

UNEQUAL PROTECTION: DISPENSING WITH UNILATERAL PRESIDENTIAL WAIVERS

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INTRODUCTION

On June 23, 2016, the U.S. Supreme Court, operating one vote short after the death of Justice Antonin Scalia earlier that year, issued a one-sentence opinion that resulted from a 4-4 deadlock on a case relating to an executive action by President Barack Obama.¹ The 4-4 outcome upheld the judgment of the Fifth Circuit Court of Appeals, affirming an injunction that blocked the president's executive order.² That order would have protected up to five million immigrants from being subject to federal law that makes it a crime to enter the United States illegally.³

However, because the Supreme Court's evenly divided membership "established no precedent," the country did not receive the type of ruling expected beforehand when the Court "seemed poised to issue a major ruling on presidential power."⁴ In other words, the justices' tie vote meant that the Court missed an opportunity to restore order and clarify boundaries in an area of law that is fundamental to the nation's entire system of democratic government.

Specifically, to what extent can a president waive application of statutes to particular people or groups and entities? Earlier in the Obama years, the White House granted waivers in regard to the Affordable Care Act (ACA), with nearly 2,000 employers afforded exemption from the need to comply with the law.⁵ Congress did not authorize most of those waivers.⁶ Other administrations also implemented this practice. President George W. Bush engaged in a waiver of the Clean Air Act for a category of coal-powered electrical plants.⁷ In the early 1990s, President George H.W. Bush used an executive order similar to President

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1. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.); *see also* *Texas v. United States*, 809 F.3d 134 (2015).

2. *Id.*

3. Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> [<https://perma.cc/A6N9-CAE2>].

4. *Id.*

5. Ilya Shapiro, *President Obama's Top 10 Constitutional Violations*, CATO INST. (Dec. 4, 2011), <https://www.cato.org/publications/commentary/president-obamas-top-10-constitutional-violations> [<https://perma.cc/3PK7-GYSG>] [hereinafter Shapiro, *Constitutional Violations*].

6. *Id.*

7. Tom Valtin, *Bush Chips Away at Clean Air Act*, SIERRA CLUB, https://vault.sierraclub.org/planet/200302/clean_air_act.asp (last visited Sept. 26, 2020) [<https://perma.cc/MV8X-J8JE>].

Obama's to suspend deportation of Chinese nationals.⁸ Subjective enforcement of federal law constitutes a relatively recent trend, however, as George W. Bush was the first president to use categorical non-enforcement as a prominent policy-making tool.⁹

The Supreme Court has marginally addressed the issue of selective enforcement in the context of administrative law, choosing to “essentially leave to Congress, and not to the courts, the decision as to whether an agency’s refusal to institute proceedings should be judicially reviewable.”¹⁰ In the context of criminal law, the Supreme Court has stated that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case” on a case-by-case basis.¹¹ However, the highest Court in the land has not directly addressed the specific issue of whether waiver or executive order is constitutionally acceptable where the action exempts certain entities from requirements of duly passed laws and leaves other entities subject to the law’s requirements.

This Note argues that this practice, in which presidents operate like customers in a cafeteria, picking and choosing which parts of the statutory buffet they like enough to make operative and against whom those laws will be operative, violates the Constitution. The consequence of these executive waivers and exemptions is to render statutes on the books effectively repealed or redefined and rewritten. As George Washington University law professor Jonathan Turley stated, “If a president can claim sweeping discretion to suspend key federal laws, the entire legislative process becomes little more than a pretense.”¹² This Note further argues that the Constitution’s inherent principles of equal protection present an overlooked but readily available tool for at least significantly curtailing unauthorized waivers. Part I of this Note surveys the various uses of arbitrary waivers by presidents and explores how courts have reacted or not reacted to these actions. Part II then examines the different approaches taken by courts in interpreting and applying equal protection principles at the federal level and explains how this jurisprudence suffers from unnecessary limitation. Part III argues that unilateral presidential waivers violate the Constitution’s guarantee of equal protection—parties treated equally under duly passed laws cannot arbitrarily be treated differently by an executive branch that waives application of a statute to certain parties and denies to other similarly situated parties that same protection from a statute’s commands. Finally, this Part argues that presidential waivers present an urgent and fundamental threat to our system of government.

8. Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990).

9. Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 503-04 (2017).

10. Heckler v. Chaney, 470 U.S. 821, 838 (1985).

11. United States v. Nixon, 418 U.S. 683, 693 (1974).

12. Hans A. von Spakovsky, *DACA Is Unconstitutional, as Obama Admitted*, HERITAGE FOUND. (Sept. 8, 2017), <https://www.heritage.org/immigration/commentary/daca-unconstitutional-obama-admitted> [<https://perma.cc/7PRX-ZELA>].

I. OVERVIEW OF THE HISTORY OF PRESIDENTIAL WAIVER
AND NON-ENFORCEMENT

The philosopher and Nobel Prize-winning economist Friedrich Hayek emphasized that laws “must be general, equal and certain.”¹³ Yet, in recent times, presidents of the United States have drifted far from this ideal.

Discretion in the executive branch of the federal government for criminal prosecutions dates back to the nation’s earliest days, but discretion in civil enforcement of the law is a more recent development traced to the rise of administrative agencies in the 1940s.¹⁴ Nowadays, presidents—despite taking an oath to see that the laws are faithfully executed—tend to claim that they possess broad power to decline enforcement of federal statutes.¹⁵

A. Instances of Presidential Waivers

An understanding of the current state of affairs and where this may all be headed begins with an understanding of how modern presidents have used their policy-making tools to unilaterally change or waive provisions of statutes. What follows, in chronological order, is an inventory of the most dramatic examples.

George H.W. Bush employed an executive order to exempt Chinese nationals from deportation under federal immigration law.¹⁶ It included an “irrevocable waiver” of a two-year residency requirement and waiver of passport requirements.¹⁷ The order permitted the Attorney General to take any steps necessary to defer the enforced departures of nationals from the People’s Republic of China and any of their dependents.¹⁸ The motivation behind the order came in response to a nationwide crackdown on dissent in China that climaxed with the violent suppression of demonstrations in Tiananmen Square.¹⁹ Bush sought to allow Chinese nationals to remain in the United States to avoid persecution in China, where brutal treatment of civilian protesters earned international condemnation and sanctions, especially from Western nations.²⁰ The

13. LAURA GRENFELL, *PROMOTING THE RULE OF LAW IN POST-CONFLICT STATES* 69 (2013) (citation omitted).

14. Daniel Stepanicich, Note, *Presidential Inaction and the Constitutional Basis for Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1529 (2016).

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

16. Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990).

17. *Id.*

18. *Id.*

19. Andrew Rosenthal, *Bush to Formalize Shield for Chinese in U.S.*, N.Y. TIMES (Apr. 7, 1990), <https://www.nytimes.com/1990/04/07/world/bush-to-formalize-shield-for-chinese-in-us.html> [<https://perma.cc/LW4Z-FBT6>].

