities and Waivers: Laws*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/general/ineligibilities.html> [<http://perma.cc/APR7-NFXL>].

69. See Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2548 (2014) (noting that the creation of DHS in 2002 divided “[r]esponsibility for asylum administration” such that “DHS now has jurisdiction over affirmative asylum applications in the first instance, but . . . a DOJ component[] adjudicates the de novo review of [denied]

immigration system often come into contact with multiple (sub)agencies with the power to grant or deny relief. Such jurisdictional overlap can allow novel policy experiments to emerge within various subagencies that filter up to higher authorities within the executive branch. Thus, differing institutional responses of frontline officers within distinct agencies and subagencies, and the conflicts they create, can generate fruitful arenas for experimentation and policy innovation.

### *B. The Evolution of Frontline Discretion*

For nearly five decades, agency memoranda have directed frontline officers to grant favorable exercises of discretion, based on an array of factors, in immigration enforcement. The bases for discretion have changed over the years, but they generally have been articulated through flexible and open-ended frameworks, leaving room for innovation in an officer's daily decisionmaking. For example, one particular prosecutorial discretion memorandum—in place between June 2011 and November 2014—listed nearly twenty different factors relevant to a potential favorable exercise of discretion.<sup>70</sup> Even the earliest memoranda on record contemplated a

---

applications . . . as well as asylum claims raised defensively in removal proceedings"); *see also* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9,824, 9,825 (Feb. 28, 2003) (describing the jurisdiction and regulation overlap between INS and EOIR); Retrospective Regulatory Review Under E.O. 13563, 77 Fed. Reg. 59,567, 59,568–69 (Sept. 28, 2012) (same).

70. *See* Morton, *Exercising Prosecutorial Discretion*, *supra* note 49, at 4. Morton listed the following factors as relevant to a favorable exercise of discretion:

the agency's civil immigration enforcement priorities; the person's length of presence in the United States, with particular consideration given to presence while in lawful status; the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child; the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States; whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat; the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants; the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud; whether the person poses a national security or public safety concern; the person's ties and contributions to the community, including family relationships; the person's ties to the home country and conditions in the country; the person's age, with particular consideration given to minors and the elderly; whether the person has a U.S. citizen or permanent resident spouse, child, or parent; whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative; whether the person or the person's spouse is pregnant or nursing; whether the person or the person's spouse suffers from severe mental or physical illness; whether the person's nationality renders removal

fairly wide range of scenarios supporting favorable exercises of discretion.<sup>71</sup> An internal agency “Operations Instruction” from 1975 directed that officers consider

(1) advanced or tender age; (2) many years’ presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; [and] (5) criminal, immoral or subversive activities or affiliations.<sup>72</sup>

Frontline discretion became increasingly significant in the wake of 1996 legislation that drastically limited statutory relief from removal, rendering increased numbers of cases ineligible for immigration relief.<sup>73</sup> As a response, individual members of Congress pressured the legacy Immigration and Naturalization Service (INS)<sup>74</sup> to make more expansive use of prosecutorial discretion in sympathetic cases.<sup>75</sup> In 1999, twenty-eight members of the House of Representatives, including Congressman Lamar Smith, the principal author of the 1996 legislation, wrote a letter to Attorney General Janet Reno and INS Commissioner Doris Meissner, requesting the adoption of prosecutorial discretion in meritorious cases.<sup>76</sup>

---

unlikely; whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident; whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities.

*Id.*

71. (LEGACY) IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, OI § 103.1(a)(1)(ii) (1975); *see* Wadhia, *supra* note 2, at 187–88 n.8.

72. *Id.*

73. *See* T.A. ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 780 (7th ed. 2012); Wadhia, *Prosecutorial Discretion*, *supra* note 57, at 252–55 (describing the Cooper memorandum written in response to the 1996 immigration reforms).

74. The abolishment of INS and its transfer of functions across DOJ and DHS are described *supra* at note 61.

75. *See* Wadhia, *Prosecutorial Discretion*, *supra* note 57, at 252–53; Anthony Lewis, Opinion, *Abroad at Home: The Mills of Cruelty*, N.Y. TIMES (Dec. 14, 1999), <http://www.nytimes.com/1999/12/14/opinion/abroad-at-home-the-mills-of-cruelty.html> [<http://perma.cc/9582-LBVP>]; Mirta Ojito, *Immigrant Fights Off His Deportation*, N.Y. TIMES (Sept. 4, 1998), <http://www.nytimes.com/1998/09/04/nyregion/immigrant-fights-off-his-deportation.html> [<http://perma.cc/NCH9-DE68>].

76. Letter from Rep. Henry J. Hyde et al. to Janet Reno, Att’y Gen., and Doris Meissner, Comm’r, Immigration & Naturalization Servs., on Guidelines for Use of Prosecutorial Discretion in Removal Proceedings (Nov. 4, 1999) [hereinafter Hyde Letter], <http://www.ice>.

Subsequently, at the behest of Meissner, INS General Counsel Bo Cooper outlined the legal basis and limitations of the agency's discretionary powers,<sup>77</sup> which Meissner used as the foundation for published guidance on the principles underlying prosecutorial discretion and the bases on which it could be favorably exercised.<sup>78</sup> Importantly, Meissner instructed INS personnel to consider the totality of the circumstances of a given case, greatly expanding the opportunities for frontline officers to grant favorable exercises of discretion.<sup>79</sup>

When INS was abolished in 2003,<sup>80</sup> the entities that absorbed its functions—USCIS, ICE, and CBP, all within DHS—followed the same guidance for exercising favorable discretion. In 2005, William Howard, the head of the office charged with prosecuting all removal proceedings, issued a memorandum to all chief counsel describing the specific types of cases in which favorable exercises of discretion should be granted and concluding that “the universe of opportunities to exercise prosecutorial discretion is large.”<sup>81</sup> Likewise, in 2007, Assistant Secretary of ICE Julie Myers released guidance on the effect of discretionary enforcement authority on arrests and detention practices against nursing mothers.<sup>82</sup> Myers incorporated the Meissner

---

gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf [http://perma.cc/PP7P-GR G2]. The letter conceded that “[t]here has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardships.” *Id.* at 1.

77. Memorandum from Bo Cooper, *supra* note 54, at 4–7.

78. Memorandum from Doris Meissner, *supra* note 54, at 7–9. The memorandum provided a nonexhaustive list of factors to be considered when deciding whether to favorably exercise discretion, including (1) the immigration status of the noncitizen, (2) the length of time spent living in the United States, (3) the humanitarian concerns contained in the INS Operations Instructions, (4) whether a criminal history exists, and (5) whether there was a history of immigration violations. *Id.* at 7–8. Other factors included (6) the likelihood of ultimately removing the noncitizen, (7) the likelihood of achieving the enforcement goals by other means, (8) whether the noncitizen is eligible for other relief, or is likely to become so, (9) the effect of an enforcement action on future admissibility, (10) any current or past cooperation with law enforcement, (11) honorable U.S. military service, (12) community attention to the issue, including public opinion and publicity, and (13) the resources of the agency. *Id.*

79. *Id.* at 8.

80. See Noël L. Griswold, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U. L. REV. 207, 221 (2006); Wadhia, *Prosecutorial Discretion*, *supra* note 57, at 257.

81. Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enf't, to All OPLA Chief Counsel 2 (Oct. 24, 2005) (on file with the *Duke Law Journal*).

82. Memorandum from Julie L. Myers, Assistant Sec'y, U.S. Immigration & Customs Enf't, to All Field Office Dirs. and All Special Agents in Charge (Nov. 7, 2007) (on file with the *Duke Law Journal*).

memorandum by reference, reminding ICE personnel of the agency's responsibility "to use discretion in identifying and responding to meritorious health related cases and caregiver issues."<sup>83</sup>

Under more recent memoranda, the factors underlying prosecutorial discretion have been further expanded. In 2010, ICE Director John Morton issued a pair of influential memoranda that identified the agency's enforcement priorities<sup>84</sup> and reemphasized the broad availability of favorable exercises of discretion by officers, agents, and attorneys within ICE.<sup>85</sup> The memorandum on prosecutorial discretion provided nineteen factors that ICE employees could consider when deciding whether to favorably exercise prosecutorial discretion in a given case.

In 2012 and 2014, the Obama administration unveiled across-the-board prosecutorial discretion programs for foreign nationals who came to the United States as children (DACA)<sup>86</sup> and for the foreign-national parents of U.S.-citizen and LPR children (DAPA).<sup>87</sup> Contemporaneous with the 2014 prosecutorial discretion initiative, the Obama administration modified its enforcement policies,<sup>88</sup> outlining three priority enforcement categories<sup>89</sup> while retaining the

---

83. *Id.*

84. Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enf't, to All ICE Emps. (June 30, 2010) (on file with the *Duke Law Journal*). This memorandum listed three categories of enforcement priorities—those posing a threat to national security or public safety, recent arrivals, and immigration fugitives. *Id.* at 1–3. Removal of immigrants that did not fall into these categories was deemphasized. MARC R. ROSENBLUM & KRISTEN MCCABE, MIGRATION POLICY INST., DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 3 (Oct. 2014), <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change> [<http://perma.cc/U9RQ-EDJ2>].

85. See Morton, *Exercising Prosecutorial Discretion*, *supra* note 49, at 1, 3–4. Morton amplified the role of ICE attorneys by empowering them to review the charging decisions of ICE, CBP, and USCIS at any stage in the removal process. *Id.*

86. See *supra* note 22 and accompanying text.

87. See *supra* note 23 and accompanying text.

88. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al. 2 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<http://perma.cc/M4AF-PD9P>].

89. See *id.* at 3–4. The first priority includes those immigrants who pose a threat to national security, border security, or public safety, including those arrested at the border while trying to illegally enter the United States, those convicted of non-immigration-related felonies, and those convicted of an aggravated felony. *Id.* at 3. The second priority includes those convicted of three or more non-immigration-related misdemeanor offenses (other than minor traffic offenses), those who have been convicted of a "significant" misdemeanor, those who have not been continuously present in the United States since January 1, 2014, and those who have "significantly abused the visa or visa waiver programs." *Id.* at 3–4. The third priority includes

open-ended language of prior memoranda directing officers to grant favorable exercises of discretion in meritorious cases.<sup>90</sup>

### III. IMMIGRATION AS A LABORATORY FOR EXECUTIVE EXPERIMENTATION

In the case studies that follow, frontline officers placed their discretion at the vanguard of policy innovation by addressing certain immigration problems that higher-level officials could not or would not resolve. In some cases, a groundswell of favorable exercises of discretion later became reflected in across-the-board policies set by officials within the highest echelons of government. Though these case studies do not provide empirical proof that decisionmaking on the ground actually produced across-the-board change—the evidence is correlative, not causal—the case studies illustrate how lower-level enforcement decisions that converge around various policy solutions could be a basis for across-the-board policy. At a minimum, agency higher-ups should look to case-by-case exercises of discretion as a resource for generating information and new ideas.

---

those who received a final order of removal on or after January 1, 2014. *Id.* at 4. Although the three categories of enforcement priorities are reminiscent of those identified in the 2010 Morton memorandum, the 2014 memorandum differs in three significant respects: First, the more recent memorandum lowers the priority for immigrants convicted of misdemeanors and provides more detail regarding the types of misdemeanors that make an immigrant an enforcement priority. WILLIAM A. KANDEL, JEROME P. BJELOPERA, ANDORRA BRUNO & ALISON SISKIN, CONG. RESEARCH SERV., THE PRESIDENT'S IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION OF NOVEMBER 20, 2014: OVERVIEW AND ISSUES 10 (Feb. 24, 2015), <http://fas.org/sgp/crs/home/sec/R43852.pdf> [<http://perma.cc/HM68-E6ZY>]; *Legislative Update: 11/24/2014*, FED'N FOR AM. IMMIGRATION REFORM, <http://www.fairus.org/legislative-updates/legislative-update-11-24-2014> [<http://perma.cc/M6WC-9AAR>]. Second, the 2014 memorandum increases the priority level of immigrants arrested at the border while trying to unlawfully enter the United States. KANDEL ET AL., *supra*, at 10. Finally, those immigrants who were issued a final order of removal before January 2014 are no longer an enforcement priority, provided they do not pose a criminal or national-safety concern. *Id.* at 9.

90. See Memorandum from Jeh Charles Johnson, *supra* note 88, at 6 (instructing DHS personnel to consider factors such as “extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative”); *id.* (“These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.”).



### A. Caveats Regarding Ground-Level Discretion

Before proceeding, a few caveats are in order. First, this more optimistic side of bureaucratic discretion cannot erase the numerous accounts in which agents have refused to grant favorable exercises of discretion in the most obvious and deserving cases.<sup>91</sup> Indeed, during the past several years, many frontline officers have either refused to grant favorable exercises of discretion even in categories of cases designated as a low priority under policy memoranda,<sup>92</sup> or challenged those memoranda wholesale by suing the government.<sup>93</sup> To be sure, on-the-ground experiments require supervision by policy officials who have the bigger picture in mind, and the concept of bottom-up experimentation should not be decoupled from strong presidential leadership: in theory, lower-level experimentation and higher-level oversight work in tandem to move immigration law forward. But bottom-up experimentation, combined with top-down controls, could provide better mechanisms for a kind of dialogue that can lead to better policy learning and outcomes—a point that some at the highest levels of immigration policy have explicitly endorsed.<sup>94</sup> Thus, it is

---

91. See Stephen Dinan, *Dysfunctional Immigration Enforcement System Tears Apart Family*, WASH. TIMES (May 13, 2015), <http://www.washingtontimes.com/news/2015/may/13/immigration-enforcement-system-dysfunction-tears-a/?page=all> [<http://perma.cc/4CPZ-GRKZ>]; Holly Hines, *Attorney: Pastor Max Villatoro Deported: 'No Easy Way' to Get U.S. Visa*, IOWA CITY PRESS-CITIZEN (Mar. 20, 2015), <http://www.press-citizen.com/story/news/local/2015/03/20/villatoro-deported/25092073> [<http://perma.cc/PQ7S-K3RY>].

92. See, e.g., Cox & Rodríguez, *supra* note 2, at 187–88 (noting resistance by bureaucratic officers to grant favorable exercises of discretion as spelled out in top-down enforcement directives and “routinely ignoring individual requests for deferred action”); Kagan, *supra* note 9, at 678–79 (noting frustration by “immigration activists who complained that sympathetic immigrants were still being placed into removal proceedings”); Julia Preston, *Deportations Under New U.S. Policy are Inconsistent*, N.Y. TIMES, Nov. 12, 2011, at A16 (noting uneven application of “administration policy to avoid deportations of illegal immigrants who are not criminals”); Terry Greene Sterling, *Immigration Lawyers Say Enforcement of Deportation Memo Falls Short*, THE DAILY BEAST (Nov. 18, 2011), <http://www.thedailybeast.com/articles/2011/11/19/immigration-lawyers-say-enforcement-of-deportation-memo-falls-short.html> [<http://perma.cc/W9FA-R3AU>].

