TAKING CARE OF IMMIGRATION LAW: PRESIDENTIAL STEWARDSHIP, PROSECUTORIAL DISCRETION, AND THE SEPARATION OF POWERS

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President Obama's chief initiative on immigration, Deferred Action for Childhood Arrivals (DACA), has inspired a fierce debate on presidential power with the usual suspects switching roles. Critics of presidential unilateralism have endorsed DACA, which administratively implemented portions of the DREAM Act to avoid hardship to undocumented children who accompanied their parents to the United States. In contrast, proponents of presidential unilateralism such as John Yoo have assailed the Administration's prosecutorial discretion rationale.

Critics are correct on one point: The Obama Administration's prosecutorial discretion rationale does not support the blanket relief that DACA affords. DACA's legal support stems not from prosecutorial discretion but from the President's provisional power to protect "intending Americans" from violations of law by nonfederal sovereigns. The nonfederal sovereigns posing a danger here are individual states like Arizona that have enacted restrictive immigration legislation. To analyze the scope and derivation of this presidential power, this Article builds on the stewardship theory advanced by Theodore Roosevelt.

This Article views stewardship as a provisional power within Youngstown*'s second category of congressional acquiescence. Presidents since the Founding Era have used this power in the course of conducting foreign relations. Under the stewardship paradigm, the President can act interstitially to preserve Congress's ability to legislate. Stewardship on this reading can also check wayward state impulses, ensure synergy between international law and national interests, and offer reasoned elaboration of the President's actions.*

DACA reflects what I call the "new stewardship" of the Obama Administration. This new paradigm blends the Framers' concern about negative externalities of state measures with a commitment to the fairness that undergirds modern equal protection doctrine. DACA limits state incentives for profiling and harassing undocumented children. Moreover, like the most resonant passages in Obama's Second Inaugural Address, DACA posits a synergy between the welfare of the most vulnerable and the national interest.

INTRODUCTION

President Obama's Deferred Action for Childhood Arrivals (DACA) program[1] has prompted some peculiar pivots in views of presidential power.

[1] *See* 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 Mayoral, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (requesting the

Critics of presidential unilateralism have endorsed DACA.[2] In contrast, proponents of presidential unilateralism have been eager to criticize DACA's legal grounding.[3] This Article argues that both the Administration's critics and defenders are wrong. DACA is legally sound, but for reasons more complex than the prosecutorial discretion rationale advanced by the Administration.[4] Support stems from another source: the President's provisional power to protect both "intending Americans" and resident foreign nationals from violations of law by nonfederal sovereigns.[5] Intending Americans are individuals who seek to establish permanent ties with the United States, regardless of their country of origin. The nonfederal sovereigns posing a

exercise of prosecutorial discretion with respect to seeking removal of individuals who came to the United States as children).

[2] The work of a leading immigration scholar illustrates the point. *Compare* David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate*, 18 GEO. IMMIGR. L.J. 305, 325 (2004) (critiquing the Administration of President George W. Bush for raising the "prospect of broad executive authority to detain US citizens as enemy combatants"), *with* 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, 184-85 (2012) [hereinafter Martin, *A Defense of Immigration-Enforcement Discretion*] (defending DACA as a lawful exercise of prosecutorial discretion), *and* David A. Martin, *A Lawful Step for the Immigration System*, WASH. POST, June 25, 2012, at A17. Professor Martin, to his credit, has actually sought to carve out a middle course that accords a reasonable measure of deference to the executive branch while still preserving checks and balances. *See, e.g.*, David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1356-58 (1990) (offering a model for asylum adjudication that preserves fairness while respecting executive competence in the foreign policy realm). I use Martin's work largely as a heuristic for the phenomenon described in this Article.

[3] *See* Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 837-38 (2013) (arguing that DACA does not pass muster as a measure promulgated with Congress's consent, as a response to congressional silence, or as an exercise of the President's inherent Article II authority); *cf.* Kris W. Kobach, *The 'DREAM' Order Isn't Legal*, N.Y. POST (June 22, 2012), http://www.nypost.com/p/news/opinion/oped columnists/the_dream_order_isn_legal_4WAYaqJueaEK6MS0onMJCO (arguing that Congress sharply limited prosecutorial discretion in enacting provisions of the 1996 Immigration Act).

[4] *See* Memorandum from Napolitano, *supra* note 1, at 1 ("[A]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.").

[5] *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 49 n.231, 61 (1993) (indicating that presidential authority includes a protective authority and that "[p]residential authority in immigration has been held, at least in some instances, to exist absent statutory language to the contrary").

danger here are individual states like Arizona that have enacted restrictive immigration legislation.[6]

To analyze the scope and derivation of this presidential power, this Article reframes the stewardship concept initially advanced by President Theodore Roosevelt.[7] Roosevelt applied his stewardship theory to a range of initiatives, including an executive agreement between the United States and Japan that resolved a crisis caused by San Francisco's attempt to segregate Japanese-American schoolchildren.[8] DACA heralds what I call the "new stewardship" of the Obama Administration.

Like many examples of presidential power in foreign relations, new stewardship emerges from historical practice[9] rooted in the Constitution's Take Care Clause.[10] In complying with the Take Care Clause's command to "faithfully execute . . . the Laws," Presidents should consider constitutional

[6] *See* S.B. 1070, § 2(B), ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (requiring state officers to detain individuals suspected of being present in violation of federal immigration law).

[7] *See* THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 357 (Charles Scribner's Sons rev. ed. 1927) ("My view was that every executive officer, and above all every executive officer in a high position, was a steward of the people bound actively and affirmatively to do all he could for the people . . . .").

[8] *See id.* at 378-81.

[9] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. . . . Presidential powers are not fixed but fluctuate . . . ."); *see also* Dames & Moore v. Regan, 453 U.S. 654, 684 (1981) ("[C]ongressional acquiescence in settlement agreements . . . supports the President's power to act here."); *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring) (discussing legislative acquiescence as triggering judicial deference to presidential action); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) (holding that Congress had acquiesced in the presidential protection of federal land for conservation and orderly development, suggesting that the President had such power); *cf.* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 121-29 (1994) (describing what authors call "customary national security law"); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 102-05 (2006) (discussing *Midwest Oil* and the development of the acquiescence doctrine); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 54-69 (1990) (discussing factors, including numerosity and consistency, that should contribute to an analysis of the course of dealing between Congress and the President regarding foreign affairs); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 415 (2012) (stating that when judicial review is not an option "interactions between the political branches will, as a practical matter, determine the separation of powers"); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1498 (2010) ("[W]ithin [the Office of Legal Counsel], its own body of executive power precedents is a critical piece of the broader historical practice informing its understanding of the law in this area.").

[10] U.S. CONST. art. II, § 3.

and international structure. As a matter of constitutional structure, the President is most powerful when he is acting in conjunction with Congress.[11] The President should also honor the Framers' hope that the United States conduct itself responsibly as a member of the community of nations.[12]

The first element of stewardship is provisionality. Stewardship does not license presidential unilateralism. Rather, it prevents irreparable harm to Congress's ability to legislate. As Alexander Hamilton demonstrated in defense of the Neutrality Proclamation issued by President Washington that kept U.S. citizens out of harm's way in the war between Britain and France, the President can act to preserve Congress's opportunity to decide matters of war and peace.[13] The Neutrality Proclamation maintained the peace, while conceding that the ultimate authority resided with Congress.[14]

Second, stewardship entails synergy between the welfare of current and intending citizens. Here the Founding Era provides a powerful negative example in President John Adams's hasty extradition to Britain of the alleged mutineer Thomas Nash, who claimed to be an American citizen named Jonathan Robbins impressed by the British navy.[15] Adams discounted Nash's status as an intending American and the emerging human rights argument that

[11] *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

[12] *See, e.g.*, THE FEDERALIST NO. 3, at 42 (John Jay) (Clinton Rossiter ed., 1961) (warning of the challenge to peace presented by a "disunited America" in which individual states offended foreign powers).

[13] *See* ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 5, 11 (Alexander Hamilton) (Washington, D.C., J. Gideon & G.S. Gideon 1845) (arguing that since "the legislature have a right to declare war, it is . . . the duty of the executive to preserve peace, till the declaration is made").

[14] *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 78-79 (1990) (explaining that the Neutrality Proclamation "received overwhelming congressional support" and that Washington "expressly conceded that Congress had the power to change neutrality policy by legislation"); *cf.* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551-53 (2004) (arguing against a more sweeping interpretation that the Vesting Clause of Article II of the Constitution, U.S. CONST. art. II, § 1, cl. 1, grants the President broad residual authority over foreign affairs); Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, *in* PRESIDENTIAL POWER STORIES 21, 29-39 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (tracing the history of controversy over the Neutrality Proclamation).

[15] *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 234-35 (1990). Other scholars have been more favorable toward President Adams. *See* H. JEFFERSON POWELL, THE PRESIDENT'S POWER OVER FOREIGN AFFAIRS 81 (2002) ("Modern scholars have generally attributed the House's interest in the Robbins/Nash matter to a partisan Republican effort to embarrass the Adams administration by any means possible . . . .").

mutiny was a form of self-defense against impressment and brutal maritime discipline.[16] Presidential inattention to synergy had significant foreign affairs consequences, as pushback against the failure to protect Nash made extradition a dead letter for decades to come.[17]

Third, under such stewardship the President has more leeway when he has an institutional advantage over other players. Because, as Hamilton observed, the President has the advantage of "dispatch,"[18] the need for emergency action helped validate President Pierce's rescue of the Hungarian freedom fighter and intending American Martin Koszta.[19] While border states may be quick to act "under the impulse of sudden irritation,"[20] the President may embody the more "temperate and cool" disposition that the Framers ascribed to the federal government.[21] Then-Secretary of State Daniel Webster illustrated this attribute in avoiding war with Britain after New York state ignored international law in trying a Canadian law enforcement officer for murder based on the officer's performance of his duties.[22]

Finally, legitimacy under a stewardship conception derives from reasoned elaboration of the factors driving presidential action. In the San Francisco school crisis, Secretary of State Elihu Root did not merely assist President Roosevelt in heading off local attempts to segregate Japanese-American schoolchildren. In that most rational of forums, the law review article, Root defended the Administration's position that international law protected the children from the state impulse toward racial "hatred."[23] Root also hinted at the transformation of protection into a robust constitutional norm prohibiting discrimination.[24]

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[16] *See infra* Part II.B.

[17] *See* Wedgwood, *supra* note 15, at 361 (explaining how, following the Nash affair, President Adams lost the election and the extradition articles were allowed to lapse).

[18] *See* THE FEDERALIST NO. 70, *supra* note 12, at 424 (Alexander Hamilton) ("Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . . .").

[19] *See In re* Neagle, 135 U.S. 1, 64 (1890) (discussing the Koszta episode as support for its holding that the President had the power to protect federal officials).

[20] *See* THE FEDERALIST NO. 3, *supra* note 12, at 44 (John Jay); *see also* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (quoting John Jay's characterization of state government tendencies in the course of holding that federal immigration law preempted or limited Arizona's immigration statute).

[21] *See* THE FEDERALIST NO. 3, *supra* note 12, at 45 (John Jay).

[22] *See* People v. McLeod, 25 Wend. 483, 603 (N.Y. Sup. Ct. 1841); *cf. Neagle*, 135 U.S. at 71 (citing the McLeod affair as precedent for presidential action); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 115-17 (2012) (discussing Webster's actions in the McLeod episode).

[23] *See* Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT'L L. 273, 286 (1907).

[24] *Id.* at 277 (asserting that the segregation of Japanese-American schoolchildren is unlawful because the "state will be forbidden . . . to discriminate").

Analyzing presidential stewardship in this fashion has a number of benefits. First, as a normative matter, it tethers a stewardship theory to an interstitial role. While President Theodore Roosevelt is often associated with a sweeping, extraconstitutional view of presidential power,[25] the account offered here stresses the more bounded initiatives of Roosevelt and other Presidents. Second, as a descriptive matter, the approach advanced here reveals common themes in a range of initiatives throughout American history from the Founding Era to the present, instead of grounding the explanation in the vagaries of presidential temperament. Third, stewardship gives us a more precise lens for examining DACA's legality.

Under a stewardship analysis, the prosecutorial discretion justification for DACA fails the test of provisionality. Our touchstone is the canonical concurrence of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[26] In Justice Jackson's famous typology, the President receives (1) greatest deference when he acts consistently with Congress's will, (2) some deference when executive action occurs against the backdrop of legislative silence, and (3) little or no deference for decisions that clash with those of Congress.[27] Unfortunately for the prosecutorial discretion account, Congress in the Immigration and Nationality Act (INA) expressly provided only limited avenues for the exercise of discretion and impliedly offered room for additional discretion only on a case-by-case basis.[28] DACA, in contrast, sets up a system of blanket immigration relief.[29] The clash between DACA's broad relief and the INA's comprehensive scheme thus eliminates the President's recourse to category one of the *Youngstown* typology.

DACA is also problematic under *Youngstown*'s third category, which demarcates presidential power at its lowest ebb. The Court has consistently stressed Congress's plenary power over immigration.[30] The case law does not

[25] *See* KOH, *supra* note 14, at 88-89 (describing President Roosevelt's stewardship theory, including his "unprecedented" use of the executive agreement to broadly exercise presidential authority).

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

[27] *Id.*; *cf.* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 693-94 (2008) (analyzing *Youngstown*'s implications).

[28] *See* 8 U.S.C. § 1182(d)(5)(A) (2012) (providing that the Attorney General may "only on a case-by-case basis" parole noncitizens into the United States for "urgent humanitarian reasons or significant public benefit").

[29] *See* Memorandum from Napolitano, *supra* note 1, at 1.

[30] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring) ("[T]his Court . . . has recognized that the determination of a selective and exclusionary immigration policy was for the Congress and not for the Judiciary. . . . [Immigration regulations] have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.").

recognize presidential power under Article II to alter Congress's finely calibrated balance. Without more, therefore, DACA fails.

Youngstown's second category may, however, salvage DACA if the program is compared with earlier episodes like the Martin Koszta affair.[31] Viewed from the perspective of category two, DACA would be the latest installment in presidential efforts to which Congress acquiesced to protect intending and actual citizens from harm caused by nonfederal sovereigns. In DACA's case, the offending nonfederal sovereigns are individual states like Arizona that have passed restrictive immigration laws.[32] These laws target undocumented persons, foreign-born citizens, lawful residents, and native-born citizens sharing traits such as accent and appearance with the first three groups.[33] DACA mitigates, although it does not eliminate, the harm caused by restrictive state laws. Because the INA does not bar mitigation of this harm, DACA belongs in *Youngstown*'s second category of presidential measures invited by congressional silence.

The stewardship represented by DACA is new because it incorporates a number of departures from the traditional model. First, it entails a broader conception of synergy between the nation's interests and the interests of intending Americans, informed by equality, rather than by the traditional foreign relations imperatives that drove earlier episodes. Echoing the rights revolution of the 1960s, President Obama declared in his Second Inaugural Address that unfairness to any person diminishes all of us, and fairness for one

[31] *See infra* Part II.C.1.

[32] *See, e.g.*, S.B. 1070, § 2(B), ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (authorizing state officers to detain individuals upon "reasonable suspicion" that those individuals were present in the state in violation of federal immigration law). State immigration laws are the source of much commentary. *See* Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 609 (2012) (discussing the "civil rights concerns at the core of state and local efforts to regulate immigration"); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 79 U. COLO. L. REV. 1361, 1365-72 (1999) (examining the dramatic expansion of the role states play in immigration related law and policy); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 129-34 (1994) (explaining the possibilities for state-level immigration law and policy); *cf.* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 496 (2012) (commenting on the role of states in monitoring the executive branch's enforcement of federal statutes); Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1340-43 (2012) (observing that state enforcement of immigration laws may be biased and that state officials may have better access to some information about immigrant behavior than federal officials). The restrictive trend in state law on immigration has not prevailed in all jurisdictions. Indeed, a number of influential jurisdictions have pushed back, granting greater rights to undocumented immigrants. *See* Patrick McGreevy & Melanie Mason, *State Passes Bill to License More Drivers; Eligibility for Those Here Illegally Would Be Expanded. Another Measure Requires OT for Domestic Workers*, L.A. TIMES, Sept. 13, 2013, at A1 (discussing new immigrant-friendly legislation in California).

[33] *See, e.g.*, S.B. 1070, § 2(B), ARIZ. REV. STAT. ANN. § 11-1051(B).

is a benefit for all.[34] This approach harmonizes with then-Senator Obama's stand for the "rights and opportunities" of immigrants in *The Audacity of Hope*.[35] It also dovetails with the Supreme Court's equal protection decision in *Plyler v. Doe*, which struck down a Texas law that barred undocumented children from public schools.[36] An expanded vision of synergy would hold that singling out children for punitive action based on their parents' decisions offends fairness. The nation as a whole benefits from curbing unfair decisions of this kind.

Second, the new stewardship conception of the President's institutional advantage entails a more liberal nexus between the President's action and the mitigation of harm to citizens. DACA helps bridge the gap between the facial challenge to state legislation that led to partial success in *Arizona v. United States*,[37] and the as-applied challenges to such laws that remain to be decided. Only as-applied challenges can address the racial and ethnic profiling that the opponents of such laws fear.[38] DACA helps fill this gap by reducing incentives for overzealous state enforcement. Recognizing this indirect benefit extends stewardship.[39]

Ultimately, this Article has value as an analysis of President Obama's contribution to the ongoing dialogue about presidential power. That contribution will be important, even if the relief afforded by DACA is overtaken by comprehensive immigration reform.[40] If that reform is

[34] *See* President Barack Obama, Second Inaugural Address (Jan. 31, 2013) ("[O]ur individual freedom is inextricably bound to the freedom of every soul on Earth.").

[35] *See* BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 268 (2006) ("The danger will come if . . . we withhold from [immigrants] the rights and opportunities that we take for granted.").

[36] Plyer v. Doe, 457 U.S. 202, 230 (1982).

[37] Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).

[38] *See* Johnson, *supra* note 32, at 631 (discussing how the Supreme Court likely will not directly address the civil rights deprivations raised by state immigration enforcement as the federal government in *Arizona* made its arguments on federal preemption grounds).

[39] It is, however, hardly without precedent – the *Neagle* Court recognized well over a century ago that the President's protective power could be prophylactic as well as reactive, since preventing harm can be far more efficient than reacting to harm once it has occurred. *See In re* Neagle, 135 U.S. 1, 59 (1890) ("It [is] . . . apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed.").

[40] One lawsuit challenging DACA attracted interest, but ultimately floundered on jurisdictional grounds. *See* Crane v. Napolitano, 920 F. Supp. 2d 724, 740 (N.D. Tex. 2013) (finding that immigration officers challenging DACA's legality had standing because of the possibility of job-related discipline if they refused to implement the program's provisions); Crane v. Napolitano, No. 3:12-cv-03247-O, 2013 WL 1744422, at *13 (N.D. Tex. Apr. 23, 2013) (determining that DACA was inconsistent with the Immigration and Nationality Act); Order at 2, *Crane*, 2013 WL 1744422 (N.D. Tex. July 31, 2013), ECF No. 75 (holding that the lawsuit was an employment dispute governed by a collective bargaining agreement and

forthcoming, President Obama's DACA initiative will deserve some of the credit for mobilizing public support and disarming critics. DACA's success as both politics and policy, however, means more if it meshes with a plausible account of presidential authority.

This Article proceeds in four parts. Part I explains why DACA encounters problems under categories one and three of the *Youngstown* test. To situate DACA within *Youngstown*'s second category, Part II outlines the history of presidential stewardship and the protection of intending U.S. citizens from the Founding Era to the Administration of Theodore Roosevelt. Part III refines the stewardship conception with developments from the last forty years, including the claims settlement that concluded the Iranian hostage crisis.[41] This Part also highlights judicial involvement in the protection of intending Americans through both equal protection and preemption doctrine. Part IV supplies a new stewardship gloss of DACA, arguing that President Obama has combined equal protection's focus on fairness and the Framers' concern about state impulses roiling foreign affairs.

I. DACA, PROSECUTORIAL DISCRETION, AND *YOUNGSTOWN*

DACA implements many of the provisions of the DREAM Act, a humane measure that, as of December 2013, had not been enacted into law.[42] The policy behind DACA is commendable. Its unilateral implementation by the executive branch, however, clashes with the separation of powers.

A. *DACA and the DREAM Act*

The proposed DREAM Act[43] addresses a compelling problem. Substantial numbers of undocumented noncitizens – over one million, by many estimates[44] – came to this country at an early age, accompanying their parents. These migrants are effectively Americans – they attend public schools,[45] absorb American popular culture (for better or worse), and have friends and often relatives who are citizens or lawful residents.[46] Despite this American

the Civil Service Reform Act, and that the court therefore lacked jurisdiction).

[41] *See* Dames & Moore v. Regan, 453 U.S. 654, 679 (1981).

[42] *Compare* Memorandum from Napolitano, *supra* note 1, at 1 (describing the exercise of prosecutorial discretion based on the criteria laid out in the DREAM Act with respect to individuals who came to the United States as children), *with* Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (2011) (establishing conditions for obtaining the status of an alien lawfully admitted for permanent residence).

[43] Development, Relief, and Education for Alien Minors Act of 2009, S. 729, 111th Cong. (2009).

[44] *See, e.g.*, Cindy Carcamo, *Many Immigrants Fail to Seek Deportation Deferral*, L.A. TIMES, Aug. 15, 2013, at A9 (reporting estimates that 1.09 million individuals qualify for relief under DACA).

[45] *See* Plyler v. Doe, 457 U.S. 202, 226 (1982).

[46] *See* Gerald P. Lopez, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711,

background, childhood arrivals face the risk of removal by immigration authorities, and encounter difficulties in obtaining higher education and employment.[47] The DREAM Act's many sponsors hoped to change this situation in order to prevent the wasted years and frustrated aspirations that the plight of childhood arrivals represents. They sought to accomplish this goal by forging a pathway to lawful permanent residence for a large number of undocumented noncitizens who came here before reaching the age of sixteen.[48]

DACA was introduced by the Department of Homeland Security (DHS) some time after it became clear that the DREAM Act would not become law before the 2012 election.[49] DACA did not grant childhood arrivals lawful permanent residence.[50] In other respects, however, it echoed the DREAM Act's central elements. Its substantive criteria were similar, focusing on youthful arrival, good moral character, and education or service in the armed forces.[51] Those individuals who met the criteria were invited to apply for

1732-33 (2012) ("Undocumented Mexicans in the U.S. have been integral parts of work crews and child or elderly care arrangements, kinship networks and families, neighborhoods and communities. They have shouldered burdens and shared living spaces that tie them to others in the U.S. . . . . They function in fact as would-be citizens . . . .").

[47] *See* Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5, 11 (2012) ("For the undocumented student who came as a baby or child to the United States and who has been raised exclusively in this society, his or her belonging in U.S. society is indistinguishable . . . . *Plyler*, however, failed to resolve the fate of those children beyond high school graduation, who find themselves unable to legally work and, in most cases, unable to attend college."); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 525 (2012) ("[W]ith the impossibility of practicing their trades, becoming licensed, and gaining employment, there is evidence of the stressful lives [noncitizen students] lead and the abject prospects they face.").