20. Yunqiu Zhang, *Chinese Student Protection Act of 1992*, IMMIGR. TO U.S., <https://immigrationtounitedstates.org/429-chinese-student-protection-act-of-1992.html> (last visited Sept. 27, 2020) [<https://perma.cc/SGU8-WZ3Y>].

order was issued on April 11, 1990; two years later, Congress passed and Bush signed the Chinese Student Protection Act allowing Chinese nationals who entered the United States prior to Bush's executive order to remain legally.²¹ However, before that legislative resolution, Bush had skirted the normal lawmaking process in December 1989 when he vetoed a bill to protect the Chinese students.²² Bush opted for an executive order, he said, "to make it easier" to implement the policy.²³ He initially claimed a legislative fix "infringed on his executive powers."²⁴

George W. Bush exempted a category of coal-fired power plants from the need to comply with the Clean Air Act.²⁵ Older facilities gained permission to expand without having to install anti-pollution devices as required by law.²⁶ Older facilities also gained greater latitude in making their own calculations of their own pollution.²⁷ One of the compromises made to secure passage of the Clean Air Act was a grandfathering clause for thousands of the oldest and dirtiest power plants and refineries allowing them to pollute much more than modern plants.²⁸ However, under a provision called New Source Review (NSR), if these older, dirtier facilities expanded, the law mandated upgrades to newer, modern anti-pollution technology and pollution-control equipment.²⁹ In December 2002, Bush's Environmental Protection Agency issued NSR rule revisions that rendered NSR-subject facilities essentially immune from government sanction.³⁰ The day after the EPA announcement, nine states³¹ filed suit to block the new rules from taking effect.³² The attorneys general of those states insisted that the Bush administration's rules altering the Clean Air Act far exceeded the executive branch's legislative authority under the Act.³³

Congress took notice of Bush's unilateral move to waive the law, as Senator John Edwards (D – N.C.) introduced legislation to fight the new rules; but Edwards' measure suffered a 50-46 defeat in a full Senate vote.³⁴ "Americans don't want Bush to 'fix' the Clean Air Act; they want him to enforce it," then-Sierra Club Air Committee chair Blake Early said.³⁵

21. *Id.*

22. *See* Rosenthal, *supra* note 19.

23. *Id.*

24. *Id.*

25. Valtin, *supra* note 7.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Those nine states: Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

The states' lawsuit for enforcement of the law as written produced a complex opinion from the United States Court of Appeals for the District of Columbia Circuit that "agreed with no one entirely" but upheld the central provisions of the new NSR rules.³⁶ Because of the administrative law context, however, the court conceded that it applied "a highly deferential standard of review."³⁷

Despite the controversy, unilateral presidential waiver continued—and ramped up public debate—in the next administration. Again, President Obama issued an executive order granting protection to millions of illegal immigrants from being subject to immigration law.³⁸ Congress, in its customary legislative process, had rejected on multiple occasions the concept underlying that order, and the order's constitutionality endured widespread questioning.³⁹ Sixty-one percent of the public, polling found, felt it "extremely important" or "very important" for reform of immigration to take place through the legislative process.⁴⁰ Obama himself seemed to agree in October 2010 when he responded to calls for unilateral presidential action on immigration by stating, "I am not king. I can't do these things just by myself."⁴¹ In May 2011, the president said he was not allowed to "just bypass Congress and change the (immigration) law myself," because that would be contrary to the democratic process.⁴² After Obama eventually reversed course and granted new immigration rights by executive order, a heated debate ensued in Congress.⁴³ In the House of Representatives, a 216-192 vote against Obama's executive order included four of his fellow Democrats opposing the order.⁴⁴ Representative Mario Diaz-Balart (R – Fla.) broke ranks with his own party to support the executive action, but he added, "I don't criticize folks for being concerned about the president overstepping his constitutional boundary."⁴⁵

In 2017, Obama's successor Donald Trump rescinded the Deferred Action for Childhood Arrivals policy (DACA) established by Obama, with Attorney General Jeff Sessions in a September 2017 letter labeling the program "an open-ended

36. Michael Janofsky, *U.S. Court Backs Bush's Changes on Clean Air Act*, N.Y. TIMES (June 25, 2005), <https://www.nytimes.com/2005/06/25/politics/us-court-backs-bushs-changes-on-clean-air-act.html> [<https://perma.cc/PX2S-7NQ6>].

37. *New York v. U.S. EPA*, 413 F.3d 3, 17 (D.C. Cir. 2005).

38. Liptak & Shear, *supra* note 3.

39. *Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> (last visited Sept. 27, 2020) [<https://perma.cc/2DF6-BV5M>].

40. *Five Things We Learned About DACA*, PEW TRS. (Aug. 19, 2014), <https://www.pewtrusts.org/en/research-and-analysis/articles/2014/08/19/five-things-we-learned-about-daca> [<https://perma.cc/94XM-TQ7P>].

41. Von Spakovsky, *supra* note 12.

42. *Id.*

43. Emma Dumain, *Republicans Vote to End DACA After Tense Floor Debate (Updated)*, ROLL CALL (Aug. 1, 2014), <https://www.rollcall.com/news/republicans-vote-to-end-daca> [<https://perma.cc/P9NG-QUJT>].

44. *Id.*

45. *Id.*

circumvention of immigration laws” and “an unconstitutional exercise of authority.”⁴⁶ At least one DACA beneficiary, Hilario Yanez, agreed, saying in House testimony: “I believe what former President Obama did was the right thing to do but the wrong way to do it, which is why I believe DACA is unconstitutional and why President Trump has every right to get rid of it.”⁴⁷ In 2020, the Supreme Court prevented Trump from immediately ending DACA; though the majority opinion rested on the Administrative Procedure Act and expressed no view of whether DACA exceeded the president’s authority, Justice Clarence Thomas pointed out in dissent that DACA was “unlawful from its inception.”⁴⁸

Another prominent example of Obama administration waiver: the immunity granted to certain companies and unions from requirements imposed upon them by the ACA. The executive branch’s process for meting out these waivers was “as clear as mud” with its “lack of a transparent standard” and tendency to depend on the whims of bureaucrats.⁴⁹ The waivers presented a clear risk for politicization, “as the waivers could easily be used to reward friends, pick favorites, and alter the competitive equilibrium within certain industries.”⁵⁰ The administration claimed the waivers were necessary as a temporary measure to stabilize the insurance market until additional ACA provisions took effect in 2014.⁵¹ But just in the law’s first year, 1,168 businesses, insurers, unions, and other entities received waivers for non-compliance with a provision requiring at least \$750,000 in annual benefits.⁵²

Also, despite the ACA’s requirement that an employer mandate take effect in 2014, the Obama administration moved to put off implementation of the provision until 2015.⁵³ The part of the law creating that mandate imposed an

46. *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP’T HOMELAND SECURITY (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/DCP2-7P3J>].

47. Daniel Jativa, *Dreamer Tells Lawmakers: Obama’s DACA Program Is ‘Unconstitutional’*, WASH. EXAMINER (Mar. 6, 2019), <https://www.washingtonexaminer.com/news/dreamer-tells-lawmakers-obamas-daca-program-is-unconstitutional> [<https://perma.cc/3GRF-XPS2>].

48. Elizabeth Redden, *DACA Lives for Now*, INSIDE HIGHER ED (June 19, 2020), <https://www.insidehighered.com/news/2020/06/19/supreme-court-rules-trump-administration-cannot-immediately-end-daca> [<https://perma.cc/5US9-9A6C>].

49. Peter Suderman, *ObamaCare’s Opaque Waiver Process*, REASON (Jan. 19, 2011), <https://reason.com/2011/01/19/obamacares-opaque-waiver-proce/> [<https://perma.cc/JA7L-RT2X>].