93. See, e.g., *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (holding that five officers within ICE did not have standing to sue the Obama administration over its 2012 DACA policy, despite the claim that the policy prevented them from carrying out a statutory obligation to enforce the nation’s immigration law and deport all undocumented foreign nationals). The plaintiff states in *Texas v. United States* have had more success. See *supra* note 25 and accompanying text.

94. Indeed, some at the higher echelons of policymaking have shown an interest in adapting based on the involvement of a broader range of stakeholders. Deputy Secretary of Homeland Security, Director Alejandro Mayorkas, announced at the American Immigration Lawyers Association conference in June 2014,

worth considering how to tap into the power of bureaucratic ranks for the potential benefits career officers can bring to the development of agency law and policy.

To be sure, the decision by a presidential administration to take categorical action can result from a range of inputs—including the president, Congress, the federal courts, the media, and especially the immigration bar—that coalesce over time.<sup>95</sup> And some of the innovation identified in this Article includes the work of advocates who, in conjunction with bureaucratic officers, found new solutions to immigration inequities. Nevertheless, many categorical executive branch policies emerged in the wake of a groundswell of frontline enforcement decisions—suggesting possible links between case-by-case enforcement and across-the-board agency action.

Although it may be easy to distinguish between top-down and bottom-up decisionmaking in certain cases, the distinction is not always obvious. Clearly, a directive from the president is top-down, while decisions initiated by frontline officers are bottom-up. For purposes of this Article, I will treat as top-down all measures taken by the president, cabinet members, undersecretaries, and policy officials that include midlevel personnel—all of which are directed downward to agents in the field. Meanwhile, bottom-up influencers are those field agents, frontline officers, or other members of the lower bureaucratic ranks who implement the law on a day-to-day basis, and who exercise discretion based on guidance articulated through policy memoranda.<sup>96</sup> The point of drawing the distinction is not for the sake of a hard-and-fast rule about where various agency actors fall within a chain of command, but rather to understand an iterative and dialogic

---

It is my plan to have ICE and CBP engage with you fully in the spirit of openness and transparency that are the hallmarks of good government and significantly in the service of justice . . . [and] collaboration. As individuals, groups, organizations or otherwise, we are stakeholders with a shared interest in the success of the immigrant experience in America. To that end, we must be open with one another, exchange ideas, advocate, agree or disagree, and ultimately work together to realize the promise of whatever decisions we make.

Alejandro Mayorkas, Deputy Sec'y, Dep't of Homeland Security, Keynote Address at the American Immigration Lawyers Association Conference (July 2, 2014), <http://www.aila.org/publications/videos/aila-events-and-highlights/video-deputy-secretary-of-homeland-security> [<http://perma.cc/3DMB-TFMP>].

95. When immigration advocates seek change, they generally launch a multifront campaign that includes Congress, the White House, the courts, and the press. *See infra* Part III.B.

96. Immigration law may be somewhat unusual given that many ground-level officers throughout the various immigration subagencies arguably have, by virtue of their law-enforcement discretion, an enhanced power that similarly situated officers within other agencies generally lack.

process between lower-level immigration officers and the higher ranks that, rather than predicated on a strict dichotomy, is a part of a larger and more fluid evolutionary process of policymaking.

### *B. Immigration Innovation in Action*

The following four case studies highlight a number of different contexts in which frontline officers have put their enforcement discretion to creative uses. On certain occasions, immigration bureaucrats solved an immigration-law problem or conundrum that higher-level administrative officials refused to address categorically. On others, the lower-level bureaucracy resisted top-down immigration policies that were greatly out of step with the agency's long-term interests and best practices. The case studies span (1) deportation relief for LGBT foreign nationals in relationships with U.S. citizens and LPRs, (2) the granting of parole in place for the immediate family members of U.S. citizen service members, (3) efforts to protect victims of gender-motivated persecution under domestic asylum law, and (4) bureaucratic resistance to policies that required automatic detention of foreign nationals ordered removed. Together, they highlight different ways that frontline discretion can constitute an important locus of subfederal policymaking, with tremendous potential for higher-level learning, innovation, and adaptation.

1. *LGBT Immigrants in Binational Relationships*. The first case study involves discrimination against gay and lesbian foreign nationals in relationships with U.S. citizens and LPRs, an issue that predates laws like the Defense of Marriage Act (DOMA), which, for years, refused federal recognition to valid same-sex marriages.<sup>97</sup> Long before the Supreme Court invalidated DOMA in *United States v. Windsor*<sup>98</sup> and upheld the constitutional right of same-sex couples to marry in *Obergefell v. Hodges*,<sup>99</sup> frontline officers within the various arms of the executive branch used their discretionary power to provide a reprieve to same-sex couples who faced separation because the law prevented them from seeking family-based immigration benefits. Although there was no basis for the foreign national to

---

97. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996), *invalidated in part by United States v. Windsor*, 133 S. Ct. 2675 (2013).

98. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

99. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

obtain immigrant status, exercises of discretion on the ground allowed families to remain together within the United States.<sup>100</sup> These favorable exercises of discretion occurred one at a time, without any guidance from higher-ups; eventually, after a groundswell of similar, case-by-case decisions by ground-level officers across DHS and DOJ, the Obama administration took across-the-board action by directing favorable exercises of discretion in all similarly situated cases involving binational same-sex couples.

The first reported case of a binational same-sex couple involved Richard Adams, a U.S. citizen, and Anthony Sullivan, a citizen of Australia, who secured a marriage license in 1975 from a County Clerk in Boulder, Colorado.<sup>101</sup> Marriage license in hand, Adams sponsored Sullivan for permanent residency as his “immediate relative” so that Sullivan could apply to adjust his status to that of an LPR.<sup>102</sup> Legacy INS denied the petition because the couple “failed to establish that a bona fide marital relationship can exist between two faggots.”<sup>103</sup> The Ninth Circuit upheld that decision in 1982.<sup>104</sup>

Adams and Sullivan’s treatment by legacy INS is one in a long history of especially unkind and humiliating experiences suffered by LGBT immigrants and binational couples, which included a longtime ban on gay and lesbian entrants.<sup>105</sup> The elimination of that ban in 1990

---

100. Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 *FORDHAM L. REV.* 619, 629–43 (2012).

101. *Adams v. Howerton*, 486 F. Supp. 1119, 1120 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036, 1038 (9th Cir. 1982). In many ways, the Adams/Sullivan marriage was an instance of frontline innovation by both the Colorado clerk, Clela Rorex, who issued the license, and the county attorney, who concluded that Colorado law did not preclude granting marriage licenses to same-sex couples. Robert Barnes, *40 Years Later, Story of a Same-Sex Marriage in Colo. Remains Remarkable*, *WASH. POST* (Apr. 18, 2015), [https://www.washingtonpost.com/politics/courts\\_law/40-years-later-a-same-sex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfab310\\_story.html](https://www.washingtonpost.com/politics/courts_law/40-years-later-a-same-sex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfab310_story.html) [<https://perma.cc/ERC8-NQHZ>]. Rorex was eventually barred from issuing licenses when then-Colorado Attorney General J.D. MacFarlane issued a contrary legal opinion. John Aguilar, *Boulder County Begins Issuing Same-Sex Marriage Licenses; AG Says No*, *DENVER POST* (June 25, 2014, 4:12 PM), [http://www.denverpost.com/news/ci\\_26033269/boulder-county-clerk-begins-issuing-same-sex-marriage](http://www.denverpost.com/news/ci_26033269/boulder-county-clerk-begins-issuing-same-sex-marriage) [<http://perma.cc/U365-FLG8>].

102. *Adams*, 486 F. Supp. at 1120.

103. See Barnes, *supra* note 101. The Obama administration issued an apology to Sullivan in 2015 for “the disrespect shown toward you and Mr. Adams.” *Id.*

104. *Adams*, 673 F.2d at 1038.

105. In 1952, Congress barred entry to noncitizens suffering from “psychopathic personality, epilepsy, or a mental defect.” Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952) (repealed 1990). Although that phrase did not necessarily contemplate a homosexuality-based exclusion, the Supreme Court interpreted it as such in *Boutilier v. INS*, 387

did not improve the lot of many same-sex binational couples, who continued to suffer under the weight of discriminatory marriage laws that prevented them from staying together in the United States. Whereas foreign nationals routinely obtain permanent residency through marriage to a U.S. citizen,<sup>106</sup> for decades the LGBT foreign-national partners and spouses of U.S. citizens lacked access to that common immigration benefit—the problem facing Adams and Sullivan, and one that persisted until only very recently.<sup>107</sup>

Even as the federal government began to recognize same-sex relationships for certain, limited positive immigration treatment in the 1990s,<sup>108</sup> LGBT immigrants facing separation from their U.S.-citizen or LPR partners still had to appeal to frontline officers to avoid

---

U.S. 118, 122–25 (1967) (applying the statute to the case of a gay man). Congress later reinforced the exclusion of gays and lesbians by amending the immigration statute to exclude those with a “sexual deviation.” Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919. Congress did not repeal the bar on gays and lesbians from entering the country until 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (amending Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182).

106. Spousal immigration (in which a U.S. citizen or LPR sponsors a noncitizen for immigration benefits) accounts for 25 percent of all LPR flow annually. RANDALL MONGER & JAMES YANKAY, DEP’T. OF HOMELAND SEC., U.S. LAWFUL PERMANENT RESIDENTS: 2013, ANNUAL FLOW REPORT, at 3 tbl.2 (2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_fr\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf) [<http://perma.cc/8YJR-FDUG>]; Cori K. Garland, Note, *Say “I Do”: The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 IND. L.J. 689, 702 (2009).

107. In the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (guaranteeing the freedom of same-sex couples to marry, see *supra* note 99 and accompanying text), and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating the Defense of Marriage Act); see *supra* note 98 and accompanying text, the foreign-national spouses of same-sex couples can access all family-based immigration benefits, including adjustment of status through marriage.

108. In 1993, the Department of State recognized the importance of allowing “nonimmigrant” foreign nationals (those coming to the United States temporarily for a specific purpose, such as a foreign-government official, student, or temporary worker) to bring same-sex spouses or partners with them. See *B-2 Visa Available for Non-Spouse, Same-Sex Partner of L-1*, INS Says, 70 INTERPRETER RELEASES 421, 422 (Mar. 29, 1993); U.S. DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 41.31, N14.4 (2002); Telegram from Colin Powell, Sec’y of State, Dep’t. of State, to All Diplomatic and Consular Posts, on B-2 Classification for Cohabiting Partners (July 1, 2001). Under this policy, the same-sex partners of nonimmigrants could apply for a visitor’s visa to accompany their partner to the United States. The policy remained in effect for nearly two decades, under both Democratic and Republican administrations, and was expanded in 2011 when the Obama administration issued guidance to make it easier to extend the partner’s status. See Policy Memorandum, U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Security, Changes to B-2 Status and Extensions of B-2 Status for Cohabiting Partners and Other Nonimmigrant Household Members (Aug. 17, 2011), [http://www.uscis.gov/USCIS/Laws/Memoranda/2011/August/Cohabiting\\_Partners\\_PM\\_081711.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2011/August/Cohabiting_Partners_PM_081711.pdf) [<http://perma.cc/6378-7ZKM>] (directing officers to consider a nonimmigrant’s cohabiting partnership as a “favorable factor” when granting extensions of the visitor’s status).

separation. And as the issue of same-sex marriage began to gain traction nationwide, higher-level officials remained silent on the injustice of separating gay and lesbian binational couples. For years, progress occurred one case at a time—via frontline officer discretion.

During the mid-to-late 2000s, as a growing number of gay and lesbian couples obtained marriage licenses in various domestic and foreign jurisdictions, immigration officers throughout both DHS and DOJ exercised discretion to spare LGBT foreign nationals with U.S.-citizen or LPR partners and spouses some of the harshest consequences of the contemporaneous state of the law.<sup>109</sup> Section 3 of the Defense of Marriage Act—which remained on the books until the 2013 *Windsor* decision—prevented gay and lesbian U.S. citizens and LPRs from sponsoring their foreign-national spouses for family-based immigration benefits, including (but not limited to) spousal benefits,<sup>110</sup> resulting in the couple's separation.<sup>111</sup> For couples with children, an inability to marry or have a valid marriage respected by the federal government meant additional complications.

Case-by-case favorable exercises of discretion occurred in a number of different ways. In some cases, DHS prosecutors took the initiative by moving to administratively close<sup>112</sup> cases that were

---

109. See *supra* note 100 and accompanying text.

110. See Landau, *supra* note 100, at 630–31 & nn.39–43. In addition to spousal immigration, the Immigration and Nationality Act (INA) provides for a number of other family-based immigration benefits, all of which were unavailable during this time to the foreign-national spouses and partners of LGBT U.S. citizens and LPRs. *Id.* These include visas for foreign-based fiancé(e)s, waivers of bars to inadmissibility that prevent foreign-national spouses from obtaining status as LPRs, and cancellation of removal—an important defense to removal—which was unavailable to the foreign national unless he or she could claim the relief based on a U.S.-citizen or LPR parent or child. *Id.*

111. Not only would individuals without another basis for lawful permanent residence be required to leave the country (or possibly face removal proceedings), but if a foreign national left the country after overstaying a visa or otherwise accruing unlawful presence within the United States, he or she could face a lengthy bar from reentry into the United States as well. See 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2012) (making inadmissible any foreign national who “was unlawfully present in the United States for a period of more than 180 days but less than 1 year . . . [who] again seeks admission within 3 years of the date of such alien’s departure or removal”); *id.* § 1182(a)(9)(B)(i)(II) (making inadmissible any foreign national who “has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien’s departure or removal”).