[48] The proposed DREAM Act required that each applicant be under thirty-five years of age, be a high school graduate, be currently enrolled in school, or hold a general education development (GED) certificate; or not have committed various types of crimes, and pose no risk to national security or public safety. *See* S. 729 § 4.

[49] President Obama gave a press conference explaining the new policy. *See* President Barack Obama, Remarks by the President on Immigration (June 15, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.
Prospective beneficiaries of the DREAM Act (called "Dreamers") helped gather political momentum for the cause by publicly disclosing their situation in concert with others. *See* Julia Preston, *Immigrant Activists Cast a Wider Net*, N.Y. TIMES, Dec. 3, 2012, at A12; *cf.* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2146-47 (1991) (discussing the importance of the beneficiaries of law reform assuming a substantial decisionmaking role).

[50] Memorandum from Napolitano, *supra* note 1, at 3 (explaining that DACA "confers no substantive right, immigration status or pathway to citizenship").

[51] For a brief but informative discussion, see *Deferred Action for Childhood Arrivals*, DEP'T OF HOMELAND SEC., http://www.dhs.gov/deferred-action-childhood-arrivals (last

deferral of deportation, even if they were not currently in removal proceedings.[52] A grant of deferred action would shield the successful applicant from deportation for two years.[53] Successful applicants would also receive employment authorization.[54]

B. *DACA Meets* Youngstown

Unfortunately, although DACA is sensible and compassionate immigration policy, supporting it as an exercise of presidential power requires more effort than the Administration has committed to that task. To see why this is the case, consider the bases for presidential power outlined by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*.[55]

In *Youngstown*, the Court invalidated President Truman's seizure of steel mills during a Korean War labor dispute, holding that Congress had refused to grant this power to the President when it enacted comprehensive labor-management legislation.[56] Justice Jackson's celebrated concurrence[57] divided presidential action into three categories: (1) action taken with Congress's consent, express or implied; (2) action taken in the face of congressional silence; and (3) action taken against Congress's wishes, based only on the President's constitutional authority.[58] As a general rule, the President's power

visited Oct. 17, 2013). DACA applicants must have been under the age of thirty-one as of June 15, 2012, come to the United States before their sixteenth birthday, and continuously resided in the United States since June 15, 2007. *See Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last visited Oct. 17, 2013). Individuals who received deferred action under DACA are "considered by DHS to be lawfully present." *Id.* Arizona, which initially declined to issue driver's licenses to DACA recipients, is now reconsidering its position. *See* Cindy Carcamo, *Arizona Reviews License Ban*, L.A. TIMES, Jan. 25, 2013, at A10.

[52] *See Frequently Asked Questions*, *supra* note 51.

[53] *Id.*

[54] *Id.*

[55] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

[56] *See id.* at 588-89.

[57] *Id.*

[58] *See* Barron & Lederman, *supra* note 27, at 693-94 (outlining the scope of presidential war powers in light of *Youngstown*'s categories of presidential power); Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadow*, 19 CONST. COMMENT. 87, 147-49 (2002) (arguing that avoiding a precise delineation of the President's inherent power is unhealthy for democratic deliberation); Patricia L. Bellia, *The Story of the* Steel Seizure *Case*, *in* PRESIDENTIAL POWER STORIES, *supra* note 14, at 233, 273-75 (outlining the context of the decision); Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1924-25 (2012) (discussing *Youngstown* and judicial deference to administrative agencies); *see also* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process*

is at its height in *Youngstown*'s first category, where he reaps the benefit of the political branches' shared consensus.[59] The second category includes cases where Congress, through a pattern of inaction or subsequent legislative activity, can be viewed as acquiescing in measures taken by the President.[60] In each of these categories, the President is acting as Congress's agent,[61] thus bolstering Congress's ability to take action it could not take when acting on its own because of institutional deficits such as delays in decisionmaking. In the third category, in contrast, the President's opposition to Congress places executive action at its "lowest ebb."[62] When the President stops being Congress's agent, and the President's actions defy or diminish Congress's ability to legislate, the executive must rely solely on the President's Article II power. Courts have rarely found that power sufficient.

1. Prosecutorial Discretion in Immigration Law

Secretary Napolitano's memorandum establishing DACA did not directly confront the *Youngstown* criteria. Its reliance on prosecutorial discretion as the basis for the program,[63] however, suggests a belief that DACA was within one of the first two *Youngstown* categories.[64] The Supreme Court has recognized

Approach to Rights During Wartime, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 161, 179 (Mark Tushnet ed., 2005) (discussing *Youngstown* and how "the Court relied on the absence of a formal declaration of war as indicating a lack of congressional authorization for the claim of exceptional powers"); Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263, 316-24 (2010) (arguing that Justice Jackson's approach incentivizes overreaching by the executive).

[59] *Youngstown*, 343 U.S. at 635.

[60] *Id.* at 637.

[61] *See* Delahunty & Yoo, *supra* note 3, at 834 ("The conception of the President as playing the role of 'agent' to a congressional 'principal' is but another way of framing the question of what Congress would have willed.").

[62] *See* Barron & Lederman, *supra* note 27, at 693-94 (discussing clashes between the political branches, such as when the executive acts in a manner contrary to congressional will, as situations where the President's authority will be at its lowest ebb).

[63] *See* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 8-10 (2012) (discussing the background of deferred action); Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 41 (2013) (arguing that the exercise of prosecutorial discretion should be subject to judicial review under the Administrative Procedure Act); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) (arguing for consistency in the use of prosecutorial discretion); *cf.* Nicholas v. INS, 590 F.2d 802, 805-08 (9th Cir. 1979) (discussing INS's internal criteria for using prosecutorial discretion, which also included "advanced or tender age" of subject); Memorandum from Doris Meissner, Comm'r of Immigration & Naturalization Serv., to Reg'l Dirs. (Nov. 17, 2000) (setting out criteria for the use of prosecutorial discretion, including the "advanced or tender age" of the subject).

[64] President Obama had earlier rejected assertions that he could grant temporary

that prosecutorial discretion is an important tool in the immigration enforcement repertoire.[65] It would have been both impossible and inadvisable for immigration authorities to remove each and every immigrant who lacked a legal status or otherwise ran afoul of the INA. The government had neither the resources nor the political capital to accomplish this daunting task.[66] Prosecutorial discretion makes enforcement more manageable and more precise.[67] Shortly before DACA's announcement, a group of distinguished law professors wrote an influential letter to administration officials suggesting that prosecutorial discretion could provide a rubric for executive implementation of many of the DREAM Act's provisions.[68]

protective status to childhood arrivals. *See* President Barack Obama, Remarks at Univision's "Es el Momento" Town Hall Meeting & Question-and-Answer Session (Mar. 28, 2011) (rejecting the idea that because "there are laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system, that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President").

[65] Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (acknowledging that "[a] principal feature of the [immigration] system is the broad discretion exercised by immigration officials" and that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns").

[66] The government acknowledged this problem before passage of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which permitted previously undocumented noncitizens to apply for lawful permanent resident status. *See* Plyler v. Doe, 457 U.S. 202, 218 n.17 (1982) (quoting a 1981 congressional hearing in which then-Attorney General William French Smith of the Reagan Administration admitted that "we have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens").

[67] *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 533 (2009) ("In the face of congressional inaction, then, discretion on the part of the Executive to balance public concern over immigrant influxes with pressure from consumers, employers, and the labor market through its enforcement policies may make good policy sense."); *cf.* KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 26 (2013) (suggesting that prosecutorial discretion is broad but may be limited by Congress's power); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1117-19 (2013) (arguing that President Obama's use of prosecutorial discretion in DACA was appropriate because the policy reflected reasonable enforcement priorities and it was publicly disclosed). *But see* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. (forthcoming 2014) (manuscript at 76-78), *available at* http://ssrn.com/abstract=2359685 (arguing that DACA's furnishing of blanket relief without congressional authorization exceeded presidential authority).

[68] *See* Letter from Hiroshi Motomura et al., Law Professors, to President Barack Obama (May 28, 2012), *available at* http://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf ("[T]he Executive Branch has the authority to grant . . . forms of administrative relief to some significant number of DREAM Act beneficiaries . . . .").

While prosecutorial discretion is a touchstone of immigration law, it cannot bear DACA's weight. Prosecutorial discretion to grant deferred removal[69] has typically functioned as a palliative measure after a noncitizen has been apprehended and placed in immigration proceedings. DACA, in contrast, establishes an *affirmative* immigration benefit that noncitizens can apply for just as they can seek asylum or other relief.[70]

Courts have viewed the power to defer the removal of a noncitizen as implicit in the INA.[71] That implied power, however, has a cabined context. Immigration authorities have historically decided on deferred action "on a case-by-case basis."[72] They have resorted to deferred removal interstitially, to address harshness or other case-specific exigencies. For example, in *Johns v. Department of Justice*,[73] immigration officials deferred removal of a young child pending the resolution of a state court custody litigation between the child's birth mother, a Mexican national, and two U.S. citizens who claimed that they had lawfully adopted the child.[74] If the state court ultimately

[69] *See* 8 C.F.R. § 274a.12(c)(14) (2013) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority").

[70] This distinction may account for the vigor of Justice Scalia's criticism of DACA in his *Arizona* dissent. *See Arizona*, 132 S. Ct. at 2521 (arguing that the scope of DACA coupled with the majority's assertion that the Arizona statute interfered with federal enforcement "boggles the mind"); *cf.* Bulman-Pozen, *supra* note 32, at 484 ("[S]tates seize on mandatory provisions of federal law to attempt to drive federal executive action."); Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 539-40 (2012) (arguing that states' attempts to create strict immigration policy via "mirror-image" laws interfere with "the federal government's exclusive power to control immigration policy at the national level"); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1853-58 (2011) (positing state enforcement as vehicle for pushing federal government toward stricter enforcement of immigration law); David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1148 (2012) (contending that courts should hesitate to view federal administrative action without express delegation from Congress as preempting state law).

[71] *See* Johns v. Dep't of Justice, 653 F.2d 884, 890 (5th Cir. 1981) (discussing the discretion given to the Attorney General to "ameliorate the rigidity of the deportation laws"). One famous example of deferred removal is the case of the late, great John Lennon. *See* Olivas, *supra* note 47, at 475-78; *see also* Lennon v. INS, 527 F.2d 187, 195 (2d Cir. 1975) (vacating the original order of deportation based on Lennon's conviction in the United Kingdom for possession of cannabis resin and remanding for further proceedings).

[72] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 n.8 (1999) ("[T]here is no indication that the INS has ceased making this sort of determination [in deferred-action decisions] on a case-by-case basis.").

[73] *Johns*, 653 F.2d 884.

[74] *See id.* at 888; *cf.* David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 509-10 (2008) (discussing immigration and child custody). For a useful discussion of prosecutorial discretion and how prosecutors consider factors like youth, criminal history, cooperation with law enforcement authorities, and other factors, see Mary Fan, *Rebellious*

determined that the citizens were entitled to custody, the child would have had the legal right to stay in the United States. Officials opted for deferred action because preserving the status quo while this disposition remained possible was more efficient and less disruptive than removing the child to Mexico and then seeking her return if the U.S. citizens gained custody.[75] Such interstitial measures are a far cry from the blanket relief that DACA confers, however humane the latter is in practice.

Parole, the other administrative measure cited in the law professors' letter, is a similarly slender reed.[76] Parole is authorized by statute, but is typically applied in circumstances more limited than those presented by DACA.[77] Officials grant parole on a case-by-case basis.[78] In addition, parole virtually always responds to unpredictable conditions abroad outside the United States' control,[79] such as revolutions that ramp up oppression in a foreign nation, natural disasters, or sudden migration flows when a country with traditionally closed borders, such as Cuba, decides for a brief period to permit its residents to emigrate elsewhere. Parole is not available for undocumented individuals, like those eligible for relief under DACA, who already reside in the United States and then are apprehended by immigration authorities.[80] Individuals in this category can seek bond from an immigration judge.[81] Bond, of course, is always a case-by-case form of relief.

State Crimmigration Enforcement and the Foreign Affairs Power, 89 WASH. U. L. REV. 1269, 1282-84 (2012).

[75] *Johns*, 653 F.2d at 887. In this sense, deferred removal functions much like a stay of removal granted by an appellate court. *See* Nken v. Holder, 556 U.S. 418, 427 (2009) (indicating that a stay of removal pending appeal "allows an appellate court to act responsibly," permitting consideration of merits while preventing prejudice to any party pending final decision).

[76] Letter from Hiroshi Motomura et al. to President Barack Obama, *supra* note 68.

[77] *See* 8 U.S.C. § 1182(d)(5) (2012).

[78] *See id*. (providing that the Attorney General may only parole noncitizens into the United States "on a case-by-case basis" for "urgent humanitarian reasons or significant public benefit").

[79] *Id.*

[80] *Id.* The provision of parole is limited to persons "applying for admission to the United States." *Id.* "Admission" in this context refers to persons who are outside the United States or at a port of entry. *Id.*; *cf.* Elwin Griffith, *The Meaning of Admission and the Effect of Waivers Under the Immigration and Nationality Act*, 55 HOW. L.J. 1, 12-13 (2011) (stating that "admission" under the Immigration and Nationality Act can have different meanings dependent on policy considerations relevant to the different statutory provisions that use the term).

[81] *See* 8 C.F.R. § 1003.19 (2013) (providing for the review of custody and bond service by an immigration judge); Daniel A. Arellano, Note, *Keep Dreaming: Deferred Action and the Limits of Executive Power*, 54 ARIZ. L. REV. 1139, 1147 (2012); *cf.* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 48 (2010) (criticizing arbitrariness in bond decisions that prolong detention); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained*

On the rare occasions the government has granted parole to a group, not merely isolated individuals, those occasions are clearly inapposite to the childhood arrival context. For example, the letter mentions President Jimmy Carter's parole of Cubans who arrived during the Mariel Boatlift, in which Cuba's head of state Fidel Castro permitted 125,000 people to leave Cuba.[82] While President Carter made the decision to admit the Mariel Cubans through parole, however, Congress had fifteen years earlier passed legislation – the Cuban Adjustment Act – that specifically provided eligibility to apply for permanent residence to Cubans who set foot in the United States.[83] President Carter's parole did not create new affirmative relief, but intertwined with already existing relief specifically available under the INA. It therefore did not present the change to existing law posed by DACA.[84]

Immigrants Pending Removal Proceedings, 18 MICH. J. RACE & L. 63, 68 (2012) (arguing that detention is constitutionally flawed without provision of counsel).

[82] *See* Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans – Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1735-36 (1989) (discussing the Attorney General's parole of approximately 123,000 Cubans who arrived in the Mariel boatlift).

[83] *See* Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended in scattered sections of 8 U.S.C. (2012)).

[84] The same conclusion applies to two other contexts that have attracted recent attention. In the first situation, immigration authorities will elect not to pursue removal of an individual who has been apprehended and served with a notice to appear, if the individual does not fit a checklist of enforcement priorities. *See* Memorandum from John Morton, Dir., Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 3 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (providing examples of enforcement priority factors, such as whether the individual arrived as a child, the individual's ties to the community, and the individual's criminal history). In the second context, officials have administratively closed cases where the individual subject to removal showed ties to the community, including marriage to a U.S. citizen of the same sex. *See* Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 636-38 (2012) (indicating favorable exercises of discretion in DOMA cases); Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16 (discussing one such case where federal officials cancelled deportation proceedings); *see also In re* Zeleniak, 26 I. & N. Dec. 158 (B.I.A. 2013) (holding that after the Supreme Court's decision to strike down DOMA in *United States v. Windsor*, 133 S. Ct. 2675 (2013), a same-sex spouse would qualify as a beneficiary of a visa petition by a U.S. citizen or legal resident if the marriage was valid in the state where it was celebrated). *But see* Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549, 561-67 (2012) (arguing that the Obama Administration's policy of requiring local law enforcement to share immigration information with federal officials has introduced a more punitive element that has undermined the benefits of increased federal prosecutorial discretion on immigration). Each of these contexts involves individuals for whom the removal process has already commenced. Neither context involves the blanket licensing of violations of federal law. Moreover, each initiative encompasses a group smaller than the more than one million

2. Why Prosecutorial Discretion Cannot Support DACA

If prosecutorial discretion as historically interpreted provides little or no valid precedent for DACA, the latter has a substantial problem under *Youngstown*. Category one, which entails the consent of Congress, seems ruled out, because DACA goes beyond the ordinary discretion contemplated in case-by-case adjudication. Moreover, the INA is comprehensive legislation, whose scope resembles the provisions of the labor-management legislation the Court cited in *Youngstown* itself.[85] The INA contains a number of provisions that grant noncitizens affirmative relief. For example, noncitizens who have been in the United States for a particular period of time can apply for cancellation of removal if their deportation would cause "exceptional and extremely unusual hardship" to an immediate relative who is a United States citizen or lawful permanent resident.[86] Provisions also furnish affirmative relief to survivors of domestic violence[87] and refugees.[88] The INA provides for the removal of noncitizens who *lack* any legal basis for remaining in the country, such as a visa granted pursuant to a petition by an immediate relative who is a citizen.[89] The INA's text and structure, therefore, suggest that Congress wished that noncitizens without a legal status who are not eligible for affirmative relief

potential beneficiaries of DACA. While opponents of DACA may argue that these initiatives raise similar issues, they do not undercut Congress's comprehensive immigration framework in the same way, or to a similar degree.

[85] Ironically, the opinions of the Justices on both sides in *Youngstown* cited statutory comprehensiveness and President Roosevelt's stewardship theory. Justice Tom Clark, concurring in the Court's holding, asserted that the stewardship theory had relevance where Congress was silent, but the theory could not overcome the inference of congressional opposition when Congress had already "laid down specific procedures to deal with the type of crisis confronting the President." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring). In contrast, Chief Justice Vinson's dissent argued that President Roosevelt's stewardship theory furnished support for President Truman's action. *Id.* at 688 (Vinson, C.J., dissenting) (citing Roosevelt's consideration of seizing Pennsylvania coal mines to ensure that the United States had stable energy sources during labor dispute); *cf. id.* (acknowledging criticism of President Roosevelt by his successor, President William Howard Taft (citing WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-47 (1916))). While Chief Justice Vinson did not fully spell out his argument, he seemed to be contending that while the Labor Management Relations Act contained detailed provisions on settlement of labor disputes and the Congress that had enacted the legislation had rejected an amendment that would have granted the President power to seize industrial property, the statute's text did not expressly forbid such presidential action. *Id.* at 702 (endorsing President Truman's seizure because "[t]here is no statute prohibiting seizure as a method of enforcing legislative programs").

[86] 8 U.S.C. § 1229b(b)(1)(D) (2012).

[87] *Id.* § 1229b(2).

[88] *Id.* § 1158(b)(1)(A).

[89] *Id.* § 1227(a)(1)(A) (providing for removal of aliens who enter the United States while being inadmissible); *cf. id.* § 1182(a)(6)(A) (providing that an alien who enters the United States without being admitted or paroled is inadmissible).

should remain subject to removal. Executive initiatives that unilaterally carve out substantial administrative exceptions undermine this normative framework.[90]

That brings us to *Youngstown*'s second category, which historically has focused on venerable executive practices to which Congress has repeatedly acquiesced.[91] This category includes the executive practice of settling claims with foreign nations to further foreign relations goals[92] and protecting federal land against the depredations of private development.[93] In these cases, the Court viewed Congress as acknowledging over time the need for prompt action, and found that requiring the President to either secure express congressional approval or negotiate individually with disparate stakeholders would imperil American citizens or property.[94] The Court, however, has required some evidence of a course of dealing to find acquiescence; it declined to make such a finding in *Youngstown*.[95]

[90] My goal here is not to defend the policy basis for particular immigration restrictions, but only to point out its centrality to Congress's scheme.

[91] *See* Bradley & Morrison, *supra* note 9, at 419 (explaining that "[h]istorical practice is especially pertinent in cases" arising in *Youngstown*'s second category because, as Justice Jackson explained in his concurrence, legislative acquiescence may invite presidential responsibility).

[92] *See* Dames & Moore v. Regan, 453 U.S. 654, 679-80 (1981) (finding implicit congressional approval of the "longstanding practice of settling claims [of nationals of one country against the government of another] by executive agreement").

[93] United States v. Midwest Oil Co., 236 U.S. 459, 471 (1915) (finding that the executive can make land reservations despite having no statutory authorization because Congress "uniformly and repeatedly acquiesced in the practice").

[94] *Dames & Moore*, 453 U.S. at 688 ("[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute . . . and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims."); *Midwest Oil*, 236 U.S. at 472 (recognizing that the President may make land reservations "as the exigencies of the public service required" (internal quotation marks omitted) (quoting Grisar v. McDowell, 63 U.S. 363, 381 (1867))).

[95] In a recent case, the Court found no evidence that Congress had acquiesced in the President's unilateral effort to alter state rules of criminal procedure, even when a transnational tribunal acting under a treaty ratified by the United States had declared such an action necessary for compliance with the United States' obligations under international law. *See* Medellín v. Texas, 552 U.S. 491, 495 (2008) ("[T]he non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so . . . ."); *cf.* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 663 (2008) (asserting that *Medellín* can be justified only on the theory that the underlying treaty did not create a private right of action in U.S. courts and that the President lacked the power to supply unilaterally such a right of action); Ingrid Wuerth, Medellín*: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 5-8 (2009) (suggesting

Here, no pattern has developed apart from the executive's use of case-by-case discretion. As observed previously, DACA is more expansive than the typical discretionary regime. It therefore falls outside any course of dealing in which Congress has acquiesced.[96]

Finally, we can consider the President's inherent power in *Youngstown*'s third category. The President's power over immigration, however, is limited, and hardly furnishes the support needed for the affirmative dimension of DACA. The Constitution does not mention immigration specifically.[97] Where

that the use of the *Youngstown* framework in *Medellín* was confusing and unnecessary).

[96] Courts, if they found any challenge to DACA cognizable, might accord some deference to DHS's view that it possessed prosecutorial discretion. *See* MANUEL & GARVEY, *supra* note 67, at 22-23 (discussing the *Chevron* doctrine of deference to agencies set out in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)); *cf.* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 674-75 (2000) (discussing the virtues of an appropriately cabined doctrine of deference in foreign affairs); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1257-75 (2007) (arguing against blanket deference to the executive); Landau, *supra* note 58, at 1961-77 (supporting more limited deference to the executive in national security decisions); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1227-28 (2007) (arguing for deference to the executive). I agree that case-by-case prosecutorial discretion is a valid exercise of executive power under both a *Youngstown* category two acquiescence theory and *Chevron*. *See* Martin, *A Defense of Immigration-Enforcement Discretion*, *supra* note 2, at 5-17 (critiquing view that 1996 immigration legislation barred resort to case-by-case discretion). *Chevron*, however, does not save DACA. Under *Chevron*, agency interpretations only receive deference if the underlying statute is ambiguous. *See Chevron*, 467 U.S. at 842-43. Since no provision in the INA so much as hints at the blanket relief that DACA provides, DACA fails *Chevron*'s Step One. Some might argue that DACA's blanket relief is purely administrative, not legal, since DACA does not provide successful applicants with lawful permanent residence. In this sense, it is only a temporary reprieve from removal. Importantly, however, the provisions for indefinite renewal of DACA grants, along with employment authorization and entitlement to state privileges such as driver's licenses, suggest that this view of DACA's scope is unduly narrow.