50. *Id.*

51. Hill Staff, *List of Health Reform Waivers Keeps Growing*, HILL (Apr. 2, 2011), <https://thehill.com/policy/healthcare/153421-list-of-health-reform-waivers-keeps-growing> [<https://perma.cc/L8D6-J44X>].

52. *Id.*

53. Michael F. Cannon, *Yes, Delaying Obamacare’s Employer Mandate Is Illegal*, CATO INST. (July 8, 2013), <https://www.cato.org/blog/yes-delaying-obamacares-employer-mandate-illegal> [<https://perma.cc/Q9VZ-DY5V>].

effective date: “The amendments made by this section shall apply to months beginning after December 31, 2013.”⁵⁴ Congress did not authorize, nor did the law permit, Obama’s delay of implementation to 2015.⁵⁵

For affected parties, the effects of receiving or not receiving waivers were drastic. Small businesses that did not receive waivers stared down “a fiscal cliff.”⁵⁶ Fifty-employee thresholds imposed by the ACA for triggering the requirement to cover employees’ health insurance, or the associated fines from non-compliance with that requirement, threatened the businesses’ profits and growth and forced layoffs and hour reductions.⁵⁷

B. Court Response to Presidential Waivers

Case law thus far is “extremely limited” regarding presidential prosecutorial enforcement discretion, even in the modern era when administrative agencies loom large.⁵⁸ The foremost case decided by courts in this arena is *Heckler v. Chaney*. In *Heckler*, the Supreme Court reviewed an executive branch decision to eschew enforcement actions against states for administering allegedly unsafe drugs to people the state sentenced to death by lethal injection.⁵⁹ In reaching its holding that let non-enforcement stand, the Court clarified that a “decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion,” though the *Heckler* judgment itself rested on statutory grounds.⁶⁰ The *Heckler* Court opined that non-enforcement decisions generally provide unsuitable grounds for judicial review.⁶¹ Indeed, subsequently murky jurisprudence in the administrative law context indicates that courts customarily are not willing to review agency non-enforcement.⁶²

In *Texas v. United States*, however, the Fifth Circuit Court of Appeals drew a critical distinction within the sort of discretion contemplated by *Heckler*, noting a marked difference between mere absence of enforcement and an “affirmative act” shielding selected entities from otherwise applicable law.⁶³ Under the Court of Appeals’ analysis in *Texas v. United States*, the Obama executive order conferring legal status on a class of immigrants stood as an affirmative exercise

54. *Id.*; see also Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, 256.

55. Cannon, *supra* note 53.

56. Paul Christiansen, *To Outsmart ObamaCare, Go Protean*, WALL ST. J. (Jan. 28, 2013), <https://www.wsj.com/articles/SB10001424127887324461604578193472562389926> [<https://perma.cc/4K4P-F4MQ>].

57. *Id.*

58. Markowitz, *supra* note 9, at 505.

59. *Heckler v. Chaney*, 470 U.S. 821, 823 (1985).

60. *Id.* at 831.

61. *Id.* at 832.

62. Markowitz, *supra* note 9, at 505.

63. *Texas v. United States*, 787 F.3d 733, 757 (5th Cir. 2015).

of power and thus became reviewable judicially.⁶⁴ The court wrote that Obama's order was more than prosecutorial discretion and more than non-enforcement because it conferred benefits—lawful presence in the United States and eligibility for related government benefits—otherwise unavailable.⁶⁵ The court found the government did not make a strong showing of likelihood of success on the merits of the suit filed against the immigration order.⁶⁶ Therefore, the court denied the government's motion to stay a preliminary injunction.⁶⁷

II. EXPLAINING FEDERAL EQUAL PROTECTION PRINCIPLES

A. Application of Federal Equal Protection and Similar Scenarios

With its decision in *Bolling v. Sharpe* in 1954, the Supreme Court established that the Equal Protection Clause of the Fourteenth Amendment implicitly applies to the federal government.⁶⁸ The Court in *Bolling* acknowledged that, explicitly, the clause applies only to the states.⁶⁹ However, the improvising Court devised another path for principles of equal protection to apply to the federal government, writing that:

[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.⁷⁰

Thus, *Bolling* held that equal protection principles exist in the Due Process Clause of the Fifth Amendment that bind the federal government.⁷¹

Proceeding on from *Bolling*, at least until the mid-1970s, the most rigid equal protection standard applied to the federal government, the late Justice John Paul Stevens noted, was where “a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession” affecting a smaller portion of persons.⁷² Stated differently, this meant that if a federal action was unusually limited in reach, that action received more rigorous review for equal protection.

64. *Id.* at 758.

65. *Id.* at 757.

66. *Id.* at 767.

67. *Id.* at 769.

68. Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 76 n.17 (2013).

69. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

70. *Id.*

71. *Id.* at 500.

72. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

In now assessing presidential waivers, the question arises whether equal protection requirements are less rigid against the federal government than against states. The Supreme Court has never explicitly held that different standards of equal protection apply depending upon whether the government action in question was state or federal.⁷³ However, there are certain policy realms, such as alienage and Native American law, in which the federal government was held to less stringent standards of equal protection; and indeed Justice Stevens noted that while equality principles do exist in both the Fifth and Fourteenth Amendments alike, higher national interests may justify more selective (unequal) governmental action at the federal level than would be acceptable for states.⁷⁴

But in other areas of policy, there is no difference in the standard for the federal government and for states. For example, the highest court in the land has not distinguished between state and federal equal protection in matters involving gender.⁷⁵ And much case law supports the notion that a rigorous standard of equal protection binds the federal government.

In *Rostker v. Goldberg*, the Court wrote that “[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality,” meaning legislate equality on paper without substantive effect because persons are not similarly situated.⁷⁶ There is additional support for the federal obligation of treating similarly situated persons similarly from *Hampton v. Mow Sun Wong*, where the Court wrote that “[t]he federal sovereign, like the States, must govern impartially.”⁷⁷ This requirement to govern impartially, the *Hampton* Court explained, serves as a limitation on the power of the federal government to “classify persons subject to its jurisdiction.”⁷⁸ The “concept of equal justice under law” justifies the Constitution’s imposition on the federal government to govern impartially.⁷⁹

Case law on impartial governance at the federal level needed time to evolve. In the early 1900s, challenges to the new direct federal income tax took their basis in equal protection claims, but those claims failed, as prior to *Bolling*, the Court had not yet ruled that the Fifth Amendment contained equal protection principles applicable to the federal government.⁸⁰

Several later cases applying equal protection principles offer logic extendable to scenarios of presidential waiver. One such case is *March for Life v. Burwell*, which held that the ACA’s selective requirement of contraceptive coverage violated the plaintiffs’ right to equal protection under the Fifth Amendment.⁸¹ The

73. *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1426 (1982) [hereinafter *A Madisonian Interpretation*].

74. *Id.* at 1427.

75. *Id.* at 1429.

76. *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

77. *Hampton*, 426 U.S. at 100.

78. *Id.* at 101.

79. *Id.* at 100.

80. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 983-84 (2004).

81. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 120 (D.D.C. 2015).

plaintiffs argued the mandate did so “because it treats March for Life differently than it treats similarly situated employers.”⁸² While acknowledging that regulations must sometimes classify people or entities, the court said that the government must not treat differently entities that are alike in all relevant respects.⁸³ The statute exempted religious employers from the mandate, and the court found that the government’s attempt to remove March for Life, a pro-life organization, from the safe harbor of that exemption must fail because non-exempt March for Life and the exempted religious organizations “are not just ‘similarly situated,’ they are *identically* situated.”⁸⁴ The court wrote of the unequal treatment: “This is nothing short of regulatory favoritism.”⁸⁵ Because the government’s action treated entities with the precise same applicable trait differently, the court explained, “it sweeps in arbitrary and irrational strokes that simply cannot be countenanced, even under the most deferential of lenses. As such, the Mandate violates the equal protection clause of the Fifth Amendment and must be struck down as unconstitutional.”⁸⁶

Another case analogous to equal protection waiver analysis came from the Sixth Circuit Court of Appeals in *Craigsmiles v. Giles*, holding that a Tennessee law prohibiting the sale of caskets by anyone without a funeral-director license was unconstitutional on equal protection grounds, as the opinion expressly rejected Tennessee’s “naked attempt to raise a fortress” protecting one industry over another.⁸⁷ Such logic reminds that economic regulations do fall within equal protection jurisprudence, as courts “have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”⁸⁸ Action by government “to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose,” the court explained.⁸⁹

Federal courts also recognize a so-called “class-of-one” equal protection claim.⁹⁰ As explained by Judge Diane Sykes of the Seventh Circuit, “[t]he core idea behind a class-of-one claim is that the equal-protection guarantee ‘protect[s] individuals against purely arbitrary government classifications, even when a classification consists of singling out just one person for different treatment for arbitrary and irrational purposes.’”⁹¹ To prevail on a class-of-one claim, the plaintiff must demonstrate the government intentionally treated the plaintiff differently from others similarly situated and that it did so without a rational

82. *Id.* at 125.

83. *Id.*

84. *Id.* at 127 (emphasis in original).

85. *Id.*

86. *Id.* at 128.

87. *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002).

88. *Id.* at 224.

89. *Id.* at 229.

90. *Paramount Media Grp., Inc. v. Vill. of Bellwood*, 929 F.3d 914, 920 (7th Cir. 2019).

91. *Id.*

basis.⁹² In *Geinosky v. City of Chicago*, the Seventh Circuit Court of Appeals held that a man hit with more than a dozen “bogus” parking tickets had a valid equal protection claim.⁹³ The court wrote that a class-of-one claim involves “a wrongful act that necessarily involves treatment departing from some norm or common practice.”⁹⁴

Jurisprudence that applies antitrust law also offers helpful guiding principles on how standing and application might work for equal protection and presidential waivers. Private antitrust actions for damages play a leading role in the enforcement of federal antitrust law.⁹⁵ This development stemmed from “a series of landmark post-War Supreme Court decisions in which the Court liberalized traditional doctrines and statutory interpretations that would otherwise have acted as ‘barriers to relief’ in ‘suits serving important public purposes.’”⁹⁶

Like the Equal Protection Clause, the main federal antitrust laws retain the basic objective of protection of an important interest in fairness and efficiency.⁹⁷ Also like the Equal Protection Clause, the antitrust laws proscribe only a general definition of what is unlawful and leave courts to assess illegality on a case-by-case factual basis; and courts have applied the laws’ general principle through changing times, which might offer a model for a shift in equal protection jurisprudence.

B. Limitations of Federal Equal Protection

The core area of equal protection analysis has centered upon discrimination against minorities at the state level.⁹⁸ The doctrine of reverse incorporation from *Bolling* remains a bulwark to limit the scope of affirmative action as well as strike down federal discrimination based on sex and alienage.⁹⁹ But, critically, courts have typically not used equal protection grounds as a basis for reigning in government action under the Commerce Clause or other regulation of economic activity: “Judicial invalidation of economic regulation under the Fourteenth Amendment has been rare in the modern era.”¹⁰⁰

Equal protection analysis largely seems driven by immutable characteristics such as race or gender. There is an argument for introducing more flexibility into equal protection application, as the late professor Ronald Dworkin “insist[ed] that

92. *Id.*

93. *Geinosky v. City of Chi.*, 675 F.3d 743, 749 (7th Cir. 2012).

94. *Id.* at 747.

95. See Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977).

96. *Id.* at 809 n.1.

97. *The Antitrust Laws*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Sept. 27, 2020) [<https://perma.cc/ZJE5-PAUR>].

98. *A Madisonian Interpretation*, *supra* note 73, at 1404.

99. Primus, *supra* note 80, at 975.

100. *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002).

individuals should read the Constitution to mean what the framers intended it to say. For example, individuals should understand equal protection as commanding equal status as defined at the time of interpretation.¹⁰¹ That is, as opposed to an interpretation in accordance with the framers' 1800s understanding of equal status.¹⁰²

The *meaning* of equal protection has stayed constant.¹⁰³ However, even an originalist approach to constitutional interpretation can support a flexible view in *applying* equal protection; given the way the Equal Protection Clause was written, one could argue its enactors intended flexibility in application.¹⁰⁴ As explained by Kermit Roosevelt, professor of constitutional law at the University of Pennsylvania Law School, "it is possible for the *meaning* of a constitutional provision to remain constant while its *applications* change."¹⁰⁵ The application of equal protection principles did broaden over decades, as "historical evidence strongly suggests that the ratifiers of the Equal Protection Clause did not believe that it would stop states from segregating schools, or banning interracial marriage, or excluding women from the practice of law."¹⁰⁶

Yet that is precisely what the clause came to forbid. The requirement of equal protection is thus "value-laden" and, because values shift over time, best enforced by "asking whether that purpose is better served by a static or a flexible range of applications."¹⁰⁷ Roosevelt argues that "reading the Equal Protection Clause to contain a fixed set of applications will predictably lead to results that future generations will find outrageous."¹⁰⁸ It is more sensible, Roosevelt maintains, to interpret equal protection as a constitutional guarantee with a constant meaning but one whose applications change.¹⁰⁹ Given that "the words of the Equal Protection Clause do not limit its application to particular issues or forms of discrimination," the purpose of the clause appears broad and generalized, even though halting racial discrimination did represent the clear immediate focus of the drafters.¹¹⁰

The federal government carries no lighter burden than states; courts have determined that equal protection analysis in the Fifth Amendment area "is the same as that under the Fourteenth Amendment."¹¹¹ The Supreme Court has said

101. Ronald Dworkin & James Nygard, *Freedom's Law: The Moral Reading of the American Constitution*, 6 B.U. PUB. INT. L.J. 645, 645 (1996) (book review).

102. *Id.*

103. Bianca Spinosa, Note, *Interpreting Emoluments Today: The Framers' Intent and the "Present" Problem*, 78 MD. L. REV. 998, 1035 (2019).

104. *Id.*

105. Kermit Roosevelt, *Originalism and the Living Constitution: Reconciliation*, 1 ADVANCE 57, 59 (2007) (emphases in original).

106. *Id.* at 60.

107. *Id.*

108. *Id.* at 61.

109. *Id.*

110. *Id.* at 62.

111. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

its “approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”¹¹² However, while the courts’ approach might be the same under the Fifth and Fourteenth Amendments, the subject matter of federal equal protection case law under the Fifth Amendment has been more limited in scope than the case law regarding state actions under the Fourteenth Amendment.¹¹³ For example, instead of venturing into economic regulations from Congress or the executive branch, much of the federal equal protection jurisprudence has been focused just on three areas: sex classifications, classifications adversely affecting illegitimate children, and some regulations of welfare.¹¹⁴

III. ENDING UNILATERAL PRESIDENTIAL WAIVERS

A. Violation of Constitutional Equal Protection

Text matters. The plain meaning of the language of the Equal Protection Clause (the same principles of which apply to the federal government through the Due Process Clause of the Fifth Amendment), as well as the plain reality that selective waivers almost always distinguish between similarly situated persons, recommends the Supreme Court grant certiorari at its next available opportunity and establish that unilateral, unauthorized waivers are forbidden by the Constitution as running afoul of equal protection.

