

Immigration Law's Boundary Problem: Determining the Scope of Executive Discretion

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In immigration law, executive discretion has become contested terrain. Courts, officials, and scholars have rarely distinguished between regulatory discretion, which facilitates exclusion and removal of noncitizens, and protective discretion, which safeguards noncitizens' reliance interests. Moreover, courts have long discerned an internal-external divide in discretion, deferring to executive measures that exclude noncitizens abroad, while reducing deference for measures concerning noncitizens who have already entered the United States. Immigration law needs a cohesive framework for executive discretion. This Article suggests a stewardship model to fill that gap.

Recent developments have emphasized the need for a coherent model of discretion. The Trump Administration altered the landscape of executive discretion, seizing every chance to make the law harsher. The Biden Administration's efforts to correct this imbalance have been only partially successful. For example, the Biden Administration has issued a final rule supporting the Deferred Action for Childhood Arrivals (DACA) program and has issued enforcement guidelines that prioritize threats to national security and public safety and address recent irregular entries at the border. The Biden Administration has also sought to end the Trump Administration's "Remain in Mexico" program, which subjects tens of thousands of asylum seekers to peril. However, for over a year, President Biden retained the Title 42 program, which precluded asylum in the name of preventing the introduction of COVID-19. That program undercuts asylum and does not perform its ostensible public health mission. Only an unfavorable court decision in 2022 spurred efforts to terminate Title 42. At that point, another court enjoined Title 42's termination, illustrating yet again the confused state of executive discretion.

A workable approach to executive discretion requires returning to first principles. To achieve these goals, the stewardship model highlights three factors: fit with the statutory framework, protection of reliance interests, and avoidance of adverse impacts on foreign relations. This Article applies these values to DACA, the Biden enforcement guidelines, Title 42, and the Remain in Mexico program.

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INTRODUCTION

In the fraught realm of immigration, presidential discretion takes many forms. As in the Deferred Action for Childhood Arrivals (DACA) program established by President Obama, the exercise of discretion can be protective, providing noncitizens with relief such as a reprieve from removal and eligibility for a work permit.¹ Presidential discretion can also be regulatory, barring immigrants or revoking relief: consider President Trump's suspension of entry from certain majority-Muslim countries,² his failed attempt to rescind DACA,³ or his invocation of public health authorities to suspend entry at the southern border, which President Biden has continued.⁴

Courts lack consistency in delineating the contours of executive discretion. The Supreme Court limited the Trump Administration's discretion to end DACA, which provided a reprieve from removal and eligibility for a work permit to childhood arrivals. As a basis for its decision, the Court found that the Trump Administration had failed to comply with the "reasoned decisionmaking" standard of the Administrative Procedure Act (APA).⁵ However, since the Court's DACA rescission decision, a federal district court has held that initiating DACA was beyond the discretion of the Obama Administration.⁶ When courts hold that both starting and ending a program are beyond executive discretion, officials are left searching for discretion's parameters.

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

2. See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

3. See generally *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (holding that Department of Homeland Security (DHS) had not supplied reasoned explanation of rescission of DACA program).

4. Order Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806, 65806-07 (Oct. 16, 2021); *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 157-59 (D.D.C. 2021) (enjoining Title 42 public health program), *aff'd in part and remanded*, 27 F.4th 718 (D.C. Cir. 2022); *Huisha-Huisha v. Mayorkas*, No. 21-cv-100, 2022 U.S. Dist. LEXIS 207282, at *23-29 (D.D.C. Nov. 15) (vacating and setting aside program under Administrative Procedure Act), *dismissing emergency stay*, No. 22-5325, 2022 U.S. App. LEXIS 34912 (D.C. Cir. Dec. 16, 2022), *stay and cert. granted sub nom.*, *Arizona v. Mayorkas*, 2022 U.S. LEXIS 5459 (Dec. 27, 2022). President Biden has sought to terminate another program initiated by President Trump, called the "Remain in Mexico" or Migrant Protection Protocols (MPP) program. See generally *Biden v. Texas*, 142 S. Ct. 2528 (2022) (holding that INA does not categorically prohibit ending MPP).

5. See *Regents*, 140 S. Ct. at 1911-16.

6. *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021), *aff'd in part, vacated in part, and remanded*, 50 F.4th 498 (5th Cir. 2022). The Biden Administration has since promulgated a rule regarding operation of DACA. See *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53152 (Aug. 30, 2022) (codified at 8 C.F.R. pts. 106, 236, 274a).

The geographic reach of the discretion at issue is a problematic basis for fixing such parameters. Distributed along an internal-external divide, courts have often found that Congress delegated more discretion to the executive branch in matters concerning noncitizens outside the United States and less in matters concerning noncitizens who are already here.⁷ The Supreme Court upheld President Trump's suspension of entries from certain majority-Muslim countries—sometimes known as the “travel ban” or “Muslim ban”—asserting that Congress gave the President expansive power to bar foreign nationals from entering the United States.⁸ President Trump's attempted DACA rescission elicited more probing judicial scrutiny, in part because the rescission affected hundreds of thousands of noncitizens who had been in the United States for years, forging personal, institutional, and economic ties that bound them to this country.⁹ But this longtime distinction clouds rather than sharpens the analysis.

A divide between external and internal arenas obscures reliance interests in the external realm and erodes transparency in the domestic domain. President Trump's travel ban delayed and sometimes extinguished U.S. citizens' and lawful permanent residents' (LPRs) plans for family reunification—plans that the Immigration and Nationality Act's (INA) framework prioritizes.¹⁰ At the same time, the thin national security rationale for the travel ban and the backdrop of deference to such meager justifications may well have contributed to the cursory explanation for the DACA rescission.¹¹ That absence of reasoned decisionmaking in the domestic realm stems from judicial deference in the external context.

Even as courts have muddled the issue of discretion, scholars have offered unsatisfying responses. Most immigration scholars deplore the arbitrariness and

7. This dovetails with a judicial tendency to read delegations more broadly in the foreign realm and view such delegations as consistent with any constitutional limits on Congress's power to delegate. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–16 (1936); cf. Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 24–28 (2017) (discussing current efforts to revive nondelegation doctrine). Courts also have held that Congress has greater power over noncitizens still awaiting entry into the United States. See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020) (holding that Congress can limit judicial review of administrative denials of asylum claims for certain noncitizens apprehended at or near the border).

8. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2412–14 (2018).

9. *Regents*, 140 S. Ct. at 1914.

10. Cf. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 49–51 (2014) (noting problem of aging out under INA's visa categories as a visa applicant waits for their visa to become currently available).

11. Cf. *Hawaii*, 138 S. Ct. at 2443 (Sotomayor, J., dissenting) (arguing that the majority's deference to President Trump on the travel ban “empower[ed] the President to hide behind an administrative review process that the Government refuses to disclose to the public” and that subsequent disclosures revealed that the government's process for reviewing practices in more than 200 countries, rather than being “thorough,” amounted to a mere seventeen pages of documentation).

artificiality of the internal-external divide.¹² However, approaches to discretion have often been asymmetrical, with immigration scholars arguing for the lawfulness of protective discretion while opposing regulatory discretion, and conservative scholars taking the opposite view.¹³ This exchange can yield useful insights, but ultimately lacks nuance.

Two important immigration scholars, Adam Cox and Cristina Rodríguez, have taken a different path, outlining a model of plenary discretion.¹⁴ This model boldly places both protective and regulatory discretion in the realm of political

12. See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (noting judicial deference in immigration law); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 26–27 (2019) (critiquing deference in travel ban decision); Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797, 803 (2020) (arguing that deference in immigration law reflects biases of colonial “settler state” mindset); see also Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61–62 (2015) (arguing that recent Supreme Court decisions tempered deference). David Martin has provided a dispassionate account of the plenary power doctrine, which holds that Congress has virtually complete power over immigration law, particularly the admission of foreign nationals. See David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 44 (2015) (outlining most compelling bases for deference). The internal-external divide includes deference to Congress on grounds for removal of LPRs based on criminal convictions; these grounds can also prompt arbitrary and unfair results. See generally César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197 (2018).

13. SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 105–07 (Ediberto Román et al. eds., 2015) (arguing for legality of large-scale programs such as DACA); Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1352–54 (2021); Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 103 (2018); see Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1035–36 (2013) (defending broad use of protective discretion under constitutional and administrative law); Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1929 (2015) (same). But see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674–75 (2014) (suggesting constitutional limits on any such power). The characterization of immigration law scholars as being asymmetrically inclined to support the legality of any protective discretion may paint with too broad a brush. See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 390–92 (2017) (noting problems of formulation and execution in DAPA, a larger protective program than DACA that the Obama Administration announced in 2014, but that courts soon enjoined); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1186 (2015) (arguing that DAPA exceeded power delegated by Congress); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 170–71 (2018) (analyzing anomalies and paradoxes in arguments on the rule of law in immigration and other contexts). Conservatives have been insightful and influential in critiquing protective discretion and supporting regulatory discretion but have failed to supply a comprehensive account of their position. See Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 239 (2015); 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, 856–57 (2013) (asserting that DACA went beyond the scope of delegation from Congress).

14. ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 127 (2020) [hereinafter COX & RODRÍGUEZ, *THE PRESIDENT*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 219–21 (2015) [hereinafter Cox & Rodríguez, *Redux*]; Cristina M. Rodríguez, *Reading Regents and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 18 [hereinafter Rodríguez, *Reading Regents*]; Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 157 (2021) [hereinafter Rodríguez, *Regime Change*].

choice, largely immune to judicial second-guessing. Although Cox and Rodríguez's sympathies are plainly with the protective camp, their approach is consistent, arguing both that the Obama Administration had discretion to promulgate DACA and Deferred Action for Parents of Americans (DAPA), and that courts should have allowed the Trump Administration to end DACA.¹⁵ But the plenary discretion model has serious flaws. Because it views the President as an independent actor, it minimizes accountability to Congress. In addition, because different presidential administrations will wield discretion in different ways, the plenary discretion doctrine impairs continuity. In discounting the importance of statutory structure, the plenary discretion model disserves transparency, since a statute is the single most accessible source of guidance for the public.¹⁶

Finally, as we shall see, the plenary model is flawed as a descriptive model of past practice on immigration. Most past examples of presidential policy have not stemmed from unilateral presidential action. Instead, as with the Family Fairness program that the Administration of President George H.W. Bush initiated to help the children and spouses of noncitizens legalized under the 1986 Immigration Reform and Control Act (IRCA), these measures have sprung from close collaboration between Congress and the executive branch.¹⁷ Discretion has been interstitial in such cases, not plenary.

To best frame both protective and regulatory discretion as normative matters, this Article advances a stewardship model.¹⁸ This model stresses accountability to Congress, continuity, and transparency. Its principal criterion is what this Article calls "framework fit"—the match between the INA's overall structure and the exercise of the discretion at issue. Framework fit centers on the major questions doctrine. Under that doctrine, courts infer a limit to the discretion's scope if legislation meets two conditions: (1) enactment of a comprehensive legislative framework, and (2) silence about the use of executive

15. See Rodríguez, *Reading Regents*, *supra* note 14, at 3. Cox and Rodríguez have a carveout for actions triggered by animus. See COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 235 (discussing President Trump's travel ban).

16. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2210 (2017); John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1945–47 (2015). Members of elites, such as lawyers, scholars, agency personnel, and legislative staffers, often have access to more specialized agency materials, but a statute is still the best single source of guidance.

17. Memorandum from Gene McNary, Comm'r, U.S. Immigr. & Naturalization Serv., to Reg'l Comm'rs, U.S. Immigr. & Naturalization Serv. (Feb. 2, 1990), *reprinted in* 67 INTERPRETER RELEASES app. 1, at 164 (1990) [hereinafter McNary Memorandum]; Margulies, *supra* note 13, at 1217–20; *see infra* notes 226–39 and accompanying text.

18. See Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 108–11 (2014).

discretion on a related matter of great social, political, or economic importance.¹⁹ In addition, framework fit considers structural cues in a statute, such as the specificity of grants of authority and exceptions to a statutory mandate.²⁰ The stewardship model would apply framework fit across the board, ending application of the internal-external distinction. Deference flowing from that distinction has undermined accountability to Congress, continuity, and transparency, allowing animus and political expedience to substitute for reasoned decisionmaking. Tempering that deference would promote the values that discretion should serve.

Under framework fit, DACA would be a lawful exercise of discretion, although the Obama Administration's larger DAPA program was not. In a puzzling agency development, the Biden Administration's explanation for its final rule on DACA failed to fully integrate framework fit into its analysis.²¹ It thus veered dangerously close to the expansive plenary discretion approach. DACA's survival hinges on a more tailored account of its legality that this Article teases out of the Biden Administration's explanation.²²

Reliance interests are another cornerstone of the stewardship model. Taking a broad view of reliance interests, the stewardship model of discretion considers the collateral impact of discretion on noncitizens, including the DACA recipients who would have had commitments to education and services disrupted by the Trump Administration's attempt to rescind the DACA program.²³ The stewardship model would also consider the reliance interests of U.S. citizens and LPRs in the orderly administration and processing of visa applications for close relatives abroad, which President Trump disrupted with

19. See, e.g., *MCI Telecommc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321–24 (2014); *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–10 (2022); cf. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (finding that Occupational Safety and Health Act delegated authority to an agency to regulate distinctive workplace hazards, not more generalized health risks such as infectious diseases that might happen to spread in workplace as well as other settings); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151–52 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014), and suggesting uncertainty in conception and application of major questions doctrine). Champions of plenary discretion have criticized application of the major questions doctrine to immigration. See Rodríguez, *Regime Change*, *supra* note 14, at 112 (suggesting that INA's structure is composed of diverse and sometimes inconsistent additions over time and does not provide a comprehensive framework that warrants inferences from statutory gaps); cf. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2039–40 (2018) (arguing that the Fifth Circuit applied an unduly broad version of major questions doctrine in its holding that DAPA exceeded statutory authority).

20. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *Texas v. United States*, 809 F.3d 134, 180 (5th Cir. 2015).

21. *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53152 (Aug. 30, 2022) (codified at 8 C.F.R. pts. 106, 236, 274a).

22. *Id.* at 53257 (stressing special humanitarian factors applicable to current DACA recipients).

23. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020).

his travel ban.²⁴ Broader still, the stewardship model would honor the reliance interests of asylum seekers who reach the U.S. border or U.S. ports of entry. Asylum seekers cannot reasonably assume that all their asylum claims will prevail. However, given Congress's incorporation into the INA of international law's *non-refoulement* principle—prohibiting a state from returning asylum seekers to a country where those persons face arrest, torture, or death—asylum seekers can assume that the United States will fully and fairly *adjudicate* their claims. Measures such as Title 42²⁵ that undercut this reliance interest exceed the bounds of discretion under the stewardship model.

The stewardship model then considers the foreign impacts of discretion. A case in point is the “Remain in Mexico” policy (officially known as the Migrant Protection Protocols (MPP)), which resulted in sending around 70,000 asylum seekers back to Mexico, even though virtually all were nationals of countries other than Mexico or the United States.²⁶ Seeking to end the policy, President Biden's Secretary of Homeland Security, Alejandro Mayorkas, cited the unquestioned need for Mexico's consent to the presence of tens of thousands of noncitizens within its territory and the resulting imperative for complex negotiations with Mexico about the program's existence, scope, and operation.²⁷ An administration that regards such negotiations as entailing difficult tradeoffs that the government would wish to avoid should have discretion to end the program without judicial interference.

This Article proceeds in five Parts. Part I discusses both individual and programmatic discretion: individual discretion refers to decisions to commence removal proceedings or to practice forbearance in particular cases, while programmatic discretion—the focus of this Article—deals with measures with a larger footprint. Part I further divides programmatic discretion into protective and regulatory components. Part II lays out the stewardship approach, discussing core values of accountability to Congress, continuity, and transparency, as well as the model's criteria of framework fit, reliance interests and other domestic impacts, and foreign consequences. This Part also discusses the plenary discretion model as an alternative and highlights the strengths and weaknesses

24. Marc Ramirez, ‘*This Is Unacceptable: After Biden Reversed Trump's Muslim Ban, Advocates Say Little Has Changed*,’ USA TODAY (Feb. 5, 2022), <https://news.yahoo.com/unacceptable-biden-reversed-trumps-muslim-110803415.html?guccounter=1>; see *infra* notes 474–75 and accompanying text.

25. See Order Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806 (Oct. 16, 2021).

26. Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Troy A. Miller, Acting Comm'r, U.S. Customs & Border Prot., Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, and Tracy L. Renaud, Acting Dir., U.S. Citizenship & Immigr. Servs. 1 (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [hereinafter Mayorkas June 2021 Memorandum].

27. Biden v. Texas, 142 S. Ct. 2528, 2543 (2022); *id.* at 2549 (Kavanaugh, J., concurring) (discussing need for deference to the President's foreign policy judgments regarding effect of MPP on relations with Mexico).

of that approach. Part III provides an account of U.S. immigration law history within the stewardship frame, moving from the open door era to the first century of federal statutory regulation and contemporary statutes such as the Refugee Act of 1980. Part IV discusses recent developments, including the Biden Administration's guidelines on enforcement priorities,²⁸ the fate of DAPA, and the attempted rescission of and new final rule regarding DACA. It then discusses the Biden Administration's efforts to end the Remain in Mexico program. Finally, Part V discusses recent episodes in regulatory discretion, including President Trump's travel ban and the Title 42 program.

I. VARIETIES OF DISCRETION

In immigration law, Congress has plenary power, and executive discretion stems from congressional delegation.²⁹ Implementing the framework that Congress has established requires a measure of executive discretion. To see why this is so, consider the details of Congress's framework, as set out in the INA.

A. INDIVIDUAL AND PROGRAMMATIC DISCRETION

Discretion regarding individual cases is crucial to the INA's implementation. In the INA, Congress has enumerated forms of legal status, listing categories of foreign nationals who can lawfully enter or remain in the United States, which includes close relatives of U.S. citizens and LPRs, skilled employees, and refugees.³⁰ Executive branch officials determine who meets the criteria for legal status in the first instance.