[97] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 587-88, 590 (1952) (indicating that immigration "matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference," and that "nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress"); Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 604-05, 609 (1889) (inferring the basis for Congress's plenary power over immigration from a penumbra of enumerated powers over other issues, the structure of the Constitution, and conceptions of sovereignty). Although scholars have frequently criticized the Court's approach to finding congressional authority over immigration, they have typically argued that courts should defer less to the political branches overall, not that the Constitution grants more power to the President. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 113-16 (2007) (criticizing the holding in the *Chinese Exclusion Case* that "immigration laws would receive only the most minimal sort of judicial review, if any"

it does mention matters related to immigration, it consigns them to Congress. For example, the Framers in the Migration and Importation Clause gave Congress the power to regulate the slave trade in 1808.[98] Congress also has the power to establish criteria for the naturalization of foreign-born aspiring citizens.[99] If Congress has this power, the Court has inferred it also should possess the power to regulate the admission of noncitizens who may eventually apply for naturalization.[100] Finally, Congress has power over interstate commerce and commerce with foreign nations.[101] Immigration involves the movement of individuals who often seek jobs, consume goods, buy or rent property, and both contribute and use resources. These activities necessarily affect interstate commerce, as well as commerce around the world. If these powers imply a broader power over immigration, surely that power resides in Congress.[102]

as disregarding basic constitutional standards); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059-60 (1994) (decrying judicial deference to immigration policies such as "indefinite detention" and "forcibl[e] return [of] asylum seekers to their countries of nationality without a hearing"); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 733-38 (1996) ("In creating the federal political branches' plenary power over immigration from the sovereignty perspective, the Constitution and the rights of the people essentially are ignored."); *see also* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 459-63 (2002) (critiquing judicial deference to Congress in the governance of territories). *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 100-17 (1996) (analyzing the consequences of territoriality under the Constitution); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 580-83 (1990) (arguing that courts have developed approaches to statutory interpretation to mitigate the plenary power doctrine's harsh impact on noncitizens).

[98] U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .").

[99] *Id.* art. I, § 8, cl. 4 (granting Congress the power "[t]o establish a uniform Rule of Naturalization").

[100] *E.g.*, Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (citing the fourth clause of Article I, Section 8 as giving rise to the federal government's power over immigration).

[101] U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States").

[102] If one views power over immigration as incident to sovereignty itself, the President may assert a stronger interest. *Cf.* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 160, 279 (2002) (tracing this argument from its origins). A sovereignty-based argument that favors the President over Congress, however, must still explain the contrary inferences to be drawn from the Constitution's text.

In contrast, the President possesses no enumerated powers over immigration. The closest power is the power to receive ambassadors, with the control over diplomacy that such authority implies.[103] This power, however, does not support the broad-ranging affirmative elements in DACA. The President has the authority to prioritize enforcement on a case-by-case basis, but only within the parameters that Congress has set.

Champions of presidential authority might point to dicta in Supreme Court decisions that support a more expansive conception of presidential power. For example, consider *Fong Yue Ting v. United States*,[104] in which the Court upheld a law that allowed Chinese laborers to stay in the country only if they produced a statement by a "credible white witness" that they met the statutory criteria.[105] In the process of upholding the statute, the Court asserted that in extradition cases the President could act unilaterally.[106] This discussion, however, appears in the course of an acknowledgment that the President's power over immigration was a product of congressional delegation.[107] The Court observed that a statutory delegation to the executive was "the more common method."[108] It also found that "[t]he power to exclude or to expel aliens . . . is to be regulated by treaty or by act of Congress."[109] Unilateral moves by the executive on matters such as extradition have been few and far between since the Founding Era.[110] Indeed, as discussed below,[111] President Adams's extradition of a British national without authority from Congress created a "political firestorm" and set extradition back decades.[112] President

[103] U.S. CONST. art. II, § 3; HAMILTON & MADISON, *supra* note 13, at 5, 12-13 (Alexander Hamilton) (explaining the foreign policy dimensions of the ability to receive ambassadors, including acknowledging nations' new governments and treaties made with such nations).

[104] 149 U.S. 698 (1893).

[105] *Id.* at 732 (finding that the "credible white witness" requirement is "consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of th[e] court").

[106] *Id.* at 714 ("For instance, the surrender . . . of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone . . . .").

[107] *Id.* (explaining that Congress has the right to expel aliens, but that Congress may also "submit the decision of questions . . . to the final determination of executive officers").

[108] *Id.* (stating that Congress can legislate so as to authorize the President to make final or initial determinations that will later be subject to judicial review).

[109] *Id.* at 713.

[110] *See* John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT'L L.J. 1209, 1293-1303 (2009) (discussing Chief Justice John Marshall's support for unilateral executive action in matters of foreign affairs, and acknowledging widespread rejection of these arguments).

[111] *See infra* Part II.

[112] Parry, *supra* note 110, at 1296, 1303 (finding that the election of 1800 rejected the idea of unitary executive power under treaties); *see infra* Part II.B (discussing President

Abraham Lincoln's repatriation of a prisoner to Cuba without a judicial hearing was also controversial, and never to be repeated.[113] Dicta in a later case, *United States ex rel. Knauff v. Shaughnessy*,[114] also asserted an executive prerogative over immigration.[115] That case, however, turned on the constitutionality of a *statute* that delegated power to the executive branch to deal with the immigration consequences of national security emergencies.[116]

One historical episode – President Truman's continuation of the Bracero Program (or Guest Worker Program) from 1948 through 1951 – suggests a broader presidential power.[117] Viewing this episode, however, as an example of inherent executive power requires a number of caveats. First, the episode occurred in the context of extraordinary labor shortages that had started during World War II and continued afterward.[118] The Supreme Court had given the President deference on determining exactly when the war ended for purposes of presidential authority under the Alien Enemies Act, and Congress may have recognized that during this particularly exigent period the President would have comparable authority over temporary workers.[119] Second, in 1950,

Adams's action and its consequences).

[113] *See* John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 117-18 (2002) ("The fact that Congress – in the middle of the Civil War and relieved of its southern members – raised concerns about the extradition . . . suggests both the impropriety of [the] action[] and the weak precedential value of the . . . extradition.").

[114] 338 U.S. 537 (1950).

[115] *Id.* at 542 (asserting that "[t]he exclusion of aliens is a fundamental act of sovereignty" that is "inherent in the executive power to control the foreign affairs of the nation").

[116] *Id.* at 540-42 (rejecting the petitioner's argument that a statute enacted during World War II that gave the executive branch power to exclude foreign nationals whose entry would be "prejudicial to the interests of the United States" was an unconstitutional delegation, because "exclusion of aliens is a fundamental act of sovereignty . . . stem[ming] not alone from legislative power but . . . inherent in the executive power to control the foreign affairs of the nation").

[117] *See* Cox & Rodríguez, *supra* note 67, at 489 (explaining that President Truman continued the program in spite of legislation requiring the opposite).

[118] *Id.* at 540.

[119] *See* Ludecke v. Watkins, 335 U.S. 160, 167 (1948) ("War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act . . . is not exhausted when the shooting stops."); Cox & Rodríguez, *supra* note 67, at 489 (discussing this aspect of presidential power over immigrant temporary workers). In immigration, the Court seemed to view the President's authority over the conduct of hostilities during World War II as melding with authority in the Cold War that followed. *See Knauff*, 338 U.S. at 543 (citing legislative and executive power over immigration "during a time of national emergency" in rejecting claims of a foreign national arising from her permanent exclusion from the United States in 1948); *see also* Dalehite v. United States, 346 U.S. 15, 19, 40-41 (1953) (rejecting governmental liability under the Federal Tort Claims Act for a catastrophic explosion caused by failure to properly store combustible fertilizer, on the ground that lack of care was a policy decision prompted by the need for

President Truman established a Commission on Migratory Labor that studied the Bracero Program and ultimately made negative findings regarding the program's effect on United States citizen workers.[120] These findings, which eventually catalyzed political momentum for the program's termination in 1964,[121] may have amounted to a presidential concession that the program was being continued on a purely provisional basis, pending receipt of the Commission's findings. In other words, the President was not seeking to replace congressional authority with his own, but was merely trying to preserve the status quo while gathering information that would enhance Congress's ability to make a definitive decision on the Program's fate. Moreover, the Bracero Program by definition involved temporary workers engaged in seasonal employment, who often returned to Mexico for significant periods annually and remitted large portions of their salaries to families in Mexico.[122] In contrast, the childhood arrivals benefited by DACA are United States domiciliaries, not temporary residents. Indeed, the equities attached to that domicile are a principal rationale for the President's action.[123] DACA therefore has more far-reaching immigration consequences than the Bracero Program. In light of all of these concerns, President Truman's continuation of the Bracero Program is hardly a decisive precedent for the presidential power exercised in DACA.

II. PROTECTION OF INTENDING CITIZENS AND PRESIDENTIAL STEWARDSHIP

Although the prosecutorial discretion theory is inadequate to support DACA, a more promising avenue is accessible. The President may well have provisional authority to protect foreign nationals with some affiliation to the United States from adverse action by *nonfederal* sovereigns, including states. From the Founding Era on, Presidents have exercised such power. Defenders of this protective power have typically viewed it as a product of dialogue with

speedy export of fertilizer to occupied territories following World War II).

[120] Cox & Rodríguez, *supra* note 67, at 489 (explaining that the report "documented the high levels of illegal immigration that had accompanied the Bracero Program and the depressive effect this immigration had had on the wages of U.S. citizen workers").

[121] *Id.* at 489-90 (stating that, although Congress extended the program for years following the Commission on Migratory Labor report, the concerns raised in the report "eventually contributed to the program's demise" in 1964).

[122] The Bracero Program, and guest-worker programs generally, have remained a source of controversy among policymakers and scholars. *Compare* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 74-82 (1992) (arguing that the Bracero Program exploited Mexican labor), *with* Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047, 1054 (2011) (observing that guest workers in the United States can realize substantially more value from their labor than they could by remaining in their country of origin).

[123] Memorandum from Napolitano, *supra* note 1, at 2 (commenting that many of those eligible for DACA know nothing of their native countries and "contribute[] to our country in significant ways").

the other branches, which Hamilton contended promoted "deliberation and circumspection."[124] In this sense, the presidential decisions I link with stewardship belong in Justice Jackson's second *Youngstown* category, in which Congress has not authorized the President's action but has invited it through silence.

The President's stewardship stems from the Constitution's Take Care Clause[125]: the "Laws" that the President must "faithfully execute[]" include not only laws already passed by Congress, but the values underlying the Framers' vision of a strong federal government, including the federal government's ability to comply with international law,[126] provide for the protection of its own officials,[127] and ensure the free movement of persons and goods between states.[128] The President who takes such action against the backdrop of congressional silence acts as Congress's agent, not its adversary. While President Theodore Roosevelt's theory of stewardship extolled what Hamilton had called the President's ability to act with "energy" and "dispatch,"[129] even Roosevelt often cooperated with Congress and regarded his unilateral moves as defusing forces that would have undermined Congress's ability to legislate.[130] Stewardship in the protection of U.S. citizens and foreign nationals alike involves four attributes: provisionality (not unilateralism), comparative institutional advantage, synergy between aid to U.S. citizens and foreign nationals, and reasoned elaboration.

To understand how Presidents have interpreted these factors, it is useful to first consider the contours of harm to U.S. citizens or foreign nationals that will trigger presidential protective action. The notion of protection, as used in the eighteenth and nineteenth centuries, included not only citizens, but also aliens with ties to the state based on a range of factors, including residence, stay in

[124] *See* THE FEDERALIST NO. 70, *supra* note 12, at 427 (Alexander Hamilton).

[125] U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

[126] *See* THE FEDERALIST NO. 42, *supra* note 12, at 265 (James Madison) (deploring that the Articles of Confederation had permitted "any indiscreet member [state] to embroil the Confederacy with foreign nations").

[127] *In re* Neagle, 135 U.S. 1, 62 (1890) (asserting that, because of federal supremacy, state governments cannot arrest or obstruct federal officials acting in the scope of their offices).

[128] *In re* Debs, 158 U.S. 564, 582 (1895) ("The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce . . . .").

[129] THE FEDERALIST NO. 70, *supra* note 12, at 426 (Alexander Hamilton); *see also* ROOSEVELT, *supra* note 7, at 357 (outlining stewardship theory); *cf.* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2084-87 (2009) (analyzing President Roosevelt's theory and approach to governance).

[130] *See infra* notes 275-78 and accompanying text (discussing President Roosevelt's conservation policy).

the course of a visit, and physical presence.[131] Blackstone, for example, noted that "the prince affords . . . protection to an alien only during his residence."[132] On occasion, individual states and the federal government sought to inquire about the loyalty of particular aliens.[133] Disloyal aliens who had violated municipal laws could be detained and subjected to criminal punishment.[134] Individual states, however, generally acknowledged that detaining aliens required some individualized suspicion of harm.[135] Over time, even this right of individual states became less clear, as worries increased about the effects of disparate, biased, or capricious state enforcement.[136]

The definition of harm to citizens or others that would trigger protection was flexible, including both diffuse and specific risks. One example dates from the Founding Era: President Washington's Neutrality Proclamation of 1793. Although this example principally addressed harm to current U.S. citizens, Alexander Hamilton justified it through interpretive moves that have influenced subsequent invocations of the President's stewardship authority.[137]

The Neutrality Proclamation[138] was a response to the machinations of French Minister Edmond Genet that threatened to embroil the United States in

[131] J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 502-03 (2007) (explaining that in eighteenth- and early-nineteenth-century England and America, aliens were "under the protection of the sovereign's municipal laws"); *cf.* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1858-59 (2009) (discussing the application of the concept of protection during the Revolutionary War).

[132] Kent, *supra* note 131, at 503 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *370).

[133] *Cf.* Hamburger, *supra* note 131, at 1854 (describing how "states used their treason and loyalty statutes for their own ends," for example to "pressure disloyal citizens and visiting aliens towards greater loyalty").

[134] *Cf. id.* at 1853 (citing a resolution of the Continental Congress during the American Revolution that urged states to pass legislation that would provide for the prosecution of resident aliens who engaged in treasonous activities).

[135] *See id.* at 1928-31 (recounting Virginia Governor Henry's struggle in 1785 to find a basis to detain Algerian men present in his state and suspected of planning an attack); *id.* at 1930 (acknowledging that some states permitted detention of aliens without express authorization from the legislature).

[136] *See* Chy Lung v. Freeman, 92 U.S. 275, 278 (1875) (striking down a state immigration measure on the grounds that its discriminatory application subjected immigrants "to systematic extortion of the grossest kind").

[137] Skowronek, *supra* note 129, at 2078 (explaining how President Roosevelt based his presidential stewardship theory on Hamilton's arguments in support of the Neutrality Proclamation).

[138] *Proclamation of Neutrality* (Apr. 22, 1793), *reprinted in* 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 430-31 (John C. Fitzpatrick ed., 1939) (declaring the United States' neutrality in the war between Austria, Prussia, Sardinia, Great Britain and the Netherlands and announcing that U.S. citizens who are prosecuted for involvement in the war will not receive protection from the

the conflict between Britain and France.[139] Harm to citizens could stem from two sources. First, individual citizens could enlist in the conflict, thereby exposing themselves to the risks of both war and prosecution as what Vattel called *banditti* engaging in violence without state authority.[140] The actions of these citizens could then spark retaliation against the United States. Second, a decision by the United States *government* to enter the conflict at France's side would subject the new republic to Britain's military might.[141] War with Britain, Hamilton noted, would be "most dangerous,"[142] since the "resources . . . [of the United States were] not great" and its military was not prepared for such a struggle.[143] Presidential action, Hamilton argued, was necessary to avert these harms.[144]

A. *The Neutrality Proclamation and Provisionality*

The Neutrality Proclamation was successful because it *rejected* unilateral presidential power and embraced dialogue between the President and Congress. The Proclamation was a provisional measure. In accordance with Justice Jackson's formulation, the Proclamation did not defy Congress, but instead filled a gap caused by congressional silence. This provisionality

U.S. government).

[139] *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 332-53 (1993) (describing Genet's failed attempts of "rousing" Americans and Canadians to "cast off the yoke of their oppressors"); MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 78-80 (2007) (describing President Washington's response as far from obvious, and recognizing the important consequences of the Neutrality Proclamation); Flaherty, *supra* note 14, at 44 (detailing Genet's tactics in trying to secure American support for France).

[140] EMER DE VATTEL, THE LAW OF NATIONS § 227 (Béla Kapossy & Richard Whatmore eds., Liberty Fund, Inc. 2008) (1797) (explaining that the military alone can wage war for a country, and that civilians who are captured when engaging in warfare will not "receive such treatment as is given to prisoners taken in regular warfare"). President Jefferson, who was sympathetic to France, nevertheless warned individual citizens about the grave risks of such conduct. *See* Letter from Thomas Jefferson, U.S. Sec'y of State, to Edmond C. Genet, French Minister to the U.S. (June 17, 1793), *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON 131, 136 (Andrew A. Lipscomb ed., 1903), *quoted in* 10 ANNALS OF CONG. 596, 599 (1800) (remarks of John Marshall) (warning that enticing "citizens . . . to commit murders and depredations on the members of nations at peace with us . . . [was] as much against the law of the land as to murder or rob [other United States citizens]").

[141] HAMILTON & MADISON, *supra* note 13, at 24, 26-27 (Alexander Hamilton) ("With the possessions of Great Britain and Spain on both flanks . . . and with the maritime force of all Europe against us, . . . it is impossible to imagine a more unequal contest . . . .").

[142] *See id.* at 39, 46 (Alexander Hamilton).

[143] *Id.* at 43 (Alexander Hamilton).

[144] *Id.* at 28 (Alexander Hamilton) (arguing that "the duty and the interest of the United States dictated a neutrality in the war," and that the President was "fully justified" in making the Neutrality Proclamation).

emerged in two respects: The Proclamation's protection of Congress's warmaking prerogatives, and its path to codification of criminal penalties for citizens assisting France in the European conflict.[145]

In the first respect, Hamilton artfully turned the President's claim of the power to interpret treaties into a healthy respect for Congress's authority. Hamilton readily conceded that the legislature could declare war, entering the European conflict if it chose.[146] Hamilton argued, however, that the President would unduly slight Congress's prerogatives if he casually interpreted treaty obligations as requiring war.[147] As Hamilton put it, if "the legislature have a right to declare war, it is . . . the duty of the executive to preserve peace, till the declaration is made."[148]

To preserve peace, Hamilton asserted, the President needed latitude in interpreting treaties that threatened to entangle the United States in foreign wars. Hamilton argued that both the Constitution's Take Care Clause[149] and the President's power to receive ambassadors[150] allowed the President to interpret the treaty with France against the backdrop of the United States' modest resources.[151] Elaborating on America's weakness, Hamilton explained that the new republic was incapable of "external efforts which could materially serve the cause to France."[152] The President was free, Hamilton reasoned, to interpret the treaty so as not to require futile measures whose only effect would be risk to the United States.[153]

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[145] *Proclamation of Neutrality*, *supra* note 138, at 430-31 (announcing the country's intentions to maintain neutrality in the conflict and the possibility of criminal sanctions against citizens who intervene).

[146] HAMILTON & MADISON, *supra* note 13, at 5, 14 (Alexander Hamilton) ("[T]he legislature can alone declare war . . . .").

[147] *Id.* at 11 (Alexander Hamilton) (arguing that, since Congress had not declared war, the President was obligated to enforce neutrality in order to conform with Congress's wishes).

[148] *See id.* (Alexander Hamilton).

[149] U.S. CONST. art. II, § 3.

[150] *Id.* ("[H]e shall receive Ambassadors and other public Ministers . . . .").

[151] HAMILTON & MADISON, *supra* note 13, at 5, 9-10, 14 (Alexander Hamilton) (arguing that these powers are examples of the President's general executive power and that it was within the President's power to consider international law and treaties and issue the Neutrality Proclamation).

[152] *Id.* at 43 (Alexander Hamilton).

[153] *Id.* at 15 (Alexander Hamilton) (explaining that the President executes both laws and treaties, and, as such, has the power to execute the treaty with France). One can also read Hamilton more broadly, as arguing for sweeping, unilateral presidential power. *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 11-24 (2005) (tracing a broad view of executive power). *But see* Bradley & Flaherty, *supra* note 14, at 664-87 (critiquing this view based on evidence from the Founding Era); *cf.* Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 82-97

The evolution of neutrality policy also demonstrated the importance of provisionality in another way. While a number of the Framers of the Federalist persuasion, including John Jay and James Wilson, believed that the United States could base criminal prosecutions on violation of the Proclamation or of international law,[154] the Administration quickly pivoted toward a partnership with Congress.[155] Popular constitutional sentiment opposed the prosecution of citizens for mere violation of the Proclamation's terms.[156] That feeling found expression in the well-publicized acquittal of a citizen who had allegedly heeded Genet's bid to encourage American privateers.[157] Bowing to this popular preference, President Washington worked with Congress to enact a statute that codified the Proclamation's bar on assistance to the warring European powers.[158]

(2007) (citing historical evidence as limiting the scope of the Commander-in-Chief Clause).

[154] *See* Henfield's Case, 11 F. Cas. 1099, 1103-04 (C.C.D. Pa. 1793) (No. 6360) (grand jury charge of Jay, C.J.) (explaining that as the Neutrality Proclamation established the country's neutrality in the war, individuals break the law by intervening in the hostilities); *cf. id.* at 1119-21 (grand jury charge of Wilson, J.) (asserting that common law prosecution was permissible, labeling individuals who defied neutrality policy as short-sighted, and commenting that, by risking war, such individuals would be "destroying not only those with whom we have no hostility, but destroying each other").

[155] *See* Bradley & Flaherty, *supra* note 14, at 675 (describing President Washington's report to Congress concerning the Neutrality Proclamation).

[156] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 3-4 (2004) (describing popular celebrations following the acquittal of a defendant charged for his involvement in the war); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 434 (2012) (describing the anger of French supporters in their reaction to the prosecution of Henfield, a citizen who enlisted in the French military).

[157] *See* KRAMER, *supra* note 156, at 3 ("The jury['s] . . . verdict triggered celebrations throughout the nation."); Reinstein, *supra* note 156, at 439 (explaining that the jury acquitted Henfield, the defendant, despite explicit grand jury instructions that the opposite verdict was correct); *cf.* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1602-15 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)) (assessing arguments against popular constitutional interpretation, or interpretation by members of the general public and elected officials); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 861-66 (2011) (cautioning that popular constitutionalism is a double-edged sword that can protect liberty but is also susceptible to manipulation).