Origins and history speak volumes. Waivers, according to professor Philip Hamburger of Columbia Law School, date to the Middle Ages when popes used the practice, which kings of England then adopted.¹¹⁵ These waivers from the king granted the recipient the authority to do as he pleased without concern for a particular law.¹¹⁶ The power of waiver for particular individuals or corporations was known as dispensation.¹¹⁷ Justifying this practice was the idea that the king had absolute power and that the king stood above the very concept of law itself.¹¹⁸ Contemporary commentator Matthew Paris and Judge Roger de Thurkeby, among others, recognized the danger of dispensation and lamented its existence, while other religious men worried about a pope’s ability to excuse individuals from canon law.¹¹⁹

In the late 1600s, Parliament restricted the monarchs’ use of the dispensation

112. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

113. Rebecca A. Delfino, *The Equal Protection Doctrine in the Age of Trump: The Example of Undocumented Immigrant Children*, 84 BROOK. L. REV. 73, 82-84 (2018).

114. *Id.* at 82-83.

115. Philip Hamburger, *Are Health-Care Waivers Unconstitutional?*, NAT’L REV. (Feb. 8, 2011, 9:00 AM), <https://www.nationalreview.com/2011/02/are-health-care-waivers-unconstitutional-philip-hamburger/> [<https://perma.cc/392Q-KEFN>].

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

authority.¹²⁰ In the English Declaration of Rights that followed the Revolution of 1688, Parliament outright declared illegal the monarch's use of waiver.¹²¹ That maneuver meant waiver's only legal existence came through express legislative authorization.¹²²

American state constitutions then followed the English model and thoroughly disclaimed the dispensation power; no constitution in the United States, federal or state, allowed such waiver.¹²³ The manner in which early American legal systems drew upon English common law leads to a sound assumption that the rejection of dispensation was a conscious decision of American drafters.

How might the Equal Protection Clause, which, again, applies against the federal government by reverse incorporation, come into play with unilateral waivers of law? It is quite true that the clause originated out of an urgent need for racial equality in the states. Yet neither the clause's text nor the "equal protection of the laws" it promises are limited to race or gender or nationality or any other suspect classification.¹²⁴ In other words, traditional thinking about the meaning of the Equal Protection Clause aligns too closely with the original intent of the authors and enactors rather than the possible applications drawn from the plain meaning of the words those individuals wrote into our Constitution.

Justice Oliver Wendell Holmes said that, when interpreting a legal document, "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, . . ."¹²⁵ and that we "do not inquire what the legislature meant; we ask only what the statute means."¹²⁶ For judges, Holmes noted that "when their task is to interpret and apply the words of a statute, their function is merely academic to begin with" and is only "to read English intelligently" so long as the meaning of the words is not "open to reasonable doubt."¹²⁷

Regardless of the wisdom or justness of a president's decision to unilaterally grant amnesty to a class of immigrants here illegally, his unauthorized choosing of whom to protect from the law is hardly the "equal protection of the laws,"¹²⁸ if the phrase retains anything resembling its meaning in plain English. At passage, according to Cato Supreme Court Review publisher Ilya Shapiro, the Equal Protection Clause "was widely (and properly) understood as prohibiting the states from passing what's known as 'caste' legislation—laws that create 'second-class'

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. U.S. CONST. amend. XIV, § 1.

125. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

126. *Id.* at 419.

127. Andrew P. Campbell, *RICO in the 11th Circuit After H.J., Inc.*, 51 ALA. LAW. 272, 279 (1990).

128. U.S. CONST. amend. XIV, § 1.

citizens with inferior legal rights.”¹²⁹ If a veritable “caste” system may not be created through passage of legislation, why would unilateral executive alteration or waiver *after* passage be any more permissible a method of creating a quasi-caste system?

Unilateral presidential waiver undoubtedly looms as a new frontier in equal protection jurisprudence, but according to the Supreme Court, a constitutional right “extends” to “modern forms” even if the newer applications of the right “were not in existence” at the time of the amendment.¹³⁰ Indeed, one constitutional scholar describes the necessity of “updating the application” of “fixed principles in light of new factual information.”¹³¹ The word “protection” in the Equal Protection Clause necessarily extends to application of the law,¹³² as described *supra* Section II.A in a class-of-one claim, for example. Also, the Supreme Court has already found it “appropriate to judge selective prosecution claims according to ordinary equal protection standards.”¹³³ Why not selective waiver claims as well?

An arbitrary waiver process in which the executive branch alone decides whether a statutory provision will apply or not apply is not the equal application of the laws mandated by the Fourteenth Amendment. Instead, such a process leaves in its wake a score of second-class entities that have to follow the law whereas another group is free and clear from obeying it.

Within this process, the potential for federal officials to play favorites and thus make a mockery of the rule of law appears immense. While small businesses seeking to avoid the costs of a health care law are not, without more, a suspect class, the unauthorized division of statutory application essentially creates suspect classes. Any opaque process not provided for by law that enforces rules so differently ought to be seen by courts as inherently suspect. A core concept of the American structure is that presidents do not make law,¹³⁴ yet a slicing and dicing by waiver or executive order amounts to changing a law so that it works in ways the president likes better.

Keep in mind that an equal protection argument is different than one purely grounded in separation of powers. Under this Note’s theory, if a provision of law were waived universally, there would be no equal protection claim. If every party subject to a requirement receives an exemption, there is no unequal treatment.

129. Ilya Shapiro, *The Equal Protection Clause Requires Giving Marriage Licenses to Same-Sex Couples*, CATO INST. (Mar. 8, 2015, 6:00 PM), <https://www.cato.org/blog/equal-protection-clause-requires-giving-marriage-licenses-same-sex-couples> [https://perma.cc/9FA5-XZES].

130. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

131. Ilya Somin, *William Eskridge on Originalism and Same-Sex Marriage*, WASH. POST (Jan. 23, 2015, 3:55 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/23/william-eskridge-on-originalism-and-same-sex-marriage/> [https://perma.cc/LT7K-8C7K?type=image].

132. U.S. CONST. amend. XIV, § 1.

133. *Wayte v. United States*, 470 U.S. 598, 608 (1985).

134. See U.S. CONST. art. II, § 3; *Justice John Marshall Harlan: Lectures on Constitutional Law, 1897-98*, 81 GEO. WASH. L. REV. ARGUENDO 12, 201 (Brian L. Frye et al. eds., 2013).

Where the law is enforced entirely or not at all, there is no violation of equal protection. This theory concerns only partial application of a law.

Also, the critical point must be made that the theory of equal protection urged by this Note applies only to instances where there has been the sort of “affirmative act” the Fifth Circuit Court of Appeals referenced.¹³⁵ This proposal does not create an equal protection claim where the executive takes no action. Suppose a law applies to Company A and Company B, and the federal government moves for enforcement against Company A while simply ignoring violations by Company B. That does not run afoul of equal protection. That is the sort of non-enforcement *Heckler* mentioned as typically outside judicial review.¹³⁶ However, if the president formally issues a waiver or executive order freeing Company B from compliance while leaving Company A controlled by the statute, such an affirmative act creates a basis for an equal protection claim.