112. See, e.g., *In re Avetisyan*, 25 I. & N. Dec. 688, 692 (B.I.A. 2012). Administrative closure removes a case from the immigration court’s or the BIA’s active docket, requiring either the government or the respondent to the proceeding to move that the case be recalendared before the judge (or reinstated before the BIA). See *id.* (explaining the result of an administrative closure).

pending before immigration judges.<sup>113</sup> In other cases, immigration judges granted continuances for unusually long periods—perhaps with the expectation that the law would change in the near future such that the foreign national could take advantage of newly available benefits.<sup>114</sup> And when neither option was available, or in some cases in which the foreign national was not (yet) in removal proceedings, foreign nationals would seek (and USCIS would grant) deferred action.<sup>115</sup> Although different subagencies took different kinds of action, these various exercises of discretion ultimately coalesced around a common set of outcomes—namely, preventing LGBT

---

113. See Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16 (noting a June 2011 case in which the government moved to administratively close removal proceedings against a Venezuelan national living in New Jersey with a U.S.-citizen husband); Michael Bowman, *U.S. Immigration Judge Suspends Deportation for Gay Spouse*, VOICE OF AM. (Mar. 26, 2011), <http://www.voanews.com/content/usimmigration-judge-suspends-deportation-of-gay-spouse-118741179/174610.html> [<http://perma.cc/9RT6-G68B>] (noting a case in which the government filed a motion to administratively close removal proceedings against an Argentine who lived in Queens, New York, with her U.S. citizen wife); Chris Geidner, *Immigration Judge Closes Deportation Case Against Married Gay Man*, METRO WEEKLY (Aug. 20, 2011), <http://www.metroweekly.com/poliglot/2011/08/immigration-judge-closes-depor.html> [<http://perma.cc/V762-W2M3>] (noting the government's motion to administratively close removal proceedings against a Venezuelan national with a U.S.-citizen husband); *Officials Agree to Close Deportation Case Involving Gay Binational Couple*, ADVOCATE (Dec. 16, 2011), <http://www.advocate.com/news/daily-news/2011/12/16/officials-agree-close-deportation-case-involving-gay-binational-couple> [<http://perma.cc/2D5S-PMWZ>] (noting a government motion to administratively close removal proceedings against a citizen of Trinidad and Tobago with an American spouse in Massachusetts).

114. See Semple, *supra* note 113 (describing how DHS trial attorneys originally balked at a favorable exercise of discretion, which prompted the immigration judge to grant adjournments so that the agency could reconsider); see also Geidner, *supra* note 113 (noting how an immigration judge postponed deciding a case for two years). In the face of government opposition, immigration judges occasionally would order that the case be administratively closed. See Landau, *supra* note 100, at 641 n.102 (describing a decision by an immigration judge in Charlotte, North Carolina, to administratively close removal proceedings over DHS's opposition).

115. See Press Release, Rep. Nancy Pelosi, *Pelosi Statement on Anthony John Makk and Bradford Wells* (Jan. 4, 2012), <http://pelosi.house.gov/news/press-releases/pelosi-statement-on-anthony-john-makk-and-bradford-wells> [<http://perma.cc/4MKC-YZ89>] (reporting that USCIS granted deferred action to an Australian foreign national with a U.S.-citizen partner after the noncitizen spouse was denied permanent residence); see also Miranda Leitsinger, *Gay Couples, Where Spouse is a Foreigner, Sue Over DOMA*, NBC NEWS (Apr. 3, 2012, 12:42 PM), [http://usnews.nbcnews.com/\\_news/2012/04/03/11004440-gay-couples-where-spouse-is-a-foreigner-sue-over-doma?lite](http://usnews.nbcnews.com/_news/2012/04/03/11004440-gay-couples-where-spouse-is-a-foreigner-sue-over-doma?lite) [<http://perma.cc/6WVL-55QQ>] (noting that the government provided a South African national with a U.S.-citizen spouse a one-year grant of deferred action); John Yoo, *Deportation Threat Lifted for Lesbian Vt. Couple*, FOX NEWS (Oct. 12 2012), <http://www.foxnews.com/us/2012/05/22/deportation-threat-lifted-for-lesbian-vt-couple.html> [<http://perma.cc/FKM4-XCBU>].

foreign nationals from being separated from their U.S.-citizen or LPR partners and spouses.

As these novel exercises of discretion by lower-level officers began to take root, at least one higher-level official took similar action. In 2011, Attorney General Eric Holder certified a case from the BIA denying relief to a same-sex binational couple, vacated its decision, and ordered the BIA to consider whether the foreign national could seek deportation relief based on the harm of being separated from his U.S.-citizen domestic partner.<sup>116</sup> Although it seemed clear under the Immigration and Nationality Act (INA) that the foreign national was statutorily ineligible for the requested form of deportation relief in that case given that he was not a “spouse, parent, or child” of a U.S. citizen or LPR,<sup>117</sup> DHS moved to have the case administratively closed on remand, sparing the foreign national from being separated from his partner.<sup>118</sup> Indeed, the attorney general’s decision in that case, *Matter of Dorman*,<sup>119</sup> precipitated a wave of additional decisions in which lower-level officers granted favorable exercises of discretion to foreign nationals in same-sex relationships with U.S. citizens.<sup>120</sup> Through a feedback loop spanning both ground-level and high-level decisionmaking, actors throughout the agency made clear that the lack of formal legal protections for the foreign-national spouses of LGBT U.S. citizens and permanent residents would not be a bar to some effective form of reprieve.

Eventually, the Obama administration took categorical action. On October 5, 2012, it provided across-the-board protections for all similarly situated same-sex foreign-national partners of U.S. citizens and LPRs, directing officers to consider granting prosecutorial discretion in such cases.<sup>121</sup> After a wave of decisions by DHS

---

116. *In re Dorman*, 25 I. & N. Dec. 485 (A.G. 2011).

117. The foreign national was seeking cancellation of removal, an important defense to removal that is limited to those who can establish, *inter alia*, “that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1) (2012). Non-LPRs who are granted cancellation of removal obtain permanent residency. *See id.*

118. Landau, *supra* note 100, at 640 n.92.

119. *In re Dorman*, 25 I. & N. Dec. at 485.

120. Email from Lavi Soloway, Immigration Attorney in Private Practice, to author (Nov. 4, 2015) (on file with the *Duke Law Journal*).

121. Memorandum from Gary Mead, Exec. Assoc. Dir., U.S. Immigration & Customs Enf’t, Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enf’t, and James Dinkins, Exec. Assoc. Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs., All



attorneys, immigration judges, and benefits adjudicators within USCIS—as well as the attorney general’s efforts in *Dorman*—the agency eventually ensured that all similarly situated foreign nationals would receive equal treatment and be spared separation from their families in appropriate cases.<sup>122</sup>

2. *Parole in Place for Military Spouses.* The next case study, involving parole in place for the family members of U.S. service members, demonstrates not only the vertical interplay between lower- and higher-level personnel, but also how actors across multiple agencies can simultaneously create mechanisms for policy change. Parole in place had for decades been used to benefit Cuban citizens,<sup>123</sup> and it more recently became a mechanism to prevent military family members from facing separation. Like the binational couples context, this case study shows how possibilities for policy learning are formed not only in elite policy circles, but also through experiments forged on the ground and at all levels within the bureaucracy.

U.S. citizens routinely sponsor certain family members for permanent residency,<sup>124</sup> but those individuals must generally have been “inspected and admitted or paroled” upon entry to be eligible to adjust their status in the United States.<sup>125</sup> Family members who cannot demonstrate proper inspection and admission (or parole) upon entering the United States, and who do not qualify for adjustment

---

Chief Counsel, and All Special Agents in Charge (Oct. 5, 2012), <http://www.washingtonblade.com/content/files/2012/10/9-Oct-12-PD-and-Family-Relationships.pdf> [<http://perma.cc/R986-ZA B6>].

122. See Email from Lavi Soloway, *supra* note 120 (noting a wave of favorable exercises of discretion to foreign nationals in binational same-sex couples prior to and after *Dorman*).

123. See, e.g., Memorandum from Doris Meissner, to Regional Dirs., District Dirs., Chief Patrol Agents, and Reg'l & Dist. Counsel (Apr. 19, 1999) (describing Cuban parole in place policy), <http://www.american.edu/clals/upload/Doris-Meissner-CAA-Memo.pdf> [<http://perma.cc/RH73-Z8Z>].

124. Parents, spouses, and children under age twenty-one (often including stepchildren) of U.S. citizens are not subject to standard immigration quotas and are eligible to obtain lawful permanent residence without being subjected to numerical limitations. See Immigration and Naturalization Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (defining “immediate relatives” as “the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age”); *id.* § 1151(b)(1) (describing those not subject to direct numerical limitations).

125. *Id.* § 245(a), 8 U.S.C. § 1255(a). Certain exceptions exist for asylees, Cubans, special immigrant juveniles, Violence Against Women Act petitioners, grandfathered foreign nationals, and some others. See Margaret D. Stock, *A Path to Citizenship for Undocumented Military Family Members*, IMMIGRATION BRIEFINGS, July 2012, at 1, 2–3; see also *id.* (explaining how foreign nationals can prove proper entry without documentary proof).

under certain narrow and special exceptions,<sup>126</sup> confront the prospect of having to leave the country and undergo consular processing overseas. However, once these foreign nationals depart the United States, they often face bars to entry based on the period of “unlawful presence”<sup>127</sup> accrued within the United States. That reentry bar effectively prevents those foreign-national spouses from adjusting to LPR status despite having an approved family-based petition.

This issue was particularly troublesome for members of the U.S. Armed Services with undocumented spouses, who faced added stress when deploying overseas. In one case—the first publicly reported case of this kind—Army Specialist Alex Jimenez, a U.S. citizen, attempted to sponsor his wife, Yaderlin Hiraldo, for lawful permanent residence prior to disappearing when his unit was ambushed in Iraq.<sup>128</sup> Hiraldo, who had entered the United States without inspection, was placed into removal proceedings and ordered to leave the country and seek an immigrant visa overseas, which would have triggered a ten-year reentry bar. When then-Senator John Kerry became aware of the situation, he prevailed on DHS Secretary Michael Chertoff to grant Hiraldo discretionary parole so that she could obtain permanent residency without leaving the country,<sup>129</sup> and Chertoff agreed.<sup>130</sup>

Although Chertoff’s action applied only to one case, the decision to grant discretionary parole spawned widespread media attention<sup>131</sup>

---

126. See, e.g., Immigration and Naturalization Act § 245(i), 8 U.S.C. § 1255(i) (providing for possible adjustment of status of those physically present in the United States if they have had a petition for classification or application for labor certification submitted before April 30, 2001, were present in the United States as of December 21, 2000, and pay a \$1,000 penalty).

127. See Immigration and Naturalization Act § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). As explained *supra* at note 111, any foreign national who is unlawfully present in the United States for a period of more than 180 days but less than one year is subject to a bar on admission for three years from the date of departure or removal; if the foreign national is unlawfully present for one year or more, that individual is subject to a bar on admission for ten years from the date of departure or removal. See *id.*

128. See Stock, *supra* note 125, at 3.

129. *Id.* at 4. Unfortunately, Specialist Jimenez was later deemed killed in action. *Id.*

130. Department of Homeland Security Secretary Chertoff Agrees to Kerry’s Request to Protect Wife of Missing Soldier, U.S. FED. NEWS SERV., June 21, 2007 (containing text of letter from DHS Secretary Chertoff to Senator John Kerry, which described how Secretary Chertoff had directed that “ICE will grant Ms. Hiraldo discretionary parole into the United States”).

131. See, e.g., Marcus Baram & David Schoetz, *A Military Wife’s Rock and Hard Place*, ABC NEWS (June 20, 2007), <http://abcnews.go.com/TheLaw/story?id=3297537> [<http://perma.cc/TJY9-3EYR>]; *G.I.’s Illegal Immigrant Wife Awarded Green Card*, NBC NEWS (July 1, 2007, 4:58 PM), [http://www.nbcnews.com/id/19536767/ns/us\\_news-life/t/gis-illegal-immigrant-wife-awarded-green-card](http://www.nbcnews.com/id/19536767/ns/us_news-life/t/gis-illegal-immigrant-wife-awarded-green-card) [[perma.cc/G2T4-VMFY](http://perma.cc/G2T4-VMFY)].

and precipitated discretionary grants of parole in place by lower-level officers in discrete cases.<sup>132</sup> The interventions by Kerry and Chertoff appeared to have cascading effects, leading to a host of follow-on activity by frontline bureaucratic officers within “local USCIS office[s] having jurisdiction over [a] service member’s residence or place of duty.”<sup>133</sup> For years, these case-by-case discretionary grants of parole in place allowed military family members to adjust status to become an LPR without having to leave the United States and undergo consular processing.<sup>134</sup> Still, without formal guidance directing across-the-board exercises of discretion, practitioners reported variation and inconsistencies throughout various USCIS offices.<sup>135</sup>

By 2010, favorable exercises of discretion in these military cases became an increasingly routine occurrence, with frontline officers taking a variety of approaches—including joining motions to reopen before immigration judges, granting deferred action, or deciding not to initiate removal proceedings in the first place.<sup>136</sup> Secretary Napolitano was therefore able to acknowledge that “DHS utilizes parole and deferred action to minimize periods of family separation, and to facilitate adjustment of status within the United States by immigrants who are the spouses, parents and children of military members.”<sup>137</sup> Finally, in 2013, after years of case-by-case exercises of enforcement discretion, DHS issued across-the-board guidance,

---

132. See *Immigration Enforcement Limitations Hearing*, *supra* note 58, at 4 (statement of Prof. Margaret D. Stock); Stock, *supra* note 125, at 4; see also Julia Preston, *Immigration Policy Aims to Help Military Families*, N.Y. TIMES (July 31, 2010), [http://www.nytimes.com/2010/08/01/us/01immig.html?\\_r=0](http://www.nytimes.com/2010/08/01/us/01immig.html?_r=0) [<http://perma.cc/878R-QUPX>] (noting that officers provided reprieve for military families “on a case-by-case basis”).

133. Stock, *supra* note 125, at 5.

134. *Id.* at 3.

135. *Id.* at 5 (“Practitioners report[ed] a variety of different approaches at different USCIS offices.”).

136. 160 CONG. REC. H2328, H2329 (daily ed. Mar. 12, 2014) (reproducing a July 2010 letter from various members of the House of Representatives to Secretary of Homeland Security Janet Napolitano noting that DHS could join in motions to reopen, consider deferred action, favorably exercise parole authority, forbear from initiating removal, or use other devices to “ease the burden for soldiers suffering from immigration-related problems”).