[158] *See* Reinstein, *supra* note 156, at 440. While controversy attended efforts to prosecute violations of the Neutrality Proclamation as common law crimes, no one doubted that Congress had the power to prohibit such conduct. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 850-51 (1997) (arguing that "statements made in connection with neutrality prosecutions in the 1790s" did not establish that common law encompassed international law).

B. *Impressment, Synergy, and President Adams's Failure to Protect*

Presidential moves to protect either citizens or foreign nationals acquire greater legitimacy when the executive can show that the action reinforces both U.S. interests and the broader global movement toward human rights. Presidents who harmonize these two realms have a deeper reservoir of credibility. Synergy of this kind signals an attribute discussed in the next Subsection – the President's ability to exercise judgment while others succumb to myopia or haste. This enhanced legitimacy generates congressional acquiescence under category two of Justice Jackson's *Youngstown* analysis. In contrast, as President Adams found out in the course of extraditing the British seaman and accused mutineer, Thomas Nash, who claimed to be an American citizen named Jonathan Robbins,[159] Presidents who unilaterally disregard such synergy breed constitutional crises.[160]

Britain had sought extradition of Nash pursuant to Article 27 of the Jay Treaty, which purported to authorize the extradition of individuals sought by either country on charges of murder or forgery.[161] Nash, a former petty officer, had allegedly led a mutiny against a notoriously brutal captain in the Royal Navy.[162] The captain was infamous among Americans for his long track record of impressing American seamen.[163] In the course of the mutiny, the captain was killed, as were a number of other officers.[164]

For key players in the Founding Era, extradition was bound up with emerging conceptions of asylum and human rights. Jefferson, writing in his capacity as Secretary of State, observed that extradition of criminal offenders to a requesting state often triggered human rights concerns, because it was

[159] *See* POWELL, *supra* note 15, at 79-89; Larry D. Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 ESSEX INST. HIST. COLLECTIONS 99, 100-08 (1975); Parry, *supra* note 110, at 1295-303; David L. Sloss, *Executing* Foster v. Neilson*: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 146-49 (2012) (reviewing Chief Justice John Marshall's justification of President Adams's power to enforce the treaty calling for Robbins's extradition). *See generally* Wedgwood, *supra* note 15.

[160] *See* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1976 n.10 (2010) (describing an episode as the "cautionary tale of executive power for decades to come").

[161] Wedgwood, *supra* note 15, at 266, 302 (explaining the ratification of Article 27 of the treaty and the trial judge's application of the article to Nash).

[162] *Id.* at 235-37 (describing the mutiny on the *Hermione* and the "tyranny" of the ship's captain).

[163] *See id.* at 283. Anger over impressment helped build the animosity with Britain that eventually brought on the War of 1812. *Id.* at 320 ("Impressment's gall and burr would disquiet American-British relations for the next forty years. The issue yielded the 1812 War . . . ."). Indeed, as we shall see, impressment was a major issue through negotiation of the Webster-Ashburton Treaty of 1842.

[164] *See* Niklas Frykman, *The Mutiny on the* Hermione*: Warfare, Revolution, and Treason in the Royal Navy*, 44 J. SOC. HIST. 159, 163-66 (2010).

"difficult to draw the line between [ordinary crimes] . . . and acts rendered criminal by tyrannical laws only."[165] Most other authorities agreed that the human right of asylum should trump comity between nations when the alleged offense was political in nature.[166] Pursuant to a grant of asylum, individuals accused of a political offense by their country of origin were "under the protection of the laws" of the host state.[167] Britain's brutal treatment of its sailors in the 1790s[168] invited the Jeffersonian response that extrajudicial remedies, such as mutiny, were appropriate.[169] That the British resorted to the impressment of sailors from other fleets, including America's, to meet their naval needs only reinforced the Jeffersonian view.[170] The Jeffersonians' indignation at British brutality here intertwined with America's broader view of nationality.

While Britain desperately sought to man its fleet, America sought seamen for a fleet of its own. To that end, Congress reacted to impressment in 1796 by passing an Act for the Protection and Relief of American Seamen, which allowed seamen to apply for certificates of American nationality.[171] It seems likely that American officials were overinclusive in granting certificates, providing documentation to a significant number who were in fact British seamen fleeing the rigors of His Majesty's navy.[172] Liberal grants of American

[165] *See* Letter from Thomas Jefferson, U.S. Sec'y of State, to President George Washington (Nov. 7, 1791), *reprinted in* 3 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 131, 132 (Thomas Jefferson Randolph ed., 1829).

[166] *See* Commonwealth *ex rel.* Short v. Deacon, 10 Serg. & Rawle 125, 130 (Pa. 1823) ("[W]hen government becomes oppressive, the best citizens, with the best intentions, may be implicated in treason . . . [therefore in such cases] asylum is always granted by liberal and enlightened nations.").

[167] *Id.* at 132-33 (quoting Letter from Thomas Jefferson, U.S. Sec'y of State, to Edmond C. Genet, French Minister to the U.S. (Sept. 12, 1793), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 177, 177 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1833)).

[168] *See* Frykman, *supra* note 164, at 167 (considering the "truly horrifying conditions of naval warwork in the 1790s").

[169] *Short*, 10 Serg. & Rawle at 130 (explaining that when a government is tyrannical, treason may be the correct response).

[170] *See* Wedgwood, *supra* note 15, at 269 (indicating that in "the early proceedings raised by the *Hermione* mutiny," impressment was deemed "a proper cause for shipboard rebellion").

[171] The statute was enacted on May 28, 1796. An Act for the Relief & Protection of American Seamen, ch. 36, 1 Stat. 477 (1796) (authorizing the President to provide for the protection of American seamen); *see* DOUGLAS L. STEIN, AMERICAN MARITIME DOCUMENTS, 1776-1860, at 146 (1992).

[172] *Cf.* STEIN, *supra* note 171, at 145 (explaining that to obtain a certificate, a seaman only had to produce a notarized affidavit and that the system "was easy to abuse"). Indeed, the defenders of President Adams in the House of Representatives' extensive debate on the Nash/Robbins affair claimed that the certificate presented by Nash had been procured by fraud. *See* 10 ANNALS OF CONG. 566 (1800) (statement of Rep. Bayard) ("What could be

nationality to seamen also reflected the deeply held American perspective, informed by Enlightenment philosophers such as John Locke, that individuals had greater latitude in choosing the state to which they owed allegiance.[173] Declining extradition in Nash's case would have struck a blow for the liberal American approach, which enhanced individual choice and, not so incidentally, aided America's nascent naval aspirations.

Instead, the Adams Administration violated a course of dealing with Congress and shortchanged both the human rights aspect of the case and Nash's claim that he was actually Jonathan Robbins, an American citizen owed protection by his government. Although the Washington Administration had interpreted the Consular Convention with France as requiring an express grant of jurisdiction by Congress,[174] the Adams Administration ignored this

more easy than for this Thomas Nash, this perjured pirate and murderer, to have got a certificate, when he murdered some man, or he might have procured it by purchase or favor.").

[173] *See* Josh Blackman, *Original Citizenship*, 159 U. PA. L. REV. PENNUMBRA 95, 104-09 (2010) (discussing Locke's influence on the Framers); *cf.* Charles Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 318-19 (1965) (discussing the theoretical and practical background of impressment disputes culminating in the War of 1812).

[174] Judicial Discretion, 1 Op. Att'y Gen. 55, 55 (1795) (discussing *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795), in which the Supreme Court had declined to issue a writ of mandamus against a district court that had found that a French national was not a deserter and therefore could not be delivered under the Convention). Albert Gallatin, later Secretary of the Treasury and one of the leaders of the Jeffersonians' vigorous (albeit ultimately unsuccessful) effort to censure Adams for his conduct of the affair, cited the Consular Convention. Wedgwood, *supra* note 15, at 336-37. He noted that the Jay Treaty was even less specific than the Consular Convention with France, which had expressly designated judges as participants in the execution of the Convention's terms but had still been found wanting by Washington. *See id.* at 336-38 (discussing Gallatin's arguments); *see also* JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 96 (2002) (same).

John Marshall, who just prior to his appointment as Chief Justice was President Adams's staunchest congressional defender, contended that the President had the sole power to determine whether Nash was a citizen, thus rendering that decision effectively unreviewable. 10 ANNALS OF CONG. 596, 617 (1800). Marshall conceded that Congress may "prescribe the mode" of executing treaty obligations, *id.* at 614, which lead some to view this passage as qualifying Marshall's much quoted view that the President is the "sole organ" of the nation in foreign affairs. *Id.* at 613; *cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (citing Chief Justice Marshall in asserting broad presidential power). *Compare* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 59-60 (5th ed. 2011) (arguing that Chief Justice Marshall intended only to say that the President was charged with the primary responsibility for communicating with foreign nations), *with* POWELL, *supra* note 15, at 87-89 (recognizing Marshall's qualification, but arguing that Marshall was making a broader argument about presidential power). This more tempered interpretation of Marshall's meaning, however, clashes with Marshall's assertion elsewhere in his remarks that the scope of the nation's duties under Article 27 of the Jay Treaty was a

understanding. Secretary of State Pickering gave judicial independence short shrift[175] when he informed the district court, which was sitting without legislatively conferred jurisdiction, that President Adams "advi[sed] and request[ed]" that the court deliver Nash to the British.[176] The evidence adduced against Nash was slender; Nash's arrest in Charleston came after a report by a disgruntled crewmate who claimed to have overheard a conversation in a tavern in which Nash acknowledged that he had served on the vessel on which the mutiny took place.[177] Through Judge Bee, however, the court made little effort to discern whether President Adams's proffer of Nash's guilt satisfied the legal standard, or whether the mutiny was a political offense, because of the brutality of the practices to which the mutineers were subject.[178] Judge Bee also dismissed out of hand Nash's claim that he was actually a U.S. citizen who had resorted to mutiny as self-help against impressment.[179] While Nash produced an affidavit of his intent to become a citizen allegedly made in New York in 1795, Judge Bee declined to credit this evidence.[180] The court quickly

matter of "political law" beyond the cognizance of the courts. 10 ANNALS OF CONG. 596, 613 (1800). The Supreme Court has subsequently rejected this view. *See* Medellín v. Texas, 552 U.S. 491, 491 (2008) (rejecting the President's reading of the provisions of the United Nations Charter and Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, June 8, 1967, 21 U.S.T. 325, 596 U.N.T.S. 486); Valentine v. United States, 299 U.S. 5, 7 (1936) (holding, despite the President's argument to the contrary, that an extradition treaty that did not expressly confer the power to extradite U.S. citizens to a foreign country precluded this result). *See generally* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1766-70 (2007) (discussing approaches to deference).

[175] This disregard of judicial independence was problematic because both Jeffersonians and Federalists were most likely familiar with British precedents on habeas corpus, in which noted jurists such as Lord Mansfield showed marked solicitude for the plight of wrongly impressed seamen. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 116 (2010); *cf*. Eric M. Freedman, *Habeas Corpus in Three Dimensions – Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591, 612 (2011) (discussing the interaction of habeas and impressment, including settlements out of court brought on by authorities' receipt of the writ); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 974 (commenting on the flexibility of British judges granting relief pursuant to habeas in impressment cases (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010))).

[176] *Cf*. Sloss, *supra* note 159 (discussing the underlying facts of the dispute); Wedgwood, *supra* note 15, at 290 (same).

[177] *See* Wedgwood, *supra* note 15, at 286-87. Wedgwood concluded, based on a review of documentary evidence, that Nash's claim was probably false, *see id.* at 308 (holding that ship's books reflected that Nash was born in Waterford, Ireland), but nonetheless faulted the judge for a hasty decision, *see id.* at 304-05.

[178] United States v. Robins, 27 F. Cas. 825, 833 (D.S.C. 1799) (No. 16,175).

[179] *Id*. at 832.

[180] *Id*. ("Nor does it make any difference, whether the offence is committed by a citizen,

complied with President Adams's "request" that Nash be delivered to the British.[181] The British just as quickly tried, convicted, and executed Nash.[182] The district court's haste did not inspire confidence in its own diligence or that of the Adams Administration.

Adams's disregard of the value of synergy between human rights and the protection of a self-avowed intending American became a "cautionary tale,"[183] setting the stage not only for President Jefferson's election, but also for the end of the Federalists as a national party. Extradition was a dead letter in the United States for almost a half century.[184] The pushback against President Adams suggested that protection of intending Americans put a ratchet into presidential stewardship. Decisions to protect intending Americans against harm caused by nonfederal sovereigns will usually receive deference. Turning a blind eye to such harm, however, spawns doubt about the President's ability to "faithfully execute" the laws.[185]

C. *The President's Institutional Edge*

While President Adams's delivery of Nash/Robbins to Britain is an example of what *not* to do, the 1853 rescue of refugee Martin Koszta encountered a far more positive reception. The Koszta episode illustrated the presidency's institutional advantages. Presidential "energy"[186] can prevent irreparable harm. Moreover, when presidential action preserves federal interests endangered by individual states, the President can both cut transaction costs and claim the

or another person. This will obviate the objection made by the counsel on that head. And I cannot but take this occasion to observe, that the two papers produced by the prisoner, are only affidavits of his own, or a certificate founded on an affidavit, which are not evidence . . . .").

[181] *Id.* at 833.

[182] *See* Frykman, *supra* note 164, at 175.

[183] *See* Parry, *supra* note 160, at 1975 n.10. The account in the text may be somewhat uncharitable toward President Adams, who arguably was guilty of a political tin ear rather than any more profound failing. *See* Wedgwood, *supra* note 15, at 234 ("The few truncated accountings of the Robbins affair have not discerned what were Adams'[s] actual demerits and extenuations in this case of alleged interference with the independence of the judiciary and disregard of the domain of the House, nor have they measured Adams'[s] involvement against his own revolutionary youth, when he defended American sailors charged for resisting British impressment."). Indeed, Adams's cardinal motivation may have been avoiding a confrontation with Britain. The Jeffersonian Republicans were less reticent about provoking Britain and more solicitous of the rights of actual or putative American citizens. This sentiment carried the day in the election of 1800, as it did in the lead-up to the War of 1812.

[184] *See* Holmes v. Jennison, 39 U.S. 540, 582 (1840) (holding that the absence of a federal extradition treaty prohibited the state from engaging in extradition).

[185] U.S. CONST. art. II, § 1, cl. 8.

[186] *See* THE FEDERALIST NO. 70, *supra* note 12, at 423 (Alexander Hamilton) ("Energy in the executive is a leading character in the definition of good government.").

benefit of the "temperate and cool" frame of mind identified with the federal government by John Jay in *Federalist No. 3*.[187]

1. Acting in Time: Rescuing Refugees

When time is of the essence, executive power has no peer. As Hamilton noted in *Federalist No. 70*, the executive possesses the vital attribute of "dispatch."[188] Congress must wait for the mobilization of individual members in two houses. Courts have to wait for the pleas of litigants and carve out time for the submission of evidence. The President can set plans in motion expeditiously.[189]

Decades after the Nash/Robbins episode, as the United States began to assert a greater role in world affairs, time drove President Franklin Pierce's decision to provide protection overseas to an individual who was not yet a citizen. Martin Koszta was a refugee who had participated in the gallant but failed Hungarian Revolution of 1848. After Austria crushed the revolt, Koszta fled to New York, where he completed a declaration of his intent to naturalize.[190] Koszta then traveled to Turkey, where a number of refugees from the revolution had gathered.[191] Austrian officials hired Greek thugs to kidnap Koszta,[192] planning to ship him back to their empire for interrogation, trial, and a speedy execution.[193] A U.S. captain at the Turkish port of Smyrna who learned of Koszta's plight threatened to block the Austrian vessel holding Koszta from leaving port, and demanded that the Austrians deliver Koszta to the custody of the French charge d'affaires pending resolution of the matter.[194] The President backed up the commander's decision, setting a clear contrast with the Nash/Robbins affair, where a sailor's relatively brief stay on U.S. territory and claimed impressment from a U.S. vessel triggered demands by an

[187] THE FEDERALIST NO. 3, *supra* note 12, at 45 (John Jay) ("[The national government] will be more temperate and cool, and in that respect, as well as in others, will be in more capacity to act with circumspection than the offending State.").

[188] THE FEDERALIST NO. 70, *supra* note 12, at 424 (Alexander Hamilton).

[189] The executive branch is not always unitary in practice. *Cf.* Rebecca Ingber, *Interpretation Catalysts and Executive Branch Decisionmaking*, 38 YALE J. INT'L L. 359, 360 (2013) (analyzing how players within the executive branch can use interactions with transnational bodies such as the United Nations to persuade colleagues in the executive branch to promote rule of law goals); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an "It*,*"* 96 MINN. L. REV. 194, 195 (2011) (discussing disagreements within the executive branch).

[190] H.R. DOC. NO. 33-91, at 18 (1853).

[191] *Id.* at 15.

[192] *Id.* at 11 (recounting that in Smyrna, Koszta had been "set upon by some fifteen ruffian[s] . . . all armed . . . [and] said to have been employed for that purpose by the Austrian consul").

[193] *See id.* at 37 (observing that, absent American intervention, Koszta would have been "hurried off [by Austrian agents] to meet a certain and ignominious death").

[194] *Id.* at 42.

outraged public for government protection that President Adams declined to provide.[195]

In a memo from Secretary of State William Marcy, the Pierce Administration justified its action based on Koszta's intending or "affiliated" citizenship and the duty, much remarked on in the debates about the Nash/Robbins affair, to refrain from extradition of political offenders.[196] Secretary of State Marcy indicated that Koszta's acquisition of citizenship was not necessary to the United States' claim of support under international law; rather, Marcy explained, the touchstone was Koszta's domicile:

> [International law] gives the national character of the country not only to native-born and naturalized citizens, but to *all* residents in it who are there with, or even without, an intention to become citizens, providing they have a domicil therein. Foreigners may, and often do, acquire a domicil in a country, even though they have entered it with the avowed intention not to become naturalized citizens, but to return to their native land . . . .[197]

For Marcy, Koszta's stay of twenty-three months in New York was sufficient to establish domicile and thus oblige the United States to protect him against harm.[198] Rather than endure the shame resulting from President Adams's default in the Nash/Robbins affair, presidential protection in Koszta's case became a building block of presidential authority, which the Supreme Court praised in a noted decision later in the nineteenth century as "[o]ne of the most remarkable episodes in the history of our foreign relations."[199]

The Koszta affair also entailed synergy with international law. U.S. officials asserted that their protection of Koszta would positively affect other nations' treatment of *non-U.S. nationals*.[200] A U.S. diplomat in Turkey asserted that Austria had engineered Koszta's seizure as the start of a round up of Hungarian refugees.[201] Ambassador Marsh predicted that the decisive American action would have a "salutary effect in checking the course of illegal violence and . . . persecution."[202] America's protection of Koszta reinforced the norms that the Jeffersonians had championed in the Nash/Robbins matter: the use of regular

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[195] *Id.* at 60.

[196] *See* Letter from William M. Marcy, U.S. Sec'y of State, to Baron von Hulsemann, Austrian Charge D'Affaires (Sept. 26, 1853), *reprinted in* CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND THE CHARGE D'AFFAIRES OF AUSTRIA RELATIVE TO THE CASE OF MARTIN KOSZTA 12 (1853) [hereinafter Marcy Letter of Sept. 26, 1853].

[197] *Id.* at 18 (emphasis added).

[198] *Id.* at 19.

[199] *In re* Neagle, 135 U.S. 1, 64 (1890).

[200] H.R. DOC. NO. 33-91, at 5 (1853) ("Respect the flags of other nations, and with the more pride you can demand respect for your own.").

[201] *Id.* at 37.

[202] *Id.*

judicial channels for extradition and the exclusion of political offenses from extradition's scope.[203]

2. Countering States' Short-Term Impulses and Cutting Transaction Costs

If the Koszta case shows that the President has an institutional advantage when time is of the essence, the case of Alexander McLeod shows that the President can counter a state's short-term thinking and limit transaction costs. John Jay, writing in *Federalist No. 3*, worried that individual states would often become unduly invested in emotions such as revenge for border quarrels with neighboring nations, raising the risks of war.[204] Requiring the federal government to bargain with individual states about matters of international law, foreign policy, and the treatment of foreign nationals would raise transaction costs for the more temperate federal perspective.[205] In the case of Alexander McLeod, a few years before the Koszta episode, New York state's prosecution of a Canadian law enforcement officer for acts protected under international law almost erupted into war with Britain.[206] President Tyler, acting through Secretary of State Daniel Webster, took steps without congressional authorization that contributed to resolving the fraught situation.[207] The nation's path back from the brink of war encouraged

[203] In an even more general nod to human rights, Secretary of State Marcy anticipated by almost 150 years the justification for the North Atlantic Treaty Organization's humanitarian intervention in Kosovo, invoking the "law of nature . . . [which] protect the weak from being oppressed by the strong, and . . . relieve the distressed." Letter from William M. Marcy to Baron von Hulsemann, *supra* note 196, at 17.

Time was also a factor in the decision during that period to use military forces to deter further attacks on American personnel and property in South America. Durand v. Hollins, 8 F. Cas. 111, 111 (C.C.S.D.N.Y. 1860) (No. 4186) (asserting that the President had the authority to intervene in South America to protect the "lives and property" of American citizens). Some scholars have expressed wariness about the scope of the President's power to rescue U.S. citizens or domiciliaries abroad. *See* GLENNON, *supra* note 9, at 74-75 (stating that the presidential power to protect Americans abroad in emergency situations is distinct from the power to intervene abroad as a means of retaliation); Monaghan, *supra* note 5, at 71 ("Based on incidents such as that involving Mr. [Koszta], modern Presidents now insist on the right to use force to protect American citizens anywhere in the world against foreign aggression . . . But I am skeptical." (footnote omitted)); *cf.* KOH, *supra* note 14, at 84, 88 (suggesting that *Durand v. Hollins* provided authority that could be used inappropriately to justify failure to consult with Congress).

[204] *See* THE FEDERALIST NO. 3, *supra* note 12, at 44-45 (John Jay).

[205] Arizona v. United States, 132 S. Ct. 2492, 2498-99 (2012) (indicating that *Federalist No. 3* argues that federal power is necessary in part because "'bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury' might take action that would undermine foreign relations" (quoting THE FEDERALIST NO. 3, *supra* note 12, at 44 (John Jay))).

[206] *See* People v. McLeod, 25 Wend. 483, 566 (N.Y. Sup. Ct. 1841) ("If war must come, let it come.").

[207] David Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and*

receptivity to presidential initiatives that countered states' impulsive decisions. Webster's moves also brought progress on extradition after the decades of discredit that followed the Nash/Robbins affair.

The Framers' concern with states' tendencies to ignore international law drove the Constitution's drafting. Before the Constitution's enactment, Alexander Hamilton had persuaded a New York court to apply international law in the construction of a statute governing rights to property that changed hands during the Revolutionary War.[208] In this test of "national character,"[209] a New York statute appeared to side with a U.S. national over a British subject who had complied with military orders in assuming ownership of the citizen's property during the Revolutionary War. This reading conflicted with the law of nations and the peace treaty between Britain and the United States, both of which held harmless individuals who acquired property pursuant to military orders. Rejecting the short-sighted impulse of vengeance at Hamilton's urging, the New York court construed the statute as acknowledging the British subject's rights during the period of the conflict.[210]

Because of the refusal of other states to follow this course and concern about the states' willingness to punish attacks on ambassadors that violated the international law principle of diplomatic immunity,[211] the Framers built in a

the American Writ of Habeas Corpus, 41 EMORY L.J. 515, 520 (1992).