Certainly, unilateral waiver raises ample concern about separation of powers and should not be dismissed as a minor stretching of presidential power. Equal protection theory is not a replacement for finding a violation of the separation of powers. Rather, the advantage of equal protection theory as a mode of assault on this presidential practice is that equal protection theory creates a more discernible pathway to standing. Just as federal antitrust law grew in part from the soil of having private suits be a tool for enforcement, allowing standing for claims of equal protection offers a fertile ground for enforcing the separation of powers between congressional lawmaking and the president’s duty to take care that the laws are faithfully executed.¹³⁷

B. Practical Frameworks for Interpretation

Finally, this Note presents original analysis on the best means for courts to apply a new frontier of jurisprudence in holding that unauthorized presidential waivers violate principles of equal protection. Strict scrutiny should often be the appropriate standard of review, and a version of Justice Robert Jackson’s *Youngstown* test represents an appropriate one for waivers in rules promulgated by administrative agencies.¹³⁸ To these tests this Note shall return momentarily.

If one recognizes and accepts the contention of this Note that selective presidential waiver violates the core constitutional concept of equal protection and should be remedied, the next question is: How does a court do that? Injunctive relief is most appropriate. Under this Note’s proposal, enforcement of the unilateral executive action shall be enjoined by a court when found to violate equal protection, and a similarly situated party not covered by the waiver shall have standing to sue once injury is shown by unequal treatment.

There is no question that federal courts retain jurisdiction to hear this sort of

135. *Texas v. United States*, 787 F.3d 733, 757 (5th Cir. 2015).

136. *See Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

137. *See* U.S. CONST. art. II, § 3.

138. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

matter. The Supreme Court has long held “that a suit ‘arises under’ the Constitution if a petitioner’s claim ‘will be sustained if the Constitution * * * (is) given one construction and will be defeated if (it is) given another.’”¹³⁹ In this instance, if the Constitution is construed to prevent an unauthorized presidential waiver, a suit for violation of equal protection prevails. If the Constitution’s equal protection requirements are given a stricter, more traditional construction, the claim fails. Therefore, a suit of the sort contemplated by this Note “arises under” the Constitution and is eligible subject matter for courts established under Article III of the Constitution.

Whether such courts are eager to dive into politically fraught waters is a fair question, however, and there is reason for skepticism of their willingness to do so. The so-called “political question doctrine” presents a bar on jurisdiction “when the Constitution textually commits ‘the issue’ to be adjudicated in the case ‘to a coordinate political department,’ or when there is ‘a lack of judicially discoverable and manageable standards for resolving it.’”¹⁴⁰

Nonetheless, as mentioned and as will be explored in this section, there are sensible, manageable standards for courts to employ in resolving unilateral presidential waivers. More importantly, case law establishes, “at a minimum, that the mere fact that there is a conflict between the legislative and executive branches . . . does not preclude judicial resolution of the conflict.”¹⁴¹ And “the applicability of the political question doctrine depends on the nature of the conflict, [and] the needs and risks” involved on either side of that conflict.¹⁴² The nature of an equal protection conflict regarding unilateral waiver is not directly a policy dispute, even though the pursuit of policy objectives may be the reason for presidential non-enforcement of laws.

Stated differently, conflict over arbitrary waiver invokes a fundamental aspect of process concerns and separation of powers. Because the “separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch,”¹⁴³ this conflict is not minor in nature. The notion that a president executes the law, not makes it, is a core constitutional concept.¹⁴⁴ There are politically charged issues on which courts find “that neither the Constitution nor prudential considerations require judges to stand on the sidelines.”¹⁴⁵ Realistically, this appears one of those issues. The legislative and executive branches, “left to their own devices, might agree to arrangements that contradict the allocation of authority expressly provided in the

139. *Powell v. McCormack*, 395 U.S. 486, 514 (1969) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

140. *Hourani v. Mirtchev*, 796 F.3d 1, 8 (D.C. Cir. 2015) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

141. *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976).

142. *Id.*

143. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

144. *See* U.S. CONST. art. II, § 3.

145. *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 4 (D.D.C. 2013).

text of the Constitution.”¹⁴⁶ When the executive branch of government exercises powers not authorized by either statutes or the Constitution, the rule of law is weakened. That courts are charged with upholding the rule of law “suggests the need for some judicial role in separation of powers disputes.”¹⁴⁷

Standing is a much thornier subject than jurisdiction or justiciability. For standing before an Article III judge, the plaintiff must have suffered “an injury in fact” that is both “concrete and particularized” and “actual or imminent”; the injury must be traceable to the defendant’s actions; and it must be likely that the injury will be redressed by a favorable judgment.¹⁴⁸ Not only do those requirements present a significant hurdle, but also one of the main goals of the standing inquiry in the first instance is to help “enforce the separation of powers by preventing the use of citizen suits as a means to assert judicial control over the executive branch.”¹⁴⁹ Thus, some courts might find that granting standing to citizen suits on equal protection would run afoul of a main goal of standing by inviting assertion of judicial control over the executive branch.

Theoretically, a statute could confer standing on a certain class of plaintiffs to challenge unilateral presidential waivers, but even if Congress created such a provision, the Supreme Court has made clear that a statutory right does not obviate the need for a “concrete injury.”¹⁵⁰ Justice Scalia, writing the majority opinion in *Lujan v. Defenders of Wildlife* where the Court threw out a case brought by an environmental group asserting standing to sue the executive branch for a declaratory judgment, expressed fear that a broader allowance of standing would turn the judiciary into a continual arbiter of the wisdom of executive action.¹⁵¹ Wrote Scalia: “To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty,” to see that the laws are faithfully executed.¹⁵² The Court earlier stated this concern in *Schlesinger v. Reservists Committee to Stop the War*:

To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by

146. Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 213 (1990).

147. *Id.*

148. *United States v. Windsor*, 570 U.S. 744, 757 (2013).

149. Kyle La Rose, Note, *The Injury-in-Fact Barrier to Initiative Proponent Standing: How Article III Might Prevent Federal Courts from Enforcing Direct Democracy*, 44 ARIZ. ST. L.J. 1717, 1721 (2012).

150. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576-77 (1992).

151. *Id.* at 577.

152. *Id.*

injunction.¹⁵³

In legislation of the sort that Congress believes might tempt presidents to claim arbitrary power to apply or not apply the law, Congress could still tuck a cause of action into the statute's procedural language that would ease the standing requirement. Many plaintiffs could then rely on a concrete-injury theory similar to that found in the case of *Havens Realty Corp. v. Coleman*.¹⁵⁴

In *Havens Realty*, the Supreme Court held that Housing Opportunities Made Equal ("HOME"), a Virginia non-profit, had standing to challenge violations of the Fair Housing Act because such violations "perceptibly impaired" HOME's purpose and produced a "drain" on the organization's resources.¹⁵⁵ HOME's specific purpose: advancing housing opportunity by providing counseling and referral services for individuals seeking homes.¹⁵⁶ Unlawful housing discrimination, the non-profit argued, made the organization's services more costly to operate because discrimination made it more difficult to find homes.¹⁵⁷ This alleged injury amounted to "far more than simply a setback to the organization's abstract social interests," the Court said.¹⁵⁸