137. Letter from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to The Honorable Zoe Lofgren (Aug. 30, 2010), <http://cmsny.org/wp-content/uploads/Napolitano-Letter-08.30.101.pdf> [<http://perma.cc/K6CK-XPQJ>]. Napolitano also noted ways that DHS, in conjunction with the State Department, collaborated to expedite the adjudication of various waivers to the reentry bar—discussed *supra* notes 111, 127 and accompanying text—or dependents who had already departed the United States and were seeking an immigrant visa through consular processing. *Id.*

instructing field agents to make parole in place generally available for the relatives of military members who were not inspected or paroled upon entry.<sup>138</sup>

One particularly noteworthy feature of this story involves interagency communication, namely the Department of Defense's (DOD) especially active role in prevailing on DHS to take a more consistent approach. DOD was concerned about morale problems that service members, worried about the status of their family members, would suffer in their ability to serve.<sup>139</sup> DOD's concerns were not entirely out of sync with the interests of the immigration agencies. Indeed, the BIA noted the same military-readiness issues when it granted cancellation of removal<sup>140</sup> to an undocumented spouse and a four-year-old child of a U.S. service member deployed to a combat zone in 2010.<sup>141</sup> Members of Congress highlighted the importance of the issue as well.<sup>142</sup>

Even after DHS issued across-the-board guidance, DOD continued to press for more and expansive use of parole in place—this time for the family members of U.S. citizens *seeking to enlist* in

---

138. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0091, CHANGES TO B-2 STATUS AND EXTENSIONS OF B-2 STATUS FOR COHABITATING PARTNERS AND OTHER NONIMMIGRANT HOUSEHOLD MEMBERS; REVISIONS TO *ADJUDICATOR'S FIELD MANUAL (AFM)* CHAPTERS 30.2 AND 30.3; *AFM* UPDATE AD11-27 (Nov. 15, 2013).

139. *Id.* (noting concern that military members would “face stress and anxiety because of the immigration status of their family members in the United States”). A former commander of ground forces in Iraq explained, “As a battlefield commander, the last thing I needed was a soldier to be distracted by significant family issues back home. Resolving citizenship status for family members while serving our country, especially during combat, must not be allowed to continue detracting from the readiness of our forces.” 160 CONG. REC. H2328 (daily ed. Mar. 12, 2014) (quoting a letter from Retired Lieutenant General Ricardo Sanchez to the House Committee on the Judiciary).

140. In the case of non-LPRs, cancellation of removal is limited to those who can establish, *inter alia*, “that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1) (2012). When a non-LPR is granted cancellation of removal, he or she is granted lawful permanent residency. *Id.*

141. See *Hinder the Administration’s Legalization Temptation (HALT) Act: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 51 (2011) (statement of Prof. Margaret D. Stock). An immigration judge denied the wife’s application for cancellation of removal, and the BIA reversed. *Id.* The BIA recognized not only that the spouse’s removal from the country would cause great emotional distress to the military member, but also that removal would diminish the service member’s ability to fulfill his duties while deployed. See *id.*

142. See Hyde Letter, *supra* note 76, at 2 (“True hardship cases call for the exercise of such discretion, and over the past year many Members of Congress have urged the INS to develop guidelines for the use of its prosecutorial discretion.”).

the military.<sup>143</sup> Again, based on DOD's input, DHS Secretary Jeh Johnson "direct[ed] USCIS to work with the Department of Defense to address the availability of parole in place and deferred action for the spouse, parent, and child of a U.S citizen or lawful permanent resident who seeks to enlist in the U.S. Armed Forces."<sup>144</sup> DOD's successful (and continued) effort in working with DHS demonstrates how the overlapping interests of different agencies reinforced top-down, categorical enforcement policy. Thus, the military case study adds to those vertical checks (via case-by-case exercises of discretion on the ground) a horizontal layer (via interagency communication) that bolsters across-the-board enforcement measures.

3. *Gender-Based Asylum.* The next case study concerns the matter of asylum relief for victims of gender-motivated persecution. This vital issue has involved numerous immigration agencies and subagencies, at various rungs of the bureaucracy, in a conversation about how to protect individuals who are at risk of facing rape, domestic violence, or forced marriage upon return to their country of origin.<sup>145</sup> Although the evolution of this issue is extraordinarily complex and difficult to trace, the absence of formal law on gender-based asylum has not prevented dramatic change, thanks largely to work on the ground. Without any clear statutory protection<sup>146</sup> or

---

143. As DHS Secretary Jeh Johnson noted in a November 2014 memorandum, DOD requested that DHS "expand the scope of its parole-in-place memorandum of November 2013 to encompass family members of U.S. citizens and lawful permanent residents who seek to enlist in the U.S. armed forces." Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Customs & Immigration Servs. 2 (Nov. 20, 2014), [http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Parole%20for%20Families%20of%20Military.pdf/at\\_download/file](http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Parole%20for%20Families%20of%20Military.pdf/at_download/file) [<http://perma.cc/RJ8M-QV9S>].

144. *Id.*

145. The cognizability of asylum based on female genital mutilation is clearer. The BIA issued a precedential decision on the subject of female genital mutilation in 1996. *See In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996). Two years after *Kasinga*, the BIA denied protection to a woman who had suffered past female genital cutting. *In re A-T-*, 24 I. & N. Dec. 296, 296 (B.I.A. 2007). This decision, which seemed to undermine *Kasinga*, was vacated by Attorney General Mukasey in 2008 on the grounds that the BIA had erred in reasoning that female genital mutilation cannot occur more than once. *In re A-T-*, 24 I. & N. Dec. 617, 621 (A.G. 2008). Attorney General Mukasey outlined a framework for adjudicating asylum cases based on past persecution, which the BIA adopted in a new 2009 ruling. *In re A-T-*, 25 I. & N. Dec. 4, 9 (B.I.A. 2009).

146. The doctrinal question that remained (and to some degree remains) unanswered is whether an individual fleeing persecution on account of gender satisfies the "particular social group" requirement in the INA. 8 U.S.C. § 1158(a)(2)(A) (2012).

definitive BIA or federal court interpretation regarding gender-based asylum protection, the law has developed piecemeal, often through case-by-case adjudications in administrative and federal court. Through decades of incremental development, lawyers on the ground—both for immigrants and the government—“changed the culture of the relevant immigration agencies [and] the perspective of judges and other decisionmakers, in effect creating a body of jurisprudence at the administrative level, which, despite its nonprecedential nature, has had enormous impact.”<sup>147</sup> Thus, “[g]ender asylum in the United States . . . tells an unusual story of legal change from the bottom up,”<sup>148</sup> with lessons for interagency coordination, adaptation, and learning.

Governmental efforts to protect victims of gender-based persecution date back to 1995, when legacy INS—then a subagency of DOJ—issued a guidance memorandum (the “Guidelines”) directed to asylum officers that outlined the basis for favorable grants for applicants who had experienced gender-based persecution—including domestic violence, rape, female genital mutilation, and other forms of violence.<sup>149</sup> The Guidelines were formed through collaboration between advocates and government officials,<sup>150</sup> attempting to bring uniformity and consistency to adjudications by setting forth detailed factors for asylum officers to consider.<sup>151</sup> Because the Guidelines were not mandatory, and were directed only to the complement of asylum officers located within USCIS,<sup>152</sup> they failed to produce any kind of uniformity across all asylum adjudications within the immigration courts or the federal court system. Thus, even as the Guidelines were “highly normative and influential,”<sup>153</sup> they were not binding on

---

147. See Anker, *supra* note 16, at 48.

148. *Id.* at 46.

149. Memorandum from Phyllis Coven, Immigration & Naturalization Servs. Office of Int'l Affairs, to All INS Asylum Office 9–16 (May 26, 1995) [hereinafter INS Guidelines] (on file with the *Duke Law Journal*). Canada's 1993 Gender Guidelines served as a model for the 1995 U.S. guidelines. See Anker, *supra* note 16, at 54.

150. See Anker, *supra* note 16, at 55.

151. See INS Guidelines, *supra* note 149, at 9–16.

152. See Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 2, 46, 52 (2010).

153. See Anker, *supra* note 16, at 55.

immigration judges or the BIA<sup>154</sup> and did not root out disparities in adjudications of gender-based claims.<sup>155</sup>

The BIA's 1999 decision in *Matter of R-A*<sup>156</sup> reflected this lack of clarity. In *R-A*, the BIA denied asylum to Rody Alvarado, a Guatemalan woman who had fled domestic abuse, including brutal beatings and rape,<sup>157</sup> calling into question whether persecution in the form of domestic violence could provide the basis for a successful asylum claim.<sup>158</sup> Attorney General Janet Reno responded by vacating *R-A* and ordering the BIA to stay the decision in light of then-pending DOJ regulations on the topic of gender-based asylum.<sup>159</sup> The proposed federal regulations, which reinforced that gender could form the basis of a "particular social group"<sup>160</sup> and provided guidance for analyzing domestic-violence claims,<sup>161</sup> were never finalized.<sup>162</sup>

---

154. See Musalo, *supra* note 152, at 52–53.

155. Caroline J. O'Neill, *Health Is a Human Right: Why the U.S. Immigration Law Response to Gender-Based Asylum Claims Requires More Attention to International Human Rights Norms*, 17 J. CONTEMP. HEALTH L. & POL'Y 241, 242 (2000); see also Lisa C. Chan, *Everything in Moderation: Why Any Gender Nexus Under U.S. Asylum Law Must Be Strictly Limited in Scope*, 29 B.U. INT'L L.J. 169, 172 (2011) (arguing that the INS Guidelines have "failed to achieve consistency among immigration officials over how to adjudicate . . . gender-based claims").

156. *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999), *vacated and remanded*, 22 I. & N. Dec. 906 (A.G. 2001).

157. *Id.* at 908–09 (describing acts of abuse including the dislocating of the respondent's jawbone, repeated rapes, beatings to unconsciousness, and the throwing of a machete toward the respondent's body).

158. *Id.* As a result, advocates began relying on alternative legal theories, such as political opinion or religion, to win asylum claims. Anker, *supra* note 16, at 56–57. This tactic proved effective in *In re S-A*, 22 I. & N. Dec. 1328 (B.I.A. 2000), in which the BIA granted asylum on account of religion to a Moroccan woman who had been physically abused by her father. Anker, *supra* note 16, at 57.

159. *In re R-A*, 22 I. & N. Dec. at 906 (A.G. 2001). These regulations were intended to remove "certain barriers that the [*In re R-A*] decision seem[ed] to pose." Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,589 (Dec. 7, 2000).

160. See 8 U.S.C. § 1158(b)(1)(B)(i) (2012) (noting the requirement that an applicant for asylum demonstrate persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion").

161. Asylum and Withholding Definitions, 65 Fed. Reg. at 76588 ("This rule . . . restates that gender can form the basis of a particular social group . . . [and] will aid in the assessment of claims made by applicants who have suffered or fear domestic violence."); see also Department of Homeland Security's Position on Respondent's Eligibility for Relief at 5, *In re R-A*, 22 I. & N. Dec. 906 (A.G. 2001), <http://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf> [<http://perma.cc/A94H-H84H>] ("DHS expects that the final rule will represent the conclusion that, under current law, it is possible for some limited number of victims of domestic violence to establish that the harm they suffered or fear is on account of membership in a particular social group . . .").

Instead, DOJ determined that a case-by-case approach “would be better than a categorical rule.”<sup>163</sup>

*R-A-* remained pending for almost a decade, and while the BIA issued no decisions during that time regarding the cognizability of gender- or domestic-violence-based asylum,<sup>164</sup> DHS changed its position. Although it had appealed the initial grant of asylum to Rody Alvarado,<sup>165</sup> DHS submitted a brief to the BIA arguing that the Board should grant asylum to “married women in Guatemala who are unable to leave the relationship.”<sup>166</sup> DHS argued that by not granting asylum based on domestic violence, the BIA “would impede rational, coherent development of particular social group law . . . [and] would undermine clarity, consistency and fairness in the administration of asylum law in general.”<sup>167</sup>

While *R-A-* remained pending, the attorney general again intervened. In 2005, John Ashcroft certified *R-A-* to himself (just as Attorney General Reno had done) and ordered the BIA to reconsider its decision following the publication of a proposed rule.<sup>168</sup> By 2008, these regulations had still not been finalized, so Attorney General Michael Mukasey certified the case to himself, lifted the stay, and remanded the case to the BIA for a decision.<sup>169</sup> The BIA remanded the case to the immigration judge, and in 2009 the immigration judge granted Rody Alvarado asylum.

Although the decision was hailed as a victory, it applied only to one individual, offering no precedent for the hundreds of other pending cases.<sup>170</sup> As a result, advocates turned to “nontraditional”

---

162. See Marsden, *supra* note 69, at 2529 (noting that the regulations were “abandoned after George W. Bush took office in 2001”).

163. *Id.* at 2552.

164. See Anker, *supra* note 16, at 57.

165. See Musalo, *supra* note 152, at 58–59.

166. Department of Homeland Security’s Position on Respondent’s Eligibility for Relief, *supra* note 161, at 19. DHS’s limited definition of the particular social group in this case reflected a pattern among gender-based asylum applicants to define the group narrowly, given a reluctance by courts to accept a definition of particular social group that is too large. See Marsden, *supra* note 69, at 2527 (“Because courts have treated particular social groups that hinge only on an applicant’s gender with skepticism, gender-based asylum claims often define the particular social group more narrowly to make the group appear smaller.”).

167. Dep’t of Homeland Security’s Position on Respondents Eligibility for Relief *supra* note 161, at 15–16.

168. *In re R-A-*, 23 I. & N. Dec. 694 (A.G. 2005).

169. *In re R-A-*, 24 I. & N. Dec. 629 (A.G. 2008).

170. Anker, *supra* note 16, at 57–58.



sources of authority to make their arguments,<sup>171</sup> including government briefs (such as DHS's brief in *R-A-*), INS and United Nations High Commissioner for Refugees (UNHCR) gender guidelines, and more recent guidance by USCIS for asylum officers.<sup>172</sup> Attorneys drawing on such "normative, but subregulatory sources" won cases, which in turn "led to greater formalization of these sources."<sup>173</sup>

DHS's recognition of domestic violence as a basis for asylum increased with another domestic-violence case, *Matter of L-R*.<sup>174</sup> Once again, as with *R-A-*, DHS submitted a brief recommending asylum based on domestic violence.<sup>175</sup> As a result, attorneys who had relied on DHS's brief in *R-A-* could also rely on its submission in *L-R-* as a "de facto statement of agency policy."<sup>176</sup> Moreover, one year after *L-R-* was decided, DHS issued written clarification acknowledging that it considered domestic violence a valid basis for asylum.<sup>177</sup> Despite DHS's position, the BIA remained silent on whether gender could constitute a particular social group and whether asylum claims could be based on domestic violence.<sup>178</sup> However, in 2014, the BIA came closer to resolving these issues with its decision in *Matter of A-R-C-G*.<sup>179</sup>

*A-R-C-G-* concerned a woman who fled Guatemala in 2005 to escape the abuse she had suffered at the hands of her husband.<sup>180</sup> When she sought asylum, the immigration judge found that she was not eligible because her husband's acts of abuse, while arbitrary and

---

171. *Id.* at 58.

172. *See id.* at 58. The more recent USCIS guidance, like the INS Guidelines and UNHCR guidelines, is neither binding on the agency nor enforceable in court. *See* ASYLUM DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS 26 (2009), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTCLesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf> [<http://perma.cc/Z2R5-5UMD>].

173. *See* Anker, *supra* note 16, at 53.