[208] *See* Rutgers v. Waddington, *reprinted in* 1 THE LAW AND PRACTICE OF HAMILTON: DOCUMENTS AND COMMENTARY 392, 400 (Julius Goebel, Jr. ed., 1964) ("The truth is, that the law of nations is a noble and most important institution: The rights of sovereigns, and the happiness of the human race, are promoted by its maxims and concerned for its vindication."); *cf.* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD 199-201 (2005) (discussing *Rutgers*); Daniel M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 963-66 (2010) (same); Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT'L L.J. 1, 7 (2013) (same); John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV. 895, 899-900 (2011) (same).

[209] The Trespass Act, *in* 1 THE LAW AND PRACTICE OF HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 208, at 282, 362.

[210] *Id.* at 400 n.* (holding that the law of nations required transcendence of an impulse toward "revenge").

[211] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24-25 (Max Farrand ed., rev. ed. 1966) (quoting the opening remarks of Edmund Randolph, who flagged the risk under Articles of Confederation that, "[i]f a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the federal government] cannot punish that State, or compel its obedience to the treaty"); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 716-17 (2004) (observing that anxiety due to "inadequate vindication of the law of nations persisted through the time of the Constitutional Convention"); Golove & Hulsebosch, *supra* note 208, at 932 ("These devices, which generally sought to insulate officials responsible for ensuring compliance with the law of nations from popular politics, also signaled to foreign

number of safeguards that consolidated federal power over dealings with foreign nationals and property. The Constitution barred treaties by states with foreign powers.[212] It made federal law supreme over state law.[213] It also granted Congress the power to "define and punish . . . [o]ffences against the Law of Nations,"[214] including violations of diplomatic immunity. In addition, the Constitution granted Congress control over naturalization.[215] Madison, in *Federalist No. 42*, had cautioned that anarchy might result if each state had the power to set its own naturalization criteria.[216] The result could be a race to the bottom, Madison warned, with inadequate protection for federal interests.[217]

The role of states rose to the fore in a dangerous episode fifty years after the ratification of the Constitution, as federal officials strove to head off a war with Britain after New York state initiated the prosecution of the Canadian law enforcement officer Alexander McLeod.[218] McLeod allegedly had participated in a British military operation in December 1837 against Canadian rebels who used New York territory to prepare for their attacks.[219] British forces had

governments the seriousness of the nation's commitment."). *But see* Curtis Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 640-41 (2002) (questioning the importance of attacks on foreign ambassadors in constitutional debates); J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 874-88 (2007) (same).

[212] U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .").

[213] *Id.* art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[214] *Id.* art. I, § 8, cl. 10. *See generally* Harlan Grant Cohen, *Historical American Perspectives on International Law*, 15 ILSA J. INT'L & COMP. L. 485, 491-92 (2009) (identifying a strand of scholarship that contends that the Framers wished to "establish the United States as an independent member of the international community . . . capable of self-governance, ready for diplomacy, and able to ratify and abide by agreements").

[215] U.S. CONST. art. I, § 8, cl. 1, 4 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . . .").

[216] THE FEDERALIST NO. 42, *supra* note 12, at 270 (James Madison) ("An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other.").

[217] *Id.* at 270 ("What would have been the consequence if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them? Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature not to be provided against.").

[218] *See* People v. McLeod, 25 Wend. 483, 492-93 (N.Y. Sup. Ct. 1841); *cf.* WITT, *supra* note 22, at 116-17 (discussing the McLeod episode); Bederman, *supra* note 207, at 515 (same); Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of* United States v. Rauscher, 34 VA. J. INT'L L. 71, 85-90 (1993) (same).

[219] *See* Bederman, *supra* note 207, at 515.

attacked and destroyed a vessel, *The Caroline*, which Canadian rebels had deployed in their campaign.[220] In November 1840, New York state charged McLeod with murder in connection with the death of a U.S. citizen, Amos Durfee, who had been a ship hand on *The Caroline*.[221] New York officials, including then-governor William Seward, who later took a different view of international law as President Lincoln's Secretary of State, indulged in demagoguery[222] that confirmed the Framers' worst fears about states' impulsiveness roiling foreign affairs.

Secretary of State Webster valiantly tried to vindicate the federal interest in complying with international law and avoiding a conflict with Britain. Webster disagreed with the British on the justification for the attack on *The Caroline*, arguing in an influential passage that self-defense included only actions taken when harm was imminent.[223] While the British did not accept Webster's formulation regarding the justifications for the use of force, the two sides agreed on another fundamental principle: the immunity from prosecution of lawful combatants. Under this precept, a state's armed forces are immune from

[220] *See id.* at 516-17.

[221] *Id.* at 518.

[222] *Id.* at 521.

[223] *See* Letter from Daniel Webster, U.S. Sec'y of State, to Henry Fox, British Minister in the U.S. (Apr. 24, 1841), *reprinted in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 132 (1848) [hereinafter WEBSTER DIPLOMATIC PAPERS] (asserting that self-defense was appropriate when a threat was "instant, overwhelming, leaving . . . no moment for deliberation"); *see also* DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2013) (providing a framework for targeted killing as self-defense, including a definition of imminence); Robert M. Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK INT'L HUMANITARIAN L. 3, 4 (Michael N. Schmitt et al. eds., 2011) (suggesting that the need to address the problem of terrorist groups has resulted in a broader definition of imminence); Harold Hongju Koh, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (discussing the U.S. government's commitment to following international law on its use of force in the targeting of violent nonstate actors such as terrorist groups); *cf.* Kenneth Anderson, *Efficiency* In Bello *and* Ad Bellum*: Making the Use of Force Too Easy?*, *in* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 374, 391-96 (Claire Finkelstein et al. eds., 2012) (rejecting the assertion that the use of unmanned aerial vehicles such as drones has vitiated practical checks on the willingness to wage war); Jeremy Rabkin, *Even Republics Must Sometimes Strike Back*, 7 F.I.U. L. REV. 87, 103-11 (2011) (arguing that international law and state practice do not preclude retaliatory strikes that go beyond the narrow definition of self-defense). *But see* Craig Martin, *Going Medieval: Targeted Killing, Self-Defense and the* Jus Ad Bellum *Regime*, *in* TARGETED KILLINGS, *supra*, at 223, 235-38 (arguing that international rules on the use of force, often referred to as the *jus ad bellum*, tightly constrain state efforts to combat violent nonstate actors).

prosecution for their conduct in the course of the conflict, even if their leaders went to war for reasons, such as aggression, that are not consistent with international law. In other words, a soldier for an aggressor is a "privileged belligerent" who can use lethal force against the armed forces of other state parties to the conflict.[224] Webster acknowledged that this time-honored separation of the conduct of war (*jus in bello*) from the decision to resort to war in the first instance (*jus ad bellum*) was a rule of international law "to be respected in *all* courts."[225] Unfortunately, neither the power of Webster's argument nor the prospect of war with Britain persuaded New York's prosecutors to drop their prosecution of McLeod.

The New York court that heard McLeod's petition took a parochial stance, relying on a formalistic notion of armed conflict that was not consistent with the law then or now.[226] Further illustrating the rush to judgment in New York, evidence available at the start of the prosecution indicated that McLeod had not even *participated* in the attack on *The Caroline*.[227] Rather, he was merely a convenient scapegoat for Western New Yorkers who had long chafed under their proximity to British sovereign territory. The British made this argument about McLeod's innocence from the very beginning, but insisted that international law barred New York state from trying McLeod at all – a position that Webster seconded and international law confirmed. The absence of

[224] *See* Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 62 (2010) ("Combatants have a right to participate in hostilities and have immunity from prosecution – known as combatant immunity – for lawful acts taken in the course of combat."). Both Webster and the British assumed that the American citizen, Durfee, as a member of the *Caroline*'s crew, stood in the shoes of a combatant or a civilian directly participating in hostilities, who can be legally targeted by combatants on the other side. While enjoying immunity for killing those engaged in hostilities, the soldier can still be prosecuted for war crimes such as targeting those outside of combat, including civilians or captives. *See* M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 721 (2008). The principle of combatant immunity is designed to prevent unfairness and limit the duration of hostilities. It avoids the unfairness of holding individual foot soldiers, who might well be conscripts, accountable for policy decisions made by their superiors. It also tends to shorten conflicts and reduce unnecessary suffering, because soldiers who could be punished – perhaps by death – for ordinary combat with the soldiers of an adversary would fight on rather than surrender. *See* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 53 (2009).

[225] Letter from Daniel Webster, U.S. Sec'y of State, to Henry S. Fox, British Minister to the U.S. (Apr. 24, 1841), *quoted in* People v. McLeod, 25 Wend. 483, 512 n.* (N.Y. Sup. Ct. 1841) (emphasis added); *see also id.* (discussing the principle of combatant immunity and observing that, "[n]one is either so high or so low as to escape from its authority").

[226] *See McLeod*, 25 Wend. at 574 (asserting that there was no armed conflict generating combatant immunity because Britain had not formally declared war).

[227] *Id.* at 603 n.* (indicating that McLeod had an alibi).

evidence eventually led to McLeod's acquittal,[228] sidestepping what Webster had viewed as the likely prospect of war. Allowing war and peace to turn on a single jury verdict, however, resembles "Russian Roulette" more than it reflects a stable foreign policy. Placating a myriad of state juries across the nation would ramp up transaction costs for the federal government, making a coherent foreign policy impossible.

Acting to safeguard federal interests and ensure Britain's rights to protection of its nationals, Webster authorized the sitting United States Attorney for the federal district to personally represent McLeod, and also provided advice helpful to McLeod's defense.[229] Webster, who criticized the New York court's interpretation of the law of nations as not "respectable,"[230] acted without securing congressional consent. His rationale, like Hamilton's in justifying the Neutrality Proclamation, was that the executive branch was using the "energy" that Hamilton had praised to preserve the status quo and give Congress an opportunity to legislate. To prevent a recurrence of the McLeod episode, Congress, at the Tyler Administration's urging, passed a provision that gave federal courts the power to grant habeas petitions by foreign nationals who were subject to state proceedings because of conduct of official duties for a foreign power.[231] Fresh from the close call with war prompted by McLeod's case, Webster described the provision as "necessary and proper . . . to maintain the peace of the country."[232] Webster warned that without such a statute to curb wayward state impulses on the treatment of foreign nationals, the "tie which holds the government together would become a band of straw."[233]

Webster's timely moves on McLeod's behalf not only avoided war, but also generated specific synergies in understandings with British officials: progress on the impressment issue that had undone President Adams in the Nash/Robbins affair and acceptance of the broader American view of

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[228] *Id.*

[229] *See* WITT, *supra* note 22, at 115-17 ("When New York officials refused to [abandon the prosecution and release McLeod], Webster (in a highly unusual move) asked the U.S. district attorney for northern New York to join McLeod's defense team."); Bederman, *supra* note 207, at 521 (stating that one of McLeod's attorneys, Joshua Spencer, was also the local United States attorney); *see also McLeod*, 25 Wend. at 555-56 (quoting U.S. Attorney Joshua A. Spencer arguing on McLeod's behalf that "[l]egitimate and formal warfare must be carefully distinguished from those illegitimate and informal wars, or rather predatory expeditions, undertaken either without lawful authority . . . and solely with a view to plunder," and further asserting that McLeod had participated in conflict of the former variety as an "obscure individual, who obeyed . . . order[s]," and was therefore entitled to immunity under the law of nations).

[230] *See* William Beach Lawrence, *Extradition*, 16 ALB. L.J. 361, 363 (1877) (stating that Webster referred to the decision in *McLeod* as "not respectable").

[231] *See* 28 U.S.C. § 2241(c)(4) (1988); Bederman, *supra* note 207, at 529-31 (analyzing passage of the measure).

[232] Lawrence, *supra* note 230, at 364.

[233] *Id.*

nationality that impressment had impugned. For Webster, impressment was particularly problematic because the broader American view of immigration and nationality served other countries, including Britain, which encouraged emigration to the "New World" of people who had lived in poverty in their countries of origin.[234] Describing the immigrant experience, Webster explained:

> In time they mingle with the new community in which they find themselves, and seek means of living; some find employment in the cities, others go to the frontiers . . . and a greater or less number of the residue, becoming in time naturalized citizens, enter into the merchant service under the flag of their adopted country.[235]

Because of this experience, which in its depiction of "means of living" in a new community echoes the narrative of today's immigrants, Webster contended that a foreign power would commit an affront to the "general sentiments of mankind" by separating migrants to 1840s America "from their new employments, their new political relations, and their domestic connections."[236] With generous praise for British reform efforts that had largely supplanted impressment with "other means of manning the royal navy more compatible with justice and the rights of individuals,"[237] Webster advised the British in the course of negotiating the Webster-Ashburton Treaty of 1842 that, "impressing seamen from American vessels can not hereafter be allowed."[238] Although the treaty did not expressly mention impressment, Webster's correspondence with the British minister Ashburton defused the issue.[239]

Timely action also gave Webster an opening to resolve another issue roiled by divergent conceptions of nationality: extradition. Departing from policy put in place because of public indignation over the Nash/Robbins affair decades earlier, the Webster-Ashburton Treaty committed the United States to extraditing criminals to Britain, while imposing a reciprocal duty on the British. Taking a page from the failures of provisionality in that earlier

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[234] *See* Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton (Aug. 8, 1842), *reprinted in* WEBSTER DIPLOMATIC PAPERS, *supra* note 223, at 95, 98 (asserting that countries such as Britain had promoted emigration by the "poorer classes . . . ejected from the bosom of their native land by the necessities of their condition . . . [including] distress in over-crowded cities").

[235] *Id.*

[236] *Id.*

[237] *Id.* at 101.

[238] *Id.*

[239] *Cf.* Richard N. Current, *Webster's Propaganda and the Ashburton Treaty*, 34 MISS. VALLEY HIST. REV. 187, 188-91 (1947) (discussing the treaty's terms and Webster's efforts).

cautionary tale, however, American officials pushed successfully for the enactment of an extradition statute that included a specific role for courts.[240]

In short, Webster's agile moves amounted to a working definition of stewardship. Webster countered the wayward impulses of New York officials. His knowledge of Congress and public opinion limited future transaction costs. He also promoted forward movement in the thickets of impressment and extradition that had trapped the Adams Administration decades earlier.

3. *Neagle* and Executive Prophylaxis

The Court's landmark decision in *Neagle*[241] highlights another crucial dimension of the President's institutional advantage in protection of both citizens and foreign nationals: once provisionality and synergy have been established, the President has a measure of discretion in devising remedies that will alleviate harm. The President can react to threats ex post, scrambling to cobble together a strategy as Webster did on President Tyler's behalf in the McLeod affair. As Justice Samuel Miller's opinion for the Court in *Neagle* asserts, however, the President is not limited to ex post responses.[242] Prophylactic steps that seek to deter harm are also part of the President's remedial repertoire. Moreover, Justice Miller's citation in *Neagle* to the Martin Koszta episode[243] suggests that the President also should receive a measure of deference in determining when a foreign national has acquired sufficient ties to the United States to justify that individual's protection. Setting the stage for analysis of those factors, it is useful to review the way in which Justice Miller's opinion encapsulated each of the other stewardship factors.

a. Neagle *as a Synthesis of Stewardship Through 1890*

Time was clearly of the essence in the events surrounding *Neagle*. The case arose because a deputy U.S. marshal had been assigned to guard Justice Stephen Field, whose life had been threatened by litigants displeased with a

[240] *Cf.* United States v. Rauscher, 119 U.S. 407, 410-11 (1886) (citing article 10 of the Webster-Ashburton Treaty, which provided for extradition upon certification by a judge or magistrate that evidence was "sufficient to sustain the charge"); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 474 n.153 (1990) (discussing provisions of the first extradition statute, passed in 1848).

[241] *In re* Neagle, 135 U.S. 1, 62 (1890); *cf.* BRUFF, *supra* note 9, at 94-95 (discussing the decision); John Harrison, *The Story of* In re Neagle*: Sex, Money, Politics, Perjury, Homicide, Federalism, and Executive Power*, *in* PRESIDENTIAL POWER STORIES, *supra* note 14, at 133 (same); Monaghan, *supra* note 5, at 70-71 (discussing the need to limit some of the broader language in the opinion to keep presidential power in balance with powers of the other branches).

[242] *Neagle*, 135 U.S. at 13 ("It is the duty of the Executive Department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty . . . .").

[243] *Id.* at 64.

decision the Justice had made while riding circuit in California.[244] Deputy Marshal Neagle shot and killed one of the litigants after witnessing that individual approach and strike Justice Field. In an echo of the *McLeod* case, California authorities then arrested the deputy marshal for doing his job.[245]

Although no federal statute expressly granted the executive authority to assign personnel to protect federal officers by the use of deadly force, the Court in *Neagle* held that the President had the power under the Take Care Clause[246] to ensure the safety of federal officers. Justice Miller's opinion cited the Koszta episode, which the Justice described as among the most "remarkable" episodes in the annals of American history.[247] Just as rescuing Koszta required prompt action, protecting Justice Field could not wait for the culmination of legislative efforts.[248]

The President's power, Justice Miller asserted, was also central to compensating for the short-term impulses of the states. Here, Justice Miller cited McLeod's case as an example of states' shortsighted tendencies in matters of federal interest.[249] Justice Miller warned that, absent the exercise of presidential power, states could hinder "acts done under the immediate direction of the national government, and in obedience to its laws . . . [or] deny the authority conferred by those laws."[250] These state measures could "paralyze the operations of the [federal] government."[251] To vindicate the Framers'

[244] *See* Harrison, *supra* note 241, at 141-45.

[245] Authorities also arrested Justice Field, but the country prosecutor dismissed the charges against him after a message from the governor. *Id.* at 146.

[246] *See* U.S. CONST. art. II, § 3.

[247] *Neagle*, 135 U.S. at 64.

[248] The *McLeod* case also buttressed the arguments of Neagle's counsel, who expressly invoked it as a cautionary tale regarding the importance of timing. *See id.* In citing the habeas provisions that Congress enacted in 1842 after the McLeod affair, Senator Choate noted the "emergency" nature of the threatened war with Britain that prompted the Act. *Id.* Reinforcing the *McLeod* case's stature as a negative example, Choate further observed that the crisis arose in that matter because another state – New York – had "successfully refused and resisted the intervention of the federal government" and persisted in McLeod's prosecution, even though the federal government's entreaties were grounded in the "law of nations." *Id.*

[249] *Id.* at 71. Justice Miller had also written the opinion of the Court in *Chy Lung v. Freeman*, in which the Court struck down a heavy-handed state effort to regulate immigration. *See* Chy Lung v. Freeman, 92 U.S. 275, 279-80 (1876) (stating that claims arising from a state's overreaching on immigration would be made not on the state, but on the federal government, and that "all [of] the Union" would suffer the consequences of one state's irresponsibility). In *Arizona v. United States*, Justice Kennedy's opinion for the Court cited *Chy Lung* in holding that substantial portions of Arizona's immigration statute were preempted by the federal statutory framework on immigration. Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (citing *Chy Lung*, 92 U.S. at 279-80).

[250] *Neagle*, 135 U.S. at 62.

[251] *Id.*; *see also* Harrison, *supra* note 241, at 152-53 (discussing the Court's analysis in

vision and safeguard the nation from the short-sighted actions of individual states, the President needed the power to protect federal officials from state penalties, even without express authorization from Congress.[252] Moreover, Miller added, the President's power also extended to matters implicated by the United States' sovereign conduct of its "international relations."[253] Miller observed that the federal government in McLeod's case had struggled to check state impulses that undermined foreign policy interests.[254]

Miller's opinion also stressed the provisionality of the President's action.[255] Congress would clearly have intended to authorize the President's protection of federal officials, Miller argued, commenting that a federal statute declared that U.S. marshals would have the same authority in "executing the laws of the United States" that state peace officers enjoyed in executing the laws of their respective jurisdictions.[256] The Court inferred that since the authority of state law enforcement officers would clearly extend to protection of a judge, federal marshals at the request of the President should be able to perform an equivalent function.[257] Congress shortly thereafter made targeting of federal officials a violation of the federal criminal code.[258]

b. Neagle *and the Proactive Presidency*

Justice Miller asserted that the President, when acting in this provisional capacity, was entitled to deference in fashioning remedies for the harm threatened by wayward state impulses.[259] The federal government did not have to wait for state defiance of federal authority.[260] Rather, the President could proactively discourage states from such defiance, thus shaping the landscape to facilitate the protection of federal interests.

Neagle).

[252] *Neagle*, 135 U.S. at 65.

[253] *Id.* at 64.

[254] *Id.* at 71.

[255] *Id.* at 68 (citing precedent and examples of the necessary exercise of executive power incident to its constitutional powers and to the needs of a functional government permitting action in the absence of express congressional authority).

[256] *Id.* at 68.

[257] *Id.* The *Neagle* Court asserted that the combination of the President's inherent and delegated power should also cover protection of U.S. nationals abroad, and even those who wished to become U.S. citizens. *See id.* at 64 (discussing the Koszta episode).

[258] *See* 18 U.S.C. § 1114 (2012).

[259] *Neagle*, 135 U.S. at 59.

[260] *Id.* at 62 (holding that no "such . . . element of weakness is to be found in the Constitution" as to allow a state law to conflict with a federal law or act upon a federal agent before the case can be brought before the U.S. courts forcing the agent from the exercise of his duty for that period).

In taking this pragmatic, "modern" approach,[261] Justice Miller cited an opinion of his on extradition, *United States v. Rauscher*,[262] for the principle that ignited controversy in the Nash/Robbins affair: the notion that extradition did not cover political offenses.[263] In *Rauscher*, the Court ruled that both treaty law and customary international law incorporated the doctrine of specialty, which holds that a receiving state may try the subject of an extradition request only for crimes expressly mentioned in the request.[264] The state delivering the subject can thus ascertain if the request is based on commission of a political offense or another crime not covered by the extradition agreement. The doctrine's main effect is prophylactic and ex ante: a state will think twice about trying a "bait and switch" strategy that snatches up a pesky dissident émigré with an extradition request that merely cites a mundane criminal charge. For Miller, individual states that declined to follow the rule of specialty corrupted the "relations with foreign nations which are necessarily implied in the extradition of fugitives from justice."[265] Miller viewed specialty as vital because of this ex ante effect, even though it was also necessarily overinclusive: the doctrine would bar prosecution even when the offense charged by the requesting state was *not* political in nature, and where the omission of the charge from the request was the product of inadvertence, not a desire to retaliate against an opponent of the regime.[266]

In *Neagle*, Justice Miller hailed this ex ante approach, deploying public health as a metaphor. "[T]he physical health of the community," Miller explained, "is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed."[267] Similarly, Miller argued, law is more "efficient" in

[261] *Id.*

[262] United States v. Rauscher, 119 U.S. 407 (1886).