In *Ragin v. Harry Macklowe Real Estate Company*, the Second Circuit Court of Appeals adopted an even more expansive vision of standing.¹⁵⁹ The court assumed that four individuals combing through a newspaper were not actually looking for housing, but the four came across advertisements that violated the Fair Housing Act; and the court determined the four individuals had standing based solely on proof that they read the ads, and that an ordinary reader would see the ads as racially discriminatory.¹⁶⁰ This the court deemed a sufficient "personal stake" in the matter as defined by *Havens Realty* for an individual plaintiff to meet the standing burden.¹⁶¹

The relevance of *Havens Realty* and *Ragin* is to demonstrate that a concrete injury need not result directly from the action in question. In each case, the plaintiffs felt effects of housing discrimination sufficient for standing even though the discrimination was not directly targeted at the plaintiffs. An equal protection challenge to selective presidential waiver would necessarily involve a plaintiff whose relationship to the waiver was similarly adjacent, meaning the plaintiff was not the recipient of the waiver or even necessarily directly involved in the waiver process. Nonetheless, that waiver could result in a perceptible setback to organizational interests such as when a business has to follow a health care law's costly provisions while competitors receive an exemption. In the criminal context,

153. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

154. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

155. *Id.* at 379.

156. *Id.* at 368.

157. *Id.* at 379.

158. *Id.*

159. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993).

160. *Id.*

161. *Id.*; *see also Havens Realty*, 455 U.S. at 378.

mere awareness of placement in a “caste” system by waiver might be statutorily defined as the type of “personal stake” injury that *Ragin* accepted.¹⁶²

Aware of case law’s murkiness regarding what constitutes an injury, the Supreme Court has been willing to “say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it,” and the Court has essentially conceded “that the concept cannot be reduced to a one-sentence or one-paragraph definition.”¹⁶³ Boiled down to its essence by the Court, however, “the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”¹⁶⁴ The Court’s “emphasis” in deciding standing is that the party seeking standing holds a “personal stake” in the outcome of the controversy.¹⁶⁵ When is a stake insufficiently personal? The answer: when it is “merely a general interest common to all members of the public.”¹⁶⁶

In summation, a concrete injury must be demonstrated in order for standing to challenge an unauthorized presidential waiver. If the selective non-enforcement affects too many people or entities, “no private party will have standing to litigate a generalized grievance.”¹⁶⁷ For example, in *Diamond v. Charles*, the Supreme Court considered a private party’s interest in the enforcement of a statute.¹⁶⁸ The Court ruled that to maintain a legally cognizable interest in the enforcement or non-enforcement of a statute, a private-party plaintiff’s “own conduct” must be “implicated” or “threatened” by the statute in order for there to be standing.¹⁶⁹ Under an equal protection concept of presidential waiver, plaintiffs within the category of similarly situated entities separated by the waiver can argue their own conduct was implicated by the waiver sufficiently for them to have standing to challenge the waiver’s validity. This incorporates the understanding that, as the First Circuit Court of Appeals explained, “the proponent of the equal protection violation must show that the parties with whom he seeks to be compared have engaged in the same activity vis-à-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison inutile.”¹⁷⁰

President Obama’s unauthorized delay of an ACA employer-insurance requirement resulted in a 2014 lawsuit brought by the U.S. House of Representatives, raising the possibility of Congress itself having standing to

162. *Ragin*, 6 F.3d at 904.

163. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 475 (1982).

164. *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

165. *Id.*

166. *Ex parte Levitt*, 302 U.S. 633, 636 (1937).

167. *Entin*, *supra* note 146, at 217.

168. *Diamond v. Charles*, 476 U.S. 54, 56 (1986).

169. *Id.*

170. *Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007).

challenge executive waiver.¹⁷¹ The logic behind potential congressional standing is intriguing: when a president unilaterally changes or waives provisions of laws passed by Congress, whatever equal application of the law Congress intended is overridden. One can convincingly insist such an erosion of the rule of law suggests “that the courts should police the vision of the framers by rigorously enforcing the separation of powers.”¹⁷² Nonetheless, Judge Rosemary M. Collyer, in the aforementioned 2014 lawsuit, found that the House lacked standing to challenge Obama’s delay of the employer mandate.¹⁷³ The parties settled the lawsuit before the D.C. Circuit Court of Appeals ruled.¹⁷⁴

Under an equal protection analysis, however, private parties are better suited than Congress to claim standing. In fact, the promise of a path to standing for private parties is one of the most attractive features of attacking arbitrary waivers on equal protection grounds as opposed to attacking the waivers through other means. For example, companies or unions that did not receive an ACA waiver were exposed to potential annual costs of millions of dollars and more effort confronting red tape,¹⁷⁵ while competitors or similarly situated enterprises were exempted from that same trouble,¹⁷⁶ even though the ACA did not distinguish between them.¹⁷⁷ The concrete injury, then, to the parties denied waiver was a quantifiable financial loss.¹⁷⁸

When the federal government refuses to enforce immigration laws against select, identified parties who are offered affirmative protection of an executive order, other illegal immigrants remain vulnerable to deportation. If they violate other laws, their lack of legal status could form the basis of an increased penalty.¹⁷⁹ Meanwhile, others living here illegally, if shielded by a presidential waiver, could commit the same ancillary violation of another law and not have their lack of legal status serve as an aggregator—all because a president granted

171. See U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015).

172. Entin, *supra* note 146, at 219.

173. *Burwell*, 130 F. Supp. 3d at 70.

174. Timothy Jost, *ACA Round-Up: Court Blocks New Contraceptive Coverage Rules; CSR Case Settlement; Final Tax Bill Released; Open Enrollment Closes*, HEALTH AFF. (Dec. 16, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20171215.665944/full/> [<https://perma.cc/W7MR-XXQG>].

175. Grace-Marie Turner, *6 Obamacare Realities for Businesses in 2014*, U.S. CHAMBER COM. (Jan. 14, 2014, 5:45 PM), <https://www.uschamber.com/above-the-fold/6-obamacare-realities-businesses-2014> [<https://perma.cc/ZYD5-E3WD>].

176. See *Self-Insured Employers: Approved Applications for Waiver of the Annual Limits Requirements*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 6, 2012), https://www.cms.gov/CCIIO/Resources/Files/Downloads/Employer_01062012.pdf [<https://perma.cc/BPU4-WTZ3>].

177. Shapiro, *Constitutional Violations*, *supra* note 5.

178. Letter from John E. Dicken, Dir. Health Care Issues, Gov’t Accountability Office, to Congress (June 14, 2011), <https://www.gao.gov/new.items/d11725r.pdf> [<https://perma.cc/YQ5A-VJ4L>].

179. See *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (noting how deportation is a mandatory collateral consequence to many non-citizen criminal convictions).

“rights” by executive order.¹⁸⁰ The injury to those not granted exemption is that they were deemed by an official act of government to reside in a separate “class” and subjected to differing treatment, even though the text of the pertinent statute holds that they are not in a separate class.¹⁸¹

Critics of this “class” concept of injury would likely argue that the presidential waivers and executive orders listed above confer tangible benefits on the recipients and do not revoke any rights or benefits of non-recipients, thus leaving the non-recipients without injury. However, the injury to uncovered parties in the criminal context is the very denial of equal protection itself, denial of the guaranteed equal treatment (guaranteed, at least, in formal, affirmative governmental acts) of similarly situated people or entities.¹⁸²

Taken to its logical extreme, allowing the executive branch to grant exemptions where duly passed statutes do not differentiate would lead to massively disparate and extralegal treatment. Say Congress enacted a universal ninety-seven percent tax rate on any actor engaging in interstate commerce. If a president could simply make that tax disappear like a rabbit from a magician’s palm, the president would hold a tremendous power to decide economic winners and losers that finds no justification in the text of a statute of universal application.