174. *See* Department of Homeland Security's Supplemental Brief, *In re L-R-* (B.I.A. Apr. 13, 2009), [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf) [<http://perma.cc/DSE3-9V3X>].

175. *Id.* DHS noted that the "delay of over nine years in producing either regulations or an authoritative administrative precedent" reflected the challenges presented by domestic-violence asylum claims. *Id.* at 4.

176. Anker, *supra* note 16, at 58.

177. *Id.* at 59.

178. *Id.*

179. *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

180. *Id.* at 389.

“without reason,” did not constitute “persecution.”<sup>181</sup> Noting that “cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations,”<sup>182</sup> the BIA recognized, as a particular social group, “married women in Guatemala who are unable to leave their relationship.”<sup>183</sup> Although the BIA remanded the case to the immigration judge,<sup>184</sup> its ruling provided a useful roadmap for future successful domestic-violence cases in immigration court.

There is still no binding rule on domestic violence as a basis for asylum, but commentators see “reason . . . for some optimism” through the various steps taken throughout varying levels of the immigration agencies.<sup>185</sup> Owing to the DHS briefs filed in *R-A-*, *L-R-*, and *A-R-C-G-*, combined with decisions by individual immigration judges and the BIA, litigants are increasingly able to bring successful asylum claims on behalf of domestic-violence victims.<sup>186</sup> This improved state of affairs has been credited to “a legal transformation that occurred from the ground up” as well as “a long tradition of adjudicators recognizing gender-based persecution and gender-based asylum claims.”<sup>187</sup> Owing to progress forged on the ground, “there is now a ground-level jurisprudence that is having significant impact on other aspects of refugee law and decisionmaking institutions including at higher levels.”<sup>188</sup>

4. *Bureaucratic Resistance to Mandatory Detention.* Bottom-up agency influences are also evident in the occasional *resistance* by immigration enforcement officers to experimental top-down policies that placed unrealistic burdens on the immigration system and undermined well-established agency practices. For example, in 2003, the newly created DHS established pilot programs in three U.S. cities requiring the automatic and immediate detention of all foreign

---

181. *Id.* at 390.

182. *Id.* at 394.

183. *Id.* at 390.

184. *Id.* at 396.

185. Anker, *supra* note 16, at 48.

186. Blaine Bookey, *Domestic Violence As A Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 143 (2013) (“In many cases, judges have accepted the DHS framework and recognized groups that include some combination of the *L-R-* characteristics of gender, nationality, and status in the relationship . . .”).

187. Anker, *supra* note 16, at 67.

188. *Id.*

nationals ordered removed by an immigration judge. Although foreign nationals are ordinarily not detained upon being ordered removed, the newly created Detention After Removal Hearing (DARH) program, also known as “Operation Compliance,” required automatic detention in all such cases. The policy was short-lived, which practitioners attribute to the program’s unpopularity, not only among foreign nationals and their attorneys, but also frontline officers who enforce immigration law.<sup>189</sup>

DHS created DARH in 2003 in an effort to address concerns that too many nondetained foreign nationals ordered removed were never actually deported.<sup>190</sup> News reports consistently quoted an ICE statistic that 85 percent of undocumented immigrants abscond; the government estimated that there were about 400,000 foreign-national fugitives within the United States.<sup>191</sup> The DARH program, piloted in Hartford<sup>192</sup> and later rolled out in Atlanta and Denver, required that an ICE detention officer take custody of each and every foreign national ordered removed by an immigration judge—regardless of whether that person appealed the order.<sup>193</sup> DARH also required

---

189. Telephone Interview with Michael Boyle, Immigration Attorney in Private Practice (Aug. 17, 2015) (notes on file with the *Duke Law Journal*) (noting that frontline prosecutors disliked the program and sent their negative feedback up the chain of command); Telephone Interview with Anthony Collins, Immigration Attorney in Private Practice (Oct. 7, 2015) (notes on file with the *Duke Law Journal*) (remarking that DARH illustrates how immigration officers resist top-down policies that lack buy-in).

190. For example, in one year, ICE removed 92 percent of detained foreign nationals but had a much lower removal rate of 13 to 35 percent for those who were not detained. IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., DRO OPERATION ORDER 2-03 (HARTFORD PROJECT) 1 (Aug. 2003) [hereinafter HARTFORD PROJECT DRO OPERATION ORDER] (on file with the *Duke Law Journal*); see also IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., DRO OPERATION ORDER 1-04 (ATLANTA PILOT) 1 (Apr. 2004) [hereinafter ATLANTA PILOT DRO OPERATION ORDER] (on file with the *Duke Law Journal*) (citing an effective removal rate of 94 percent for detained foreign nationals but only 11 percent for those who were not detained); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REP. NO. I-2003-004, THE IMMIGRATION AND NATURALIZATION SERVICE’S REMOVAL OF ALIENS ISSUED FINAL ORDERS 11 (Feb. 2003), <https://oig.justice.gov/reports/INS/e0304/final.pdf> [<http://perma.cc/WC2R-KBEP>] (citing an effective removal rate of 92 percent for detained foreign nationals but only 13 percent for those who were not detained and noting this low rate of removal existed despite corrective actions recommended years earlier).

191. See Bruce Finley, *In New Push, Deportees Will be Jailed at Once, Efforts to Cut Absconders Expands to Denver*, DENVER POST, Mar. 31, 2004, at A1; Press Release, U.S. Immigration & Customs Enf’t, ICE Expands Pilot Project to Detain Deportable Aliens (Mar. 26, 2004).

192. The first program debuted in Hartford, Connecticut from August 12, 2003 through October 12, 2003. See Hartford Pilot Project Briefing Paper (on file with the *Duke Law Journal*) (provided in response to FOIA request).

193. Press Release, U.S. Immigration & Customs Enf’t, *supra* note 191.

removal for foreign nationals who, while not ordered removed, were granted voluntary departure with a condition of posting bond.<sup>194</sup> Once the judge issued a removal order or granted voluntary departure with a condition of posting bond, the foreign national would be taken into custody immediately.<sup>195</sup>

The DARH program marked a dramatic shift from prior enforcement policies in which ICE “refrained from making arrests at immigration courts due to a lack of detention capacity and the resistance of the private bar and advocates who maintain that regular arrests at the courts will deter many aliens from showing up for hearings.”<sup>196</sup> Absent exceptional cases in which a foreign national was a danger to the community or a flight risk, detention was generally not imposed until all administrative appeals had been exhausted.<sup>197</sup> DARH changed the status quo by placing an Office of Detention and Removal (DRO) officer in every courtroom;<sup>198</sup> once in custody, ICE revoked any previous bond. The foreign national could apply for bond again, but bond amounts could soar higher than \$200,000.<sup>199</sup> Unless released by DRO or the immigration judge, a foreign national ordered removed was detained until the proceedings were administratively final, or he or she was removed.<sup>200</sup>

---

194. See LEGAL ACTION CTR., AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: ICE’S DETENTION AFTER REMOVAL HEARING (DARH) PROGRAM 1 (Apr. 9, 2004), [http://americanimmigrationcouncil.org/sites/default/files/lac\\_pa\\_041204.pdf](http://americanimmigrationcouncil.org/sites/default/files/lac_pa_041204.pdf) [<http://perma.cc/8QQL-PNSM>]. Voluntary departure is defined as “[t]he departure of an alien from the United States without an order of removal. The departure may or may not have been preceded by a hearing before an immigration judge. An alien allowed to voluntarily depart concedes removability but does not have a bar to seeking admission at a port-of-entry at any time.” *Voluntary Departure*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/tools/glossary/voluntary-departure> [<http://perma.cc/RWF4-NNMT>].

195. See Memorandum from Office of the Chief Immigration Judge, EOIR, to Detention and Removal Operations, Dep’t of Homeland Sec. app. At 1 (Mar. 26, 2004) (on file with the *Duke Law Journal*) (provided in response to a FOIA request).

196. See ATLANTA PILOT DRO OPERATION ORDER, *supra* note 190, at 1.

197. See *id.* at 2 (noting that the target population for the program were those ordered removed “on the non-detained docket” who lacked a criminal conviction or had been convicted solely of a minor crime); Ricardo Alonso-Zaldivar, *Foreigners Fighting Orders to Leave U.S. May Face Jail*, L.A. TIMES, Apr. 25, 2004, at A28; Matt Apuzzo, *Illegal Immigrants in Connecticut Arrested Before Appeals as Part of Homeland Security Pilot Program*, ASSOCIATED PRESS, Sept. 16, 2003.

198. See Alonso-Zaldivar, *supra* note 197, at A28; Memorandum from Dir., Office of Det. and Removal, to Assistant Sec’y, U.S. Dep’t of Homeland Sec. (June 27, 2003) (on file with the *Duke Law Journal*).

199. See Hartford Pilot Project Briefing Paper, *supra* note 192, at 1 (noting that bonds ranged “from \$5,000 to more than \$200,000”).

200. *Id.*

DARH was part of a larger effort by DHS called “Endgame,”<sup>201</sup> a ten-year strategic plan created by DRO to try and reduce the number of fugitive foreign nationals. It was composed of the DARH program, the electronic-monitoring-device program (which placed an electronic monitoring device on nondetained foreign nationals to track them while awaiting removal), and a telephone-reporting program.<sup>202</sup>

The Hartford pilot program was short-lived, and there is very little reporting about the policy or its demise.<sup>203</sup> However, immigration attorneys have attributed its fall to resistance from both the private bar as well as from some within DHS.<sup>204</sup> According to Michael Boyle, an attorney in North Haven, Connecticut, DHS trial attorneys abhorred the program and wanted it to end. Boyle also observed that government prosecutors preferred to spend time on heavy-duty enforcement efforts, defying DARH in more run-of-the-mill cases.<sup>205</sup> Anthony Collins, another local attorney practicing during the time of DARH, noted that the policy was especially punitive in cases in which immigrants ordered removed had viable grounds for an appeal and faced detention and separation from their families before their appeal could be heard.<sup>206</sup> Practicing attorneys also remarked that the potential consequence of prolonged detention chilled some foreign nationals from seeking various benefits or other forms of immigration relief in the first place.<sup>207</sup>

Immigration judges would respond to DARH by holding bond hearings immediately at the conclusion of a merits hearing so that a foreign national ordered detained would not necessarily be placed in custody during the interim between the merits and bond hearings.<sup>208</sup> On occasion, DHS attorneys appeared willing to use what little

---

201. Teresa Borden, *Q&A/John Mata, U.S. Bureau of Immigration and Customs: ‘80,000 Criminal Aliens Are Roaming Our Streets’*, ATLANTA J. & CONST., Sept. 1, 2004, at F3.

202. *Id.*

203. See ATLANTA PILOT DRO OPERATION ORDER, *supra* note 190, at 1 (noting that “[t]he Hartford Project took place over a period of sixty days”). Following the conclusion of the Hartford pilot program, DHS piloted DARH in Denver, Colorado, and Atlanta, Georgia, from April 2004 to August 31, 2004. See *id.* at 3; Press Release, U.S. Immigration & Customs Enf’t, *supra* note 191. As in the case of Hartford, the government never made these programs permanent.

204. Telephone Interview with Michael Boyle, *supra* note 189.

205. *Id.*

206. Telephone Interview with Anthony Collins, *supra* note 189.

207. *Id.*; Telephone Interview with Joseph Tapper, Immigration Attorney in Private Practice (Oct. 9, 2015) (notes on file with the *Duke Law Journal*).

208. Telephone Interview with Anthony Collins, *supra* note 189.

discretion they had to spare foreign nationals the program's harsh consequence. Collins recalls one particularly sympathetic case involving a Polish immigrant who faced technical hurdles to getting relief. In that case, the DHS trial attorney took the unusual step of consenting to a continuance so that the foreign national would not be subject to mandatory detention.<sup>209</sup> Continuances in that court were exceedingly rare during this time, but the trial attorney's consent provided a reprieve long enough to outlast the DARH program.<sup>210</sup>

DARH faced additional, practical hurdles as well. ICE had limited bed space and would prioritize those with criminal records,<sup>211</sup> requiring automatic detention of noncriminal cases threatened to overwhelm immigration-detention facilities.<sup>212</sup> Moreover, in Hartford, the nearest detention centers were fairly far away from the immigration court,<sup>213</sup> creating additional work for deportation officers and making it hard for ICE officers to comply. The program also raised concerns for the effects it would have on more vulnerable asylum-seekers.<sup>214</sup>

Given how little information exists on the DARH program, one can only speculate why it never matured into the program some within the Bush administration imagined it would become. But members of the immigration bar believe that feedback being sent up the chain was negative and that the program failed because it lacked buy-in from the agency's own long-term experts.<sup>215</sup> Thus, to the extent there were concerns that DARH would become national policy, practitioners took some solace "when prosecutors were telling us [that DARH] was a nightmare for them and for the judges too."<sup>216</sup>

### C. Executive Deferred Action and Bottom-Up Innovation

The correlations between frontline exercises of case-by-case discretion and certain across-the-board policies raise the question whether the more recent executive branch programs, DACA and

---

209. *Id.*

210. *Id.*

211. Alonso-Zaldivar, *supra* note 197, at A28.

212. *Id.*

213. Telephone Interview with Michael Boyle, *supra* note 189 (noting that the two closest facilities were in Greenfield, Massachusetts, and Wyatt, Rhode Island).

214. Alonso-Zaldivar, *supra* note 197.

215. Telephone Interview with Michael Boyle, *supra* note 189; Telephone Interview with Anthony Collins, *supra* note 189.

216. Telephone Interview with Michael Boyle, *supra* note 189.

DAPA, have similar relationships with individual decisions on the ground. Interestingly, a number of recent empirical studies suggest that such correlations may exist.<sup>217</sup> Shoba Wadhia's analysis of deferred action cases processed by ICE field offices from October 2011 through June 2012 demonstrates that two of the three most common factors for a favorable grant—"having a [U.S-citizen] dependent [] or being an individual in the United States since childhood"<sup>218</sup>—are the same criteria for DACA and DAPA, which prevent family separation through the deportation of foreign nationals who arrived as children and the undocumented parents of U.S.-citizen and LPR children.<sup>219</sup> A study by Leon Wildes of deferred action statistics from USCIS reveals similar results. Although the Wildes study is much older, it notes that two of the three most common factors for granting deferred action were to protect foreign-national youths and to prevent the separation of families.<sup>220</sup>

To be sure, DACA and DAPA are clearly a result of decisionmaking by high-level officials, responding in part to other high-level influences and pressures to find ways to avoid deporting DREAMers and other foreign nationals who have long resided in the United States and to focus resources on criminal offenders instead. Indeed, one could argue that DACA and DAPA would have been adopted regardless of how frontline agents, acting on their own, had chosen to exercise discretion in individual cases. Yet these empirical studies reinforce the idea that ground-level decisions could bear on across-the-board deferred action programs; more positively, categorical executive policy could even be rooted in case-by-case discretionary exercises by longtime agency experts who enforce the law on a daily basis.<sup>221</sup>

The inquiry into correlations between case-by-case exercises and categorical policy also helps shore up a vague dividing line between supposedly legitimate and illegitimate uses of deferred action. For example, a November 2014 Office of Legal Counsel (OLC) memorandum that provides reinforcement for two of three proposed DHS policies adamantly rejects expanding categorical deferred action

---

217. See, e.g., Wadhia, *Great FOIA Adventure*, *supra* note 32, at 369; Wadhia, *Sharing Secrets*, *supra* note 55, at 6; Wildes, *supra* note 32, at 830.