[263] *Id.* at 420 ("[I]t has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances . . . . In many of the treaties of extradition between civilized nations of the world, there is an express exclusion of the right to demand the extradition of offenders against such laws.").

[264] *See* Semmelman, *supra* note 218, at 104-06.

[265] *See Rauscher*, 119 U.S. at 414.

[266] *Id.* at 419. Of course, the rule is also underinclusive, since it does not preclude a state from finding a routine criminal charge that colorably applies to the subject's conduct and trying the subject for that offense. Indeed, the question of whether adverse state action against a refugee is a legitimate or a forbidden prosecution haunts refugee law to this day. *See* Amar Khoday, *Protecting Those Who Go Beyond the Law: Contemplating Refugee Status for Individuals Who Challenge Oppression Through Resistance*, 25 GEO. IMMIGR. L.J. 571, 611 (2011).

[267] *In re* Neagle, 135 U.S. 1, 59 (1890). Justice Miller also cited the rationale of Senator Choate for passage of the 1842 habeas provision that guarded against recurrence of the McLeod dispute. *Id.* at 74. Under the statute, a foreign national defendant indicted in state court for conduct related to his official duties for another nation could seek release immediately, rather than enduring a trial and seeking release in the event of a conviction. *Id.*

preventing crime through "regulations, police organizations, and otherwise" than through mere "punishment of crimes after they have been committed."[268] Granting the President a measure of discretion in fashioning a remedial strategy avoided gaps in relief that would frustrate federal interests.[269]

D. *Reasoned Elaboration in the 1906-07 San Francisco School Crisis*

A President also should provide reasoned elaboration for measures that protect citizens or foreign nationals. Elaboration has both ex ante and ex post benefits. Ex ante, it encourages the executive to think through consequences before making a final decision. Ex post, it allows other stakeholders to better understand the rationales for the action and assess how it accomplishes its goals. Presidents who have articulated reasoned bases for decisions have enjoyed wide acceptance. Those whose justifications were found wanting have often, like Adams in the Nash/Robbins episode, inspired instability. Because presidencies are not monolithic, reasoned elaboration can sometimes require analysis of both general statements and more concrete instances. This is the case with the stewardship theory of the presidency advanced by President Theodore Roosevelt.[270]

In describing the President as a "steward of the people" who should do "what was imperatively necessary for the Nation" without requiring "specific authorization" in the Constitution or laws of the United States, Roosevelt

at 71 (describing the extension of the habeas corpus statute as "confer[ing] upon [federal courts] the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended on the law of nations"). Senator Choate explained that, "[i]f you have the power to interpose after judgment [by a state jury], you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition." *Id.* at 74. Senator Choate's explanation, while it did not address prudential doctrines such as abstention that might temper a federal court's exercise of its power in certain contexts, was an accurate account of Congress's authority to expand the scope of habeas jurisdiction to counter harm to federal interests.

[268] *Id.* at 59.

[269] Justice Miller warned of adverse consequences if the federal government lacked the power to act proactively. *Id.* If the President had lacked the power to provide protection to federal officers, "operations of the general [federal] government may at any time be arrested at the will of one of its members." *Id.* at 62 (quoting Tennessee v. Davis, 100 U.S. 257, 262 (1879)). Moreover, Justice Miller observed, the subsequent prosecution of an individual who attacked a federal official was not an adequate remedy. *Id.* at 59. In the interim, he reasoned, the federal interest suffered, since the federal official was "withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested." *Id.* at 62 (quoting *Davis*, 100 U.S. at 262).

[270] *See* ROOSEVELT, *supra* note 7, at 357; *cf.* JEAN M. YARBROUGH, THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION 178-87 (2012) (analyzing President Roosevelt's conception of stewardship in foreign affairs).

carved out a large role.[271] Dicta in *Neagle* concerning the President's discretion in the conduct of foreign relations provided some support for Roosevelt's view.[272] Moreover, Roosevelt was surely aware of the Court's decision in *Debs*, which had cited *Neagle* in upholding President Cleveland's use of federal troops to control striking railroad workers and an injunction against communication among the strike's leaders, despite the lack of any statutory authorization for the latter.[273] Roosevelt, who liked to tie his conception to Presidents Jackson and Lincoln, had little interest in fashioning a methodical legal argument for presidential stewardship.[274] As with Hamilton's argument that supported Washington's Neutrality Proclamation, however, applications of President Roosevelt's conception revealed more nuance.

In probably his greatest achievement, President Roosevelt protected the environment from both unscrupulous private parties and nonfederal sovereigns. Echoing criticisms of the states' parochialism that had issued from the *Federalist Papers* and continued through the McLeod affair and *Neagle*, Roosevelt scorned the "State's rights fetish" that led to shortsighted environmental policy.[275] Yet, while Roosevelt sometimes interpreted existing

[271] ROOSEVELT, *supra* note 7, at 357.

[272] *Neagle*, 135 U.S. at 64 (questioning what positive congressional act could be cited to justify the executive's decisionmaking exercised in the Koszta affair, and suggesting that this executive power exists despite the absence of a grant of such power by Congress).

[273] *See In re* Debs, 158 U.S. 564, 579 (1895) (citing *Neagle*, 135 U.S. at 62). To justify the use of troops, the government had asserted that the boycott of rail transport jeopardized interstate commerce in general, and the delivery of the mail in particular. *See* BRUFF, *supra* note 9, at 96; Monaghan, *supra* note 5, at 63-65 (describing *Debs* as addressing presidential acts that fell into an area of "uncertain mixture of legal norms" and ultimately concluding that "the Court sought to meet the presidential law-making objection without either overtly invoking emergency concepts foreign to our jurisprudence or abandoning the idea of the 'law enforcement' executive"); *cf. Debs*, 158 U.S. at 582 ("The entire strength of the nation may be used to enforce . . . the full and free exercise of all national powers and the security of all rights. . . . The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails."). President Roosevelt on a number of occasions had troops at the ready to quell disturbances based on local biases. *See, e.g.*, PHILIP C. JESSUP, ELIHU ROOT 11 (1938) (recounting that President Roosevelt instructed Secretary of State Elihu Root to deploy troops near San Francisco to prevent attacks on Japanese residents). Since Debs was a celebrated labor leader, the *Debs* case was extremely high profile. Roosevelt was attentive to Debs's public statements, which included criticism of the Roosevelt Administration for its insufficient reforms of big business. *See* ROOSEVELT, *supra* note 7, at 282.

[274] *See* ROOSEVELT, *supra* note 7, at 464 ("[T]he theory which I have called the Jackson-Lincoln theory of the Presidency; that is, that occasionally great national crises arise which call for immediate and vigorous executive action, and that in such cases it is the duty of the President to act upon the theory that he is the steward of the people.").

[275] *Id.* at 351, 396. A sound environmental policy, President Roosevelt contended, was jeopardized by "undue insistence upon states' rights." *See* Clifford Lee Staten, *Theodore Roosevelt: Dual and Cooperative Federalism*, 23 PRESIDENTIAL STUD. Q. 129, 134 (1993)

statutory authority implausibly, he never jettisoned it entirely. As Roosevelt explained, "[i]t was necessary to use what law was already in existence, and then further to supplement it by Executive action."[276] Harnessing the energy of the executive, he protected the wilderness areas and forests that would have been irreparably damaged by uncontrolled development.[277] While Roosevelt repeatedly criticized "the representatives of privilege in Congress," however, his aggressive designation of federal lands as protected areas did not preclude subsequent legislative modifications; rather, his moves protected nature's legacy from irreversible harm, allowing Congress to deliberate before risking heedless development.[278]

Roosevelt and his Secretary of State, the great New York lawyer Elihu Root, practiced reasoned elaboration even more clearly in protecting Japanese nationals against state animus during the San Francisco school segregation dispute of 1906-07.[279] The crisis arose because California, which for fifty years had seen adverse reactions to Asian immigration, had passed a state law which authorized local districts to "establish separate schools for Indian children and for children of Mongolian or Chinese descent."[280] San Francisco had established separate schools for Chinese and Korean students years before.[281] When the school board extended this move to Japanese students in 1906, however, its decision assumed an international dimension.[282] Japan, flush with a victory over the Russian Empire, the conclusion of which had been brokered

(quoting THEODORE ROOSEVELT, THE WRITINGS OF THEODORE ROOSEVELT 141 (William Harbaugh ed., 1967)) (discussing President Roosevelt's role in the Reclamation Act of 1902). Too often, local economic players and miners, lumber companies, real estate, and development interests opposed the establishment of national parks and found allies in Congress to delay extending federal protection to environmentally sensitive sites. H. Duane Hampton, *Opposition to National Parks*, 25 J. FOREST HIST. 36, 37-38 (1981). *See generally* DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 14-20 (2009) (discussing President Roosevelt's protection of the environment).

[276] *See* ROOSEVELT, *supra* note 7, at 405-06.

[277] *Id.* at 395.

[278] *Id.* at 405-06.

[279] *Id.* at 378-81; *see also* JESSUP, *supra* note 273, at 7-31; David Brudnoy, *Race and the San Francisco School Board Incident: Contemporary Evaluations*, 50 CAL. HIST. Q. 295, 296-97, 307 (1971); Charles E. Neu, *Theodore Roosevelt and American Involvement in the Far East, 1901-1909*, 35 PAC. HIST. REV. 433, 440-42 (1966). For a nuanced analysis of stewardship in Roosevelt's overall foreign policy, see David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 515 (2012).

[280] *See* Root, *supra* note 23, at 275.

[281] Brudnoy, *supra* note 279.

[282] *See* Root, *supra* note 23, at 276-77 (explaining that the Japanese government confronted the U.S. government based on San Francisco's denial of education rights for Japanese children, and that the ensuing federal claim raised both questions of treaty interpretation and the power of the federal government to enter into such a treaty).

by President Roosevelt, protested against the school board's treatment of Japanese nationals by arguing that the Treaty of Nov. 22, 1894 between the United States and Japan barred the move.[283]

Attitudes in San Francisco exhibited the wayward impulses that the Framers had condemned. San Francisco viewed the treaty as unconstitutional if it governed the decisions of the states and their local subdivisions. Presaging today's state efforts, California officials and representatives of labor, who felt threatened by competition from the unregulated flow of Japanese laborers, asserted that San Francisco's move simply filled a void that the federal government had created by defaulting on immigration control.[284] Vivid strands of racial bias and xenophobia, however, also ran through state officials' discourse, as well as the pronouncements of their defenders in Congress.[285]

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[283] *See* Editorial Comment, *The Japanese School Question*, 1 AM J. INT'L L. 150, 150-52 (1907). The treaty provided in Article I that "citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other . . . and shall enjoy full and perfect protection for their person and property." *Id.* at 151 (citing Treaty of Friendship, Commerce and Navigation, U.S.-Japan, art. 1, Apr. 2, 1953, 4 U.S.T. 2063). Japan argued that education was incidental to travel. *Id.* Japanese nationals could not travel freely in the United States or freely select a given jurisdiction as their domicile if certain jurisdictions implemented measures like San Francisco's that limited educational opportunities. *See id.* Buttressing this argument, Japan asserted that the treaty gave Japanese nationals in the United States the same rights as "natural citizens or subjects of the most favored nation." *Id.* Conferring on Japanese nationals the same rights as nationals of the "most favored nation" triggered the right of protection familiar to the Framers, requiring in the treaty's language "full and perfect protection for [Japanese nationals'] person and property." *Id.*

[284] *See* JESSUP, *supra* note 273, at 7-8 (explaining that Root perceived the influx of cheap labor as the heart of the anti-Japanese sentiment and that "the San Francisco *Chronicle* published a nine column article on the perils of Japanese immigration," which prompted the unanimous passage of an anti-Japanese resolution in California).

[285] Kentucky Democratic Representative George Gilbert declared that any federal response to the segregationist measure would make the United States the "laughing stock in the face of the whole civilized world." 41 CONG. REC. 3, 55 (1907) (statement of Rep. George Gilbert). "Such a position," Gilbert continued, "will come home to grieve us, not only in Cuba, but in every State" as "negro children and the Chinese children here at home . . . will vehemently demand the same right to send their children to the same State schools that the white children attend." *Id.* The notorious segregationist "Pitchfork Ben" Tillman warned that integration of "Mongolian" children in the West would inevitably lead to racial mixing in the South. *See* EDMUND MORRIS, THEODORE REX 483 (2001). Roosevelt deplored the "careless insolence" of this rhetoric, which he believed would needlessly exacerbate tensions with Japan. *See* HOWARD K. BEALE, THEODORE ROOSEVELT AND THE RISE OF AMERICA TO WORLD POWER 284-85 (1957) (quoting Letter from President Theodore Roosevelt to Senator Henry Cabot Lodge, Mass. (May 15, 1905)); *cf.* ROOSEVELT, *supra* note 7, at 378 (deploring the "offensive and injurious language . . . used" by "unwise and demagogic agitators in California").

Roosevelt and Root believed that the federal government had to uphold treaties against the parochial interests and impulses of the states. While Roosevelt had sought to regulate the immigration of laborers[286] in ways that largely track the contours of current immigration law,[287] he consistently favored the admission of immigrants with education and means.[288] He had also sought legislation that would permit the naturalization of Japanese residents of the United States.[289] Roosevelt convened a series of meetings with San Francisco officials, ensured that federal troops were massed to prevent violence against San Francisco's Japanese residents,[290] and commenced litigation against the segregation measure.[291]

In turning to the courts, Roosevelt and Root presaged the strategy developed by the Obama Administration regarding restrictive state legislation. Tellingly, however, the Roosevelt Administration confronted a gap in substantive law and remedies because, one decade earlier, the Supreme Court upheld segregation.[292] That gap, which did not close until after the Court's 1954

[286] ROOSEVELT, *supra* note 7, at 378 (recommending against an "influx of laborers, of agricultural workers, or small tradesmen—in short, no mass settlement or immigration").

[287] 8 U.S.C. § 1153 (2012) (allocating visas principally among individuals with close family ties to citizens and permanent residents and those, including "members of the professions," with employment skills needed for jobs lacking suitable citizen or permanent resident applicants).

[288] *See* Kitty Calavita, *Chinese Exclusion and the Open Door with China: Structural Contradictions and the 'Chaos' of Law, 1882-1910*, 10 SOC. & LEGAL STUD. 203, 215 (2001); *cf.* ROOSEVELT, *supra* note 7, at 378 ("Japanese and American students, travelers, scientific and literary men, [and] merchants engaged in international trade . . . can meet on terms of entire equality and should be given the freest access each to the country of the other."). Some scholars have been more critical of the motives behind Roosevelt's immigration policy. *See, e.g.*, Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 19 (2002) (citing President Roosevelt's view that unlimited immigration would be tantamount to "race suicide," as found in Theodore Roosevelt, *A Letter from President Roosevelt on Race Suicide*, 35 AM. MONTHLY REV. REV. 550, 550-51 (1907)). While President Roosevelt's rhetoric on immigration clashes with current terminology, his vision of equality between the races, discussed *supra*, rebuts assertions that he believed in inherent racial differences.

[289] *See* LEWIS L. GOULD, THE PRESIDENCY OF THEODORE ROOSEVELT 258 (1991).

[290] *See* JESSUP, *supra* note 273, at 11.

[291] Root, *supra* note 23, at 276 (explaining that the Japanese government raised questions of unequal treatment between Japanese children in the United States and American children in Japan, and that the United States government "promptly presented" in California federal court).

[292] Plessy v. Ferguson, 163 U.S. 537, 544, 548 (1896) ("Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.").

decision in *Brown v. Board of Education*[293] outlawing segregation, meant that other options were needed in the San Francisco crisis. Roosevelt and Root pivoted to the foreign relations domain.

Exploiting the President's room to maneuver in foreign affairs, Roosevelt negotiated a "Gentlemen's Agreement" with Japan that limited immigration to the United States to merchants, farmers, and those who had previously resided in the United States.[294] The Gentleman's Agreement, which Roosevelt and Root believed would address state concerns about uncontrolled immigration, was not a unilateral presidential move, since its implementation hinged on a statute that limited travel of Japanese nationals traveling from Hawaii to the U.S. mainland.[295] While the Gentleman's Agreement fit the model of provisional presidential action that Hamilton had outlined, however, it did not herald an increase in presidential power.[296] Congress had not limited Japanese immigration overall, as Roosevelt sought to do in the agreement.[297] Roosevelt also formalized and implemented the agreement without presenting it as a treaty for Senate ratification, thereby providing new momentum for the use of executive agreements.[298] San Francisco stood down and the Administration dropped its lawsuit.[299]

Secretary of State Root's article in the *American Journal of International Law* defended the Administration's international law position and also hinted at synergy between international law and constitutional equal protection.[300] Root observed that the President had to act to resolve crises caused by local

[293] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

[294] *See* GOULD, *supra* note 289, at 259-60.

[295] *Id.* at 260.

[296] *Cf.* YARBROUGH, *supra* note 270, at 185-87 (arguing that President Roosevelt's use of stewardship in foreign affairs should have expressly built on Hamilton's Pacificus letters, while asserting that Hamilton's vision of executive power in foreign affairs was as expansive as Roosevelt's). *But see supra* notes 138-53 and accompanying text (arguing that, in context of Neutrality Proclamation, Hamilton did not propose an untrammeled view of executive authority).

[297] *See* GOULD, *supra* note 289, at 262.

[298] ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 88-89 (2004). To bolster the Gentlemen's Agreement, President Roosevelt and Root also negotiated the Root-Takahira Agreement with Japan, which acknowledged Japan's interests in Manchuria and U.S. interests in the Philippines. *See* Gartner, *supra* note 279, at 524-25 (discussing the claims of President Roosevelt's critics that the Root-Takahira Agreement "extended the exercise of executive power beyond limits ordinarily observed by [Roosevelt's] predecessors" (quoting Simeon E. Baldwin, *The Exchange of Notes in 1908 Between Japan and the United States*, 3 ZEITSCHRIFT FÜR VÖLKERRECHT UND BUNDESSTAATSRECHT 456, 463 (1909))).

[299] Root, *supra* note 23, at 276 (observing that the situation was resolved without judgment, once the United States, California, and San Francisco aired their views to each other).

[300] *Id.* at 278-80.

passions, which often unduly discounted "rules . . . essential to the maintenance of peace . . . between nations."[301] Root highlighted rules that "assure[d] to citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations."[302] According to Root, separation of the kind decreed by the San Francisco school board was unlawful discrimination.[303] Root concluded with a warning that government policy embodying racialized "insult[s]" leads to "sowing the wind to reap the whirlwind, for a world of sullen and revengeful hatred can never be a world of peace."[304] While Root's language here focused on treaty rights, the learned lawyer Root surely knew that California officials' animus against Asian immigrants had already prompted the Supreme Court in *Yick Wo v. Hopkins*[305] to articulate the origins of the modern equal protection doctrine. The concept of protection of foreign nationals was sufficiently supple to extend to the equality of all Americans, regardless of race, although the Supreme Court's rejection of the "separate but equal" doctrine of *Plessy v. Ferguson* was still decades away.

Moreover, Root's insistence on the need to protect treaty rights against localized passions also recalls the Martin Koszta episode's solicitude for the aspirations of intending Americans. As noted, Roosevelt favored the naturalization of Japanese residents of the United States.[306] Although Congress was unwilling to go along with this goal, Roosevelt's measures gave Japanese residents a buffer from state persecution that echoed President Pierce's protection of Koszta. In Koszta's case, the persecution emanated from a foreign sovereign. In the San Francisco controversy, the persecution issued from the sovereign state of California, whose officials had earlier attempted to try the federal marshal Neagle for the "crime" of protecting a Justice of the United States Supreme Court. In each case, the President's power to curb nonfederal sovereigns' abuse of current U.S. citizens and intending Americans defused the crisis.

[301] *Id.* at 273-74.

[302] *Id.* at 277. Root's context suggested that by "other foreign nations" he meant the countries of Northern Europe, whose nationals received maximum protection in the United States. *Id.* at 280.

[303] *Id.* at 277-78.

[304] *Id.* at 286.

[305] Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886) (citing Chinese residents' treaty rights in the course of striking down a San Francisco ordinance that permitted discrimination against businesses owned by those residents); *cf.* Cleveland, *supra* note 102, at 119 (describing *Yick Wo* as "one of the late-nineteenth-century Court's most powerful affirmations of the liberal, egalitarian vision of the Constitution").

[306] *See* GOULD, *supra* note 289, at 258.

III. STEWARDSHIP AND PROTECTION IN THE POST-WORLD WAR II ERA

In the last third of a century, protection of citizens and intending Americans has continued to play out in the executive branch and the courts. Presidential moves have stemmed from the President's institutional advantage in overcoming collective action problems.[307] Courts have cautiously endorsed such moves when evidence suggested that Congress had acknowledged the President's edge. The courts have also taken a more direct role, both in limiting the negative externalities for federal interests caused by precipitous or biased state measures and in policing states' fairness.

A. *Provisional Protection of Americans in the Foreign Affairs Realm*

The President's ability to resolve collective action problems was front and center in two cases, *Dames & Moore v. Regan*[308] and *Haig v. Agee*,[309] that turned on protection of U.S. citizens at risk abroad. Each case has triggered controversy among those who believed that they unduly expanded presidential power.[310] A closer look, however, reveals that each case also hinged on the provisionality of the President's action.

Concerns about the distortions federalism could cause in foreign affairs played a subtle role in *Dames & Moore v. Regan*,[311] in which the Court upheld the President's settlement of Americans' claims against the Islamic Republic of Iran.[312] That settlement was a crucial aspect of an agreement to rescue

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[307] *See* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 48-49 (2007) (arguing that problems of collective action in Congress make it difficult to divine a congressional will, which gives the Court latitude to broadly construe statutes and justify executive action as in accord with that will); Jack L. Goldsmith, *Separation of Powers in Foreign Affairs: The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1413, 1417-18, 1422-23 (1999) (asserting that the executive is not plagued by the same collective action problems as Congress); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 219-21 (2006) (positing that collective action problems plague Congress most in "areas where uncertainty is high, information and expertise are expensive, and [where] there may be costly political repercussions," which include the areas of foreign affairs and war, giving rise to a generally broad delegation of power to the executive branch). *But see* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 819-20 (2011) (asserting that stress on the President's functional advantages, such as expertise and political accountability, can lead to undue deference to the executive branch). *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, pt. II.B (2009) (analyzing factors contributing to judicial deference to executive decisions).

[308] Dames & Moore v. Regan, 453 U.S. 654 (1981).

[309] Haig v. Agee, 453 U.S. 280 (1981).

[310] *See, e.g.*, RAMSEY, *supra* note 139, at 214-16 (criticizing *Dames & Moore*).

[311] *Dames & Moore*, 453 U.S. at 666, 679.

[312] *Id.* at 686.