When a noncitizen who is physically present in the United States lacks legal status or any other form of lawful presence, individual discretion is vital in determining if and when the government will commence removal proceedings.³¹ The government has limited resources, and individual cases have special

28. See generally Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [hereinafter Mayorkas Enforcement Memorandum].

29. See Legomsky, *supra* note 12, at 273.

30. 8 U.S.C. § 1151(b)(2)(A)(i) (providing visas for immediate relatives of U.S. citizens, such as spouses, children under twenty-one years of age, and parents whose children are at least twenty-one years of age); *id.* § 1153(a)(1)–(4) (providing other family-based visas subject to yearly caps); *id.* § 1153(b) (designating limited numbers of employment-based visas for persons with various skills and talents); *id.* § 1154 (providing for visa on petition of a U.S. citizen's spouse who, inter alia, was a victim of serious intimate abuse). The INA also provides for admission of refugees. *Id.* § 1157. In addition, noncitizens can apply for asylum in the United States. *Id.* § 1158. Refugees and asylees can gain LPR status. *Id.* § 1159. Nonimmigrants such as students are eligible for temporary visas. *Id.* § 1101(a)(15)(F); see *id.* § 1101(a)(15)(B) (providing visitor visas for tourists).

31. Lawful presence could hinge on a pending application for a legal status, such as an "affirmative" asylum application to U.S. Citizenship and Immigration Services, an office within DHS.

features that can make them a higher or lower enforcement priority.³² Factors informing discretion include: the danger, if any, that the noncitizen poses to public safety; whether the noncitizen has U.S. citizen-children; the noncitizen's community ties; and whether the noncitizen has served in the U.S. armed forces.³³ In addition, the resources available for enforcement play a role.³⁴

Programmatic discretion solves some of the problems inherent in reliance on individual discretion. By programmatic discretion, this Article means the use of categories to block initial entry, facilitate removal, or provide aid to foreign citizens. Officials turn to categories because individualized discretion can result in outcomes that are haphazard, arbitrary, unduly biased, or unduly harsh, with individual officials each wielding their discretion in different ways.³⁵ For example, noncitizens of color might be disproportionately subject to removal because of bias among immigration officers or among state and local law enforcement officers, who are often the source of referrals to federal immigration officials.

While progressives might well be concerned with racial, ethnic, or religious bias, conservatives worry that individual discretion will tilt away from immigration enforcement. On this view, discretion will become a “pull” factor encouraging foreign nationals to try to enter the United States outside the visa system.³⁶ In a recent decision limiting judicial review for asylum seekers apprehended at the border, the Supreme Court, in an opinion by Justice Alito, asserted that U.S. asylum officers were too credulous of asylum claims.³⁷ As a result of excess positive decisions, noncitizens have remained in this country for

32. See *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”); see also *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999) (remarking on the availability of deferred action—a decision to delay removal for some period—“on a case-by-case basis”); WADHIA, *supra* note 13, at 7; Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 243–44 (2010); Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765, 1768 (2021).

33. *Arizona*, 567 U.S. at 396; WADHIA, *supra* note 13, at 11.

34. Ray, *supra* note 13, at 1348–49.

35. Cox & Rodríguez, *Redux*, *supra* note 14, at 142–43 (noting that the Obama Administration favored the Secure Communities enforcement program in part because this program may have reduced the risk of racial profiling by local law enforcement, since local law enforcement officers simply passed on identification information about all arrestees without making judgments that could reflect bias); Hallett, *supra* note 32, at 1790–91; Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 250–51 (2017) (noting the consequences of keeping immigration-related information in national law enforcement databases); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1122–26 (2013).

36. See Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 410 (2020) (discussing interplay between “pull” factors within the United States that encourage irregular immigration, including the availability of jobs and certain features of U.S. law, and “push” factors within noncitizens’ countries of origin such as violence and the economic effects of climate change).

37. *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1966–67 (2020).

protracted periods, while a more rigorous approach would have hastened their removal.³⁸ Justice Alito suggested that Congress's limits on judicial review countered this trend.³⁹ While the limit on judicial review in such expedited removal cases is statutory and not a product of executive discretion, Justice Alito's concerns illuminate the conservative case for categories that compensate for protective bias.⁴⁰

Categories of programmatic discretion can include nationality, mode of entry, age at entry, and outside circumstances like COVID-19. For example, President Trump's ban on entry of nationals of certain Muslim-majority countries singled out visa applicants from Iran, Libya, Syria, and Yemen.⁴¹ For the Supreme Court, in an opinion by Chief Justice Roberts, President Trump's travel ban signaled to these countries that the United States expected better identity-management practices, such as release of information on lost and stolen passports.⁴² A program like the travel ban could communicate the United States' expectations more effectively than a patchwork of individual consular decisions. In contrast, progressives opposed the travel ban because it disrupted the ordinary visa process and institutionalized President Trump's anti-Muslim bias.

B. REGULATORY AND PROTECTIVE DISCRETION

The President and senior executive-branch officials exercise discretion at the programmatic level that is either regulatory or protective. The regulatory approach stresses enforcement of the INA, invoking sovereignty to limit entry and increase removals.⁴³ A principal focus of the regulatory approach, as Justice Alito's opinion on judicial review suggests, is weakening pull factors that encourage immigration outside the visa system.⁴⁴ Examples of regulatory discretion include the Trump Administration's measures, such as the travel ban and the Remain in Mexico policy, and the Title 42 ban linked to COVID-19

38. *Id.*

39. *Id.* at 1967.

40. See 8 U.S.C. § 1252(e)(2) (limiting judicial review for noncitizens who received negative, credible fear findings from asylum officers in expedited removal cases).

41. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404–05 (2018). The ban in its final form also included certain associates of Venezuelan government officials and nationals of North Korea, whose government does not allow residents to leave. *Id.*

42. *Id.* The government's claims about identity management were manifestly inaccurate. See David J. Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, CATO: CATO AT LIBERTY (Oct. 9, 2017, 2:07 PM), <https://www.cato.org/blog/travel-ban-based-executive-whim-not-objective-criteria>.

43. This was the focus of many of President Trump's initiatives, including the MPP. See generally Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., Ronald D. Vitiello, Deputy Dir. & Senior Off. Performing the Duties of Dir., U.S. Immigr. & Customs Enf't (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [hereinafter *Migrant Protection Protocols Memorandum*].

44. See *Thuraissigiam*, 140 S. Ct. at 1966–67.

concerns started by President Trump and continued for over a year by President Biden.⁴⁵ Regulatory measures trigger a concern from champions of protection: some exercises of regulatory discretion, such as those that limit or bar eligibility for asylum, may conflict with the INA's structure, especially its detailed substantive and procedural provisions on adjudication of asylum claims.⁴⁶

In contrast, protective discretion aids noncitizens who are claiming various forms of relief, such as asylum or status under the Violence Against Women Act (VAWA), or whose removal would be both a hardship and a lower enforcement priority, due to factors such as age or illness. By using categories, the protective approach seeks to eliminate the bias and arbitrariness that undermine individual discretion. However, acolytes of the regulatory approach raise a countervailing concern: by reducing barriers to entry and the risk of removal, protective measures strengthen the pull factors that contribute to irregular immigration.⁴⁷

Most presidents have exercised both regulatory and protective discretion. For example, Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton interdicted asylum seekers on the high seas.⁴⁸ Presidents Reagan and Bush granted deferred action—a reprieve from removal and eligibility for a work permit—to close relatives of noncitizens legalized under the IRCA.⁴⁹ Similarly, President Obama exercised regulatory discretion with the Secure Communities program, which facilitated removal of noncitizens who had committed minor criminal offenses.⁵⁰ The Obama Administration's protective initiatives included DAPA, which would have provided a reprieve from removal and eligibility for a work permit to over four million adults without a legal status who were parents of birthright citizens, and DACA, which provided comparable relief to a smaller group of noncitizens who arrived in the United States as minors accompanying

45. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 735 (D.C. Cir. 2022).

46. *See, e.g., E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1282–84 (9th Cir. 2020) (affirming preliminary injunction against DHS rule that denied asylum to persons who entered the United States at other than officially designated points); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857–58 (9th Cir. 2020) (affirming an injunction against DHS rule that denied asylum to foreign nationals who failed to apply for asylum in a third country, such as Mexico, that they traveled through en route to the United States); *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020) (holding that MPP was inconsistent with INA). *See generally* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, *THE END OF ASYLUM* 59–70 (2021) (analyzing exercises of regulatory discretion by the Trump Administration that undermined asylum protections).

47. *See* Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. 3 (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [hereinafter Nielsen Memorandum] (arguing that continuing DACA would encourage further immigration outside the visa system).

48. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 60–62.

49. *See* McNary Memorandum, *supra* note 17, at 164–65.

50. COX & RODRÍGUEZ, *Redux*, *supra* note 14, at 141–42.

their parents.⁵¹ Courts enjoined DAPA before it started operation, but DACA went into effect.⁵²

Unlike its predecessors, the Trump Administration focused almost exclusively on exercises of regulatory discretion, including reducing or eliminating past protective measures. In addition to the travel ban, the Trump Administration initiated measures that sought to restrict eligibility for asylum. One such measure was the so-called “asylum ban,” which sought to bar eligibility for asylum to applicants who crossed the border at points not designated by officials.⁵³ Courts enjoined that measure, which conflicted with a provision of the INA.⁵⁴ Other measures included the Remain in Mexico program and Title 42. In addition, the Trump Administration tried to rescind DACA, prompting the Supreme Court to hold that the rescission lacked the “reasoned decisionmaking” required by the APA.⁵⁵

President Biden has pivoted from President Trump’s stress on regulatory discretion, returning to the balance between regulatory and protective measures favored by most recent presidents. On the regulatory side, Biden continued Title 42 entry restrictions for over one year.⁵⁶ On the protective side, Biden has sought to end MPP.⁵⁷ In addition, Biden’s Department of Homeland Security has promulgated a rule to reinforce DACA’s legality.⁵⁸

II. THE STEWARDSHIP MODEL OF PROGRAMMATIC DISCRETION IN IMMIGRATION LAW

A complete account of the exercise of discretion in immigration should start with foundational values. This Article suggests three: accountability to Congress, continuity, and transparency. An approach to discretion that honors

51. Peter Margulies, *Rescinding Inclusion in the Administrative State: Adjudicating DACA, the Census, and the Military’s Transgender Policy*, 71 FLA. L. REV. 1429, 1470–73 (2019).

52. *Texas v. United States*, 809 F.3d 134, 180–86 (5th Cir. 2015); *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021) (enjoining new applications for DACA and delaying ruling on current recipients pending issuance of final rule on the program), *aff’d in part, vacated in part, and remanded*, 50 F.4th 498 (5th Cir. 2022).

53. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1259 (9th Cir. 2020).

54. 8 U.S.C. § 1158(a)(1).

55. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911–15 (2020).

56. In a further move that limits certain kinds of asylum adjudication, Biden’s DHS and Department of Justice has issued a rule revising asylum procedures that would shorten deadlines for full hearings before immigration judges (“IJs”) and increase interviews with asylum officers. *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18081–82 (Mar. 29, 2022).

57. The Title 42 program, which Biden has opted to continue, precludes many asylum claims, and in that sense overlaps with MPP. *See infra* Part IV.E.2.

58. *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53152, 53156 (Aug. 30, 2022) (codified at 8 C.F.R. pts. 106, 236, 274a).

these values will be faithful to Congress's framework. Approaches that produce tension with these values will increase the risk of executive overreach.

A. ACCOUNTABILITY

The Supreme Court has long recognized that Congress has plenary power over immigration.⁵⁹ The Constitution does not expressly give Congress power over immigration, although the Supreme Court has inferred that authority based on the combined effect of several constitutional provisions, including the Naturalization Clause, the Migration and Importation Clause, the Commerce Clause, and those clauses dealing with congressional war powers.⁶⁰ In contrast, the President's power over immigration is a type of stewardship. The executive branch wields discretion to best implement guidance that Congress has provided.⁶¹

To promote accountability to the legislative branch, the President and officials within the executive branch should be able to explain to Congress how programmatic discretion—whether regulatory or protective—harmonizes with Congress's handiwork. Officials should be able to identify convergence between executive branch policy and the framework that Congress has enacted into law. Where executive policy fails to fit the INA, Congress should be able to point to such gaps and request changes.

Programmatic discretion unmoored from Congress's guidance would undermine accountability. Metrics for assessing discretion would be uncertain, shifting with each official's perspective. An executive approach that tilts toward either protective or regulatory discretion would not offer intelligible criteria for assessing the merits of a program, beyond the polarized arenas of politics and policy. Understanding the importance of accountability to Congress, most past practice regarding discretion, such as actions in the Reagan and George H.W. Bush Administrations to assist spouses and children of IRCA-legalization enrollees, entailed partnership with the legislative branch and fidelity to the INA's structure.⁶²

Administrators and legislators who depart from this model and focus only on the supposed soundness of policy or benefits to key constituencies would still be accountable to the public. But since the public is the ultimate audience for legislation, the public would be similarly shortchanged by lack of fidelity to congressional directives.⁶³ Even more ominously, the absence of legal criteria like adherence to a statutory scheme would push public debate toward

59. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

60. *Id.* at 604.

61. Margulies, *supra* note 18, at 111.

62. *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015).

63. Barrett, *supra* note 16, at 2200.

demagogic appeals by both legislators and the President.⁶⁴ Then-candidate Trump's call for a "total and complete shutdown of Muslims entering the United States" was one example.⁶⁵ Accountability for adherence to Congress's plan will not eliminate the demagogic turn, but it will channel it to more productive choices.

Stressing accountability and adherence to Congress's plan is also vital for judicial review. Courts can instill habits of deliberation that improve the performance of the political branches.⁶⁶ The "reasoned decisionmaking" that the Supreme Court found absent in the Trump Administration's attempt to rescind DACA would lack intelligible criteria if administrative adherence to Congress's plan were merely optional or aspirational.⁶⁷ Without that nexus to Congress's plan, the legality of a given program might be a political question or an occasion for absolute judicial deference. The erosion of judicial review would also channel disputes into the political arena, as triggers for demagogic displays. This would not serve deliberation's cause.

B. CONTINUITY

Continuity is also a central value in stewardship. Reliance interests warrant respect to avoid needless disruptions in life plans. Discretion without continuity inhibits planning and long-term thinking. It breeds anxiety and susceptibility to demagogic appeals.⁶⁸

Here, again, the Supreme Court's invalidation of the Trump Administration's effort to end DACA is a compelling example. Chief Justice Roberts's opinion discussed the long-term commitments of DACA recipients that rescission would interrupt, such as studying for a college or graduate degree.⁶⁹ Acknowledging the importance of such sustained courses of action should be one component of lawful discretion. An unduly expansive view of discretion under the INA would frustrate continuity, leaving results up for grabs with each change in administration.

64. Of course, politics can also affect the formulation and application of legal criteria. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1103 (2015) (describing certain Justices, including Anthony Kennedy, as making decisions about legal criteria with an eye toward strategy regarding the merits); Kavanaugh, *supra* note 19, at 2152 (suggesting that the two-step structure of *Chevron* deference, which focuses first on statutory ambiguity and then on reasonableness of agency action, lends itself to strategic decisionmaking by courts).

65. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

66. See THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

67. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

68. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 66.

69. *Regents*, 140 S. Ct. at 1914.

C. TRANSPARENCY

Transparency is indispensable to both accountability and continuity. Courts, legislators, scholars, and the public need transparency to adequately assess the merits of executive action. Indeed, individual discretion can be problematic because it hinges on the decisions of line-level officials, who may be arbitrary or biased.⁷⁰ Programmatic discretion can address some of those problems.⁷¹ However, discretion that does not fit within a statutory scheme ultimately disserves transparency. Transparency with the public requires fidelity to the structure of statutes. Members of the public may not curl up with a copy of the U.S. Code. Nevertheless, statutes are more lasting and accessible than most administrative policies, which agencies can revise without the attention that attends enactment of laws.

Moreover, an unduly expansive view of programmatic discretion can injure transparency. Bias is not limited to line-level officials. Even professors Adam Cox and Cristina Rodríguez, the leading champions of plenary programmatic discretion, conceded that President Trump's travel ban was the product of animus.⁷² Animus takes many forms, including some that thrive in the nooks and crannies created by open-ended statutory or regulatory language. That open-ended language can conceal invidious uses of discretion, particularly if officials are adept at wielding discretion without the florid rhetoric that President Trump employed. That concealment injures the cause of transparency. But champions of plenary discretion must accept open-ended guidance that can cloak animus, if they are to remain committed to the broad parameters for discretion that they envision.

D. ONE ALTERNATIVE TO STEWARDSHIP: ASYMMETRIC DISCRETION

Some officials, courts, and scholars fail to fully observe these parameters by following an asymmetric model of discretion that tilts too far toward either the regulatory or protective pole. That tilt undermines the values of accountability, continuity, and transparency. An asymmetric stance figures in the rulings of certain federal appellate courts and in the priorities of immigration scholars.

While it can be perilous to attribute partisan motives or policy preferences to federal judges, it is fair to analyze the dispositions about programmatic discretion in court decisions. For a perspective that appears to favor regulatory discretion and rigorously scrutinize protective discretion, consider the decisions of the Fifth Circuit, which invalidated DAPA.⁷³ The Fifth Circuit's reasoning in

70. Ray, *supra* note 13, at 1359.

71. WADHIA, *supra* note 13, at 5–6.

72. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 235.

73. *Texas v. United States*, 809 F.3d 134, 178–82 (5th Cir. 2015).

the DAPA case correctly considered statutory structure.⁷⁴ However, asymmetry enters the picture in the court's upholding of an injunction against the Biden Administration's termination of MPP, one of the Trump Administration's exercises of regulatory discretion.⁷⁵ The Fifth Circuit's decision in the latter case relied on a slanted reading of the government's justifications.⁷⁶

In contrast, the Ninth Circuit rigorously scrutinized virtually all of President Trump's regulatory moves, including MPP.⁷⁷ However, in discussing the Obama Administration's significant protective measures (DAPA and DACA), the Ninth Circuit took a far more deferential approach than the Fifth Circuit. For the Ninth Circuit, the INA's limits on protective discretion did not conflict with either DAPA or the smaller, more targeted DACA program.⁷⁸

Both the Fifth Circuit and the Ninth Circuit showed marked asymmetry in the level of scrutiny that each court accorded regulatory and protective discretion, respectively. As the stewardship model acknowledges, some divergence is appropriate.⁷⁹ But the conspicuous asymmetry in these courts' approaches is troubling. To preserve accountability to Congress, continuity, and transparency, courts should strive for consistency in their approach to discretion. Otherwise, courts risk the clouding of legal criteria, the disruption of expectations, and a burgeoning cynicism about judges' own motives.