218. Wadhia, *Great FOIA Adventure*, *supra* note 32, at 369.

219. See *supra* notes 22–23 and accompanying text.

220. Wildes, *supra* note 32, at 830.

221. See *infra* Part IV.A.

to the parents of DACA recipients.<sup>222</sup> In its support of DAPA, the OLC opinion makes traditional separation-of-powers arguments couched in congressional acquiescence to administration policy.<sup>223</sup> For example, it highlights, as a basis for vindicating DAPA, a longstanding agency policy of prioritizing removal of particular categories of foreign nationals without any apparent objection from Congress.<sup>224</sup> Yet, where the parents of DACA recipients are concerned, OLC was “aware of no precedent for using deferred action in this way,”<sup>225</sup> concluding that this category of individuals would be “unlike prior deferred action programs in which Congress has acquiesced.”<sup>226</sup>

Nevertheless, the memorandum offered the suggestion that its conclusion regarding categorical determinations for the parents of DACA recipients might shift if case-by-case discretionary decisions pointed to an established practice of protecting such individuals:

DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.<sup>227</sup>

This statement, however enigmatic, could provide support for the idea that future executive deferred action programs might be legitimated by a groundswell of similar case-by-case determinations on the ground. Although there is little empirical evidence at this time that favorable exercises of discretion have been routinely granted to individuals with non-U.S.-citizen or non-LPR dependents, such a

---

222. See OLC Opinion, *supra* note 55, at 31–33.

223. See *id.* at 23 (“[P]erhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs.”).

224. *Id.* at 7–8 (“In their exercise of enforcement discretion, DHS and its predecessor, INS, have long employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others.”).

225. *Id.* at 33.

226. *Id.*

227. *Id.*



practice could emerge.<sup>228</sup> Ground-level “deferred action decisions are not limited to the presence or absence of a dependent with lawful status,”<sup>229</sup> and the development of case-by-case agency precedent for the parents of DACA recipients could lay a foundation for similar categorical action in the future.

#### IV. DISCRETION AND AGENCY “COMMON LAW”

Although the Obama administration’s use of categorical enforcement discretion has brought renewed attention to prosecutorial discretion,<sup>230</sup> the availability of immigration enforcement discretion is well established in decades of memoranda issued to the field.<sup>231</sup> Though these memoranda lack the procedures associated with notice-and-comment rulemaking, they do not entirely lack the features of agency “precedent.” Frontline discretion has a long pedigree within the immigration agencies, with increasingly open-ended criteria underlying favorable exercises of discretion.<sup>232</sup> To the extent that case-by-case exercises of discretion crowd around certain common themes, those exercises of discretion can contribute to the development of agency understandings, or best practices, which in turn guide future enforcement decisions. Moreover, the congruence between lower-level exercises of discretion and across-the-board agency policy could be a basis for vindicating categorical executive action. Thus, rather than uphold (or invalidate) executive deferred action programs exclusively through a formalistic reading of *Chevron*,<sup>233</sup> or seek to exempt enforcement policies from judicial

---

228. As Shoba Wadhia has noted, grants of deferred action to individuals without a U.S.-citizen dependent have thus far focused primarily on those individuals who serve as primary caregivers to individuals with a serious physical or mental illness. See Wadhia, *Great FOIA Adventure*, *supra* note 32, at 369.

229. Letter from Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar & Clinical Professor of Law, Pa. State Dickinson Sch. of Law et al. to President Barack Obama 2 (Nov. 3, 2014), <http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/WHLetterFinalNovember20142.pdf> [<http://perma.cc/UCX5-HBM9>].

230. See *supra* notes 1–3, 7–8 and accompanying text.

231. See *supra* Part II.B.

232. See *supra* Part II.B.

233. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (requiring deference to reasonable agency interpretations of vague statutory language); Compare *Texas v. United States*, 809 F.3d 134, 178–86 (5th Cir. 2015) (using the *Chevron* framework to enjoin the 2014 deferred action initiatives as “manifestly contrary” to, and an unreasonable interpretation of, the INA), *cert. granted*, No. 15-674, 2016 WL 207257 (U.S. Jan. 19, 2016), *with id.* at 215–18 (King, J., dissenting) (disagreeing with the majority’s decision to

review altogether,<sup>234</sup> courts might analyze executive branch policy through the alternative source of frontline enforcement. Such an analysis, grounded in expertise rather than political accountability, is a bedrock justification for the administrative process and a well-established, if undervalued, doctrinal basis for judicial deference.<sup>235</sup> On this account, the reviewing court would consider, among other things, whether a particular executive policy being challenged was supported by frontline enforcement decisions on the ground. Indeed, there already is some evidence that the Supreme Court applies these more functionalist frameworks to review the legitimacy of administrative action.<sup>236</sup> In short, the relationship between top-down decisions and more ordinary manifestations in the field could be a basis for thinking about the legitimacy of across-the-board enforcement policies.<sup>237</sup>

#### A. *Enforcement, Longstanding Practice, and Deference*

The broad range of considerations spelled out in agency field memoranda have not prevented frontline enforcement decisions from crowding around certain specific factors—in particular, hardship caused by separating families and removing foreign-national youths.<sup>238</sup> Not only have frontline officers taken a lead role in deciding which kinds of cases can be most worthy of prosecutorial discretion, but exercises of discretion have helped create new *forms* of deportation relief. Indeed, deferred action itself emerged from local practice—not statutory authorization—something OLC noted in its opinion lending

---

address the substantive APA issue but finding, in any event, that the programs would not violate *Chevron*).

234. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding “that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion”); Petition for a Writ of Certiorari at 12, 20–21, *United States v. Texas*, 2015 WL 7308179 (Nov. 20, 2015) (No. 15-674) (invoking *Heckler* as a basis to legitimate the 2014 reforms).

235. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) (noting that “practical agency expertise is one of the principal justifications behind *Chevron* deference”); *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (noting that “administrative judgments are entitled to the greatest amount of weight by appellate courts” when they are “the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts”).

236. See *infra* note 249 and accompanying text.

237. See *supra* Part III.C.

238. See *supra* notes 217–20 and accompanying text.

support for DAPA.<sup>239</sup> Thus, there are good reasons to look to frontline enforcement as a basis for bottom-up innovation. Case-by-case decisions could be harnessed to identify certain new and previously overlooked categories of immigrants deserving relief—not to mention novel ways of protecting them. Once these lower-level experiments reach a saturation point, they may provide justificatory support for higher-level, across-the-board agency action.

The wide availability of ground-level discretion, combined with added possibilities for vibrant exchange between those at the highest and lowest echelons of the agency, could imbue top-down decisions with a stronger basis in agency expertise, which in turn enhances the durability of across-the-board executive programs. Because the “bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview,”<sup>240</sup> increased coordination between higher-level officials and lower-level officers could supply executive enforcement policies with greater doctrinal and normative backing. Although the technical expertise of long time agency bureaucrats has hardly figured into the legal and scholarly debates regarding across-the-board enforcement policies such as DACA and DAPA, it seems only reasonable to look to ground-level enforcement for insights into whether the Obama administration’s policies are supported by the kind of technical specialization and expertise that are a bedrock of ordinary deference doctrines.<sup>241</sup>

The OLC opinion discussed in Part III endorses this expertise-based rationale.<sup>242</sup> The opinion makes clear that “any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency’s expertise.”<sup>243</sup> Moreover, as previously mentioned, the opinion, in its brief section finding unacceptable a policy protecting the parents of DACA recipients, appears to draw connections between favorable

---

239. As OLC noted, “[a]lthough the practice of granting deferred action ‘developed without express statutory authorization,’ it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court.” OLC Opinion, *supra* note 55, at 13 (citation omitted).

240. Katyal, *supra* note 6, at 2317.

241. See Neal Kumar Katyal, Comment, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 106 (2006) (“Historically, when courts decide whether to award deference to an executive interpretation, they have considered three factors: expertise, whether there has been a delegation from Congress, and political accountability.”).

242. See *supra* notes 223–27 and accompanying text.

243. OLC Opinion, *supra* note 55, at 24.

exercises of discretion in discrete cases and categorical executive policies.<sup>244</sup> The opinion also makes repeated references to the importance of preserving “case-by-case determinations about whether an individual alien’s circumstances warrant the expenditure of removal resources.”<sup>245</sup>

A more full-throated argument linking bureaucratic expertise with individual enforcement decisions can be found within *Arizona v. United States*,<sup>246</sup> which highlights the critical role of individual enforcement decisions as a basis for deference. Justice Kennedy’s majority opinion provides a subtle portrayal of the bureaucrat-as-expert, explicitly recognizing the significance of discretion in discrete cases:

A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . . ICE officers are responsible “for the identification, apprehension, and removal of illegal aliens in the United States.”<sup>247</sup>

The Court’s recent treatment of immigration enforcement discretion thus supports incorporating lower-level influences in considerations of agency expertise.<sup>248</sup>

Although *Arizona*’s discussion of executive discretion emerges in the federalism context, its functionalist, expertise-based account of deference converges with other, similar administrative-law decisions of late that deviate from a formal, accountability-based theory of deference to agency determinations.<sup>249</sup> It is beyond the scope of this

---

244. See *supra* note 227 and accompanying text.

245. See, e.g., OLC Opinion, *supra* note 55, at 11.

246. *Arizona v. United States*, 132 S. Ct. 2492 (2012). *Arizona* held that three provisions of an Arizona law tying criminal penalties to federal immigration policies were preempted by federal law because of Congress’s occupation of the field. See *id.* at 2501–07. The Court upheld one portion of the law requiring state officers to make a reasonable effort to determine the immigration status of a detainee when the officer has reasonable suspicion to believe that the person is unlawfully present in the United States. See *id.* at 2507–10.

247. *Id.* at 2499–500 (citations omitted) (quoting OFFICE OF IMMIGRATION STATISTICS, OFFICE OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 2 (2011)).

248. Cf. Cox & Rodríguez, *supra* note 2, at 132 (pointing out that recent changes in immigration law “have simply moved the power to provide relief to the arrest and charging phase, shifting the judgment from immigration judges to prosecutors and immigration police”).

249. See generally Joseph Landau, *Chevron Meets Youngstown*, 92 B.U. L. REV. 1917 (2012) (discussing the Supreme Court’s preference for Justice Jackson’s functionalist *Youngstown* framework over bright-line invocations of *Chevron* in a range of administrative-law contexts, with a focus on national-security cases); see also William N. Eskridge, Jr. & Lauren E. Baer, *The*

Article to engage in a full analysis of the interplay between these recent doctrinal developments and an expertise-based model of agency policy grounded in routine administrative practices—a topic for future scholarship. But the idea of analyzing the connections between across-the-board agency policy and frontline exercises of discretion in discrete cases could be important to preserving the vitality of executive deferred action policies—an important matter given the Supreme Court’s decision to review the 2014 reforms around DAPA and expanded DACA.<sup>250</sup> In a doctrinal field saturated with puzzling deference doctrines, a theory of agency buy-in could be vital to the preservation of administrative policies.

In short, bureaucratic buy-in could supply DACA and DAPA with an added—and needed—measure of legitimacy. Indeed, presidential administrations should not refrain from touting the extent to which across-the-board enforcement policies are consistent not only with decades of agency guidelines, but also enforcement decisions rendered on the ground. In noting the way that frontline exercises of discretion coalesce around certain specific factors, presidential administrations can maintain that categorical policymaking provides a curative to inequities on the ground—bringing all frontline enforcement into alignment with emerging best practices. In the same way that congressional findings and legislative history might help shore up vague statutory text, ground-level agency decisions that accumulate over time could provide support for executive branch policies that protect entire categories of individuals.

### *B. Agency Experimentation and “Common Law”*

Administrative-law theorists have observed that “creativity is impossible without discretion.”<sup>251</sup> Legislatures identify problems, but administrative agents do the hard work of deriving solutions. In a seminal volume on administrative law and justice, Kenneth Culp Davis provided the following description of the role of the bureaucratic agent:

---

*Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1179 (2008) (“[S]tatutory subject matter and institutional context appear to be more important in the Justices’ own evaluation of agency inputs than the rhetorical ‘deference’ regime the Justices attach to the case.”).

250. *United States v. Texas*, No. 15-674, 2016 WL 207257, at \*1 (U.S. Jan. 19, 2016).

251. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 20 (1969).

[T]he delegate, through case-to-case consideration, where the human mind is often at its best, nibbles at the problem and finds little solutions for each little bite of the big problem. Creativeness in the nibbling sometimes opens the way for perspective thinking about the whole big problem, and large solutions sometimes emerge.<sup>252</sup>

As frontline immigration officers begin to converge on shared discretionary decisions—whether for the partners and spouses of gay and lesbian U.S. citizens and LPRs<sup>253</sup> or the family members of U.S.-citizen military personnel<sup>254</sup>—those decisions, over time, contribute to a process of legal development that can be analogized to “the creation of [agency] common law.”<sup>255</sup> And as much as the analogy to a common-law or quasi-common-law process could help to provide a doctrinal foundation for top-down executive action, it also serves as a practical basis for novel instances of categorical executive policy.

The phrase “administrative common law” generally refers to judicially created doctrines of administrative law and procedural review,<sup>256</sup> but it relates to internal agency practices as well.<sup>257</sup> Under the conventional literature,<sup>258</sup> the “common law” aspects of judicial review of administrative law include a judge-centric adjudicative process that develops the doctrinal framework incrementally with a noted reliance on precedent—a kind of *stare decisis* for administrative-law adjudications.<sup>259</sup> But the term “administrative common law” also can be said to refer to the incremental development of law and policy within the executive branch, by

---

252. *Id.*

253. *See supra* Part III.B.1.

254. *See supra* Part III.B.2.

255. DAVIS, *supra* note 251, at 21.

256. *See, e.g.*, Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012).

257. *See* Davidson & Leib, *supra* note 44, at 262 (discussing the idea of administrative common law in the context of OIRA’s lawmaking functions).