American diplomatic personnel whom Iran had held hostage.[313] In formulating and implementing the deal, Presidents Carter and Reagan did not seek congressional authorization.[314] Making the agreement contingent on such authorization could have sent legislators scurrying to protect campaign contributors, local supporters, or other influential parties who would lose as a result of the accord.[315] Prompt action paved the way for the release of the hostages.[316] Justice Rehnquist's deft opinion[317] limited the collective action problems caused by too much reliance on Congress. In anchoring the President's authority to long-standing practice between the executive and legislative branches, Justice Rehnquist also situated the agreement within *Youngstown*'s second category of congressional silence. That portion of the Court's analysis dodged the risk to checks and balances of finding that the president had inherent power to settle claims.[318]

Haig v. Agee involved a similar dynamic. In *Agee*, the Court upheld the State Department's revocation of the passport of an ex-CIA agent who had previously gone abroad to disclose the names of U.S. intelligence operatives.[319] Some agents had been attacked after these disclosures.[320] The threat posed by

[313] Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After* Dames & Moore v. Regan*: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 69 (1982) ("The agreements resolved a prolonged and debilitating foreigu [sic] affairs trauma.").

[314] *Id.* at 686 (indicating that President Carter entered into agreements with the Iranian government to resolve the hostage situation "without the advice or consent of the Senate").

[315] Many parties seeking relief from alleged breaches of contract by the new Iranian government were corporations with substantial influence in particular jurisdictions. *See, e.g.*, Elec. Data Sys. Corp. Iran v. Soc. Sec. Org. of the Gov't of Iran, 651 F.2d 1007, 1009 (5th Cir. 1981) (discussing the claim of the Iranian subsidiary of Electronic Data Systems (EDS), a Texas corporation, now a subsidiary of Hewlett-Packard).

[316] Marks & Grabow, *supra* note 313, at 69 (conceding, despite criticism of *Dames & Moore*, that the agreements resolved the international incident).

[317] The opinion may have involved input from John Roberts, who was serving as Chief Justice Rehnquist's law clerk at the time. *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 255 (2007) (indicating Roberts's clerkship and his subsequent defense of the decision during his service in the White House Counsel's office).

[318] *See* Harold H. Bruff, *The Story of* Dames & Moore*: Resolution of an International Crisis by Executive Agreement*, *in* PRESIDENTIAL POWER STORIES, *supra* note 14, at 369, 389 (arguing that the Court combined the idea of congressional acquiescence and presidential power to reach its conclusion, without being compelled to give "content for either the statutory or constitutional powers"); *cf. id.* at 396 (detailing that Chief Justice Rehnquist sought in his opinion to "tread a narrow path between shackling executive power and endorsing executive adventuring").

[319] Haig v. Agee, 453 U.S. 280, 286, 310 (1981).

[320] *Id.* at 285. Agee's disclosures also violated his contract with the government, which required him to submit public statements regarding his activities to the government for pre-clearance, and barred him from disclosing confidential information. *Id*.; *see also* United States v. Snepp, 444 U.S. 507, 515-16 (1980) (upholding enforcement of such contracts).

future disclosures was not rooted in state law, but did raise collective action problems not wholly dissimilar from the ones that helped drive *Dames & Moore*.[321] Permitting a former official like Agee to travel abroad to disclose confidential information would have risked two potential harms to citizens. One was the prospect of uncloaking clandestine operatives, thus jeopardizing their safety. To forestall this peril, the government would have had to negotiate individually with each disgruntled ex-employee. Any holdout could derail negotiations, just as a state holdout could derail a delicate foreign affairs matter. More subtly, an ex-employee who could ignore his or her nondisclosure agreement would create a free-rider problem, exploiting the flow of information *within* the government without incurring the cost of keeping that information confidential. As in other relationships that hinge on confidentiality, such as those in trade secrets law,[322] just a few such free riders dry up the flow of information at the source, undermining internal communication and sound decisionmaking.[323] The impairment of government decisionmaking could also imperil Americans.

Both the Iranian claims settlement and the prophylactic measures in *Agee* are consistent with provisionality. In *Dames & Moore*, Justice Rehnquist cited a rich history of congressional acquiescence in claims settlements going back to the Founding Era.[324] The *Agee* Court marshaled evidence that Congress had

[321] *Id.* at 290-91 (holding that the Passport Act did not have any express terms that applied to the revocation of a passport, but that "in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval").

[322] *See* Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 780-81 (2007) (discussing the basis for trade secrets law in preventing a party from undermining a confidential relationship from which the party has obtained a benefit, while observing that most trade secrets, unlike the matters at issue in *Agee*, do not involve matters of public concern).

[323] This free-rider element also distinguished *Agee* from *Kent v. Dulles*, 357 U.S. 116, 130 (1958), where the Court held that the government lacked authority to revoke a passport because of an individual's political views, without any concrete evidence of a security risk. Prior to *Agee*, the Court had held that regulating travel abroad on content-neutral grounds was a permissible incidental burden on speech. *See* Regan v. Wald, 468 U.S. 222, 243 (1984) (justifying the President's restriction of travel to Cuba based on the political branches' "decision to curtail the flow of hard currency to Cuba – currency that could then be used in support of Cuban adventurism"); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (holding that refusing to validate a passport was not a restriction on First Amendment rights because "[t]he right to speak and publish does not carry with it the unrestrained right to gather information"); *cf.* United States v. O'Brien, 391 U.S. 367, 377 (1968) (upholding incidental restrictions on speech). Regulation of trade goes back to the Neutrality Proclamation and subsequent legislation. *See* Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 471-75 (2012) (tracing the constitutional restrictions to the Framers' distrust of foreign influence on United States governance); *supra* Part II.A.

[324] *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (observing that acquiescence can be a form of rational delegation for "responses to international crises . . .

been aware of the government's earlier efforts to safeguard national security through passport control when it amended passport legislation in 1952.[325] Congress followed up on the *Agee* case in 1982 with legislation that criminalized knowing disclosure of the identity of a CIA operative.[326] If the President had not acted to stop Agee, U.S. intelligence operations would have suffered significant harm before Congress had an opportunity to enact the statute. The President acted provisionally to protect both U.S. personnel endangered by Agee's disclosures and Congress's ability to legislate meaningfully in the near future.

B. *Judicial Review of State Immigration Restrictions: Preemption and Equal Protection*

While *Dames & Moore* and *Agee* illustrate the continuing viability of presidential action, much of the action in recent decades has occurred in the courts. Judicial review in this context does not trigger the separation of powers concerns raised by presidential action. Because the rationale for judicial review may also justify the exercise of presidential authority, however, this topic requires careful examination.

In the last thirty-five years, states have seen the animus against foreign nationals that concerned the Framers shift into high gear with restrictive legislation. Courts have addressed this legislation through two major avenues: the equal protection clause[327] and preemption doctrine. Both avenues echo the welfarist theme that has been prominent since the Founding Era – avoiding negative externalities imposed on the nation by impulsive state decisions.[328] The equal protection strand adds a theme hinted at in Root's discussion of the San Francisco school crisis: individual rights.

1. Preemption and Policing States' Negative Externalities

Preemption doctrine, discussed most recently in *Arizona v. United States*,[329] has also preserved synergies between the treatment of citizens and of foreign

[that] Congress can hardly have been expected to anticipate in any detail").

[325] *Agee*, 453 U.S. at 295-300 (citing *Zemel*, 381 U.S. at 11-12). Such instances of passport control, however, were rare. *See* Daniel A. Farber, *National Security, the Right to Travel, and the Court*, 1981 SUP. CT. REV. 263, 274-77 ("The *Agee* Court was able to point to only these three episodes as examples of the challenged practice over a thirty-year period.").

[326] Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421(a) (2006 & Supp. V 2011) (providing for up to ten years imprisonment for a person who violates the Act).

[327] *See* Plyler v. Doe, 457 U.S. 202, 210-16 (1982).

[328] *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 19 (2010) (observing that in the context of discussions about federalism and states exercising national policymaking power that "[s]ocial scientists traditionally write in a welfarist vein; they focus on externalities . . . while eschewing normative debates").

[329] 132 S. Ct. 2492, 2498-500 (2012); *cf.* David A. Martin, *Reading* Arizona, 98 VA. L.

nationals. The Court has recognized that those synergies evaporate in the glare of perceived unfairness, as foreign sovereigns concerned about the treatment of their own nationals retaliate by harming America's foreign relations.[330] A federal buffer against perceived unfairness mitigates such harms.[331] In *Arizona*, the Court held that such state laws would pose an obstacle to foreign relations interests and values built into the comprehensive framework of federal immigration law.[332]

As an illustration, consider that one preempted provision of the Arizona law permitted state officials to unilaterally detain a lawful permanent resident (LPR) who had been convicted of a criminal offense that would render that individual deportable.[333] The determination of deportability may depend on legal analysis of statutory terms, such as whether the offense constitutes a "crime of moral turpitude or an "aggravated felony."[334] State officials lack the training that federal officials receive in making such judgments,[335] which

REV. IN BRIEF 41, 41-42 (2012) (analyzing the decision and concluding that the Court "warmly reaffirmed . . . obstacle preemption, [which] will favor the federal government's interest in a wide swath of future cases").

[330] *Arizona*, 132 S. Ct. at 2498 ("Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.").

[331] *See id.*

[332] *Id.* at 2501-03. The Court also acknowledged that states had a legitimate interest in immigration enforcement. *Id.* at 2500; *see also* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 73-77 (discussing federalism as beneficial in the immigration enforcement context); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 320 (2012) (discussing scholarly skepticism of the principle that immigration policy is strictly in the federal government's domain, given the state and local governments' role in enforcement of such policy); *cf.* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 801-06 (1995) (defending a federalism-based reading of the commerce power). The *Arizona* decision came on the heels of an earlier decision that had held that Arizona's law punishing employers for hiring undocumented workers was *not* preempted. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1987 (2011) (holding that Arizona's provisions on employment fell within the state licensing exception in federal law and reinforced Congress's efforts to deter hiring of undocumented workers).

[333] *Arizona*, 132 S. Ct. at 2505 ("[A] state officer, 'without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.'" (quoting S.B. 1070, § 6, ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2012))).

[334] 8 U.S.C. § 1227(a)(2)(A)(i), (iii) (2012); *cf.* Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1244-45 (2011) (discussing deportation involving crimes of moral turpitude).

[335] *Arizona*, 132 S. Ct. at 2506 (indicating that federal arrest warrants in immigration cases "are executed by federal officers who have received training in the enforcement of immigration law").

sometimes end up being resolved by the Supreme Court.[336] Without training, chances are far greater that state officials will make mistakes,[337] erroneously detaining both citizens and LPRs, and in the latter case angering LPRs' countries of origin. The latter could retaliate against U.S. nationals within their borders, or against diplomatic initiatives that the United States supports.[338] Forcing federal officials concerned about such consequences to bargain with fifty state governments would ratchet up transaction costs.[339] Holding that federal law preempts state legislation alleviates such risks.

The Supreme Court's decision in *Arizona*, however, did not eliminate the risk of state interference with the federal government's conduct of foreign affairs. Consider section 2(B) of the Arizona law, which requires that state officers ascertain the immigration status of any person stopped, detained, or arrested before releasing that person, if a "reasonable suspicion" exists that the person is unlawfully present in the United States.[340] In holding that this provision could withstand a facial challenge on preemption grounds, the Court read the provision as permitting detention only for the duration of a "reasonable" inquiry to federal authorities regarding the individual's immigration status.[341] The Court acknowledged that detention of the individual pending a clear answer from the federal government would "raise

[336] *See* Leocal v. Ashcroft, 543 U.S. 1, 4 (2004) (holding that driving while intoxicated was not a "crime of violence" and therefore not an "aggravated felony" under immigration law).

[337] *Arizona*, 132 S. Ct. at 2506 ("[Permitting the state to achieve its own immigration policy] could [result in] unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.").

[338] *Id.* at 2498 ("[O]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." (alterations in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941)) (internal quotation marks omitted)).

[339] *Cf. id.* at 2499 ("The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy."); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 490-91 (1999) (discussing the importance of "foreign-policy objectives" in immigration decisions). In *American Insurance Associationn v. Garamendi*, 539 U.S. 396 (2003), the Court acknowledged the concrete impact of these transaction costs in finding for an insurer who argued that a California statute conflicted with an executive agreement settling claims. According to the Court, foreign nations will discount an offer by federal officials by a factor representing the delay and uncertainty of haggling with individual states. *Id.* at 424 (stating that federal officials' need to persuade a state to repeal a statute burdening insurance companies that were real parties in interest in transnational claims would give the President "less to offer," thereby reducing his "economic . . . leverage" in negotiations (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377 (2000))).

[340] S.B. 1070, § 2(B), ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

[341] *Arizona*, 132 S. Ct. at 2509.

constitutional concerns."[342] Allaying these concerns, the Court observed that Arizona could determine that it was not "reasonable" to continue to hold a person whom state officers no longer suspected of committing a crime. In the context of a facial challenge, which lacked evidence of the statute's application in practice,[343] the Court upheld this provision of the Arizona law. However, the provision's *application* may in fact reinforce the "constitutional concerns" that the Court detected. That would exacerbate the foreign relations problems posed by the Arizona statute's enforcement.

2. Equal Protection and the Protection of Intending Americans

Equal protection adds concerns about fairness to this abiding concern about negative externalities. The vision of equal protection advanced in the Fourteenth Amendment derived from the concept of protection traced to eighteenth-century sources. Political thinkers whose public speeches, treatises, and pamphlets influenced the framers of the Fourteenth Amendment recognized that, "[t]he *object* of the National Government was to protect the rights of each individual citizen against oppression at home and abroad."[344] For these thinkers, the protection of individuals who comprised a sovereign "people" was central.[345] A state which deprived a citizen of "full and ample protection"[346] was thus failing in its primary obligation. As seen in the Nash/Robbins, Koszta, McLeod, and San Francisco school episodes, U.S. officials have extended protection to intending Americans, U.S. domiciliaries, and foreign nationals apprehended on U.S. soil. Equal protection jurisprudence also includes undocumented immigrants in its ambit.

The Supreme Court took this step in *Plyler v. Doe*.[347] Much of Justice Brennan's opinion in *Plyler* echoes the negative externality concerns that drive preemption.[348] Justice Brennan wedded this pragmatic concern with a vision of intending Americans who required protection from states' unfairness.

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[342] *Id.*

[343] *Id.* ("[I]t is not clear at this stage and on this record that the verification process would result in prolonged detention.").

[344] *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 230 (2011) (citation omitted).

[345] *Id.* at 231 ("Th[e] right of individuals to the protection of government stemmed directly from the individual nature of sovereignty.").

[346] *Id.*

[347] Plyler v. Doe, 457 U.S. 202 (1982).

[348] *See, e.g.*, *id.* at 218-19 (expressing concern over the development of "a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents"); *id.* at 221 ("We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

Justice Brennan's opinion stressed the irrationality of state efforts to make undocumented noncitizen children miserable during their stay in this country.[349] This view, which also found expression in the "self-deportation" idea advanced in the presidential primaries by Republican candidate Mitt Romney, suggests that if we simply make circumstances as bad as possible for all of those immigrants that we wish to exclude, they will leave as soon as possible.[350] In fact, that is rarely the case.

As the Court observed in *Plyler*, the United States cannot deport all or even most of the families that have come here illegally.[351] Moreover, it would not be in the public interest to do so. For this proposition, the Court cited President Reagan's Attorney General, William French Smith, who informed Congress that "[w]e have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community."[352] Justice Brennan built on Attorney General Smith's testimony in finding that since so many children will "remain here permanently and that some indeterminate number will eventually become citizens,"[353] restrictive state enforcement efforts yield negative externalities for the nation as a whole. According to Justice Brennan, Texas's bar on public education for undocumented children would have yielded those externalities by creating a group without education that turned to other means for self-support, including crime.[354] Moreover, restrictions imposed a "lifetime hardship" by interfering with education during children's formative years.[355] In this fashion, restrictive state laws "foreclose any realistic possibility that [undocumented children] will contribute in even the smallest way to the progress of our

[349] *Id.* at 220 ("It is . . . difficult to conceive of a rational justification for penalizing these children for their presence within the United States.").

[350] Michael Levenson & Matt Viser, *Romney Swings Hard at Gingrich; Attacks GOP Foe on Ethics in Fla. Debate*, BOS. GLOBE, Jan. 24, 2012, at 1 (quoting Mitt Romney's endorsement of "self-deportation" during a Republican primary debate).

[351] *See Plyler*, 457 U.S. at 218 n.17.

[352] *See id.* (quoting *Joint Hearing on Administration's Proposals on Immigration and Refugee Policy: Hearing Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 9 (1981) (statement of Att'y Gen. William French Smith)).

[353] *Id.* at 222 n.20.

[354] *Id.* at 230. Justice Brennan explained further that schools "are an important socializing institution, imparting those shared values through which social order and stability are maintained." *Id.* at 222 n.20. "It is difficult to understand," Brennan summed up, "precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime." *Id.* at 230; *Cf.* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 161-62 (2006) (discussing *Plyler*'s focus on preventing formation of underclass).

[355] *Plyler*, 457 U.S. at 223.

Nation."[356] The federal interest in avoiding such costs trumped the state interest in restrictive legislation.[357]

After underlining the problem of negative externalities, the *Plyler* Court addressed the unfairness of imposing costs on children for their parents' decisions. As the Court observed, while "parents have the ability to conform their conduct to societal norms . . . children . . . can affect neither their parents' conduct nor their own status."[358] The Constitution, Justice Brennan concluded, required protecting undocumented children from punitive measures such as the Texas law.[359]

IV. OBAMA'S NEW STEWARDSHIP AND DACA

Viewed against the backdrop of restrictive state legislation, DACA fits within the pattern of episodes since the Founding Era in which Presidents have acted provisionally to protect citizens, intending U.S. citizens, and foreign nationals against nonfederal sovereigns.[360] Like all of the previous episodes, the promulgation of DACA yields synergies between the interests of each group. DACA also illustrates the President's institutional advantage over states in deliberation about immigration policy, and presidential ability to reduce transaction costs. DACA, however, also depicts differences from earlier examples of stewardship in this realm. More than earlier episodes, DACA merges the traditional protection stemming from foreign relations law with the equal protection of the rights revolution. In addition, DACA rests on a more relaxed nexus between presidential action and the alleviation of harm: it addresses the evils of restrictive state legislation in a prophylactic fashion that builds on the Court's conception in *Neagle* but also expands provisional presidential power.

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[356] *Id.* at 223. Justice Kennedy, in his *Arizona* opinion, may well have been alluding to similar concerns about futility and negative externalities when he described the Arizona law as "attrition through enforcement." *See* Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).

[357] *Plyler*, 457 U.S. at 223-24 ("In light of the[] countervailing costs [to the Nation and to the innocent children], the discrimination contained in [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State.").

[358] *Id.* at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)) (internal quotation marks omitted); *see also id.* ("[L]egislation directing the onus of a parents' misconduct against his children does not comport with fundamental conceptions of justice."); *cf. id*. ("[N]o child is responsible for his birth and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent." (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (internal quotation marks omitted))).

[359] *Id.* at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

[360] President Adams's debacle in the Nash/Robbins episode is the exception that proves the rule. *See supra* Part II.B.

As in contexts dating back to the McLeod affair, a predicate for provisional protective action by the President is the myopia of state officials. In the *Arizona* case, Justice Kennedy's opinion for the Court mentioned John Jay's warning about the wayward impulses of border states.[361] Justice Kennedy also offered a choice example from the Arizona law. Arizona sought to impose criminal penalties on undocumented persons for seeking or engaging in unauthorized employment.[362] Justice Kennedy noted, however, the state failed to reckon with Congress's "considered judgment" that such penalties would actually give unscrupulous employers *more* leverage over undocumented workers.[363]

State officials who pushed for adoption of restrictive legislation have offered a range of reasons. Governor Jan Brewer of Arizona invoked the specter of undocumented immigrants beheading law-abiding citizens.[364] Other officials offered more straightforwardly xenophobic rationales.[365] One reason that has not attracted much public acknowledgment is the eagerness of state politicians to receive campaign contributions and other favors from corporations cashing in on the increased need for detention space that restrictive state legislation will entail. In Arizona, for example, lobbyists for private detention companies played a major role in drafting restrictive legislation.[366] This dynamic is easier to understand than some of the

[361] *Arizona*, 132 S. Ct. at 2498 (citing THE FEDERALIST NO. 3, *supra* note 12, at 44 (John Jay)).

[362] *See* S.B. 1070, § 5(C), ARIZ. REV. STAT. ANN. § 13-2928(C) (2012).

[363] *See Arizona*, 132 S. Ct. at 2504 ("[M]aking criminals out of aliens engaged in unauthorized work – aliens who already face the possibility of employer exploitation because of their removable status – would be inconsistent with federal policy and objectives.").

[364] *See* Robert Farley, *Gov. Jan Brewer Talks of Beheadings in the Arizona Desert*, POLITIFACT (Sept. 8, 2010, 5:33 PM), http://www.politifact.com/truth-o-meter/statements/2010/sep/08/jan-brewer/gov-jan-brewer-talks-beheadings-th-arizona-desert (stating that Brewer offered no support for her allegations and giving Governor Brewer a PolitiFact "pants on fire" designation).

[365] Alia Beard Rau et al., *SB 1070 Foes Blast Pearce E-mails*, ARIZ. REPUBLIC, July 20, 2012, at A1 ("Can we maintain our social fabric as a nation with Spanish fighting English for dominance? . . . It's like importing leper colonies and hope we don't catch leprosy. It's like importing thousands of Islamic jihadists and hope they adapt to the American Dream." (quoting Email from Russell Pearce, Ariz. State Senate President (Jan. 29, 2007, 5:06 PM))).

[366] *See* Bob Ortega, *Political Ties Give Leverage to CCA*, ARIZ. REPUBLIC, Sept. 4, 2011, at A1 (describing the political influence of Corrections Corporation of America (CCA), the nation's largest private detention facility operator, and participation of CCA lobbyists in the organization that drafts model bills on immigration, criminal sentencing, and other law enforcement matters); Laura Wides-Munoz & Garance Burke, *Immigrants Prove Big Business for Prison Companies*, HUFFINGTON POST (Aug. 2, 2012, 8:09 AM), http://www.huffingtonpost.com/2012/08/02/immigrants-prove-big-business-for-prison-companies_n_1732252.html (reporting that three companies in the private prison industry

politicians' public claims; however, it inspires no greater confidence in the judgment of state officials.

A. *DACA and the Rights Stuff*

If, as the *Arizona* Court observed, concern about state myopia is as old as the Framers, then a response to that myopia is to incorporate new elements into DACA. Chief among these is an emphasis on protection for intending U.S. citizens as a facet of the rights revolution. In one sense, this is nothing new. The constitutional concept of equal protection grew out of the state obligation of protection.[367] The beginnings of that transition are present in the abolitionist origins of the Fourteenth Amendment and developed in early equal protection cases, such as *Yick Wo v. Hopkins*.[368] Glimmerings of this trope are also present in Roosevelt and Root's response to the San Francisco school crisis. Such strands coalesced in a judicial forum in *Plyler*. President Obama's approach, both in *Audacity of Hope* and in DACA, deepens this connection.