The Supreme Court's approach is asymmetrical, as well, but that asymmetry hinges on the internal-external distinction. In the travel ban case, the Court upheld the measure, referring to its effect on noncitizens outside the country with no previous ties to the United States.⁸⁰ However, in the DACA case, the Court invalidated a policy regarding foreign nationals who have already

74. *Id.*

75. *Texas v. Biden*, 20 F.4th 928, 988–98 (5th Cir. 2021). The Supreme Court avoided this particular asymmetrical interpretation in reversing the Fifth Circuit and remanding to the district court for further proceedings. Central to the Supreme Court's decision was a more deferential view of the relationship between provisions of the INA and the Biden Administration's decision to terminate MPP. *See Biden v. Texas*, 142 S. Ct. 2528, 2541–44 (2022), *rev'g and remanding* 20 F.4th 928.

76. *See, e.g., Texas*, 20 F.4th at 991 (viewing as “irrational” the government's concern that MPP, by subjecting asylum seekers to dangerous conditions in Mexico, had caused some to abandon meritorious asylum claims); *id.* at 1002 (discounting the government's concern that continuing MPP would involve tradeoffs in the United States' relationship with Mexico).

77. *See generally* *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) (holding that MPP exceeded power delegated in INA).

78. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 508–09 (9th Cir. 2018) (asserting that Congress's inclusion of specific protective provisions in the INA did not support an inference that Congress had precluded more expansive exercises of protective discretion; instead, the protective measures Congress inserted were mere expedients enacted “piecemeal over time” as particular needs arose), *aff'd on other grounds*, 140 S. Ct. 1891 (2020).

79. *See infra* notes 268–72 and accompanying text (arguing that judicial review of protective discretion should entail a broader reading of framework fit and that the President's own constitutional power can justify certain protective measures, absent express statutory provisions to the contrary).

80. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404–12 (2018).

entered the country.⁸¹ The internal-external distinction facilitates the migration of demagogic appeals and deceptive explanations from the external to the internal realm.⁸² That effect impairs accountability, continuity, and transparency.

Unfortunately, while immigration scholars have insightfully critiqued the Supreme Court's familiar internal-external distinction,⁸³ most immigration scholars have at least tacitly adopted a variant of the Ninth Circuit's asymmetrical approach (i.e., scrutinizing regulatory discretion rigorously, while deferring to exercises of protective discretion). In their scholarly agendas, which typically embody normative values, immigration scholars have followed this asymmetrical approach. Most scholars have argued for the legality of protective discretion, including both DACA and the larger DAPA program.⁸⁴ In assessing regulatory discretion, most immigration law scholars have vigorously critiqued categorical approaches to restricting asylum and increasing removal rates.⁸⁵ To be sure, there is much to criticize about the use of regulatory discretion, particularly in the Trump Administration's own asymmetric devotion to that approach. But if a desired goal is scrutiny of both protective and regulatory discretion, the scholarly consensus lies elsewhere.

E. THE PLenary DISCRETION OPTION

Professors Adam Cox and Cristina Rodríguez have taken a more symmetrical turn, arguing as both a descriptive and normative matter that presidents have plenary discretion in both the regulatory and protective context.⁸⁶ For example, Cox and Rodríguez have asserted both that the Obama Administration had discretion to promulgate DACA and DAPA and that the

81. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914–15 (2020).

82. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (finding that Department of Commerce Secretary Wilbur Ross's explanation for seeking to add citizenship question to U.S. census was “contrived” and that “the evidence tells a story that does not match the explanation the Secretary gave for his decision”).

83. *See Legomsky*, *supra* note 12, at 262–63.

84. *See WADHIA*, *supra* note 13, at 105–08; sources cited *supra* note 13. As noted above, the claim of asymmetry in the text is a heuristic that should not obscure counterexamples in the literature. *See Chen*, *supra* note 13, at 392; David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 588 (2017); David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 684–85 (2000) (arguing that efficient but accurate adjudication of claims of foreign nationals who lack a credible fear of persecution in their home country will shut the “revolving door” of repeated border crossings); Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 471–73 (2020) (discussing the importance of the concept of borders that preserves sovereignty but requires equality of access); Peter H. Schuck, *INS Detention and Removal: A “White Paper,”* 11 GEO. IMMIGR. L.J. 667, 669 (1997) (articulating Congress's position favoring efficient removal of inadmissible foreign nationals).

85. *See SCHOENHOLTZ ET AL.*, *supra* note 46, at 59–70.

86. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 192–95 (discussing a “two principals” model in which the President is an equal partner of Congress).

Supreme Court exceeded its role by halting the Trump Administration's attempt to end the former program.⁸⁷ The plenary discretion model advanced by Cox and Rodríguez is a landmark in recent immigration scholarship. However, their model fails to fulfill the values of accountability to Congress, continuity, and transparency that this Article argues are essential.

Cox and Rodríguez have downplayed the value of accountability to Congress because they view the President as a co-principal in immigration law and the INA as an aggregation of random accretions, not a cohesive framework.⁸⁸ As a co-principal, the President is a partner of Congress, not Congress's faithful servant. Partners have substantial discretion in pursuing their own goals, as long as those goals do not undermine the partnership or violate express or implied terms of the partnership agreement. Unfortunately, Cox and Rodríguez have not provided a sustained argument on the constitutional basis for their claim that the President is a co-principal on immigration law. While no single constitutional provision grants Congress plenary power over immigration, the Supreme Court has long viewed a combination of provisions as granting Congress such authority.⁸⁹

In contrast, no express language on executive power in the Constitution mentions anything remotely related to immigration. The Vesting Clause, which grants the President executive power, is a possibility.⁹⁰ However, critics of the Vesting Clause thesis have long cautioned that an expansive view of the Vesting Clause would condone executive overreach across the board, including with war powers.⁹¹ The Take Care Clause does not do the work that Cox and Rodríguez need it to perform, since that provision requires that the President "[t]ake [c]are that the [l]aws be faithfully executed."⁹² The duty to take care contemplates that in most situations, including immigration, the President shall be the faithful servant of Congress, not a co-principal.

If the President is, in most pertinent respects, an agent who implements Congress's design, accountability to Congress is vital. But plenary discretion over both regulatory and protective programs diffuses that accountability. Accountability to Congress suffers if senior officials can plead plenary discretion as an affirmative defense when legislators, courts, or the public question executive policy's fidelity to Congress's plan. As noted above, hashing

87. See Rodríguez, *Reading Regents*, *supra* note 14, at 6, 33.

88. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 198–99.

89. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889).

90. U.S. CONST. art. II, § 1, cl. 1.

91. See generally, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (arguing that the Vesting Clause, U.S. CONST. art. II, § 1, cl. 1, does not grant the President broad residual power over foreign relations).

92. U.S. CONST. art. II, § 3, cl. 1; Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2112 (2019).

out disputes in a purely political forum does not address this concern. Politics is a forum ripe for demagoguery and inhospitable to deliberation. Fidelity to Congress supplies one check on such excesses. A plenary discretion model disables that check.

In addition, Cox and Rodríguez are off the mark in their claim that the INA is not a coherent framework, but a miscellaneous grab-bag of accretions “over time,” as the Ninth Circuit said in suggesting that protective discretion could support both DACA and DAPA.⁹³ Congress has certainly amended the INA, as it has other statutes. But that process of evolution has signposts along the way, including the abolition of national origin quotas in 1965, the codification of refugee protection in 1980, and the integration of asylum processing into expedited removal in 1996.⁹⁴ Congress has included touchstones of protection, even as it has sought to curb undue executive discretion and encourage effective enforcement. Here, Cox and Rodríguez’s argument proves too much. Harmonizing disparate elements in a statutory structure is often difficult. However, that challenge is part and parcel of what judges do with a broad array of statutes.⁹⁵

Moreover, if past practice figures in the landscape of statutory frameworks, Cox and Rodríguez’s descriptive account is also incomplete. According to the plenary discretion argument, past exercises of executive discretion were largely unilateral, sidelining Congress.⁹⁶ This narrative unduly discounts the collaboration between Congress and the executive branch that drove the historical examples that plenary discretion’s champions have cited.⁹⁷

Plenary discretion also disserves continuity. As the Supreme Court noted in *Department of Homeland Security v. Regents of the University of California* (*Regents*), finding that the Trump Administration’s DACA rescission failed the APA’s “reasoned decisionmaking” test, noncitizens develop reliance interests in continued benefits.⁹⁸ Interrupting recipients’ long-term plans for education, service, or a prolonged course of medical treatment imposes costs. Under a regime of plenary discretion, successive administrations could provide sweeping benefits to noncitizens, precipitously withdraw those benefits, and then provide them again, keeping the pendulum swinging indefinitely. Defending the plenary discretion approach, Rodríguez has argued that it is “better to accept some losses or setbacks in order to have the future chance at quick and potentially radical

93. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 508–09 (9th Cir. 2018).

94. Motomura, *supra* note 84, at 462; Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279–83 (1996).

95. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012) (“[W]ords are given meaning by their context . . .”).

96. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 35–46.

97. See Margulies, *supra* note 13, at 1211–22.

98. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

change.”⁹⁹ In a polarized and volatile political climate, however, change may be quick, but it will not be lasting. Living in that uncertain world may prompt exhaustion, especially for noncitizens with few buffers against loss.

Transparency is perhaps the best argument for the plenary discretion model. One could condition exercise of plenary discretion on issuance of clear guidelines. That would remedy the lack of clarity that often accompanies individual discretion.¹⁰⁰ However, there are problems with the transparency strand of plenary discretion. As noted above, in a system in which the executive branch implements Congress’s framework, the best approach to transparency involves complying with Congress’s own plan. Tensions with that plan, which are endemic to the plenary discretion model, will inevitably lead to confusion among legislators, judges, and the public. Indeed, since executive branch agencies are a “them,” not an “it,” intra-agency disputes about implementing policies will persist.¹⁰¹ Those disputes will make transparency even more difficult to achieve.

F. THE STEWARDSHIP MODEL’S CRITERIA

Since the plenary discretion and asymmetrical discretion model do not fit the values of accountability to Congress, stability, and transparency, this Article advances a stewardship model. Under the stewardship model, key factors are framework fit, the presence of reliance interests or other domestic collateral impacts, and the effect of the program at issue on foreign relations. After briefly describing each factor, this Part explores the work each factor does in the evolving history of immigration law. That historical account starts with the “open door” era from 1789 to 1881, in which Congress did not directly regulate immigration.¹⁰² The Article loosely calls the next period, from 1882 to the passage of the Refugee Act of 1980, the first century of U.S. statutory immigration law. The contemporary period dates from the Refugee Act’s enactment to the present, and includes measures such as the Obama Administration’s DAPA and DACA policies; President Trump’s travel ban, Title 42, and Remain in Mexico policies; and President Biden’s attempt to end the Remain in Mexico policy, supply clear guidelines on prosecutorial discretion, and provide a firm legal footing for DACA.

99. Rodríguez, *Regime Change*, *supra* note 14, at 99.

100. Ray, *supra* note 13, at 1359.

101. See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It,”* 96 MINN. L. REV. 194, 212–16 (2011).

102. James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 359–60 (2010); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 12 (2010); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1833–34 (1993).

1. *Framework Fit*

The concept of framework fit combines a focus on statutory structure with an inquiry into a program's tailoring. Statutory structure includes consideration of a discretionary program's harmonization with the text of a statute and other statutory provisions.¹⁰³ Tailoring will generally favor narrower exercises of discretion, which are less likely to conflict with the overall statutory scheme.

a. *In General*

Assessing the overall framework that governs a provision is more reliable than merely assessing a provision's text in a vacuum. All schools of statutory interpretation recognize that courts should not consider the text of a provision in isolation.¹⁰⁴ Rather, a fair evaluation of clues from statutory structure is a necessary complement to parsing the text itself.

In considering regulatory discretion, framework fit focuses on whether the program harmonizes with statutory provisions such as the INA's asylum protections. This inquiry will disfavor exercises of regulatory discretion that impose steep limits on initial eligibility for asylum and preclude an applicant from proving the merits of their substantive claim. In considering protective discretion, the focus will shift to the program's consonance with provisions that either expressly provide forms of legal status or bar other relief.

In determining framework fit, courts should employ the major questions doctrine.¹⁰⁵ Under the major questions doctrine, when dealing with comprehensive legislation such as the INA, courts should not read either silence or generic statutory language as authorizing expansive uses of discretion that affect questions of substantial political, economic, or social significance. While the precise contours of the major questions doctrine can—like most legal rules—be blurry at the margins, the major questions doctrine invokes conceptions of proportionality and fit that are familiar in legal reasoning, summed up in Justice Scalia's much-cited observation that Congress “does not hide elephants in mouseholes.”¹⁰⁶

The major questions doctrine flows from basic premises about human judgment and behavior: if we intend to make a significant change in our routine, we first deliberate about that change and announce our intentions rather than pivoting without thought or prior notice. Statutory structure also plays a role. Suppose that Congress has already addressed a topic in specific provisions or other legislation but has not expressly granted an agency discretion to regulate

103. See *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1815 (2021).

104. SCALIA & GARNER, *supra* note 95.

105. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Util. Air Regul. Grp. v. EPA*, 537 U.S. 302, 321–24 (2014); see sources cited *supra* note 19.

106. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

in areas beyond that topic. Courts will often infer that Congress's failure to expressly delegate authority is a deliberate choice to limit the agency's discretion. When a proposed regulation is broad and covers major political, social, or economic issues, courts view statutory silence or ambiguity as reinforcing an agency's lack of authority.¹⁰⁷ Indeed, in its most recent decision on the major questions doctrine, the Supreme Court has described the doctrine as a clear statement rule that requires Congress to expressly authorize an agency to regulate such important matters.¹⁰⁸

While earlier decisions stopped short of classifying the major questions doctrine as a clear statement rule, those decisions relied on clues in statutory structure, history, and past practice to conclude that an agency lacked authority to regulate high-profile matters. For example, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court held that the Food and Drug Administration (FDA) lacked the power to regulate the tobacco in cigarettes.¹⁰⁹ The Court cited the importance and prominence of the tobacco industry and the long history of legislative enactments regarding tobacco use. In particular, the Court cited Congress's requirement that tobacco companies disclose the ingredients of cigarettes, including harmful substances such as tar and nicotine.¹¹⁰ The Court noted that requiring disclosure to consumers would have been superfluous if Congress had by implication delegated power to the FDA to ban cigarettes entirely.¹¹¹ The absence of past practice, such as prior attempts by the FDA to directly regulate the sale of cigarettes, buttressed the Court's conclusion.¹¹²

When Congress includes a detailed structure in a statute, it seems likely that Congress believed the structure would be important for implementing statutory goals. Devising a detailed structure does not happen randomly. It typically involves committee hearings, consultation about the level of detail required, and iterative efforts at drafting by both legislators and their aides. Often, other stakeholders weigh in during this process. Viewing an elaborate structure as a mere prelude to plenary executive discretion discounts the difficult work that legislators and their staffs do in creating that edifice. Similar inferences about framework fit can be helpful in assessing the discretion due the exercise of regulatory and protective discretion under the INA.

107. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–10 (2022).

108. *Id.*

109. 529 U.S. at 159.

110. *Id.* at 138–39.

111. *Id.* at 139–40.

112. *Id.* at 138–40.

b. *The Internal-External Divide*

With respect to the exercise of regulatory discretion, framework fit rejects the internal-external divide that courts have long followed on immigration. Decisions based on this distinction have read implicit grants of executive power more broadly in matters affecting foreign nationals who seek to enter the United States and have also read countervailing indications in the INA more narrowly. The approach to framework fit taken under a stewardship model would apply framework fit across the board, regardless of the location of noncitizens affected by the exercise of discretion at issue. In the “external” realm of measures such as President Trump’s travel ban, a deferential approach fails to acknowledge the impact of animus, such as the animus in then-candidate Trump’s call for a “total and complete shutdown” of Muslim immigration to the United States.¹¹³ That animus can then migrate to the domestic sphere. The most effective approach to controlling discretion involves checking excess discretion in the foreign sphere first, if that is where courts first encounter it. That approach, which rejects courts’ internal-external divide, is most faithful to the values of accountability to Congress, continuity, and transparency.

c. *A Measure of Asymmetry Regarding Protective Discretion and Past Practice*

The stewardship model also applies framework fit with a measure of asymmetry, allowing for the validity of certain protective measures if they are consistent with past practice. In considering the validity of protective measures such as DAPA and DACA, a court should first assess whether Congress has expressly precluded a particular exercise of discretion and whether it fits the statutory framework. An express restriction by Congress ends the inquiry. Absent an express restriction, a court can uphold a protective measure even if it constitutes a loose fit with the statutory framework. However, even that looser conception of fit has limits.

A measure of asymmetry regarding protective measures stems from two sources rooted in history. First is the longtime consideration of hardship and other individual equities in the exercise of individual discretion.¹¹⁴ An expansion of that approach into the realm of categorical exercise of protective discretion is appropriate if the expansion has an intelligible limiting principle, such as DACA’s aid to childhood arrivals. Second, the greater deference to protective measures stems from the constitutional relationship between the President and Congress. Under Justice Jackson’s analysis of this relationship in *Youngstown*

113. Jessica Taylor, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering’ U.S.*, NPR (Dec. 7, 2015, 5:49 PM), <https://npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s>.

114. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999).