258. Commentators traditionally conceive of administrative common law as a byproduct of federal appellate review of administrative-law adjudications. As Gillian Metzger notes, many administrative-law doctrines are “judicially created at their core,” with the development of *Chevron* deference for reviewing agency statutory interpretations a “central example.” *See* Metzger, *supra* note 256, at 1299; *see also* Jack M. Beerermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 21 (2011) (“[The *Chevron*] doctrine is the quintessential common law creation.”); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189 (1998) (referring to *Chevron* as “[t]he most important opinion in administrative common law”).

259. Metzger, *supra* note 256, at 1313.

administrative agencies themselves.<sup>260</sup> This idea of administrative common law usually concerns the development of agency action—mainly through agency adjudication—that produces a law common to the agency.<sup>261</sup>

If, as Cass Sunstein has declared, “agencies have become modern America’s common law courts,”<sup>262</sup> the conception of administrative common law might also describe the incremental development of agency decisionmaking, whether through adjudication or enforcement practices. Importing the concepts of administrative common law from the judicial review context to internal agency practices can provide the latter with a more “evenhanded, predictable, and consistent development of legal principles [that] contributes to the actual and perceived integrity of the [administrative] process.”<sup>263</sup> If “administrative agencies [have] displace[d] the previously central role of federal courts in the making of federal common law,”<sup>264</sup> the iterative process of agency decisionmaking, including enforcement decisions, merits attention—especially given the nonreviewability of frontline enforcement decisions.<sup>265</sup> These enforcement determinations

---

260. See *id.* at 1295 n.1 (“The term ‘administrative common law’ is also sometimes used to refer to common law created by agencies, for example through adjudication . . . .”); see also Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 693 (2005) (“To some extent, administrative policymaking is similar to judicial lawmaking in the general common-law system.”).

261. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998) (“Operating as common law courts, agencies have, as they should, considerable power to adapt statutory language to changing understandings and circumstances.”).

262. *Id.*

263. Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 927 (2006) (citations omitted). As Murphy has argued, “[t]he persistence of this theme in administrative law is not surprising. The idea that past practices constrain the present—both to limit the scope of arbitrary official discretion and to ensure equal treatment of persons over time—is old and powerful.” *Id.* at 932. Given that “the vast bulk of agency interpretations are issued through myriad non-legislative means such as formal adjudications, opinion letters, and manuals,” *id.* at 933, presidential measures on the scale of DACA and DAPA may be as much about bringing procedural consistency to long time agency practices as striking out new legislative ground.

264. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1719 (2001).

265. Wadhia, *Prosecutorial Discretion*, *supra* note 57, at 286–92 (noting the “Supreme Court’s reluctance to permit judicial review over prosecutorial discretion”); see also *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–92 (1999) (citing *Wayte v. United States*, 470 U.S. 598, 607–08 (1985)) (upholding broad executive branch enforcement discretion despite claims that prosecutorial discretion was used in a discriminatory manner).

can reveal insights into an internal body of common customs or conventions reflecting longtime agency practices.<sup>266</sup>

Under this theory of administrative common law, decisions by frontline officers and agency staff, and the broader policies incorporated in agency memoranda,<sup>267</sup> incrementally help to develop a culture, and—eventually—a body of precedent that is persuasive, though not binding, on the higher ranks. Such lower-level exercises provide information regarding uses of discretion that contribute incrementally to the development of longstanding agency policy, a bedrock of the common-law tradition.<sup>268</sup> This process is most pronounced in agency settings characterized by widely delegated prosecutorial discretion—a hallmark of federal immigration enforcement.<sup>269</sup> Rather than mechanistically applying codified criteria, the presence of a more open-ended enforcement standard memorialized in longstanding agency practices allows immigration officers to find in the existing guidelines ways of interpreting the individual facts of a given case to novel ends. The enforcement decisions that spring from these exercises of discretion are generally grounded in a routine (and often long-term) exposure to immigration-law issues,<sup>270</sup> an expertise formed through repeated exposure to

---

266. See *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 60–61 (D.D.C. 1998) (referring to “rules implicit in an agency’s course of conduct where that conduct gives rise to a ‘common law’ administrative rule”); see also Davidson & Leib, *supra* note 44, at 274 (noting that traditional “modes of stare decisis do not exhaust the possibilities for thinking about how to reason from precedent” and “that stare decisis can carry several meanings within the Executive Branch . . . . Calibrating the right mix of precedent, reason-giving, and transparency is all on the agenda for repleprudence”).

267. See *supra* Part II.B.

268. Daniel Solove and Woodrow Hartzog have identified this administrative common-law process at work in the development of federal privacy law at the Federal Trade Commission (FTC). See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 619–27 (2014). In enforcement actions at the FTC, agency actors employ settlement agreements and consent decrees, nonadjudicative resolutions, as a body of precedent that functions much like a body of common-law precedent. See *id.* The highest level of decision makers at the FTC, the commissioners themselves, control this formulation of administrative common law by formulating and voting on these settlements and consent orders. *Id.* In this way, an administrative common law of privacy is incrementally developed in a nonadjudicative setting from the top-down.

269. Wadhia, *Prosecutorial Discretion*, *supra* note 57, at 246–65 (describing the history of prosecutorial discretion in frontline immigration enforcement).

270. Cf. James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 376 (1976) (“The continuing expertness of an administrative agency as to matters of technical substance can be more properly understood as deriving primarily from its staff.”).



“similar matters over and over again.”<sup>271</sup> Over time, as favorable exercises of case-by-case discretion gravitate toward the periphery of pre-established criteria, these seemingly boundary-line cases, upon reaching saturation, become a new body of agency precedent.<sup>272</sup> As lower-level officers slowly create a body of law common to the agency, their work provides not only doctrinal support for executive action, but a broader form of legitimacy rooted in the expertise of lower-level day-to-day enforcement.

Current immigration structures lack any formal mechanisms that allow frontline experiments to filter up to the highest levels of the executive and inform policy on a national scale; put another way, immigration agencies lack the kind of constant interplay between lower-level laboratories and higher-level adaptation associated with “experimentalist” regimes.<sup>273</sup> Nevertheless, the agency could adopt practices that would greatly improve the possibilities for higher-level officials to seek input from frontline officers. This Article’s conclusion suggests reforms that would enhance opportunities for dialogue between higher-level officials and lower-level officers based on the latter’s use of discretion in their daily enforcement of immigration law.

## V. THE NORMATIVE IMPLICATIONS OF BOTTOM-UP INNOVATION

Lower-level exercises of discretion, and the variances to which they give rise, raise a number of normative concerns about procedural regularity. After all, novel exercises of lower-level bureaucratic discretion, notwithstanding their potential benefits, will almost certainly produce large discrepancies in frontline implementation—with wild inconsistencies, a lack of transparency, and other inequities that undermine important procedural values such as evenhandedness, interpretive consistency, and transparency.<sup>274</sup> Moreover, because

---

271. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1484–85 (2009).

272. To borrow from a different constitutional context, agency practices could be vindicated by their rootedness in “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

273. See *supra* notes 18, 45–46 and accompanying text.

274. The gender-based asylum case study, see *supra* Part III.B.3, highlights these sorts of difficulties. For years, gender-based asylum cases languished in a sea of inconsistent rules, opinions, and guidance documents. The 1995 Guidelines had no binding effect on any of the adjudicatory bodies handling gender-based claims—producing wildly different outcomes. And

frontline discretion is not subject to judicial review,<sup>275</sup> only top-down and across-the-board interventions ensure equity in law administration and application. Indeed, even a common practice that generally enjoys a longstanding history will, without categorical implementation, be applied unevenly on the ground. This problem—one that scholars have appropriately sought to remedy—has produced calls for various kinds of administrative-law solutions. But, while top-down decisionmaking remains critical—both to bring equity to lower-level enforcement decisions and to supervise officers who do not make proper use of enforcement discretion—the mechanisms some have proposed could stifle the immediate and long-term benefits that lower-level experimentation and bottom-up innovation could have for the agency as a whole.

*A. The Benefits of Top-Down Solutions—and Their Limits*

Empirical research has documented the variances of lower-level discretion—including problems in which “seemingly eligible applicants are denied and less worthy cases are granted deferred action status.”<sup>276</sup> Wadhia’s 2013 analysis of ICE’s deferred action enforcement discretion demonstrated significant disparities in the outcome of deferred action decisions across ICE’s twenty-four Enforcement and Removal Operations field offices.<sup>277</sup> These discrepancies have prompted scholars to advocate top-down solutions as a mechanism for controlling inconsistencies and other rule-of-law problems that are inherent to decentralized enforcement regimes. Wadhia has argued that deferred action policy should be embodied within agency regulations promulgated under notice-and-comment rulemaking, promoting values such as “transparency, consistency, acceptability, and accountability.”<sup>278</sup> Wildes has made a similar

---

DHS’s litigation position in the *R-A-* and *L-R-* briefs were hardly binding within the rest of DHS, leaving gender-based asylum on unsteady legal footing. Although *A-R-C-G-* has been hailed as a victory, the lack of consistent, top-down guidance for gender-based asylum plagued that issue, creating a “vacuum in the formal law as it related to domestic violence claims.” Anker, *supra* note 16, at 58.

275. See *supra* note 265.

276. Wildes, *supra* note 32, at 837–38. For a discussion of the distressing variances in asylum adjudications, see generally Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

277. Wadhia, *Great FOIA Adventure*, *supra* note 32, at 370–73.

278. Wadhia, *Sharing Secrets*, *supra* note 55, at 60–61.

argument.<sup>279</sup> Instituting agency regulations for the exercises of deferred action would indeed serve the goal of reducing these disparities and treating like cases alike.

These calls for regulatory action echo prior ones, including Colin Diver's early criticism of legacy INS's refusal to codify existing standards for exercising discretion in the related arena of adjustment of status applications.<sup>280</sup> Indeed, legacy INS had proposed regulations to govern the wide discretion in that analogous context,<sup>281</sup> but the process was rescinded in 1981 during the changeover to the Reagan administration.<sup>282</sup> The agency explained that it was withdrawing the proposed rule because it could not "foresee and enumerate all the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion."<sup>283</sup> The concern was that codification might preclude the use of discretion in new and previously unanticipated situations: "Listing some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion."<sup>284</sup>

From this perspective, the Obama administration's deferred action programs, although not a product of notice-and-comment rulemaking, are still a vast improvement in the way they bring uniformity and consistency to certain enforcement decisions. Indeed, scholars have hailed the Obama administration for bringing greater transparency and predictability to its enforcement policies. Cox and Rodríguez praise programs such as DACA and DAPA for making "the exercise of discretion more rule-like, centralized, and transparent."<sup>285</sup> And they commend the "substitution of delegated and

---

279. Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 106 (1980) (arguing that the prosecutorial-discretion guidelines "should probably be subject to the notice and publication requirements of the Administrative Procedure Act").

280. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 92-97 (1983).

281. *Id.* at 93.

282. *Id.* at 94.

283. *Id.*

284. *Id.* Diver argued that the agency's stated rationale was a smokescreen for fears of increased litigation that would arise in the wake of substantive regulations. *Id.* ("At least the Service is consistent: its explanations are no more transparent than its rules. In order to fathom the rejection of the proposed rule, we must look behind the official explanation. Several INS district officials feared increased litigation.")

285. Cox & Rodríguez, *supra* note 2, at 111.

visible authority for discretionary and opaque authority.”<sup>286</sup> In the case of DACA, Andrias argues that the Obama administration’s disclosure of its legal rationale promoted transparency and accountability through public monitoring.<sup>287</sup>

Yet the same argument for transparency that supposedly affirms the Obama administration’s policies could sink them as well. First, scholars of administrative law have raised concerns about the replacement of notice-and-comment rulemaking with subregulatory or nonlegislative rules,<sup>288</sup> and a federal district court has halted the 2014 programs nationwide, based on the legal conclusion that the Obama administration failed to subject them to notice-and-comment rulemaking.<sup>289</sup> Thus, transparency alone may not be sufficient to infuse programs like DACA and DAPA with rule-of-law content. Moreover, transparency is not a one-way ratchet, and a presidential administration could, in the name of “transparency” or “consistency,” produce a set of very different, immigrant-unfriendly directives as opposed to the current, more immigrant-affirming ones.

Scholars also have cited *Arizona v. United States* as vindication for top-down executive deferred action initiatives.<sup>290</sup> Yet *Arizona* is not singularly focused on categorical executive policy. Rather, its portrayal of prosecutorial discretion is remarkably nuanced, focusing largely on immigration enforcement through the lens of discrete cases and decisions by immigration officials rather than categorical policies.<sup>291</sup>

This discussion raises the broader question whether solutions grounded entirely within the upper echelons of the executive always provide the best mechanism for innovating administrative policy. The president can use his appointment-and-removal powers to politicize

---

286. *Id.* at 118; *see also id.* at 135–36 (“The Administration’s enforcement policy as a whole has become increasingly directed at regularizing and making more consistent . . . a system executive leadership came to see as too random and overly subject to the views of low-level bureaucrats and state and local officials.”).

287. *See* Andrias, *supra* note 2, at 1089–90, 1118.

288. For a discussion of the concerns attending alternatives to substantive rulemaking procedures, *see*, for example, Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 579–85 (2012) (recounting the debate over nonlegislative rules).

289. *See supra* note 25 and accompanying text.

290. *Unconstitutionality of Obama’s Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 64 (2015) (statement of Prof. Stephen H. Legomsky); Cox & Rodríguez, *supra* note 2, at 133–34, 145 n.119, 205.

291. *See supra* notes 246–47 and accompanying text.

the bureaucracy, exercise control through Office of Management and Budget (OMB) via budgetary decisions, and influence agency rulemaking through OIRA review.<sup>292</sup> But these are blunt tools that are rife with structural obstacles, principal-agent problems, and pragmatic hurdles to effective governance.<sup>293</sup> Appointments require the selection of candidates who will remain loyal to the president's policy preferences and are subject to "countervailing legislative pressures" derived from the Senate's advice-and-consent powers.<sup>294</sup> Budgetary control and OIRA review can push the bureaucracy toward certain policy goals, but both may be too blunt to adequately institute policy change, especially where the president seeks to influence how lower-level officers exercise their enforcement discretion.<sup>295</sup> At base, each of these mechanisms of top-down control requires that the president choose between anticipating (and avoiding) policy problems before they arise or fixing them after they occur. Both tools may be too imprecise to accomplish such goals. Although top-down control is a useful mechanism for bringing uniformity to enforcement discrepancies on the ground, there is a question whether it sufficiently responds to the unique kinds of policy problems that arise in immigration—especially nascent or rapidly changing ones. The limitation of top-down approaches may thus invite new inquiries into lower-level influences and the ways that ground-level officers provide input into emerging categories of individuals who deserve protection.