For President Obama, the synergy that Secretary of State Marcy saw in Koszta between the interests of an intending U.S. citizen and the interests of foreign nationals is even more pronounced. By viewing childhood arrivals as rights bearers, other U.S. citizens can better enjoy the rights they possess. Singling out children for punitive action when they are not responsible for parental decisions to violate the law offends fairness. The nation as a whole benefits from alleviating unfair decisions of this kind. As President Obama put it in his Second Inaugural Address, unfairness to any person within the United States diminishes all of us, and fairness for one translates into a benefit for all.[369]

To see the roots of this fairness-based conception of synergy, consider then-Senator Obama's manifesto, *The Audacity of Hope*.[370] In this volume, Obama advanced a conception of synergy that expanded on the fairness argument of *Plyler*. This conception also alluded to the negative externalities of a more punitive course. Finally, it linked the two with a narrative of the immigrant

"spent at least $45 million combined on campaign donations and lobbyists at the state and federal level in the last decade"). *See generally* PETER MARGULIES, LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION 13, 34 (2010) (discussing how patronage and government contracts increase support for overzealous immigration enforcement); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 147 (2007) (discussing how in the 1930s and 1940s awarding prison contracts was a "significant political asset" for state governments with the "currency" being patronage); *cf.* Mariano-Florentino Cuéllar, *The Political Economies of Criminal Justice*, 75 U. CHI. L. REV. 941, 951-54 (2008) (arguing that many other factors also play a role in formulation of law enforcement policy (reviewing SIMON, *supra*)).

[367] *See* Barnett, *supra* note 344, at 230-31.

[368] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[369] *See* Obama, *supra* note 34.

[370] *See* OBAMA, *supra* note 35.

experience that recalled Daniel Webster's ode to intending U.S. citizens in his comments on the 1842 treaty with Britain.

In *The Audacity of Hope*, Obama extolled the synergy between helping vulnerable immigrants and enhancing the welfare of the nation. Recounting a crucial episode, Obama discussed meeting a group of immigrants, including a third grader named Cristina who was studying government in school.[371] Cristina asked for Senator Obama's autograph, saying she would share it with her government class.[372] Reflecting on the risks and challenges of immigration, Obama mused that the true "danger" is *not* being "overrun by those who do not look like us."[373] Rather, he insisted, the most serious risk is failing to "recognize the humanity of Cristina and her family."[374]

At this juncture President Obama intertwined the fairness and welfarist strands of *Plyler*. If, then-Senator Obama contended, the nation withholds from immigrants the "rights and opportunities that we take for granted,"[375] it will reap the whirlwind foreseen by Root in his analysis of the San Francisco school crisis.[376] In guarding against a feared immigrant onslaught, the nation will bring upon itself the greater evils of tolerating a "servant class in our midst"[377] and compounding "inequality that . . . feeds racial strife."[378] Summing up the immigrant experience, then-Senator Obama couched the immigrant experience in terms of change, movement, and rebirth not radically different from those that Daniel Webster chose in 1842. As Obama recalled:

> Everywhere I went, I found immigrants anchoring themselves to whatever housing and work they could find, washing dishes or driving cabs or toiling in their cousin's dry cleaners, saving money and building businesses and revitalizing dying neighborhoods, until they moved to the suburbs and raised children with accents that betrayed not the land of their parents but their Chicago birth certificates . . . .[379]

The diligent immigrants Obama conjured up echo the newcomers in Webster's vision, who "mingle with the new community in which they find themselves, and seek means of living."[380] Obama's "suburbs" substituted for

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[371] *See id.* at 268.

[372] *Id.* Obama did not specify Cristina's immigration status.

[373] *Id.*

[374] *Id.*

[375] *Id.*

[376] *See supra* Part II.D. Obama did not mention Root, but his argument follows a similar path. OBAMA, *supra* note 35, at 268 ("[I]f we stand by idly as America continues to become increasingly unequal, an inequality that tracks racial lines and therefore feeds racial strife and which, as the country becomes more black and brown, neither our democracy nor our economy can long withstand.").

[377] OBAMA, *supra* note 35, at 268.

[378] *Id.*

[379] *Id*. at 260.

[380] *See* Letter from Daniel Webster to Lord Ashburton, *supra* note 234, at 98.

Webster's nineteenth-century "frontiers."[381] In other respects, however, the parallels are striking. Some of the "children with [Chicago] accents" that then-Senator Obama cited are siblings of the children DACA was designed to aid. President Obama made these connections even more clearly in a speech declaring that DACA's beneficiaries are "young people who study in our schools, play in our neighborhoods, are friends with our kids, and pledge allegiance to our flag."[382] Nailing down the connection with earlier cases of intending Americans, President Obama affirmed that DACA's beneficiaries "are Americans in their heart and minds, in every single way but one: on paper."[383]

B. *Immigration, State Law, and the President's Institutional Advantage*

Children and others imperiled by state restrictions require aid that carries with it the President's institutional edge. As Hamilton noted in both *The Federalist*[384] and his defense of the Neutrality Proclamation,[385] the President's key advantage is the virtue of decisiveness. In contrast, federal courts suffer from a time lag in the provision of protection to intending U.S. citizens from wayward state impulses.

Federal courts can invoke the preemption doctrine to remedy some of the problems of restrictive state laws. The nature of constitutional litigation, however, inevitably makes judicial remedies a two-stage affair. Facial challenges, such as the federal government's successful challenge in *Arizona v. United States*, can remedy many problems with state laws. The more subtle problems of the statutes, such as their tendency to promote racial profiling,[386] are not appropriate for resolution in a facial challenge.[387] The new state laws condemn profiling, making a facial challenge impossible.[388] Ferreting out the profiling that accompanies *implementation* of the laws must await the more fact-intensive work of an as-applied challenge. As-applied challenges to law enforcement take time, as parties engage in discovery or convictions under

[381] *Id.* ("[S]ome find employment in the cities, others go to the frontiers . . . .").

[382] Obama, *supra* note 49.

[383] *Id.*

[384] *See* THE FEDERALIST NO. 70, *supra* note 12, at 424 (Alexander Hamilton).

[385] *See* HAMILTON & MADISON, *supra* note 13, at 5, 14-15 (Alexander Hamilton).

[386] *See* Johnson, *supra* note 32, at 630 ("[S]ome observers expressed fears that enforcement of section 2(B) and its 'reasonable suspicion' standard would increase racial profiling of Latina/os in Arizona.").

[387] *Cf.* Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes* in Toto, 98 VA. L. REV. 301, 308-10 (2012) (discussing the difference between facial and as-applied challenges).

[388] *See, e.g.*, GA. CODE ANN. § 17-5-100 (2012) (containing a verification of immigration status similar to Arizona's but explicitly requiring law enforcement to "not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and of the United States").

state laws wind their way through the system. Time broadens the window of vulnerability for those subject to profiling. The judiciary cannot close this window, but the executive can, just as the executive rescued Martin Koszta and protected Justice Field from disgruntled California litigants.

In ensuring timely intervention, DACA also is in harmony with federal constitutional values mentioned in *Plyler v. Doe*. Justice Brennan's opinion in *Plyler* highlighted the futility and irrationality of harsh enforcement measures targeting undocumented noncitizen children.[389] Even state legislation that has no direct effect on education can adversely affect undocumented children's efforts. That adverse effect derives from the combination of children's deficits in judgment with the myopia of state restrictive legislation.

As the Court has recognized in juvenile justice decisions, teenagers are a bit like states as depicted by Jay in *Federalist No. 3*: they often act on impulse and lack clear understanding of risks.[390] Upping the risk of removal for teenagers while not assuring that result may produce what the *Plyler* Court feared: the worst of both worlds. While an adult may reason that an education is intrinsically worthwhile, a teenager facing an enhanced risk of deportation may question whether the investment of time and effort is worthwhile. After all, acquiring an education may seem quixotic if a noncitizen who receives a high school diploma cannot move on to higher education or risks removal while she is attending public school. As the threat of removal diminishes a student's willingness to invest in her own education, it leaves the field to the unproductive pursuits that Justice Brennan cautioned against in *Plyler*. The child's life chances diminish, and the likelihood of negative externalities for society increases. By minimizing these risks, DACA vindicates the fairness and policy concerns that drove the *Plyler* decision.

The discussion of DACA and *Plyler* also illustrates new stewardship's looser nexus between presidential action and harm. *Plyler* does not require the relief that DACA provides to childhood arrivals. The Court in *Plyler* did not address the deportability of undocumented children under federal law, and it

[389] *See* Plyler v. Doe, 457 U.S. 202, 218-22 (1982) ("But [the Texas statute] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.").

[390] *See* Miller v. Alabama, 132 S. Ct. 2455, 2464-66 (2012) (holding, based in part on research on adolescents' judgment, that punishment of life without parole for juvenile convicted of murder constitutes cruel and unusual punishment); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (striking down life sentences for juveniles for nonhomicide crimes); Roper v. Simmons, 543 U.S. 551, 569-71 (2005) (striking down the juvenile death penalty as cruel and unusual punishment based in part on skepticism about adolescents' maturity and judgment); Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 780-82 (2011) (analyzing brain science research); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1015-17 (2003) (discussing studies that question adolescents' judgment).

did not purport to limit Congress's power to craft rules for deportation. In this sense, DACA is an overinclusive remedy. That does not, however, render it an invalid expansion of presidential authority. After all, overinclusiveness is built into the prophylactic rationale embraced by the Court in *Neagle.* Public health measures, which Justice Miller praised in *Neagle* as the epitome of a "modern" approach,[391] are also inherently overinclusive. Vaccinations, for example, cover a large class of people, some of whom are less at risk for contracting a particular disease. Despite such gradations, we nonetheless regard vaccination as appropriate and sometimes even necessary.[392] The looser tailoring of DACA regarding the *Plyler* class makes it a more subtle remedy, but should not undermine its validity.

As another illustration of DACA's prophylactic impact, consider protection of legal residents and citizens from profiling. At first blush, DACA seems markedly underinclusive regarding this group, whose members already have documents that each restrictive state law recognizes as valid. DACA has significant positive spillover effects for lawful permanent residents and citizens, however, because it reframes organizational incentives. As organization theorists have discussed for years, human cognition often takes the path of least resistance.[393] The proclivity to take shortcuts spurs reliance on racial or ethnic profiling; in the short run, employing crude indicia like appearance or accent is easier than drilling down for facts about behavior. DACA is a small step toward reordering those incentives. The program ensures

[391] *In re* Neagle, 135 U.S. 1, 59 (1890).

[392] Congress has also purposefully made remedies for vaccine-related conditions overinclusive, to ensure prompt and certain relief. *See* Shifflett v. Sec'y of Dep't Health & Human Servs., 30 Fed. Cl. 341, 345 (1994) (discussing provisions of the Vaccine Act, 42 U.S.C. §§ 300aa-1 to 34 (2006)); *cf.* Brandon L. Boxler, *Fixing the Vaccine Act's Structural Moral Hazard*, 12 PEPP. DISP. RESOL. L.J. 1, 38 (2012) (discussing the Vaccine Act's remedial scheme).

[393] *See* Cassandra Burke Robertson, *Organizational Management of Conflicting Professional Identities*, 43 CASE W. RES. J. INT'L L. 603, 611-18 (2011) (analyzing organizational problems in the military as a result of competing professional identities); *cf.* Patrick D. Larkey, *Ask a Simple Question: A Retrospective on Herbert Alexander Simon*, 35 POL'Y SCIENCES 239, 247 (2002) (explaining that under Simon's model of organizational behavior, optimal choices are often ignored in favor of choices that fulfill other organizational imperatives, including the ease of finding someone or something to blame); Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 204-11 (2010) (discussing research on common cognitive flaws as a guide to shaping suits for damages against government officials in terrorism cases); Torsten O. Salge, *A Behavioral Model of Innovative Search: Evidence from Public Hospital Services*, 21 J. PUB. ADMIN. RES. & THEORY 181, 185 (2011) (studying incentives and judgment in public health setting); Herbert A. Simon, *Rationality in Political Behavior*, 16 POL. PSYCHOL. 45, 47 (1995) (describing both individuals and entities as "boundedly rational" in that "thinking power[] is insufficient for estimating the consequences; trade-offs among goals are handled inadequately or not at all; and . . . potential effective actions may be unknown . . . or ignored").

that a larger percentage of local police stops using crude criteria will be ineffective, since more people stopped will have the papers that state law requires. When organizations such as state law enforcement recognize that more stops will be unavailing, the impetus for the profiling shortcut dissipates. Law enforcement officials will deploy greater discernment in enforcing the law.[394]

In the anti-profiling realm, DACA also exemplifies the President's institutional advantage in easing transaction costs. While many states have not followed Arizona's course, the need to navigate through a maze of disparate state laws imposes significant costs on federal rights such as the right to travel.[395] A crazy quilt of state anti-immigration laws would inhibit movement among the several states, not just by undocumented noncitizens, but by legal residents, refugees, visitors, and citizens who fear law enforcement profiling. DACA helps vindicate the federal government in reducing the impact of these disparate sources of regulation.

DACA also limits the damage done by restrictive state laws to United States compliance with international norms. The International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, bars arbitrary detention.[396] As applied, restrictive state statutes may violate this bar. Moreover, even federal detention of undocumented noncitizens has been criticized as violating international norms.[397] While the scope of the federal government's authority to detain migrants under international law is subject to controversy,[398] federal officials nonetheless have a legitimate interest in ensuring that state governments do not compound the problem.

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[394] Shifting incentives can make other organizational options more salient and plausible. *Cf.* Richard P. Larrick, *Debiasing*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 316, 326-27 (Derek J. Koehler & Nigel Harvey eds., 2004) (discussing the value of group analysis of alternatives).

[395] *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (citing the right to travel in striking down state durational residence restrictions on the receipt of public assistance).

[396] *See* International Covenant on Civil and Political Rights art. 9(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20 (1967), 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."); *see also* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (setting out limits on detention).

[397] *See* Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 280 (2013); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 541 (1999); *cf.* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1014-21 (2002) (discussing constitutional aspects of immigration detention).

[398] *See* Medellín v. Texas, 552 U.S. 491, 513 (2008) (holding that provisions of the United Nations Charter and Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations governing compliance with decisions of the International Court of Justice (ICJ) were not self-executing and that

DACA, on this analysis, also accomplishes these goals without violating the provisionality that has typically marked accepted presidential action. A new stewardship justification tied to the need to protect against restrictive state laws would be more narrow and contingent than a broad-ranging rationale relying on prosecutorial discretion. The new stewardship rationale would fade as state laws were repealed or struck down by courts in as-applied challenges.[399] At that point, the program would fall under a *Youngstown* analysis, unless Congress acted to codify it.[400]

If one can fault DACA, it is on the reasoned elaboration front. The justification invoked centered on prosecutorial discretion, which this Article argues is insufficient to support the policy. In that respect, DACA falls short of the precedent established by others, including Daniel Webster in the McLeod affair and Secretary Root in the San Francisco school crisis, whose article in the *American Journal of International Law* was a model contribution to civic education. A more careful examination of the Obama Administration's course of conduct in implementing DACA, however, leads to a more charitable view. After all, DACA was not enacted in a vacuum. It was part of a comprehensive federal effort to combat restrictive state laws, which also included litigation against legislation in Arizona and elsewhere.[401] The government's arguments

therefore federal courts lacked power to enforce ICJ decisions regarding state criminal procedure in capital cases); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 405 (2000) (arguing that United States has wide latitude in attaching conditions to its ratification of human rights agreements); *see also* Jack Goldsmith & Jeremy Rabkin, Editorial, *A Treaty the Senate Should Sink*, WASH. POST, July 2, 2007, at A19 (arguing that ratifying the Convention on the Law of the Sea will subjugate U.S. sovereign interests to conflicting international agendas). *But see* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1831-41 (1998) (positing that history supports a wider role for United States courts in applying international law principles). A full discussion of the enforceability of international law in U.S. forums is beyond the scope of this Article.

[399] The President's power in this domain would thus reflect what Justice Jackson called a necessary "latitude of interpretation for changing times." *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring); *cf.* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 322 (2010) (discussing the Court's acknowledgment of "the flexibility . . . that the separation of powers entails" (citations omitted)).

[400] President Obama has acknowledged that DACA is a provisional program, not a "permanent fix." *See* Obama, *supra* note 49 (describing DACA as a "temporary stop-gap measure" promulgated "in the absence of any action from Congress," indicating that the earlier bill had enjoyed bipartisan support, including support from then-President Bush, Senator John McCain, and the late Senator Edward Kennedy, and observing that the "bill hasn't really changed since Republicans co-wrote it . . . [t]he only thing that has changed, apparently, is the politics").

[401] *Cf.* Declaration of William J. Burns, United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (No. 2:11-CV-2746), *aff'd in part*, *rev'd in part*, *dismissed in part*, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013), Deputy U.S. Sec'y of State at para. 7. Burns specifically stated:

for preemption in the *Arizona* case included a number of the foreign policy concerns made here. Justice Kennedy's opinion for the Court in *Arizona v. United States* praised the benefits of prosecutorial discretion for achieving foreign policy and other goals, although Justice Kennedy did not address whether discretion could take the form of an affirmative immigration benefit, such as the class-wide de facto legality that DACA provides. Moreover, Justice Scalia's dissent expressly condemned DACA as an example of federal discretion run amok.[402] The majority's refusal to adopt Scalia's view does not in itself legitimate the program. It does, however, suggest that the *Arizona* majority viewed DACA as staking a colorable claim to legality, at least in the context of restrictive state laws at issue in that case.

In addition, DACA and the Dream Act became significant issues in the 2012 presidential election. President Obama invoked DACA to show his concern for the hardships faced by childhood arrivals,[403] while his opponent, Governor Romney, oscillated from a pledge in the Republican primary contests to veto the Dream Act[404] to a tepid endorsement of President Obama's initiative.[405] The election results have been widely read as an endorsement of comprehensive immigration reform generally, and the DREAM Act in particular.[406]

> The Alabama law [with many provisions similar to Arizona's] uniquely burdens foreign nationals by regulating, and in many cases criminalizing, work, travel, housing, contracting, and educational enrollment well beyond any restrictions imposed by U.S. law. These multiple . . . provisions, adopted to supplant the federal regime and deter unlawfully present aliens from entering or residing in the State of Alabama, all manifest Alabama's intention to regulate virtually every aspect of these aliens' lives and to influence immigration enforcement nationwide.

Id.; *see also Alabama*, 691 F.3d at 1282-1301, *cert. denied*, 133 S. Ct. 2022 (holding that a majority of the provisions of Alabama's law regulating immigration were preempted).

[402] Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting) ("The President said . . . that [DACA] is 'the right thing to do' in light of Congress's failure to pass the Administration's proposed revision of the Immigration Act. Perhaps it is, though Arizona may not think so. But to say . . . that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind." (citations omitted)); *cf.* Andrias, *supra* note 67, at 1119 (citing Justice Scalia's reaction as evidence that DACA had prompted public debate).

[403] Obama, *supra* note 49.

[404] Jeff Zeleny & Jim Rutenberg, *Last-Minute Scramble as Caucus Night Nears*, N.Y. TIMES, Jan. 1, 2012, at A21 (reporting that Mitt Romney said he would veto the DREAM Act).

[405] Allison Sherry, *Romney Would Honor Deferred Action*, DENVER POST, Oct. 2, 2012, at A5 (reporting that Romney would keep DACA if elected President).

[406] Susan Carroll, *Obama Victory May Give Boost to Immigration Reform*, HOUS. CHRON. (Nov. 7, 2012, 11:27 PM), http://www.chron.com/news/article/Obama-victory-may-give-boost-to-immigration-reform-4017859.php ("Immigrant advocates called the election results a game changer, saying they represented a clear mandate for immigration reform.").

Admittedly, neither the election results nor the context of the *Arizona* case supplies the full measure of reasoned elaboration that Root provided in the San Francisco crisis. Each shows, however, that the President's initiative was the subject of debate and deliberation within the government and among the public. Indeed, if the pundits are to be believed, members of the "multitude" who inspired Root's wariness with their ignorance of international law[407] may have learned something in the last century. That is surely a virtue that Root would celebrate.

CONCLUSION

Situating DACA in the landscape of presidential power is a challenging task. The usual critics of presidential power have held their fire. Perennial champions of presidential authority have reversed field. It is tempting to chalk up such pivots to the influence of partisan politics. A deeper examination, however, yields more lasting insights.

First, the Obama Administration's stated justification for DACA, rooted in prosecutorial discretion, is not sufficient. Prosecutorial discretion has a place in immigration law. It has, however, historically involved case-by-case decisions, not the blanket relief that DACA affords. Congress's plenary power over immigration and the carefully limited avenues for discretionary relief within the INA suggest that DACA overreaches. Taking seriously the architecture of Justice Jackson's *Youngstown* concurrence, DACA lands not in the first or second categories, which respectively require congressional consent or silence, but in the third category, where presidential power is at its lowest ebb. The absence of support for the President's Article II power over immigration indicates that DACA fails under *Youngstown*'s test.

That is merely the beginning of the inquiry. While viewing DACA in a vacuum suggests its infirmity, viewing it in conjunction with the rise of restrictive state legislation yields a different conclusion. Viewed in this light, DACA builds on presidential stewardship since the Founding Era, displayed in protection of both citizens and foreign nationals against nonfederal sovereigns.

From the time of the Neutrality Proclamation, this stewardship has had four attributes. First, as the Proclamation illustrated, it has been provisional – serving interstitially to preserve Congress's options. Second, as the negative example of the Nash/Robbins affair under President Adams revealed, stewardship has sought out synergies between the protection of intending Americans and the vindication of national interests. Third, stewardship has also been accepted when it reflects the President's institutional advantages over other branches. Those advantages include the ability to act decisively when time is of the essence, as it was in President Pierce's protection of the Hungarian refugee, Martin Koszta, and the ability to reduce transaction costs,

[407] Root, *supra* note 23, at 273 ("[T]he practice of diplomacy has ceased to be a mystery confined to a few learned men . . . and has become a representative function answering to the opinions and the will of the multitude of citizens . . . .").

as Secretary of State Daniel Webster showed in his successful scramble to resolve the crisis with Britain brought on by New York State's prosecution of Alexander McLeod. Finally, stewardship requires reasoned elaboration, as Secretary Elihu Root showed in his analysis of the federal role in resolving the San Francisco school crisis.

DACA builds on this legacy to hint at a new stewardship. This paradigm is a departure in its reliance on the precepts of equality and fairness that undergird modern equal protection doctrine. In the new stewardship, this theme harmonizes with the traditional emphasis on avoiding the negative externalities of wayward state action. Because of concern for neutralizing these externalities, DACA also reveals a looser nexus with threatened harm. That looser nexus is nonetheless consistent with the prophylactic rationale advanced in earlier episodes, particularly *Neagle*'s upholding of presidential authority to protect federal officers.

As an example of the new stewardship, DACA belongs in *Youngstown*'s second category – presidential action based on congressional silence. This move may not satisfy those who persist in seeing DACA from a partisan perspective. For observers who see benefits in an institutional vantage point, however, the new stewardship offers a durable alternative to partisan accounts.