Sheet & Tube Co. v. Sawyer, courts defer most readily when the President and Congress act together.¹¹⁵ Courts may defer when presidential action is the most recent instance of an established pattern that has historically elicited congressional silence or acquiescence. That pattern may create a “gloss” that in effect augments presidential power, so long as Congress has not expressly barred an executive action.¹¹⁶ In Justice Jackson’s third category, presidential power is at its lowest ebb, and the President must rely on express and exclusive powers that the Constitution confers on the executive branch.¹¹⁷ Appropriately tailored measures will fit within Justice Jackson’s second category of presidential action against the backdrop of congressional silence or acquiescence.¹¹⁸

Under this view, a protective measure will pass muster, even with a looser framework fit than a regulatory measure, if the measure is consistent with past practice and fulfills the other criteria of stewardship: safeguarding reliance interests, reducing collateral impacts, and avoiding conflict with foreign powers. This more relaxed test is appropriate because protective measures have a long pedigree in exercises of individual discretion. This parallel with past practice creates a gloss that the President can rely on, as long as that action does not expressly clash with the statute and meets the other criteria described above. Of those, consistency with past practice is key; fit is therefore still important, focusing on the fit between the executive action at issue and those that are part of the historical record. History does provide instances of executive aid to foreign nationals, starting with assistance to British seamen in the Jefferson and Madison Administrations.¹¹⁹ Given the history, a measure of additional deference to protective measures is consistent with accountability to Congress, continuity, and transparency. As we shall see, fit with past practice is a robust criterion, which appropriately resulted in the invalidation of DAPA, although it would permit the continuation of DACA for current recipients.

115. 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (discussing gradations of judicial deference to presidential power, with deference highest when the President and Congress act together, at a middle stage when Congress is silent, and “at its lowest ebb” when the President acts in opposition to Congress); *id.* at 610–11 (Frankfurter, J., concurring) (asserting that a pattern of legislative acquiescence can provide a “gloss” on presidential power beyond Constitution’s stated authorities that should trigger judicial deference); *Dames & Moore v. Regan*, 453 U.S. 654, 657–58 (1981) (upholding presidential claims settlement as established practice in which Congress has acquiesced); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 415 (2012); Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1922–32 (2020); *cf.* Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1924–25 (2012) (discussing *Youngstown* and deference to administrative agencies).

116. *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

117. *Id.* at 637–38 (Jackson, J., concurring).

118. *Id.* at 637.

119. *Case of the Deserters from the British Frigate L’Africaine*, 3 AM. L.J. & MISC. REPERTORY 132, 134–36 & n.g (1810); *see infra* notes 142–45 and accompanying text.

2. *Reliance Interests and Domestic Collateral Impacts*

Consideration of reliance interests and other collateral impacts in the domestic realm is also an important aspect of the stewardship approach. Reliance interests involve reasonable expectations that individuals will be able to continue their plans or projects without adverse legal consequences. Reliance interests are a staple of several doctrines including obligations under the Contracts Clause, interpretation of the Ex Post Facto Clause, imposition of the rule of lenity and the presumption against retroactive application of statutes, and definitions of categories of criminal offenses that constitute grounds for removal under the INA.¹²⁰

Disruption of reasonable expectations is both unfair and inefficient. Undermining reliance interests creates a notice problem. To be fair, the government should clearly identify in advance how changes in the law will affect constituents' plans. The failure to do so is both unfair and inefficient, as legal changes force people to drop plans that require an investment of time and resources. Moreover, legal changes without notice trigger opportunity costs. In counting on the ability to complete certain plans, people decline other options. Those options may not be available at a later time.

A government practice of undermining expectations may also injure public goods, such as initiative and innovation. A "public good" is a value or attribute that affects everyone, but does so diffusely, with an impact felt by an entire society or all of humanity. For example, a clean environment is a public good spread across a country or region or the entire planet, while activities that spawn pollution may benefit certain private interests in a more concentrated and readily quantifiable fashion.¹²¹ Individuals with sufficiently low transaction costs may be able to make other arrangements that happen to be beneficial, even after a changed legal rule has injured their expectations. However, the fear that legal changes will require hasty rerouting can chill productivity and ambition, leaving society worse off.

In immigration law, reliance interests may be weighty or less substantial. The most profound interest is an LPR's interest in clear notice of potential grounds for removal. Acknowledging that removal is "akin to banishment," the Supreme Court has endorsed a rule of lenity, void for vagueness doctrine as applied to removal grounds; a presumption against retroactive application of newly enacted bases for removal; and an approach to criminal grounds for removal that focuses on the elements of an offense, not the particular facts of the

120. *INS v. St. Cyr*, 533 U.S. 289, 320–23 (2001) (invoking presumption against retroactivity to protect noncitizen's access to certain relief from removal).

121. Donald J. Boudreaux & Roger Meinert, *Externality: Origins and Classifications*, 59 NAT. RES. J. 1, 17 (2019).

case.¹²² While other interests may be less substantial, the Supreme Court has on occasion required the government to consider them. For example, in *Regents*, the Court held that the government had to assess the reliance interests of DACA recipients in continuation of the program.¹²³

The stewardship model's rejection of immigration law's internal-external distinction requires consideration of the reliance interests of foreign nationals outside the United States. Those reliance interests may intertwine with the interests of U.S. citizens or LPRs, or may exist independently. The Supreme Court has recognized the interests of citizens in sponsoring visa applicants abroad for purposes such as family reunification. In such cases, the Court has applied a relaxed "facially legitimate and bona fide" standard to visa denials that may trigger constitutional issues such as free speech, the scope of the Establishment Clause, and due process.¹²⁴

In *Kerry v. Din*,¹²⁵ the Court declined to hold that the Due Process Clause governed rules that curb disclosing the basis for certain immigrant visa denials based on national security.¹²⁶ Nevertheless, Justice Kennedy, concurring in the judgment, took a different path to deciding the case by assuming that due process governed the issue.¹²⁷ Applying a deferential "facially legitimate and bona fide" standard, Justice Kennedy found that publicly available information justified the denial and that the disclosure of more specific information about the basis for the denial could injure national security.¹²⁸ In upholding President Trump's travel ban, the Court held that the ban passed muster under the "facially legitimate and bona fide" standard, thus defeating an Establishment Clause challenge based on President Trump's inflammatory rhetoric.¹²⁹ The stewardship model, in keeping with its rejection of the internal-external distinction, would require more probing review in such cases.

The stewardship model would also recognize freestanding reliance interests by asylum claimants outside the United States. In some cases, such as with the refugees from Vietnam in the 1970s or from Afghanistan today, refugees' search resulted from U.S. armed conflicts. Here, future refugees often took actions, such as helping American forces, that led to a risk of

122. *Moncrieffe v. Holder*, 569 U.S. 184, 200–01 (2013); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018).

123. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

124. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

125. 576 U.S. 86, 101 (2015).

126. *Id.* at 92–97.

127. *Id.* at 102.

128. *Id.* at 104–06.

129. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–20 (2018).

persecution upon the armed conflict's end.¹³⁰ Reliance interests are significant in such situations.

More generally, future refugees make choices such as opposing their home country's government based on the availability of refugee protection guaranteed under international law. The United States is a part to the 1967 Refugee Protocol, which Congress implemented in the Refugee Act of 1980.¹³¹ A state's central duty under refugee law is compliance with the principle of non-refoulement, which bars a state from returning an asylum seeker who has reached its borders to another country where the asylum seeker has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.¹³² When the United States restricts refugee protections for this group, as President Trump did with both the Remain in Mexico and Title 42 programs, these restrictions upend expectations for refugees who counted on such protections when they publicly opposed their government or engaged in other acts that could merit asylum. Undermining such expectations should trigger searching judicial scrutiny.

3. *Foreign Impacts*

Lastly, courts should look to foreign impacts of both protective and regulatory discretion. Here, too, courts must be discerning. Too frequently, courts have regarded every immigration decision as having a foreign impact.¹³³ That sentiment tends to ramp up deference to regulatory discretion. A more nuanced standard should acknowledge foreign impacts in both the protective and regulatory modes.

The travel ban decision is an example of foreign impacts triggering deference. In that decision, the Supreme Court held that incentivizing foreign states, such as Iran and Yemen, to provide accurate information on visa applications could require a ban on entry for nationals of those countries.¹³⁴ As we shall see, this conclusion was problematic as a matter of framework fit. Nevertheless, the travel ban's justification raised a sufficient issue of foreign impact to satisfy this factor.

In other cases, reducing foreign impacts may require ample discretion to decline to remove certain noncitizens. The Court in *Arizona v. United States* held that the need to preserve individual discretion along these lines preempted state laws that would have pushed federal officials to commence removal

130. See Designation of Afghanistan for Temporary Protected Status, 87 Fed. Reg. 30976, 30978 (May 20, 2022) (citing as one justification for protection for Afghan nationals in the United States that the Taliban, since taking power, has retaliated against Afghans linked with former government allied with the United States).

131. Pub. L. No. 96-212, 94 Stat. 102 (repealed 1994).

132. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

133. Legomsky, *supra* note 12, at 268.

134. *Hawaii*, 138 S. Ct. at 2403–05.

proceedings.¹³⁵ For the *Arizona* Court, such enforcement-minded state laws would have run the risk of offending foreign countries that sought a more textured U.S. immigration policy.¹³⁶ A similar concern with avoiding friction with foreign countries could support certain protective measures.

III. AN EVOLVING SAGA: DISCRETION FROM THE FOUNDING ERA TO THE PRESENT

Applying the stewardship model to the history of immigration elicits new insights. This Part marshals illustrative examples from the open door era, the first century of federal statutory regulation, and the contemporary landscape. The tailored exercise of discretion in the open door era is striking as a complement to the absence of statutes that directly controlled immigration during this period. The more detailed statutory developments of the first century of federal control and the contemporary period play out against the backdrop of the open door era. This makes framework fit a more significant factor, but leaves a residue of executive discretion intact.

A. THE OPEN DOOR ERA

In the open door era, it might seem as if framework fit was not a concern because there was no federal statutory framework governing immigration. However, policymakers often sought to integrate their initiatives into a latticework of legal discourse. Often, their reference point in the open door era was international law. The increasingly dominant Jeffersonian Republican party also considered reliance interests, collateral impacts on U.S. economic interests like shipping, and the value of U.S. leadership on human rights.¹³⁷

In terms of protection, leaders of the new republic after independence worked actively to encourage immigration. The Framers agreed that the immigration of individuals with skills and resources would strengthen the country, contributing to its capacity for self-defense as well as its economic well-being.¹³⁸ Hamilton, as Secretary of the Treasury, sent agents to Great Britain to encourage immigration.¹³⁹ In his *Report on Manufactures*, Hamilton recommended adoption of other measures, including tax relief for skilled immigrants.¹⁴⁰ Indeed, sentiment in some quarters framed the Framers' efforts

135. *Arizona v. United States*, 567 U.S. 387, 396 (2012).

136. *Id.*

137. ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 100–03 (2006); Pfander & Wardon, *supra* note 102, at 367–70; Margulies, *supra* note 18, at 134–37.

138. ZOLBERG, *supra* note 137.

139. Robbie Totten, *National Security and U.S. Immigration Policy, 1776–1790*, 39 J. INTERDISC. HIST. 37, 55 (2008).

140. *Id.*

to craft a durable Constitution as an emblem of stability that in itself would attract desirable immigration.¹⁴¹

Consider the United States' view of its policy during the Founding era and the ensuing decades as providing "asylum" to the world's oppressed.¹⁴² Taking up this thread, the Jeffersonian Republicans cited the importance of human rights as a basis for offering protection to political opponents of despotic regimes.¹⁴³ In cases involving protection of seamen on U.S. vessels or in U.S. ports whom foreign powers claimed as their own nationals, Jefferson provided a legal argument for resisting extradition requests.¹⁴⁴ Jefferson's argument centered on the brutal treatment endured by British seamen.¹⁴⁵ In response to this brutal treatment, grounds for refuge in the United States were self-help measures such as desertion, mutiny, and even treason.¹⁴⁶

141. *Id.* at 54.

142. ZOLBERG, *supra* note 137, at 110 (quoting an advocate among Irish immigrants describing the United States as offering asylum to the oppressed, even though the advocate also noted that some in U.S. society were hostile to newcomers).

143. See Letter from Thomas Jefferson, U.S. Sec'y of State, to George Washington, U.S. President (Nov. 7, 1791), http://www.gutenberg.org/files/16783/16783-h/16783-h.htm#link2H_4_0084 [hereinafter Jefferson Letter].

144. *Id.* Although Jefferson and others highlighted the right to emigrate and the need to provide asylum as principles of international law, other countries disagreed. *Id.* Britain, for example, viewed international law as allowing states to restrict emigration and barring other states from interference with those restrictions. ZOLBERG, *supra* note 137, at 106. Moreover, the Jeffersonian Republicans' commitment to asylum for certain White European immigrants—while unique among nations of that day—coexisted uneasily with the Jeffersonian party's tolerance for the enslavement of other human beings. See generally William G. Merkel, *A Founding Father on Trial: Jefferson's Rights Talk and the Problem of Slavery During the Revolutionary Period*, 64 RUTGERS L. REV. 595 (2012) (discussing idealism and acceptance in Jefferson's view on human enslavement).

145. See Jefferson Letter, *supra* note 143.

146. See John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 2027 (2010); 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."). The Jeffersonian Republicans' anger at President John Adams for acceding to British requests for the extradition of a British mutineer named Thomas Nash, who claimed to be a U.S. citizen named Jonathan Robbins, contributed to the political collapse of Adams and the Federalist Party. See Parry, *supra*, at 1975 n.10 (describing the episode as a "cautionary tale of executive power for decades to come"); Niklas Frykman, *The Mutiny on the Hermione: Warfare, Revolution, and Treason in the Royal Navy*, 44 J. SOC. HIST. 159 (2010). The Jeffersonian party believed Adams should have been more robust in denying British requests to extradite Nash. See Larry D. Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 ESSEX INST. HIST. COLLECTIONS 99, 107 (1975); Margulies, *supra* note 18, at 134–36; Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 321 (1990); H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 78–89 (2002) (taking a more favorable view of Adams's role).

When Jefferson became President, his Secretary of State, James Madison, refined this theory of refuge and the limits on extradition.¹⁴⁷ The Jeffersonian Republican view reinforced reliance interests: British seamen and others entered the United States expecting U.S. protection.¹⁴⁸ Refuge for British sailors also had foreign impacts that Jefferson and Madison embraced, including opposition to British domination and support for Britain's adversary, France.¹⁴⁹ In addition, the policy had a favorable domestic economic impact, since it helped to recruit qualified seamen, who were necessary to build up both the U.S. Navy and its merchant fleet.¹⁵⁰

In another episode later on in the open door era, President Franklin Pierce used U.S. naval power to assist Hungarian dissident Martin Koszta, who had resided in New York before traveling to Turkey where Austrian agents seized him.¹⁵¹ Secretary of State William Marcy proclaimed that the United States would protect individuals anywhere around the world who had established a domicile in the United States.¹⁵² Marcy tied the U.S. stance to compliance with the laws of humanity that "protect the weak from being oppressed by the strong, and . . . relieve the distressed."¹⁵³ For Marcy and President Pierce, this position would burnish the nation's global brand. In *In re Neagle*,¹⁵⁴ the Court explained that the Koszta episode framed presidential stewardship as including not merely the "express terms" of treaties and statutes, but also U.S. "international relations and all the protection [of federal officials, U.S. nationals, and intending

147. *Case of the Deserters from the British Frigate L'Africaine*, *supra* note 119 (criticizing the views of "Mr. Madison" on the absence of a U.S. duty to return deserters from naval vessels of foreign states). Recently, Justice Alito read the *Frigate Africaine* decision narrowly in the course of holding that habeas corpus is not available to foreign nationals arriving at the U.S. border who assert that officials have wrongly denied their asylum claims. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1973 (2020); *cf.* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 991–92 (1998) (asserting that *Frigate Africaine* and similar decisions supported granting access to habeas corpus to asylum seekers at the border).

148. ZOLBERG, *supra* note 137, at 99–101.

149. *Id.* (discussing the U.S. policy of encouraging emigration from Europe and the importance of immigration to burgeoning U.S. shipping interests).

150. *Id.* The longstanding U.S. opposition to British impressment of American seamen—opposition that helped trigger the War of 1812—was in part a Jeffersonian Republican reaction to British efforts to recover deserters and mutineers shielded by U.S. policy.

151. Peter Margulies, *The DACA Case: Agencies' "Square Corners" and Reliance Interests in Immigration Law*, 2020 CATO SUP. CT. REV. 127, 141; Margulies, *supra* note 18, at 138–41; *In re Neagle*, 135 U.S. 1, 64 (1890).

152. See Letter from William L. Marcy, U.S. Sec'y of State, to Johann Georg Hulsemann, Austrian Chargé d'Affaires (Sept. 26, 1853), http://books.google.com/books?id=EMVBAAAAYAAJ&pg=PA27&lpg=PA27&dq=%22marcy%22+%22martin+koszta%22&source=bl&ots=wPTaTDGWZf&sig=6pPN4sVzp6qFF_eLPTfUbc011bE&hl=en#v=onepage&q=%22marcy%22%20%22martin%20koszta%22&f=false.

153. *Id.* at 17.

154. 135 U.S. at 64.

Americans like Koszta] implied by the nature of the government under the Constitution.”¹⁵⁵

Because these episodes occurred during the open door era, presidents acted without the constraint that a comprehensive legislative framework might have imposed. Nevertheless, it is notable that neither the Jeffersonian Republicans nor President Pierce encountered substantial congressional opposition.¹⁵⁶ In this sense, these incidents are a useful backdrop for subsequent exercises of presidential discretion that occurred after Congress passed laws that directly regulated immigration.

B. THE FIRST CENTURY OF U.S. IMMIGRATION STATUTES

Enactment of the Chinese Exclusion Act in 1882 signaled a transition from the open door era to a period of statutory guidance that continues to the present day. This new paradigm also featured both protective and regulatory discretion. Executive efforts to temper the harshness of the Chinese Exclusion Act were the first prominent example of this tendency.

1. *Ameliorating the Chinese Exclusion Act*

While the harsh and bigoted Chinese Exclusion Act appeared to require the deportation of most Chinese nationals in the United States, U.S. officials actually deported very few.¹⁵⁷ This reprieve from deportation flowed from the reluctance of immigration officials to arrest Chinese nationals, the absence of personnel for the task, and the political power of Chinese citizens and their supporters in many parts of the United States, including the Northeast.¹⁵⁸ In exercising protective discretion, officials worked closely with members of Congress. Discretion complied with framework fit: in short order, combined legislative and executive efforts resulted in the passage of the McCreary Act, which provided significant

155. *Id.*; see John Harrison, *The Story of In re Neagle: Sex, Money, Politics, Perjury, Homicide, Federalism, and Executive Power*, in PRESIDENTIAL POWER STORIES 133, 153–54 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (discussing role of Koszta episode in *Neagle*); cf. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 70–71 (1993) (warning that broad reading of *Neagle* might spur presidential excesses).