### *B. Executive Branch Initiatives and Bureaucratic Buy-In*

Allowing lower-level agency officers to experiment with novel solutions on the ground helps to sidestep some of the limitations scholars have attributed to insufficiently anticipatory or responsive top-down controls. Decisions on the ground can suggest small adjustments in how and when discretion is exercised, bringing both

---

292. Nou, *supra* note 3, at 1765, 1766–69.

293. *See id.*; Stephenson, *supra* note 3.

294. Nou, *supra* note 3, at 1765.

295. *Id.* at 1766 n.1; Andrias, *supra* note 2, at 1083–84, 1104 (arguing for the creation of a new office in OMB "dedicated to problems of regulatory compliance . . . [to] further the efficiency and accountability goals of administration," but noting that "a reactive system mirroring that of OIRA, whereby all significant individual enforcement actions require White House clearance, would undermine efficiency goals . . . [especially] when lower-level or local officials might have better information").

greater precision and innovation.<sup>296</sup> Perhaps most significant is that frontline officers can report the effectiveness of their experimentation up the chain of command and better enable policymakers to make positive choices regarding *ex ante* and *ex post* controls across entire agencies or even entire regulatory fields.<sup>297</sup>

The point, of course, is not to question the aims of transparency that Cox, Rodríguez, and Andrias rightly praise. But to the extent that mechanisms for interbranch coordination already figure into the structure of everyday administrative enforcement, those internal separation of powers can also be relevant to the legitimacy of top-down initiatives. Currently, there is little evidence that agencies actually draw on the expertise of career officers, who may understand the long-term interests of the agency as well as some political appointees who lack actual enforcement experience. Put differently, innovation may be less served by top-down administrative-law mechanisms than drawing on pockets of expertise that already exist. This does not mean that top-down solutions are always ill-advised; on the contrary, they are necessary to resolve discrepancies taking place on the ground and to ensure that immigration policy achieves the goals set by those both responsible and accountable for making across-the-board decisions. But leaving room for vertical dialogue and debate can fortify those top-down decisions. An organic approach based on bottom-up influences can have tangible and pragmatic benefits that not only promote equity in discrete cases, but also provide backing and normative support for agency-wide policies.

Thus, however valuable “creative unilateralism” may be for immigration innovation,<sup>298</sup> broad agency buy-in may be equally vital to ensure a rule-of-law content to executive enforcement policies—which in turn supports the case for coordinate-branch deference. The bureaucratic ranks are not “beholden to any particular administration”<sup>299</sup> and yet they are generally absent from discussions about immigration-law reform. To the extent that even the most

---

296. See Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1928 (2013) (“Agencies . . . are constantly engaging with the public: with stakeholders and other parties affected by administrative action, social movement groups, business and industry associations, unions, and political representatives at all levels.”).

297. See Katyal, *supra* note 241, at 105 (“After all, the bureaucracy is the only actor in the political branches with a time horizon long enough to provide expertise without heavy political interference.”).

298. Cox & Rodríguez, *supra* note 2, at 119.

299. Katyal, *supra* note 6, at 2317.

creative “Executive will need to develop policies and protocols to accomplish” an agenda,<sup>300</sup> bureaucratic buy-in, and input, is an important part of that process.

### C. *Bottom-Up Influences and Policy Learning*

Given the unlikelihood of comprehensive immigration reform within the near future,<sup>301</sup> bottom-up innovation and laboratories of executive branch experimentation could be an important gap-filling device. Thus, as opposed to relying on ex ante controls that limit discretionary authority within strict parameters,<sup>302</sup> frontline immigration officers should be encouraged to experiment with enforcement discretion as they react and adapt to changing circumstances. These agents can, through their exercises of case-by-case discretion, propose novel solutions for consideration by the upper echelons of the administration.<sup>303</sup> In that regard, frontline enforcement discretion and positive agency redundancies provide a testing ground for different viewpoints<sup>304</sup> as well as a strong set of internal agency checks and balances<sup>305</sup> in which “[d]iffering perspectives allow agencies to function more like laboratories, by devising new solutions to new problems.”<sup>306</sup>

Although the pursuit of consistency in immigration enforcement is an important and worthwhile endeavor, the creation of formalized enforcement criteria could stifle appropriate, novel, and creative exercises of discretion—in turn preventing possibilities for new policies to emerge from the field.<sup>307</sup> Uniform policy implementation that crowds out the possibility of lower-level experimentation provides no way to seek out possible alternatives. Thus, efforts to curtail such problem solving may have the unintended consequence of arresting this process of policy development. In other words, without frontline discretion—and the variance that comes with it—it may not be possible to identify who the next DREAMers will be.

---

300. Cox & Rodríguez, *supra* note 2, at 125.

301. Rey Koslowski, *Cross Country: Why New York Still Welcomes Immigrants*, WALL ST. J., July 28, 2012, at A15.

302. *See supra* note 26.

303. *See* Katyal, *supra* note 6, at 2324.

304. *Id.* at 2324–25.

305. *Id.* at 2318.

306. *Id.* at 2325.

307. DAVIS, *supra* note 251, at 20 (“[C]reativity is impossible without discretion.”).

Recognizing this point, some higher-level officials have specifically called for more input from the ground level. In a recent speech to immigration lawyers, Deputy Secretary of Homeland Security Alejandro Mayorkas expressed optimism in having “ICE . . . engage . . . fully in the spirit of openness and transparency that are the hallmarks of good government and significantly in the service of justice . . . . [and] collaboration.”<sup>308</sup> Many of the case studies in Part III illustrate such collaboration and the analogous ways that frontline officers creatively solved immigration problems in advance of subsequent across-the-board solutions. Within these disparate contexts, discretion at the bureaucratic level filtered up important issues “from the bottom of the agenda nearer to the top”<sup>309</sup>—arguably helping to advance important issues that required a categorical fix.

Although regulatory overlap brings costs “in both dollars and legal certainty”<sup>310</sup>—not to mention inefficiency<sup>311</sup>—the combination of frontline discretion and positive agency redundancies can “encourage optimal legal evolution”<sup>312</sup> and provide an array of benefits—including “acknowledging more effectively the complex identity of the subjects of regulation; overcoming regulatory inertia; encouraging innovation in regulatory design; and facilitating integration across jurisdictional lines.”<sup>313</sup> By fostering a greater number of perspectives across a range of different situations, internal separation of powers within the executive branch can enhance mechanisms for dialogue, interchange, and progress.

Finally, lower-level innovation addresses some of the narrowing effects of substantive agency regulations. As scholars have noted, “notice-and-comment rulemaking is ossifying, and formal

---

308. See *supra* note 94.

309. See David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 *FORDHAM L. REV.* 705, 711 (2012).

310. Ahdieh, *supra* note 52, at 896.

311. Todd Aagaard’s examination of OSHA and the EPA similarly found both positive and negative effects of regulatory overlap. Aagaard, *supra* note 50, at 238, 292. He found that regulatory overlap between OSHA and the EPA could “increase reliability and encourage policy innovation,” *id.* at 292, but also warned that “[r]egulatory overlap leads to duplicative regulation, which is wasteful, inefficient, and unduly burdensome.” *Id.* at 238.

312. Ahdieh, *supra* note 52, at 891. Ahdieh also argues that, “[w]hatever the source, distinctly situated agencies may encourage regulatory innovation, simply by offering each other something new.” *Id.* at 892.

313. *Id.* at 870.



adjudication is burdensome.”<sup>314</sup> Preserving discretion on the ground allows officers, in their day-to-day activities, to develop creative solutions to problems by extending protections to new categories of immigrants in response to changing facts and circumstances. Although bureaucratic discretion brings variance and inconsistent application of the law, raising concerns of its own,<sup>315</sup> the continued flexibility of prosecutorial discretion provides the breathing room necessary for regulatory innovation—a positive good in the enforcement context. Indeed, the lack of substantive regulation could be important to ensuring the continued existence of lower-level innovation. As one official in legacy INS noted, “[t]he diversity of human activities tends to continually generate new factors and issues which should logically affect the exercise of discretion.”<sup>316</sup>

To be sure, controls are needed to prevent and cure vast discrepancies in lower-level implementation—a surrogate for the absent judiciary.<sup>317</sup> Thus, oversight by the higher echelons at the back end of the process, including the president, is not only reasonable but also necessary to ensure that room for experimentation by decentralized actors is exercised appropriately and equitably.<sup>318</sup> But,

---

314. Lisa Schultz Bressman, *How Mead has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1490 (2005).

315. See *supra* notes 274–77 and accompanying text; cf. ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 240 (2012) (“Equal treatment of litigants may be purchased at the cost of getting to a correct or better answer . . .”).

316. COLIN S. DIVER, *AGENCY ARTICULATION OF POLICY: REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* 54 (1983).

317. See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–92 (1999) (upholding broad executive branch enforcement discretion despite claims that prosecutorial discretion was used in a discriminatory manner).

318. Some level of bureaucratic insulation may be inevitable, see David B. Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RES. & THEORY 199, 207–09, 214 (1997), and indeed even desirable, Stephenson, *supra* note 3, at 57–58 (noting that “aggressive political monitoring that deprives agencies of policymaking autonomy may erode agency incentives to invest in expertise, thereby raising the costs to elected politicians of acquiring policy-relevant information”). But for scholars who advocate for presidential control, executive oversight is critical to ensure that agencies are democratically accountable. See Blumenstein, *supra* note 3, at 887 (“Given that agency rulemaking does contemplate a role for political input . . . it becomes hard to see why a presidential administration should not direct or at least influence its agents’ exercise of discretion within the agency bureaucracy.”); Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 570–71 (1987) (“Presidential oversight . . . broadens . . . an unduly parochial approach by an agency and helps [it] take other values into account when reaching important decisions. . . . Presidential oversight . . . incorporat[es] the prevailing political

like federalism, ground-level executive experimentation provides a window into policy in action, requiring interaction—not atomization—among the higher and lower echelons of the federal bureaucracy.<sup>319</sup> And just as the federalism debate informs conversations about exclusive federal authority over immigration, experimentation by frontline federal officers presents alternatives to the idea of top-down innovation, highlighting the importance of a vibrant interplay between higher- and lower-level agency actors charged with executing and implementing policy.

### CONCLUSION

Many of the mechanisms associated with more experimental regimes remain untapped within federal immigration law. Thus, policymakers structuring agency relationships should consider additional ways for higher-level federal officials to pay attention to, and learn from, ground-level experiments. Exposure to lower-level problems and solutions would vest policymakers—including, but not limited to, the White House and the higher echelons of the executive branch—with greater understanding not only of the practicalities of day-to-day enforcement, but solutions forged on the ground. The result would be more workable recommendations for across-the-board change and a lower likelihood of pushback or obstructionism from the ground level.

One possible mechanism to enhance higher-level learning would involve increased field visits, where lower-level agents could report their struggles and successes. The agency might also encourage bureaucratic officers to attend conferences where they could explore and discuss, at a peer level, their responses to, and resolution of, complex and unforeseen cases. Finally, advisory councils composed of field directors could allow frontline officers to report their experiences. DOJ currently employs such a model in the Attorney General's Advisory Committee of U.S. Attorneys. This council "gives United States Attorneys a voice in Department policies" and advises the attorney general by "mak[ing] recommendations to improve management of United States Attorney operations and the

---

climate into an agency's discretion while maintaining allegiance to the relevant factors defined in the legislation.").

319. Cf. Rodríguez, *supra* note 5, at 608 (noting, as a benefit of immigration federalism, "the possibility of a relationship between the levels of government that is based on dialogue and compromise").

relationship between DOJ and the federal prosecutors. It also helps formulate new programs for improvement of the criminal justice system and the delivery of legal services at all levels.”<sup>320</sup> The DOJ model could easily be transplanted to DHS.<sup>321</sup>

These mechanisms should also be paired with better data collection about the bases upon which lower-level officers currently exercise their discretion.<sup>322</sup> The data should be collected, and shared, to promote better understanding among similarly situated actors throughout different parts of the federal bureaucracy. Although there is some indication that DHS already collects some data,<sup>323</sup> a more scrupulous accounting of the bases for discretion could help identify problems that require across-the-board action, bringing uniformity and regularity to enforcement decisions. Enhancements such as these would present better opportunities for learning by those administrative arms of the executive that handle immigration.

\* \* \*

Current agency structures, which already pair lower-level enforcement discretion with separated immigration functions across numerous different agencies and subagencies, should be better harnessed to promote laboratories for competing viewpoints and policy learning. Not unlike the federalist model, which posits novel and innovative immigration policy through the lens of a bottom-up

---

320. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, TITLE 3: EOUSA § 3-2.530 (1997), <http://www.justice.gov/usam/usam-3-2000-united-states-attorneys-ausas-special-assistants-and-agac#3-2.530> [<http://perma.cc/X87Z-M5VX>].

321. Currently, there is no field officer presence on DHS’s 38-member Homeland Security Advisory Council, which provides independent advice and recommendations to the Secretary “to support decision-making across the spectrum of homeland security operations.” United States Department of Homeland Security, *Homeland Security Advisory Council*, <http://www.dhs.gov/homeland-security-advisory-council> [<http://perma.cc/4QTJ-UXDG>]; see United States Department of Homeland Security, *Homeland Security Advisory Council Members*, <http://www.dhs.gov/homeland-security-advisory-council-members> [<http://perma.cc/W7CP-N4J4>] (detailing the council’s membership).

322. The Office of the Inspector General published a report on May 4, 2015, making a similar recommendation. Office of the Inspector General, *DHS Missing Data Needed to Strengthen Its Immigration Enforcement Efforts* (May 4, 2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-85\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-85_May15.pdf) [<http://perma.cc/YS8F-JULM>]. The report recommended that DHS “develop and implement a plan to collect, analyze, and report data on the Department’s use of prosecutorial discretion to assess immigration enforcement activities and improve future policy.” *Id.* at 7.

323. See *supra* notes 217–20, 228, 276–77 and accompanying text.

process generated by state and local governments,<sup>324</sup> internal separation of powers within the executive branch could put current agency structures to more fruitful and innovative ends. This sort of creative discretionary decisionmaking at the ground level lays a foundation for the possible emergence of large-scale and across-the-board solutions. Moreover, executive branch programs that enjoy broad bureaucratic support are better insulated from congressional or judicial override. Although the top-down theory of innovation resonates with much of the surrounding administrative-law literature, a competing theory couched in frontline bureaucratic discretion may ultimately prove more durable, both in the federal courts and in the court of public opinion.

---

324. Cf. Rodríguez, *supra* note 5, at 573 (“[F]ederalism serves as a crucial mechanism for shaping and managing national identity [and] the process of forging such identity is not a top-down, but a bottom-up process.”).