While the denial-of-equal-protection theory might appear a dramatic expansion of standing doctrine, it is worth noting that, in the Establishment Clause context, one basic method courts apply is to grant standing to plaintiffs who alter their behavior in response to an offensive religious display.¹⁸³ Imagine the following potential behavioral alterations in response to a president’s power to waive the law: a business executive self-censures her political speech so as not to offend the current administration, a union donates to the president’s re-election campaign, a steel manufacturer shifts its shipping contract to a company owned by associates of the president. All of the unseemly behaviors part and parcel to the ordinary lawmaking process provided for in the Constitution could be rerouted to appeal to a president’s arbitrary powers and induce the granting of a waiver.

Another benefit of invalidating unilateral waivers through an equal protection analysis is that injunctive relief is sufficient to restore equilibrium.¹⁸⁴ No complex

180. Kathy Brady et al., *Crimes and DACA Renewals*, IMMIGRANT LEGAL RES. CTR. (Sept. 2017), https://www.ilrc.org/sites/default/files/resources/crimes_and_daca_renewals.pdf [<https://perma.cc/7AK7-ZF2R>].

181. *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015) (noting Immigration and Nationality Act “flatly does not permit the reclassification of millions of illegal aliens as lawfully present”).

182. *See Rostker v. Goldberg*, 453 U.S. 57, 79 (1981) (noting the “Constitution requires that Congress treat similarly situated persons similarly”).

183. *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 2004 (2010).

184. *See Jeffries v. Harleston*, 21 F.3d 1238, 1249 (2d Cir. 1994) (noting injunctive relief is “proper when the plaintiff has suffered a constitutional violation that causes continuing irreparable

system of deciding and awarding monetary damages is needed. Restoring the operation of laws as passed by Congress and signed by the president is the remedy so that the laws are faithfully executed.¹⁸⁵ Of course, an equal protection analysis does not trigger injunctive relief the moment the executive branch is found to have acted outside the text of the law as written. This framework is not a call for an end to all executive orders or all prosecutorial discretion or all enforcement discretion.

Even accommodating the practices of executive order and enforcement discretion, strict scrutiny nonetheless is merited in view of just how fundamental issues of unilateral waiver are to the rule of law. Under existing equal protection analysis, most classifications receive judicial review only for rational basis.¹⁸⁶ Currently, an equal protection challenge requires the “strict scrutiny” test in the face of suspect classifications (race or national origin, for example) but also when “fundamental interests” are at stake.¹⁸⁷ Examples of such fundamental interests that invoke strict scrutiny include freedom of movement, travel, voting, free speech, and privacy.¹⁸⁸ Equally weighty an interest: the right to avoid being left out in the cold under an arbitrary, unauthorized caste system. This Note’s contention is that, if a president draws classifications for application of a statute that are not provided for by the statute, the burden rests with the administration to prove a compelling governmental interest is at stake, the waiver actually furthers the interest, and the classification drawn to satisfy the interest is no broader than necessary.

Alternatively, when a waiver occurs through rules promulgated by administrative agencies, Justice Jackson’s *Youngstown* test offers a sufficient framework. Jackson’s famous concurring opinion in the 1952 *Youngstown Sheet & Tube Co. v. Sawyer* decision classified presidential actions into three categories.¹⁸⁹ First, when the president acts with an express or implied congressional authorization, his authority receives “the widest latitude of judicial interpretation,” and there is a heavy burden to be met by any challenge to that authority.¹⁹⁰ Second, when the president acts “in absence of either a congressional grant or denial of authority,” only the independent powers of the executive branch exist, although “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”¹⁹¹ Third, when the president acts in defiance of Congress, his power reaches its “lowest ebb,” and the “claim to a power at once

injury for which the law provides no adequate remedy” (citing *New York State Nat’l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989)).

185. See U.S. CONST. art. II, § 3.

186. 20 N.Y. JUR. 2D *Constitutional Law* § 380 (2020).

187. *Id.*

188. *Id.*

189. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

190. *Id.*

191. *Id.* at 637.

so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹⁹²

Because courts view administrative agencies as extensions of Congress, utilizing a *Youngstown* test for waivers enacted through rules promulgated by administrative agencies ensures that waivers granted with express or implied statutory consent are not subjected to strict scrutiny. Also, an adapted version of the *Youngstown* test maintains an ample safe harbor for the recognition that some laws intend shifting or contingent application. Finally, the *Youngstown* test preserves flexibility for instances of what Justice Jackson called “congressional inertia, indifference or quiescence.”¹⁹³ Ambiguity arises as a matter of course in legislation, and the execution of laws necessarily involves the occasional resolution of that ambiguity. Sometimes, where congressional drafting is indifferent or inconclusive, the executive branch must decide to which entities a statute applies, and any jurisprudence on presidential waivers must allow for that reality.

In short, courts need not go far afield to resolve many waiver cases. *Youngstown* “enjoys a storied place as a definitive framework for resolving complex cases involving the clash between individual liberty and executive power,”¹⁹⁴ Professor Joseph Landau of Fordham explained, and the test’s track record and clean categorical approach invite use for equal protection claims made on waivers in an administrative law context.

CONCLUSION

While the Supreme Court did not establish any precedent on unilateral presidential waivers in the Obama era, the issue is likely to arise again in the near future as those who occupy the Oval Office figure to continue pushing the envelope if unencumbered by the judiciary. This troubling development in law goes directly to the weighty and fundamental matter of whether a president may of his own accord override and alter legislation already signed into law.

The preceding pages argued that unauthorized, arbitrary waivers loom as an increasingly prominent issue demanding the Court’s attention. This conclusion is supported by examples of flagrant non-enforcement of federal statutes against selected parties by a significant number of modern presidents from both of America’s major political parties. It is also supported by the lack of adjudication on the limits of presidential power in this arena and the lack of court-defined boundaries. Even back in the early 1950s, Justice Jackson understood the threat of power improperly flowing to the president: “By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their

192. *Id.* at 637-38.

193. *Id.* at 637.

194. Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1925 (2012).

effectiveness.”¹⁹⁵ For more than a century, Congress has delegated power to the executive branch, and in highly polarized and partisan times when gridlock rules, unilateral presidential lawmaking proves more tempting. Justice Jackson also summed up this effect on the president: “Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.”¹⁹⁶

This Note also argued that the equal protection of the law guaranteed all citizens should be naturally extended to encompass the full meaning of its plain language. Stated differently, each person or other legal entity should know that, where a statute does not treat that person or entity differently from similarly situated people or entities, a president cannot effectively rewrite the law to treat certain people or entities differently. This Note argued that such an extension of equal protection principles is a natural application of modern jurisprudence.

In sum, unauthorized presidential waivers violate the Constitution and specifically the equal protection guarantees in the Due Process Clause of the Fifth Amendment. They constitute arbitrary power concentrated in the hands of one person, an affront to his or her oath to see that the laws are faithfully executed. Allowing a president to exempt individuals and organizations from compliance, while less-favored parties remain subject, is not equal protection of the laws.

195. *Youngstown*, 343 U.S. at 653-54 (Jackson, J., concurring).

196. *Id.* at 654.