156. *Cf. Neagle*, 135 U.S. at 64 (noting wide approval of President Pierce’s action); Wedgwood, *supra* note 146, at 361 (describing durable political support after President Adams’s electoral defeat in 1800 for Jeffersonian opposition to extradition of alleged naval deserters).

157. See Gabriel J. Chin & Daniel K. Tu, *Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893*, 23 ASIAN AM. L.J. 39, 44–47 (2016) (discussing executive-branch and legislative efforts to temper effect of the Chinese Exclusion Act); see also generally Shoba Sivaprasad Wadhia, *Discretion and Disobedience in the Chinese Exclusion Era*, 29 ASIAN AM. L.J. 49 (2022). In addition, Chinese nationals who had been lawfully present in the United States until passage of the new legislation resisted its requirements and supported court challenges to the law. Chin & Tu, *supra*, at 44–45; see *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889) (upholding statute and holding that Congress has plenary power over immigration law).

158. Chin & Tu, *supra* note 157, at 44–47.

relief to Chinese nationals who had been lawfully present in the United States until the Chinese Exclusion Act.¹⁵⁹ Federal immigration officials, including then–Attorney General Richard Olney, advised frontline workers to defer enforcement of the restrictive legislation until Congress enacted the anticipated relief measures.¹⁶⁰ Olney reasoned that hastily imposing the restrictions in the Chinese Exclusion Act, which the pending legislation would ameliorate, would be both inefficient and unfair.¹⁶¹

Reliance interests contributed to Olney’s exercise of discretion: many Chinese nationals had been present in the United States for substantial periods of time and had developed a web of community relationships.¹⁶² A lack of resources for enforcement also played a role. Since Congress had appropriated only \$25,000 to enforce the legislation, full enforcement of the Chinese Exclusion Act would have been impossible.¹⁶³ As a further consideration, immigration officials did not want to needlessly separate families that included U.S. citizens or disrupt communities that depended on the labor of Chinese nationals who were subject to the new restrictive legislation.¹⁶⁴ Foreign impacts also played a role, as Chinese nationals in the United States galvanized diplomatic pressure from China against the harsh effect of the new legislation.¹⁶⁵

2. *Integrating Protective and Regulatory Discretion: Theodore Roosevelt, the San Francisco School Crisis, and the Gentlemen’s Agreement with Japan*

In an early twentieth century episode, President Theodore Roosevelt and his Secretary of State, Elihu Root, practiced stewardship in their resolution of the San Francisco segregation dispute of 1906 to 1907. This episode entailed a mix of regulatory and protective discretion. I address the protective element first, followed by an assessment of the regulatory component of Roosevelt’s strategy.

The dispute arose because of animus in California toward Japanese nationals.¹⁶⁶ Prior to the dispute, a treaty between the United States and

159. *Id.* at 42.

160. *Id.* at 47.

161. *See id.*

162. T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties”: A Response to Martin*, 44 U. PITT. L. REV. 237, 243–46 (1983) (observing that lawful residents’ ties create “mutual obligations” that “arise because of physical proximity and a sense of sharing in a common enterprise”).

163. Chin & Tu, *supra* note 157, at 46.

164. *Cf.* Wadhia, *supra* note 157, at 62–63 (discussing concern with humanitarian and economic impact of wholesale removal of Chinese nationals).

165. *Id.* at 44.

166. THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 378–81 (Scribner’s ed. 1926); PHILIP C. JESSUP, ELIHU ROOT 7–31 (1938); Charles E. Neu, *Theodore Roosevelt and American Involvement in the Far East, 1901–1909*, 35 PAC. HIST. REV. 433, 440–42 (1966); David Brudnoy, *Race and the San Francisco*

Japan governed immigration between the two countries.¹⁶⁷ In October 1906, San Francisco, driven by bias, sought to limit lawfully resident Japanese children to segregated schools.¹⁶⁸ Under this U.S.-Japan treaty, lawfully resident Japanese children would receive “the same education as other foreign national children, including children from Europe.”¹⁶⁹ Roosevelt deployed federal troops to deter violence against the Japanese community and sought an injunction against the city’s policy.¹⁷⁰ Establishing how Roosevelt’s resolute action fit into the U.S. legal framework, Root cited international law and equal protection doctrine.¹⁷¹ The Secretary of State warned against the rise of animus at the state and local level, which could undermine “rules . . . essential to the maintenance of peace . . . between nations.”¹⁷² Roosevelt and Root also wished to honor the reliance interests of Japanese nationals, who entered the United States assuming that the good will embodied in the U.S.-Japan immigration treaty would prevail.¹⁷³ In addition, Roosevelt and Root knew the San Francisco action had foreign impacts, because it would trigger tensions with Japan.¹⁷⁴

As a complement to the protective discretion that blunted San Francisco’s segregation push, Roosevelt and Root also wielded regulatory discretion through the “Gentlemen’s Agreement” with Japan that limited entry of unskilled Japanese laborers.¹⁷⁵ Meeting the criterion of framework fit, the Gentleman’s Agreement turned on the enactment of a federal statute that expressly conferred discretion on the President to manage future developments like the one that had helped precipitate the San Francisco school crisis: foreign nationals’ use of unregulated U.S. territories, including Hawaii, as way stations for immigration to the U.S. mainland.¹⁷⁶ Despite opposition in Congress from segregationist politicians wary of the protective part of this bargain, in which the federal government actively opposed state segregation efforts, Congress passed the

School Board Incident: Contemporary Evaluations, 50 CAL. HIST. Q. 295, 296 (1971); Margulies, *supra* note 151, at 142; Margulies, *supra* note 18, at 154–58. For an insightful analysis of stewardship in Roosevelt’s approach to foreign affairs, see generally David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499 (2012).

167. Margulies, *supra* note 18, at 154–58.

168. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 36.

169. Margulies, *supra* note 151, at 142.

170. Margulies, *supra* note 18, at 153 n.273 (citing JESSUP, *supra* note 166, at 11). See generally Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT’L L. 273 (1907).

171. Root, *supra* note 170.

172. *Id.*

173. Margulies, *supra* note 151, at 156.

174. *Id.*

175. See LEWIS L. GOULD, *THE PRESIDENCY OF THEODORE ROOSEVELT* 258–60 (1991); Margulies, *supra* note 18, at 157; cf. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 36–38 (suggesting that animus may have played a role in U.S. pressure for Gentlemen’s Agreement).

176. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 38–40.

provision in February 1907.¹⁷⁷ That statute required a presidential finding that a foreign state was allowing unskilled workers to emigrate to a territory or possession of the United States, like Hawaii, where further travel to the U.S. mainland would contribute to an oversupply of U.S. workers.¹⁷⁸

Both the statute and the Gentlemen's Agreement—which was really a series of written documents and evolving understandings between the United States and Japan—preserved the fabric and framework of Japanese immigration to the United States. The agreement permitted emigration to the United States of skilled workers and close relatives of current U.S. citizens and residents.¹⁷⁹ In addition, Japanese immigration to the United States continued at robust levels, with only a modest median decrease from levels that had prevailed in the years prior to the agreement.¹⁸⁰ The agreement honored reliance interests because it enforced the treaty rights of Japanese nationals in the United States. The agreement also managed foreign impacts by dissipating a cause of friction with Japan.¹⁸¹

3. *Protective Discretion in the Post–World War II Era*

The period after World War II saw additional movement toward protective discretion. This trend demonstrated the abiding relevance of framework fit, reliance interests, and foreign impact.

a. *The Bracero Program Under President Truman*

After World War II, President Truman's continuation of the guest-worker Bracero Program with Mexico between 1948 and 1951 was another marker in the history of protective discretion.¹⁸² In 1947, Congress had cut spending for

177. *Id.* at 39–40.

178. *Id.* at 39.

179. Joyce J. Chen, *The Impact of Skill-Based Immigration Restrictions: The Chinese Exclusion Act of 1882*, 9 J. HUM. CAP. 298, 303 (2015).

180. *Id.* at 302–05 (discussing effects of the Gentlemen's Agreement as part of analysis of historical trends in immigration from Asia to the United States). Immigration from Japan to the United States boomed in the immediate aftermath of the crisis to about 31,000 in 1907, but this number was an outlier. *Id.* at 305 tbl.1. Median immigration before the crisis was about 14,500 persons annually. *Id.* By 1913, after a sharp but short-lived decrease, the median rose again to about 12,000 per year, before more significant immigration limits between the two countries, including curbs on Japanese mail-order brides, drove a reduction in 1921. *Id.*

181. The territorial ambitions of Japan's military leaders led to armed conflict with the United States in World War II. At that time, unthinking fear and animus toward lawful Japanese residents of the United States and U.S. citizens of Japanese descent in California prompted the shameful Japanese American internment. *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392, 2447–48 (2018).

182. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 41–45. President Roosevelt established the Bracero Program in 1942 to alleviate labor shortages during World War II. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 19 (1992); RICHARD B. CRAIG, *THE BRACERO*

government recruitment centers, thinking the advent of peace would reduce the risk of labor shortages.¹⁸³ Heeding growers' concerns that ending the program would complicate harvesting efforts, the Truman Administration continued to admit Mexican workers.¹⁸⁴ In doing so, the Truman Administration acted against the backdrop of the ninth proviso of the Immigration Act of 1917, which gave the President power to permit the entry of otherwise inadmissible foreign nationals.¹⁸⁵

The continuation of the Bracero Program amply fulfilled the criterion of framework fit. The ninth proviso supplied express authority for Truman's action.¹⁸⁶ Collaboration with Congress featured advice from the House Agriculture Committee, which pressed for continuation of the program.¹⁸⁷ Moreover, Truman's move was interstitial, anticipating the passage of new legislation that would ratify the President's actions. In this sense, Truman's exercise of discretion echoed Attorney General Olney's response to the Chinese Exclusion Act and Roosevelt and Root's drafting of the Gentlemen's Agreement with Japan. Consistent with this pattern, Congress reauthorized the Bracero Program in 1951.¹⁸⁸ Far from fighting Congress's framework, Truman's move ensured continuity in legislative efforts.

Reliance interests contributed to Truman's actions. Growers and guest workers had grown accustomed to the benefits of the program.¹⁸⁹ The role of foreign impacts was also significant. Mexico benefited from the remittances that guest workers sent back to their families.¹⁹⁰ The partnership with Mexico included a diplomatic accord on agricultural workers that facilitated the Bracero Program's continued operation.¹⁹¹

PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 45 (1971); PRESIDENT'S COMM'N ON MIGRATORY LAB., MIGRATORY LABOR IN AMERICAN AGRICULTURE: REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR 38–41 (1951); George O. Coalson, *Mexican Contract Labor in American Agriculture*, 33 SW. SOC. SCI. Q. 228, 232 (1952); Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1766–69 (2012); Margulies, *supra* note 13, at 1212–13.

183. Margulies, *supra* note 13, at 1212–13.

184. *Id.*

185. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 42–43.

186. *Id.*

187. CALAVITA, *supra* note 182, at 26.

188. See CRAIG, *supra* note 182, at 71–72 (describing the legislative process at work in the codification of the Bracero Program). Critics of the Bracero Program argued then and now that U.S. growers exploited the guest workers, who could work only for a grower who sponsored them. See 97 CONG. REC. 4974 (1951) (quoting, in the minority report opposing reauthorization of the program, a presidential commission's critique). Balancing the risk of exploitation with the benefits of remittances to guest workers' families is a task beyond the scope of this Article.

189. Margulies, *supra* note 13, at 1212–13.

190. López, *supra* note 182, at 1767.

191. CALAVITA, *supra* note 182, at 25.

b. Aiding Hungarian Freedom Fighters

As another example of post–World War II protective discretion, consider the actions of Truman’s successor, Dwight Eisenhower, who granted parole—permission to be physically present in the United States—to thousands of refugees from the doomed 1956 Hungarian Revolution against a communist government installed by the Soviet Union after World War II.¹⁹² Advocates of plenary discretion have highlighted this episode as support for their thesis.¹⁹³ However, closer inspection reveals a more textured portrait of tailored executive discretion in the stewardship mode.

As historian Stephen Porter has explained, the Hungarian refugee episode reflected a dialectic between the President and Congress.¹⁹⁴ Soon after Soviet forces intervened to quell the would-be revolution, legislators recommended that President Eisenhower provide a haven for the refugees in the United States.¹⁹⁵ A leading voice was a senior legislative proponent of immigration limits, Democratic Representative Francis Walter of Pennsylvania.¹⁹⁶ Less than a year later, Walters became concerned that too many of the new Hungarian entrants were actually economic refugees, not bona fide freedom fighters.¹⁹⁷ At that point, Walter pivoted back to his longtime restrictionist perspective.¹⁹⁸ The Eisenhower Administration followed his lead with a pullback on refugee admissions.¹⁹⁹

The dialogue between the President and leading legislators illustrates framework fit in the Hungarian parole episode. Reliance interests were also strong: the Hungarian rebels against Soviet rule had expected U.S. aid in their battle for self-rule, in part due to CIA propaganda distributed throughout the country.²⁰⁰ Foreign policy also figured in Eisenhower’s decision to aid the refugees since U.S. aid signaled the country’s support for democratic reform.²⁰¹ A similar, albeit stronger executive-legislative partnership drove support in the 1960s for Cubans fleeing the Castro regime.²⁰²

192. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 54.

193. *Id.*

194. STEPHEN R. PORTER, *BENEVOLENT EMPIRE: U.S. POWER, HUMANITARIANISM, AND THE WORLD’S DISPOSSESSED* 134–35 (2017).

195. *Id.* at 132–33.

196. *Id.* at 145.

197. *Id.*

198. *Id.*

199. *Id.* at 146–47.

200. *Id.* at 131.

201. *Id.* at 133–34.

202. *Id.* at 183–93. Congress signaled its agreement in principle with administration efforts by passing the Cuban Adjustment Act, which granted lawful permanent resident status to Cubans a year after their parole into the United States. *See* Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended as a note following 8 U.S.C. § 1255). No other nationality receives such generous treatment under the INA. Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 102–03 (2017).

c. *Protective Discretion and the Former Beatle: A Hard[ships] Day's Night*

In the 1960s and 1970s, immigration officials expanded the exercise of protective discretion to address hardships such as extreme youth, advanced age, or infirmity.²⁰³ Officials had exercised such discretion years before the practice gained public attention because of attempts to deport former Beatle John Lennon, who had arrived in the United States on a visitor's visa with his wife, Yoko Ono, to assume custody of Yoko's child.²⁰⁴ Litigation concerning Lennon, who was deportable because of a drug conviction, revealed a written policy called an "Operations Instruction" ("OI").²⁰⁵ The OI authorized assessment of "humanitarian considerations" in awards of "nonpriority status," which usually entailed a reprieve from removal and eligibility for a work permit.²⁰⁶ Related factors included the age and disability of the noncitizen.²⁰⁷

A couple of caveats are necessary for this hardship or humanitarian measure. First, it has elements of both individual and programmatic relief. The inquiry on relief was holistic, with an open-ended focus on humanitarian considerations rather than a checklist of factors.²⁰⁸ Second, officials within local offices typically made determinations, without the involvement of senior officials.²⁰⁹ Third, the relatively low number of cases—in the thousands rather than tens of thousands²¹⁰—suggested that immigration officials sought to manage the program carefully to avoid undue disruption of the INA's comprehensive scheme.

203. Immigr. & Naturalization Serv., Operations Instructions (Legacy), O.I. § 103.1(a)(1)(ii) (1975) (outlining factors that would inform discretion); Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg'l and Dist. Couns. 7 (Nov. 17, 2000), <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00> [hereinafter Meissner Memorandum] (describing factors guiding prosecutorial discretion, including "advanced or tender age" of subject); Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All Field Office Dirs., All Special Agents in Charge, and All Chief Couns. 3 (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (providing guidance on the exercise of prosecutorial discretion consistent with civil immigration enforcement priorities of ICE for the apprehension, detention, and removal of aliens); WADHIA, *supra* note 13; Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 830–31 (2004) (enumerating factors and number of cases hinging on each factor); see Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 635–38 (2012) (discussing favorable discretion under Obama Administration for visa applicants and other noncitizens in same-sex marriage cases). See generally Wadhia, *supra* note 32 (describing implementation of prosecutorial discretion).

204. Wadhia, *supra* note 32, at 246–47.

205. *Id.* at 247–48.

206. *Id.* at 248.

207. *Id.* at 249.

208. *Id.* at 250.

209. *Cf. id.* (discussing role of line-level immigration officers in exercising discretion).

210. *Id.*

Hardship-based humanitarian relief surely involves consideration of collateral impacts and relationships with other countries. For example, removal of a very young or aged noncitizen would affect relationships with U.S. citizen or LPR relatives of that individual who had benefited from family unification. In some cases, removal might interrupt a course of medical treatment, requiring discharge planning by a U.S. healthcare provider. For similar reasons, removal would complicate relationships with foreign states that may need to scramble to provide similar care or treatment, or inform U.S. officials that foreign facilities and professional staff cannot adequately address an individual's clinical needs. Granting deferred action allows U.S. immigration officials to sidestep these disruptions, while maintaining fidelity to the statutory scheme because of limits on the kinds of humanitarian considerations that officials would consider.

C. CONTEMPORARY DEVELOPMENTS

The period from 1980 to the present has featured important additions to the INA's framework, including the Refugee Act of 1980,²¹¹ the Immigration Reform and Control Act of 1986 (IRCA),²¹² the Immigration Act of 1990 ("1990 Act"),²¹³ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).²¹⁴ These additions form an ongoing legislative dialectic of protective and regulatory measures. Procedural and substantive safeguards for refugees are a dominant theme in this dialectic. Moreover, both IRCA and the 1990 Act promoted family reunification and expanded the ranks of legal immigrants. Yet Congress has also sought to reduce pull factors that drive immigration outside the visa system, through IRCA's imposition of sanctions on employers who hire workers who are not lawfully present and IIRIRA's expedited removal procedures for noncitizens who seek to enter the United States without visas that authorize their admission. This Subpart parses the interaction of refugee protection, family reunification, and reduction of pull factors.

1. *Preserving Asylum*

After the Refugee Act of 1980 codified asylum protections, immigration officials sought to use regulatory discretion to impede access to and proof of asylum claims. Courts varied in their application of the stewardship criteria of

211. Pub. L. No. 96-212, 94 Stat. 102 (repealed 1994).

212. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

213. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. §§ 1186b, 1252b, 1254a, 1288, 1304, 1324c and 29 U.S.C. § 3292).

214. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

framework fit, reliance interests, and foreign impacts. The continued judicial reliance on the internal-external divide contributed to these disparate outcomes.

In the 1980s, it appeared that the government based grants of parole on the nationality of the applicant.²¹⁵ In particular, Haitian asylum seekers who had been apprehended by immigration officials or Coast Guard personnel before they entered the United States argued that the government was detaining them based on their race and nationality without regard to the merits of their asylum claims.²¹⁶ In contrast, the challengers to this allegedly discriminatory parole policy asserted that the government regularly paroled Cuban nationals apprehended under similar circumstances.²¹⁷ The challengers asserted that this policy violated both the Constitution and the INA.²¹⁸

The Supreme Court's decision in *Jean v. Nelson*²¹⁹ nodded toward framework fit, although it did so in a way that elevated formal equality over equality in practice. Under the federal regulation governing parole decisions, immigration officials could release a noncitizen from detention based on a standard that tracked then-current statutory language requiring "emergent reasons" that were "strictly in the public interest."²²⁰ All parties to the litigation over the allegedly discriminatory parole policy conceded that the regulation barred discrimination based on race and national origin, although the regulation did not do so expressly.²²¹

Since the government had released all Haitian asylum seekers held under the allegedly discriminatory policy, the Court declined to address that policy, rule on the challenger's constitutional arguments, or set guidelines for future parole decisions beyond the nondiscrimination principle that the parties agreed was set by the federal regulation.²²² Rather, the Court remanded the case to the district court for further findings.²²³ The district court in turn deferred to the officials' parole decisions under the broad "public interest" standard.²²⁴ Those discretionary administrative decisions often cited foreign policy justifications that resulted in more rigorous release criteria for Haitian asylum seekers.²²⁵

215. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 59–60.

216. *Id.*

217. *Id.*

218. *Id.*

219. 472 U.S. 846 (1985).

220. *Id.* at 860–61 (Marshall, J., dissenting) (citing text of then-current 8 C.F.R. § 212.5(a)(1) (1985)). The current regulation authorizes parole when an official believes that "continued detention is not in the public interest," subject to the further requirement tracking statutory language in 8 U.S.C. § 1182(d)(5) that such decisions are made on a "case-by-case basis" for "urgent humanitarian reasons" or "significant public benefit." 8 C.F.R. § 212.5(b)(5) (2023).

221. *Jean*, 472 U.S. at 852 (majority opinion).

222. *Id.* at 852, 856–57.

223. *Id.* at 857.

224. *Id.* at 857; COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 59–60.

225. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 59–60.

The Court's decision did not apply the framework fit criterion in a manner consistent with the stewardship model. That model would require a fuller explanation of the basis for categorical parole decisions that purported to apply foreign policy criteria but resulted in disparate racial and national origin impacts. The need for a fuller explanation would not require the government to accord other groups the special protections that Congress had provided for Cubans in the Cuban Adjustment Act. But framework fit would require a more elaborate justification than the one that officials typically provide for release decisions. This view also serves reliance interests: detention impairs the orderly and complete presentation of asylum claims, and discriminatory release criteria impinge on asylum applications in invidious ways. Further, while officials may be able to articulate a foreign policy basis for certain differentiations, that basis requires a full explanation. A flimsy justification will disserve U.S. foreign policy by creating the impression that the United States discriminates on the basis of race or national origin in parole decisions.

2. *Family Fairness: Deferred Action for Children and Spouses of IRCA Grantees*

IRCA showed the complementary nature of regulatory and protective actions under the INA and prompted the need for protective discretion benefiting the spouses and children of noncitizens legalized under this landmark law.²²⁶ IRCA was a legislative compromise that authorized legalization of a large group of noncitizens and imposed sanctions on employers who hired noncitizens without work permits.²²⁷ Advocates of plenary discretion have cited the Family Fairness program, which aided the spouses and children of IRCA-legalization recipients, as another example of presidential action.²²⁸ However, as in earlier examples such as the Bracero Program and the parole of Hungarians and Cubans fleeing despotic regimes, Family Fairness stemmed from executive-legislative dialogue.

IRCA's compromise provides background for subsequent disputes about the scope of protective discretion. Under IRCA's legalization provisions, a noncitizen who had been continuously physically present in the United States since January 1, 1982, was eligible.²²⁹ Importantly, Congress viewed IRCA's legalization as a one-time acknowledgment of enrollees' place in the United

226. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (prior to 1996 amendment).

227. *Id.* § 101 (codified at 8 U.S.C. § 1324a).

228. Cox & Rodríguez, *Redux*, *supra* note 14, at 126–27; Mark Noferi, *When Reagan and GHW Bush Took Bold Executive Action on Immigration*, THE HILL: CONG. BLOG (Oct. 2, 2014, 12:00 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/219463-when-reagan-and-ghw-bush-took-bold-executive-action-on>.

229. § 201, 100 Stat. at 3394. After eighteen months, an IRCA recipient could apply for LPR status. *Id.*

States, not the start of an ongoing series of legalizations.²³⁰ In addition, the sanctions that Congress authorized for employers who hired ineligible noncitizens reflected Congress's concern that excessive competition from noncitizens without a lawful status or lawful presence harms citizens and LPRs.²³¹

Against this backdrop of intertwined protective and regulatory measures in IRCA, an issue soon emerged regarding the noncitizen spouses and children of IRCA beneficiaries. Some spouses and children had begun to accrue continuous physical presence in the United States only after the IRCA cutoff date and hence were not themselves eligible for legalization.²³² Government officials therefore had the power to commence deportation proceedings against these noncitizens. In passing IRCA, Congress had declined to insert express protections against deportation for this group.²³³ Nevertheless, since IRCA recipients could apply for LPR status within eighteen months and apply for U.S. citizenship five years later, the spouses and children of IRCA enrollees had a pathway to a lawful status.²³⁴ The most urgent issues for spouses and children of IRCA recipients concerned the length of the wait for legal status, their ability to work legally, and the risk of deportation during this interim period.²³⁵

The Reagan Administration and, to an even greater degree, the George H.W. Bush Administration resolved this issue by granting deferred action to IRCA recipients' spouses and children, allowing them to wait in the United States for their visas.²³⁶ This relief, which the Bush Administration called the Family Fairness program, fit comfortably within the INA's framework.²³⁷ Prominent legislators pushed for the program, and both Houses of Congress

230. S. REP. NO. 99-132, at 16 (1985) (describing IRCA as a "one-time only" program).

231. Cox & Rodríguez, *Redux*, *supra* note 14, at 127 (explaining the rationale for employer sanctions, while arguing that immigration officials since IRCA's effective date have failed to enforce the sanctions component of the statute). Most economists believe that immigration does not adversely affect U.S. workers as a whole, although some specific cohorts may experience negative effects. See ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* 150 (Oxford Univ. Press rev. ed. 2020); George J. Borjas, *The Wage Impact of the Marielitos: A Reappraisal*, 70 ILR REV.: J. WORK & POL'Y 1077, 1104 (2017) (concluding that the arrival of Marielitos—Cubans who fled the Castro regime in the Mariel Boatlift of 1980—injured certain groups in the Miami economy, including U.S. low-wage workers of color).

232. Noferi, *supra* note 228.

233. *Id.*

234. Cox & Rodríguez, *Redux*, *supra* note 14, at 121 n.39 (acknowledging that IRCA recipients' spouses and children "would become eligible to petition for . . . admission . . . through the *already existing immigration system*" (emphasis added)).

235. The Senate Judiciary Committee Report declared that "families of legalized aliens . . . will be required to 'wait in line' in the same manner as immediate family members of other new resident aliens." S. REP. NO. 99-132, at 16 (1985). See COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 127 (explaining that spouses and children of IRCA recipients would have to wait for visas and endure risk of deportation and inability to work legally "because of significant backlogs in the regular family-sponsorship visa system").

236. See Noferi, *supra* note 228.

237. McNary Memorandum, *supra* note 17.

passed bills supporting relief that differed only in minor respects, suggesting that agreement on legislation was readily within reach.²³⁸ Congress settled on a start date when it codified the Family Fairness program in the Immigration Act of 1990, less than ten months after the Bush Administration acted.²³⁹

Given this statutory development, Family Fairness fulfills framework fit, reliance interests, and foreign impact criteria. Recipients already had a pathway to a lawful status available; Family Fairness was interstitial relief that provided a bridge to that status. Moreover, legislative efforts had already progressed to House and Senate bills that passed their respective chambers, heralding an imminent compromise. Removing IRCA grantees' spouses and children during the ten-month period between the announcement of Family Fairness in February 1990 and the enactment of the 1990 Act in late November would have needlessly encumbered the immigration system. Many deportations would still have been in progress, requiring termination when relief became available under the 1990 statute. Completed deportations would have resulted in a brief but agonizing separation of IRCA grantees from their spouses and children. Given the collaboration between legislators and administrators in this episode, it seems fair to say that both Congress and immigration officials realized that such wheel-spinning would be inconsistent with the efficient operation of U.S. immigration law.

The Family Fairness program also upheld reliance interests, since the spouses and children of IRCA recipients surely urged their respective spouses and parents to apply and had life plans in the United States that deportation would have disrupted. In terms of foreign impacts, Family Fairness spared Mexico and other countries major challenges in assuming responsibility for deportees who would soon return to the United States. In sum, Family Fairness was a sound exercise of stewardship, but it was not the adventure in executive unilateralism that advocates of plenary discretion have portrayed.

3. *Humanitarian Relief Based on Home-Country Conditions*

Protective initiatives based on foreign policy have also been features of more recent executive practice. President George H.W. Bush and subsequent presidents have asserted executive power under Article II of the Constitution to

238. See AM. IMMIGR. COUNCIL, REAGAN-BUSH FAMILY FAIRNESS: A CHRONOLOGICAL HISTORY 2-3 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/reagan_bush_family_fairness_final_0.pdf (discussing respective Senate and House bills); *Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm. on Immigr., Refugees, and Int'l L. of the H. Comm. on the Judiciary*, 101st Cong. 459 (1989) (including statements by House members to the Commissioner of Immigration and Naturalization Service urging protection from deportation for spouses and children of IRCA recipients).

239. See Immigration Act of 1990, Pub. L. No. 101-649, § 301(a), 104 Stat. 4978, 5029 (codified as amended at 8 U.S.C. § 1255a). The 1990 statute also substantially expanded available visas and therefore reduced waiting time for spouses and children of LPRs, further aiding Family Fairness grantees.

protect foreign nationals who would be at risk if they had to return to challenging situations in their countries of origin.²⁴⁰ In signing the 1990 Act, President Bush affirmed the “authority of the executive branch to exercise prosecutorial discretion in suitable cases.”²⁴¹

President Bush’s statement referred to situations otherwise covered by newly enacted provisions for granting Temporary Protected Status (“TPS”) to noncitizens whose home countries had suffered government crackdowns, civil unrest, or natural disasters.²⁴² As President Bush noted, Congress in providing for TPS had declared that, except as it had “specifically provided,” TPS was to be the “exclusive” means to permit removable noncitizens to temporarily remain in the United States “because of their particular nationality” or the “region” of their home country.²⁴³ President Bush’s signing statement asserted that this legislative declaration of exclusivity did not displace the executive branch’s discretion to respond to similar exigencies outside the TPS framework.²⁴⁴ Displacing that discretion, President Bush explained, would raise “serious constitutional questions.”²⁴⁵ President Bush exercised this authority in a range of cases raising humanitarian concerns, including protecting Chinese students in the United States who were at risk after the Chinese government’s brutal suppression of the student protests at Tiananmen Square in Beijing.²⁴⁶ In 2014, President Obama cited this power in permitting to Liberians to stay in the United States even though the Liberians’ TPS had lapsed.²⁴⁷

240. Statement on Signing the Immigration Act of 1990, 1990 PUB. PAPERS 1717, 1718 (Nov. 29, 1990) [hereinafter Bush Signing Statement].

241. *Id.*

242. 8 U.S.C. § 1254a(b)(1)(A); *see Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1811 (2021) (discussing grants of TPS).

243. § 1254a(g).

244. Bush Signing Statement, *supra* note 240.

245. *Id.* The later OLC memorandum supporting DAPA’s legality cited this power, which has since come to be known as deferred enforced departure (“DED”). *See* The Dep’t of Homeland Sec.’s Auth. To Prioritize Removal of Certain Aliens Unlawfully Present in the United States and To Defer Removal of Others, 38 Op. O.L.C. 12–14 (2014) [hereinafter Thompson OLC Memorandum].

246. *See* Blackman, *supra* note 13, at 266. Congress eventually enacted relief for Chinese students. *See* Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969 (codified as amended as a note following 8 U.S.C. § 1255) (ratifying the grants of deferred action).

247. Memorandum on Deferred Enforced Departure for Liberians, 2014 PUB. PAPERS 1238, 1239 (Sept. 26, 2014).

IV. DEFERRED ACTION AND OTHER CONTEMPORARY
EXERCISES OF PROTECTIVE DISCRETION: ENFORCEMENT
GUIDELINES, DACA, DAPA, AND TERMINATING MPP

The Obama Administration's signature programs, DAPA and DACA, took a marked protective turn. President Trump exercised regulatory discretion with his unsuccessful attempt to rescind DACA.²⁴⁸ The Biden Administration has pivoted back to the protective side in issuing guidelines on enforcement of the INA and a final DACA rule.²⁴⁹ This Part analyzes these developments, concluding first that courts rightly stopped both the implementation of DAPA and the rescission of DACA, and second that the Biden Administration's enforcement guidelines and DACA rule fit within past practice. This Part then analyzes the Biden Administration's effort to end MPP, including the Supreme Court's June 2022 decision finding that viewing MPP as discretionary, not mandatory, did not conflict with the INA.²⁵⁰

A. PROSECUTORIAL DISCRETION IN INITIATING REMOVAL

Prosecutorial discretion in immigration law often entails what Chief Justice Roberts in the DACA rescission case, *Regents*, called "forbearance."²⁵¹ Forbearance entails or concerns decisions not to seek removal of certain noncitizens who lack lawful bases for remaining in the United States. While immigration officials may compile factors that would make forbearance more or less likely, line officers have traditionally exercised prosecutorial discretion in particular cases.²⁵² The scope of prosecutorial discretion is at issue in the guidelines announced in September 2021 by the Biden Administration's Secretary of Homeland Security, Alejandro Mayorkas.²⁵³

1. *The Mayorkas Prosecutorial Discretion Guidelines' Priorities*

The Mayorkas guidelines prioritized noncitizens who pose a threat to national security through the risk of espionage, terrorism, or the like.²⁵⁴ The guidelines also prioritized concerned noncitizens who pose a threat to public safety, defined with reference to the nature of the criminal conviction and the

248. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (holding that DHS had not provided an adequate explanation for its attempt to rescind the DACA program).

249. *See generally* Mayorkas Enforcement Memorandum, *supra* note 28; Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53152 (Aug. 30, 2022) (codified at 8 C.F.R. pts. 106, 236, 274a).

250. *Biden v. Texas*, 142 S. Ct. 2528, 2544 (2022).

251. *Regents*, 140 S. Ct. at 1911–12.

252. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999).

253. *See* Mayorkas Enforcement Memorandum, *supra* note 28, at 3; *see also* Memorandum from Kerry E. Doyle, Principal Legal Advisor, U.S. Dep't of Homeland Sec., to All OPLA Att'ys (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [hereinafter Doyle Memorandum] (explaining steps to operationalize earlier Mayorkas memorandum).

254. Mayorkas Enforcement Memorandum, *supra* note 28, at 3.

sentence imposed, the harm caused by the offense, the sophistication of the crime, the use of a firearm or other deadly weapon, and the noncitizen's overall criminal record.²⁵⁵ Importantly, Secretary Mayorkas then listed mitigating factors, including the noncitizen's youth or advanced age; the duration of the noncitizen's residence in the United States; mental conditions that may have influenced the criminal activity, or mental or physical conditions that required treatment that might be most readily available in the United States; the noncitizen's status as a victim of crime or as a witness in a legal matter; the impact on the noncitizen's family in the United States, including the effect of the loss of caregiving such as child- or elder-care by the noncitizen; the public service record of the noncitizen; and whether the conviction had been a vacated or expunged.²⁵⁶

Finally, the Mayorkas prosecutorial discretion memorandum prioritized threats to border security. Here, Secretary Mayorkas focused on the date of a particular noncitizen's entry into the United States. Following the recommendation of distinguished immigration scholars, Mayorkas prioritized *recent* arrivals, on the theory that deterring future entries was key and raising the likelihood of removal for recent entrants would send a message to prospective entrants about the risks of irregular immigration.²⁵⁷ In contrast, a regime that initiates removal proceedings in chronological order, with the earliest entrants receiving priority, muddies that message of deterrence. Because of the long backlog of asylum cases—which comprise the overwhelming majority of cases currently in immigration court—a system that prioritizes removal of early entrants will result in protracted stays in the United States of over three years for most new entrants.²⁵⁸ The prospect of a protracted stay in the United States *incentivizes* new entries; it does not deter them. Shifting that calculus is a sound enforcement tactic.

The Mayorkas prosecutorial discretion memorandum also highlighted the importance of preserving civil rights and liberties, including avoiding singling out noncitizens based on their race, religion, gender, sexual orientation, gender identity, or political associations.²⁵⁹ In addition, Secretary Mayorkas called for

255. *Id.*

256. *Id.* at 3–4.

257. *Id.* at 4; cf. David A. Martin, *Taming Immigration*, 36 GA. ST. U. L. REV. 971, 989–90 (2020) (discussing focusing enforcement on verification of the immigration status of new hires and apprehending and removing noncitizens who have recently become overstays due to the expiration of their visas).

258. Muzaffar Chishti & Julia Gelatt, *Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, MIGRATION POL'Y INST. (Feb. 23, 2022), <https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden> (estimating the current backlog as including 1.6 million cases).

259. Mayorkas Enforcement Memorandum, *supra* note 28, at 5.

training and periodic review of the implementation of the memorandum's terms.²⁶⁰

2. *The Longstanding Tradition of Prosecutorial Discretion*

In criminal law, the discretion of law enforcement is part of settled practice. The Supreme Court cited that practice in *Town of Castle Rock v. Gonzales*²⁶¹ in holding that the police retained discretion on whether and under what circumstances they should arrest an individual who had violated a restraining order by taking his three young daughters from his spouse's home without permission.²⁶² After the individual's spouse informed the police of the violation, the officers failed to seek the violator's immediate arrest.²⁶³ Some hours after the spouse's contact with the police, the violator killed his daughters.²⁶⁴

In holding that the police officers' initial inaction did not violate a legal duty to the violator's spouse, the Court, in an opinion by Justice Scalia, noted that the "well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."²⁶⁵ Justice Scalia explained that law enforcement discretion flowed from a "common sense" about the role and limits of law enforcement.²⁶⁶ In an amicus brief supporting this view, the Solicitor General observed that the discretion to "decline enforcement" stemmed from the "provision of insufficient resources for . . . full enforcement," which necessitated the adoption of law enforcement priorities.²⁶⁷

Some have argued that a measure of prosecutorial discretion is inherent in the executive branch under Article II.²⁶⁸ Under this argument, various clauses of the Constitution, including the Vesting Clause, the Take Care Clause, and the Oath of Office Clause, give the President and the President's agents within the executive branch the power to decline to prosecute violators of federal law.²⁶⁹

260. *Id.* at 6.

261. 545 U.S. 748 (2005).

262. *Id.* at 751–52.

263. *Id.* at 753.

264. *Id.* at 754.

265. *Id.* at 760.

266. *Id.* at 761 (citing *Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999)).

267. See Brief of the United States as Amicus Curiae Supporting Petitioner at 16, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278); see also *id.* at 31 ("Courts should be reluctant to construe such language to constrain executive officers' traditional discretion to tailor enforcement decisions to current resources and community needs.").

268. See *In re Aiken Cnty.*, 725 F.3d 255, 262 (D.C. Cir. 2013) ("The Presidential power of prosecutorial discretion is rooted in Article II . . .").

269. *Id.* at 262–63; see Andrias, *supra* note 13, at 1035–36 (arguing for broad executive power not to enforce); cf. Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1625–30 (2016) (suggesting that constitutional separation of powers provides a basis for executive priority-setting that not only preserves discretion of individual officials, but also limits executive promulgation of categorical programs that curb individual officials' discretion without specific congressional authorization).

This power may derive from the need for the President to conserve finite resources within the executive branch. If another branch of government or other parties, including individual states, could second-guess the President's enforcement decisions, they could hobble the functioning of the executive branch. In addition, certain kinds of prosecutorial decisions, such as decisions to target a specific individual for prosecution, would exceed the power of Congress.²⁷⁰ Moreover, one can view prosecutorial discretion to decline to prosecute as a means of protecting individual rights.²⁷¹ For example, individuals who have committed crimes may have certain equities, including extreme youth, age, or ill health, that a prosecutor would view as reasons to temper or decline prosecution.²⁷² The power to decline to prosecute thus gives individuals an additional layer of protection from government power that would evaporate if Congress could require unconditional and indiscriminate enforcement of federal law.

Even if Article II does not protect the exercise of prosecutorial discretion, the allocation of resources inherent in prosecutorial discretion is a matter that should generally elicit judicial deference. As the Court noted in *Heckler v. Chaney*,²⁷³ agency decisions not to commence proceedings entail a "complicated balancing of . . . factors which are peculiarly within its expertise."²⁷⁴ One consideration that the *Heckler* Court framed in stark terms is "whether the agency has enough resources to undertake the action *at all*."²⁷⁵ The Court observed that considerations of comparative institutional competence favored permitting the agency to exercise discretion, unimpeded by judicial micromanagement.²⁷⁶

3. Prosecutorial Discretion in Immigration Law

As the discussion of the John Lennon case and 1970s immigration policy made clear, this tradition of discretion is well established in the immigration realm.²⁷⁷ The Sixth Circuit, in a well-grounded opinion by Judge Jeffrey Sutton, recounted this tradition in *Arizona v. Biden*,²⁷⁸ upholding Secretary Mayorkas's

270. *In re Aiken Cnty.*, 725 F.3d at 263 (discussing the Bill of Attainder Clause, which bars Congress from enacting a statute that requires prosecution of a particular individual or entity).

271. *Id.* at 264.

272. See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 439–40 (2002).

273. 470 U.S. 821 (1985).

274. *Id.* at 831; cf. Price, *supra* note 269, at 1578–79 (noting *Heckler v. Chaney* rationale while arguing that it was unduly broad).

275. *Chaney*, 470 U.S. at 831 (emphasis added).

276. *Id.* at 831–32 ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

277. See Wildes, *supra* note 203, at 821–22.

278. 40 F.4th 375 (6th Cir. 2022).

prosecutorial discretion memorandum.²⁷⁹ The Supreme Court has repeatedly invoked immigration officials' longstanding discretion—echoing the discretion of police and prosecutors—to initiate removal proceedings and terminate those proceedings at any point.²⁸⁰ Further testifying to immigration officials' discretion to designate factors that should inform the initiation and conduct of removal proceedings, Congress delegated to immigration officials the task of “[e]stablishing national immigration enforcement policies and priorities.”²⁸¹ To be sure, this discretion is not boundless, as this Article discusses in later Parts.²⁸² More elaborate and formal programs that provide ex ante approval for noncitizens to remain in the United States without a lawful status or a pending application for such status generate structural tensions with Congress's framework. Resolving those tensions requires more careful crafting and specific explanation.²⁸³ But the mere setting of priorities for the initiation and conduct of removal proceedings, which does not tie officials' hands in any case, is well within that tradition of official discretion.

4. *Analyzing the Mayorkas Enforcement Memorandum*

This Article has stressed three factors in the analysis of discretion over immigration: framework fit, reliance interests, and effect on foreign policy. The Mayorkas enforcement memorandum is consistent with each of these factors. The following paragraphs explain this point in greater detail.

In assessing the framework fit of the Mayorkas prosecutorial discretion memorandum, the Sixth Circuit correctly viewed that factor against the “backdrop” of prosecutorial discretion in criminal law and immigration law.²⁸⁴ As in recent cases on the state-secrets privilege and other well-established doctrines, a clear and longstanding backdrop of past practice is part of the

279. *Id.* at 390 (observing that states challenging the guidelines failed to “account for the considerable discretion already embedded in the immigration system”).

280. *See id.* (“A principal feature of the removal system is the broad discretion exercised by immigration officials.” (quoting *Arizona v. United States*, 567 U.S. 387, 396 (2012))); *see also id.* (recounting that immigration officials have “discretion to abandon the endeavor” of removing a noncitizen (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999))); *cf. Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022) (noting, in holding that INA does not categorically require return of certain non-Mexican foreign nationals at the border to Mexico to await their removal hearings, that, at least since 1996, “congressional funding has consistently fallen well short of the amount needed” for full immigration enforcement).

281. *Arizona*, 40 F.4th at 380 (citing 6 U.S.C. § 202(5)).

282. *See infra* notes 318–20 and accompanying text (discussing a more tailored justification required for categorical programs such as DAPA and DACA that provide ex ante protection against removal, akin to an indefinite license to remain, to groups of noncitizens).

283. *Cf. Price*, *supra* note 269, at 1575.

284. *Arizona*, 40 F.4th at 390; *see Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 761 (2005) (viewing ostensibly mandatory language in state criminal law provisions governing arrest against the “backdrop” of longstanding law enforcement discretion).

relevant legal structure.²⁸⁵ Courts should interpret statutory language in light of that background.²⁸⁶

With discretion to initiate and conduct removal proceedings as a backdrop, the Mayorkas enforcement memorandum fits the INA's language. While the INA contains mandatory language on the custody arrangements for certain noncitizens whom the government seeks to remove, that language does not address antecedent questions about the initiation and conduct of removal proceedings. For example, 8 U.S.C. § 1226 stipulates that immigration officials "shall take into custody any alien" who meets a range of conditions, including those who are inadmissible because of the commission of certain criminal offenses.²⁸⁷ The titles of the two relevant subsections concern "[d]etention" and "custody," which are issues that arise only *after* the government has made the decision to initiate removal proceedings.²⁸⁸ Similarly, the immediately following subsection discusses "[r]elease" and limits that to a small group of noncitizens who will serve as witnesses in criminal prosecutions.²⁸⁹ The

285. In a recent case, the Supreme Court focused on the state secrets privilege, a judicial doctrine with roots in the executive branch's Article II need to resort to clandestine measures to protect national security and conduct foreign affairs. See *FBI v. Fazaga*, 142 S. Ct. 1051, 1058–61 (2022). Under the state secrets privilege, a court can shield certain information from a party opposing the government or can even treat assertion of the privilege by the government as a complete defense on the merits. *Id.* at 1061. In *FBI v. Fazaga*, the Court interpreted certain procedural safeguards in the Foreign Intelligence Surveillance Act (FISA) against this backdrop, holding that these FISA safeguards did not abrogate the state secrets privilege. *Id.* at 1060–61.

286. Past practice is also relevant to constitutional interpretation. See *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014); Issacharoff & Morrison, *supra* note 115, at 1922–32; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 17–31 (2020) (discussing role of gloss—an understanding based on past practice—from Founding era to the present); Brett M. Kavanaugh, *Congress and the President in Wartime*, LAWFARE (Nov. 29, 2017, 3:00 PM), <https://www.lawfareblog.com/congress-and-president-wartime> (reviewing DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* (2016), and addressing the significance of historical practice).

287. 8 U.S.C. § 1226(c)(1).

288. *Id.*; see *Arizona*, 40 F.4th at 390 (distinguishing between a decision to detain a noncitizen whom the government is seeking to remove and an antecedent decision to seek removal in the first place). In *Arizona v. Biden*, Judge Sutton explained that statutory language earlier in this section cements this interpretation. *Id.* at 390–91. As Judge Sutton noted, 8 U.S.C. § 1226(a), in providing for custody of noncitizens in removal proceedings, states that after the agency issues a warrant, a noncitizen—an "alien" under this section—may be arrested and detained "pending a decision on whether the alien is to be removed." *Arizona*, 40 F.4th at 391. By using the word "may"—not "shall" or "must"—to refer to arrest of a given noncitizen, this section makes the initial arrest of the noncitizen discretionary. § 1226(a). Since an arrest often—although not always—accompanies a decision to initiate removal proceedings, this discretionary language reinforces that the decision to initiate such proceedings is itself discretionary. Otherwise, the language "may be arrested" seems incongruous. Moreover, this same subsection links arrest to the initiation of removal proceedings, providing that custody arrangements apply "pending a decision on whether the alien is to be removed." *Arizona*, 40 F.4th at 391 (citing § 1226(a)). A decision about the removal of a noncitizen requires a final order of removal, which results from the initiation and completion of removal proceedings. See *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2284–85 (2021). If immigration officials decline to initiate proceedings or abandon those proceedings after their initiation, the statutory language provides no predicate for detention of the noncitizen.

289. § 1226(c)(2).

subsection's emphasis on detention and release reinforces that the provision focuses on custody arrangements, not on the decision to start proceedings.

In sum, the language and structure of § 1226 deal with a different subject than the topic that the Mayorkas enforcement memorandum addresses. Section 1226 deals with the custody arrangements of noncitizens whom the government has placed in removal proceedings. In contrast, the enforcement memorandum deals with the logically and practically antecedent question of whether the government will seek to remove the noncitizen *at all*. While Congress could have intended to restrict the government's discretion regarding the latter topic in a statutory section dealing with the former subject, that is not the most natural reading of the provision. Absent a clear statement from Congress, the longstanding tradition of discretion and the most natural reading of the statute demonstrate the enforcement memorandum's fit with the INA's framework.²⁹⁰

In dealing with the exercise of discretion over individual removal cases, this longstanding backdrop and its consistency with framework fit are arguably dispositive on the question of the Mayorkas enforcement memorandum's lawfulness. That said, in applying the *State Farm* analysis that the Court used to strike down the Trump Administration's effort to rescind DACA in *Regents*,²⁹¹ a diligent court might also wish to consider two other factors identified in this Article: reliance interests and impact on foreign affairs. Because of the long pedigree of prosecutorial discretion, review based on these factors should be deferential. The Mayorkas enforcement memorandum readily meets this test.

In terms of reliance interests, the enforcement memorandum cited as one factor a noncitizen's development of family, educational, or employment relationships in this country.²⁹² In addition, the Mayorkas memorandum noted the roles of noncitizens as "contributing members of . . . [U.S.] communities,"

290. A district court opinion reached a different conclusion, but only by failing to fully acknowledge the distinction between custody arrangements, which § 1226 governs, and decisions about the initiation and completion of removal proceedings, which § 1226 does not address expressly or by implication. *See Texas v. United States*, No. 21-cv-00016, 2022 U.S. Dist. LEXIS 104521, at *61–64 (S.D. Tex. June 10, 2022), *cert. granted*, 143 S. Ct. 51 (2022). For the district court, the detention tail wags the removal dog. That is not the most natural way to read the statute or account for the realities of immigration enforcement. *Cf.* Anil Kalhan, *Immigration Enforcement, Strategic Entrenchment, and the Dead Hand of the Trump Presidency*, 2021 U. ILL. L. REV. ONLINE 46, 54–56, <https://illinoislawrev.web.illinois.edu/wp-content/uploads/2021/04/Kalhan.pdf> (discussing flaws in district court's reading of related statute on detention, 8 U.S.C. § 1231). The Supreme Court granted certiorari on the scope of prosecutorial discretion under the INA, as well as on two threshold issues: states' standing to challenge the guidelines and the preclusive effect of 8 U.S.C. § 1252(f)(1), which limits courts' power to grant certain relief, on the district court's order to "hold unlawful and set aside" the guidelines. *United States v. Texas*, 143 S. Ct. 51, 51 (2022). Discussion of these two threshold issues is beyond the scope of this Article.

291. 140 S. Ct. 1891, 1913 (2020) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

292. Mayorkas Enforcement Memorandum, *supra* note 28, at 3.

who are on the “frontlines” in fighting COVID, serve as leaders of religious congregations, and do “back-breaking farm work to help deliver food.”²⁹³ As part of the analysis of the agency’s policy under the APA,²⁹⁴ this discussion could have been even more detailed. However, given the deference that courts should accord the exercise of prosecutorial discretion on removal, the memorandum’s discussion was adequate for the purpose at hand.

Fairly read in light of this deference, the enforcement memorandum also took into account foreign policy concerns. In asserting broad discretion over decisions to initiate removal proceedings, the memorandum cited the Supreme Court’s *Arizona v. United States* decision.²⁹⁵ By referring to the decision, the memorandum thus incorporated the *Arizona* case’s discussion of foreign policy. As the Supreme Court noted in *Arizona*,²⁹⁶ the removal of foreign nationals potentially affects the country’s “diplomatic relations.”²⁹⁷ Treatment of foreign nationals in the United States that the foreign nationals’ home countries view as unduly rigid or heedless can trigger “harmful reciprocal treatment” of U.S. citizens in those foreign states.²⁹⁸ In an even more recent decision, *Biden v. Texas*,²⁹⁹ the Court returned to this theme, noting that the Court would be cautious in construing a section authorizing return of noncitizens to Mexico because the foreign policy effects of large-scale return to a foreign country implicated the President’s authority under Article II to negotiate with foreign governments.³⁰⁰ Without a clear statement from Congress, the Court noted that

293. *Id.* at 2.

294. *Regents*, 140 S. Ct. at 1913 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

295. See Mayorkas Enforcement Memorandum, *supra* note 28, at 2 (citing *Arizona v. United States*, 567 U.S. 387, 396 (2012)) (“A principal feature of the removal system is the broad discretion exercised by immigration officials[,] . . . [including] as an initial matter . . . whether it makes sense to pursue removal at all.”). While the enforcement memorandum did not identify the Supreme Court decision by name, informed readers surely recognized the source of the quote, especially since the memorandum provided the year of the Court’s decision. See *Arizona v. United States*, 567 U.S. 387, 396 (2012) (making this observation about official discretion in immigration cases).

296. 567 U.S. 387.

297. *Id.* at 395.

298. The Framers shared these concerns about diplomatic relations. John Jay, in *Federalist No. 3*, noted that ill-considered policies in border states, where relationships with foreign powers might be more subject to volatility, could undermine the United States’ diplomatic interests. *Id.* (citing THE FEDERALIST NO. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003) (suggesting that the deliberation and wisdom of the federal government, with its contributions from representatives around the country, would be superior to the “impulse of sudden irritation” in border states that could lead to precipitous clashes with foreign powers)).

299. 142 S. Ct. 2528 (2022).

300. *Id.* at 2543 (acknowledging that Article II empowers the President—and only the President or the President’s agents—to “engag[e] in direct diplomacy with foreign heads of state and their ministers” (quoting *Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015)); cf. *id.* at 2549 (Kavanaugh, J., concurring) (observing that when the President chooses parole into the United States of noncitizens at the border over return to Mexico because the latter is “not feasible for foreign-policy reasons,” a court construing requirements for a reasoned explanation of the policy under the APA “must be deferential to the President’s Article II foreign-policy judgment”).

it had long been reluctant to risk “the danger of unwarranted judicial interference in the conduct of foreign policy.”³⁰¹ A carefully devised regime of deliberation and the “dedication of investigative and evaluative effort” is a bulwark against needless conflict with foreign states.³⁰²

The enforcement memorandum’s stated priorities harmonize with the foreign policy interests cited by the Court in *Arizona*.³⁰³ The focus on national security and public safety involves core concerns about the preservation of U.S. sovereign interests and the safeguarding of U.S. persons. Furthermore, under the memorandum, national security threats and threats to public safety must stem from specific “activities” of the noncitizen, such as espionage and terrorism or specific criminal convictions.³⁰⁴ The need for specific findings reduces a potential concern from foreign states that the guidelines will become a fig leaf for invidious or selective enforcement that targets noncitizens based on race, religion, nationality, or other factors. Indeed, the Mayorkas memorandum expressly prohibits discretion based on invidious factors or retaliation against a noncitizen’s exercise of legal rights.³⁰⁵ The Mayorkas memorandum also provides for training of personnel and review of enforcement decisions, further curbing the potential for random, arbitrary, or invidious enforcement.³⁰⁶ The specificity in the guidelines, their prohibition on invidious practices, and their commitment to training and review should do much to reassure foreign states that U.S. immigration officials are acting reasonably. That should minimize tension with foreign states and reduce the risk of those states taking measures that would adversely affect U.S. nationals. Given the deference that the exercise of discretion to initiate removal proceedings should prompt, these steps to reduce adverse foreign impacts are sufficient.

In sum, the enforcement memorandum meets this Article’s test for the exercise of individual discretion over initiation of removal proceedings. The longstanding backdrop of discretion over these matters and the absence of statutory language expressly curbing this discretion demonstrate framework fit. Given appropriate levels of judicial deference, the enforcement memorandum’s references to reliance interests and steps to minimize adverse foreign impacts also meet legal requirements.

301. *Id.* at 2543 (majority opinion) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–16 (2013)).

302. Mayorkas Enforcement Memorandum, *supra* note 28, at 4.

303. *Arizona v. United States*, 567 U.S. 387, 395 (2012).

304. Mayorkas Enforcement Memorandum, *supra* note 28, at 3–4; Doyle Memorandum, *supra* note 253, at 3–4.

305. Mayorkas Enforcement Memorandum, *supra* note 28, at 5.

306. *Id.* at 5–6.

B. DAPA AND THE LIMITS OF PROTECTIVE DISCRETION

Discussion of the Mayorkas enforcement memorandum, which provided guidance on discretion in individual cases, is a fitting prelude to the more programmatic focus of DAPA. DAPA, announced in late 2014, followed DACA, which was enacted in 2012.³⁰⁷ While DACA addressed the challenges of child arrivals in the United States, DAPA addressed a different, larger group: adults who entered or remained in the United States without a lawful immigration status and have children who are birthright citizens under U.S. law.³⁰⁸ Over four million noncitizens without legal immigration status would have potentially been eligible for DAPA.³⁰⁹ In conjunction with the program, recipients would have received two renewable benefits: a reprieve from removal and eligibility for a work permit.³¹⁰

Recall that the INA provides detailed provisions on categories of noncitizens who can receive immigrant visas based on family relationships or skilled employment.³¹¹ The statute also imposes special constraints on noncitizen parents of birthright-citizen children: a citizen must be at least twenty-one years old to sponsor a parent.³¹² In addition, the INA erects high barriers to lawful permanent residence for noncitizens, like potential DAPA recipients, who enter the United States without possession of a valid visa, inspection by immigration officials, or assertion of an asylum claim, and then remain in the country without a lawful status.³¹³ For a potential DAPA recipient with a one-year-old birthright-citizen child, the wait for a visa could be as long as thirty years, with a decade spent outside the country separated from

307. *Texas v. United States*, 809 F.3d 134, 146–48 (5th Cir. 2015); Thompson OLC Memorandum, *supra* note 245, at 1.

308. *Texas*, 809 F.3d at 146–48.

309. *Id.* at 185.

310. *Id.* at 149.

311. *See supra* note 30 and accompanying text; *see, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (providing visas for “immediate relatives” of U.S. citizens).

312. § 1151(b)(2)(A)(i). Congress inserted this age floor to deter noncitizens from entering the United States without a visa or an asylum claim for the purpose of acquiring an immigrant visa through a future U.S. citizen child. *See Margulies, supra* note 13, at 1186–87 (discussing the evolution of the provision).

313. *See* 8 U.S.C. § 1255(a) (requiring a noncitizen who entered without inspection to leave the country before receiving an immigrant visa); *id.* § 1182(a)(9)(B)(i)(I)–(II) (barring admission for three years of any noncitizen who leaves the country after having been unlawfully present for more than 180 days, and barring admission for ten years of any noncitizen who leaves the country after having been unlawfully present for one year or more); *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1813 (2021) (discussing the limits on the ability to gain LPR status for noncitizens who entered without inspection and remained in the United States unlawfully for more than 180 days).

their family.³¹⁴ Moreover, Congress had sharply narrowed the express statutory avenue for such noncitizens to receive LPR status.³¹⁵

On the other side of the ledger, the INA contains rigorous limits on the exercise of executive discretion to aid noncitizens without a legal status. Congress limited to 120 days the length of a period of “extended voluntary departure” (“EVD”) that immigration officials could allow a removable noncitizen to wind down their commitments in the country once they had agreed to leave.³¹⁶ In IIRIRA, Congress imposed even tighter limits on parole for persons seeking to enter the country, allowing “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”³¹⁷

This daunting array of restrictions and narrow means of relief is part of Congress’s own dialectic on protection and regulation. Any participant in the system—including legislators, administrators, judges, lawyers, commentators, noncitizens, and U.S. citizens with or without ties to the noncitizens affected—should recognize the human cost of these measures. In the political arena, mobilization for statutory changes is essential. But participants in the legal realm must assess how a maximalist exercise of protective discretion, such as DAPA, would fit in Congress’s ongoing dialectic.

That inquiry about DAPA’s fit was necessary because, in the short term, the program’s components—a renewable reprieve from removal and eligibility for a work permit—would have conveyed the principal attributes of

314. See Thompson OLC Memorandum, *supra* note 245, at 29 n.14 (acknowledging the obstacles to receipt of an immigrant visa by potential DAPA recipients). DAPA recipients who had not entered without inspection but instead had overstayed by remaining in the country after expiration of a valid nonimmigrant visa—such as a visa for a student or tourist—would have to wait twenty years in the situation described because of the INA’s requirement that a U.S. citizen be at least twenty-one years old to sponsor an immediate relative for an immigrant visa. § 1151(b)(2)(A)(i).

315. 8 U.S.C. § 1229b(b) (requiring ten years of physical presence in the United States and a showing of “exceptional and extremely unusual hardship” that the applicant’s removal would cause to the applicant’s U.S. citizen or LPR spouse, parent, or child). See *Texas*, 809 F.3d at 180 (discussing this demanding provision, which is referred to as “cancellation of removal” under the INA).

316. See 8 U.S.C. § 1229c(a)(2)(A); Margulies, *supra* note 13, at 1209–10 (discussing EVD). The limits that Congress imposed on EVD were the capstone to a long period of dialogue between immigration officials and Congress in which influential legislators had pressed immigration officials to curb excesses in awards of this benefit. See *United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 980–81 (E.D. Pa. 1977) (noting concern by Representative Peter Rodino of New Jersey, a liberal Democrat who then chaired the House Judiciary Committee, that officials were using grants of EVD as a way of “circumventing Congressional intent by using the extended voluntary departure device to permit deportable aliens to remain in the United States when they had no actual intention of ever departing voluntarily”; responding to Rodino’s concerns, immigration officials restricted certain grants of EVD).

317. 8 U.S.C. § 1182(d)(5)(A); see *id.* § 1182(d)(5)(B) (requiring a showing of “compelling reasons in the public interest with respect to [the] particular alien” whom the executive branch wishes to parole into the United States); see also Margulies, *supra* note 13, at 1209–10 (providing background on narrowed parole criteria).

LPR status.³¹⁸ The renewability of DAPA enrollment increased its overlap with lawful permanent residence.³¹⁹ DAPA would thus have provided many of the advantages of legal status to over four million noncitizens without the detailed conditions and limits that Congress has imposed.³²⁰

This mismatch between DAPA's scope and the INA's scheme showed DAPA's lack of framework fit. Analyzing past practice did not enhance the parallels between DAPA and accepted bases for deferred action. Past instances of deferred action had entailed either a response to distinctive hardship such as youth, age, or infirmity,³²¹ or a "bridge" to a reasonably available legal status, as in the Family Fairness program that protected the spouses and children of IRCA grantees until Congress provided protection in the Immigration Act of 1990.³²² DAPA did not fit within either of these rubrics.

Confirming DAPA's lack of framework fit, the government's justifications for DAPA relied heavily on generic or inapposite statutory authority. The Office of Legal Counsel memorandum supporting DAPA mentioned an INA provision stating that the Secretary of Homeland Security "shall be charged with the

318. See *Texas*, 809 F.3d at 180 (listing the "benefits of lawful presence" that DAPA would have provided); cf. DORIS MEISSNER, FAYE HIPSMAN & T. ALEXANDER ALEINIKOFF, *THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD* 9 (2018), <https://www.migrationpolicy.org/research/us- asylum-system-crisis-charting-way-forward> (noting the centrality of work authorization for many noncitizens with pending asylum cases; as part of the exponential growth in asylum cases in the last decade, applications for work permits have increased from 55,000 in Fiscal Year 2012 to 270,000 in Fiscal Year 2016, while the rate of applications for work permits further increased to 278,000 in the first six months of Fiscal Year 2017); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 815–16 (2015) (discussing the waits experienced by asylum-seekers requesting employment authorization).

319. Renewability would be contingent on the cooperation of subsequent presidential administrations. The Trump Administration sought to rescind the smaller DACA program. It surely would have done the same with the far larger DAPA program if the latter had gone into effect. Exposure to the changing winds of the political climate is a distinguishing feature of deferred action programs like DAPA and DACA, which is less of a concern for LPRs, who cannot lose their status unless they engage in conduct that makes them removable. Congress can change grounds for removal retroactively, but under established rules of statutory interpretation it must do so expressly. *INS v. St. Cyr*, 533 U.S. 289, 305 (2001); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 135–41 (1998); Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743, 1750–55 (2003); Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 458–62 (2002); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 143–45, 153–55 (2010) (discussing the role of reliance interests in canons of statutory construction).

320. *Texas*, 809 F.3d at 180–84.

321. *Immigr. & Naturalization Serv., Operations Instructions (Legacy)*, O.I. § 103.1(a)(1)(ii) (1975); Meissner Memorandum, *supra* note 203, at 17; WADHIA, *supra* note 13, at 147. Wadhia supports a broader view of protective discretion, under which DAPA would have been lawful. WADHIA, *supra* note 13, at 147. *But see* Margulies, *supra* note 13, at 1222 (arguing that DAPA exceeded the power that the INA delegates to the executive branch); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 237 (2015).

322. *Texas*, 809 F.3d at 184–85; see *supra* notes 226–39 and accompanying text (discussing Family Fairness).

administration and enforcement” of the INA.³²³ Read in context, this provision merely codifies a bureaucratic flow chart for implementing the statute.³²⁴ To enable the performance of statutory duties, Congress linked that responsibility with a specific cabinet official.³²⁵ However, Congress did not convey plenary authority to the senior officials mentioned in this provision. Under a close neighbor of this provision, the Secretary of Homeland Security must “establish such regulations[,] . . . issue such instructions[,] and perform such other acts as he deems necessary for carrying out his authority *under the provisions of this Act*.”³²⁶ Congress tied official discretion to the “provisions” of the INA, indicating the need to tailor discretion to the INA’s structure. Moreover, as with most policies or regulations issued by executive branch departments or agencies, “regulations” and “instructions” require compliance with the APA, including the APA’s presumption in favor of judicial review.³²⁷ Viewed in this light, the provision’s reference to “regulations,” “instructions,” and “acts” that the responsible official “deems necessary” is yet another generic flow chart feature.³²⁸ The words “deems necessary” do not delegate absolute authority. Rather, in a redundant fashion, they merely identify the roles of responsible officials in the operation of the statute. Those officials remain subject to normal constraints such as judicial review.³²⁹

A similarly prosaic reading should prevail regarding the definition of “unauthorized alien” for employment purposes as a foreign national who is not an LPR or “authorized to be . . . employed by this chapter or by the Attorney General.”³³⁰ This section gives guidance to subjects of regulation: employers whom the government can sanction under IRCA for failing to exercise due diligence in hiring noncitizens.³³¹ For the benefit of subjects of regulation, the

323. 8 U.S.C. § 1103(a)(1); see Thompson OLC Memorandum, *supra* note 245, at 3–4.

324. *Texas*, 809 F.3d at 182–84.

325. § 1103(a)(1).

326. *Id.* (emphasis added).

327. *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 141–42 (1967).

328. A similar critique applies to language in the Homeland Security Act that identifies the DHS as the responsible agency for “[e]stablishing national immigration enforcement policies and priorities.” 6 U.S.C. § 202(5).

329. See *Yakus v. United States*, 321 U.S. 414, 426–27 (1944) (indicating that the statutory language authorizing policies and regulations that an agency or senior official “deem[s] necessary” implicitly imported criteria for assessing compliance with Congress’s framework); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397–400 (1940) (discussing the role of judicial review in the section granting agency power to set maximum prices at the level it deems necessary to protect consumers).

330. 8 U.S.C. § 1324a(h)(3).

331. See, e.g., *id.* § 1324a(b)(1) (describing the need for an employer to attest under oath to following due diligence procedures and specifying certain documents that meet statutory requirements); *id.* § 1324a(e) (outlining compliance procedures, including complaints, investigations, and hearings). Underlining the guidance theme, the provision of the INA following the section on employer sanctions prohibits national origin or other discrimination, such as not hiring naturalized citizens, refugees, asylees, or LPRs, that some employers might

provision identifies a safe harbor from sanctions: due diligence in employing noncitizens duly “authorized” to work.³³² Highlighting the need for due diligence by the regulations’ subjects does not herald the advent of absolute discretion for regulators.³³³ The sources of supposed textual authority for DAPA, in Justice Scalia’s familiar metaphor, comprised mere “mouseholes” that were a poor fit for the elephant of protective discretion that the government sought to accommodate.³³⁴ The government’s post-IRCA explanation for its own regulations on deferred action affirmed the limits of protective discretion.³³⁵

C. THE DACA RESCISSION

While courts rejected DAPA’s expansive view of protective discretion, they also rejected the Trump Administration’s regulatory discretion in rescinding DACA.³³⁶ The Supreme Court acknowledged that the Trump Administration had the power to end the DACA program—which was discretionary, not mandatory—in the first instance.³³⁷ In this sense, framework fit favored the Trump Administration’s action, or at least did not impede it.³³⁸ The real question before the Supreme Court was not *if* the Trump Administration had discretion, but *how* the Administration had exercised that discretion.³³⁹ In

use to avoid any potential risk of sanctions. *See id.* § 1324b (barring unfair immigration-related employment practices).

332. *Id.* § 1324a(b)(1).

333. *Texas v. United States*, 809 F.3d 134, 183–84 (5th Cir. 2015).

334. *Id.* at 183 n.186 (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions . . .” (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001))). *See Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1925–26 (2020) (Thomas, J., dissenting) (applying similar reasoning in concluding that DACA exceeded power that Congress had delegated to the executive branch).

335. 8 C.F.R. § 274a.12(c)(14) (2020) (cited in *Regents*, 140 S. Ct. at 1902). In its 1987 explanation, the government assured Congress that the number of noncitizens receiving deferred action and thus authorization to work was “quite small and the impact on the labor market [was] minimal.” *See Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46092 (Dec. 4, 1987). Indeed, officials observed that the number of work authorizations resulting from deferred action was “previously considered to be *not worth recording*.” *Id.* at 46093 (emphasis added).

336. *Regents*, 140 S. Ct. at 1918; *see* Margulies, *supra* note 151, at 132–37; Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1773–85 (2021) (defending *Regents* as forcing an agency to acknowledge the political basis for its decisions or engage in fuller policy deliberation). *But see* Rodríguez, *Reading Regents*, *supra* note 14, at 18 (critiquing *Regents* as interfering with an executive discretion through unduly intrusive procedural requirements); Rodríguez, *Regime Change*, *supra* note 14, at 100–03. As noted above, DACA was a smaller program than DAPA that predicated eligibility for similar benefits—a reprieve from removal and eligibility for a work permit—on a more narrowly tailored condition: arrival in the United States as a child accompanying noncitizen parents. *Regents*, 140 S. Ct. at 1901–05. DACA recipients must have continuously resided in the United States since June 15, 2007, and be under thirty-one years of age as of June 15, 2012. *Id.*

337. *Id.* at 1910.

338. *Id.* at 1925–26 (Thomas, J., dissenting) (arguing that the explanation for rescission was adequate since DACA exceeded executive authority under INA).

339. *Id.* at 1905 (majority opinion).

finding that the attempted rescission failed to meet the test of “reasoned decisionmaking” under the APA,³⁴⁰ the Court found that officials had failed to address reliance interests created by DACA and adverse collateral impacts of the rescission.³⁴¹

The backdrop for this focus on collateral impacts and exigency was DACA’s pedigree as a program that the Obama Administration had initiated in 2012.³⁴² The Trump Administration was not seeking to cancel a program with little record in the field. Instead, officials in 2017 sought to rescind a program that had been in operation for five years, spurring enrollees to participate in a spectrum of activities that spawned relationships with other individuals and entities.³⁴³ DACA’s rescission would have interrupted those activities, without effective notice.³⁴⁴

Writing for the Court in *Regents*, Chief Justice Roberts highlighted the reliance interests of DACA recipients, including their engagement in education and service.³⁴⁵ As an illustration, consider a DACA recipient who enrolled in a four-year public university in September 2016 and whose two-year DACA enrollment was due to end on March 6, 2018. Under the Trump Administration’s rescission plan, the recipient would have been unable to renew their enrollment.³⁴⁶ After March 6, 2018, this college student would have no longer been lawfully present in the United States and might have lost the ability to continue their studies or their financial aid eligibility.

According to Chief Justice Roberts, this recipient would be “caught in the middle of a time-bounded commitment.”³⁴⁷ The timing of the rescission announcement and the deadlines Trump officials had set did not provide this recipient with either adequate notice of DACA’s rescission to avoid starting their studies or adequate time to complete school.³⁴⁸ Chief Justice Roberts flagged a similar failing for recipients serving in the armed forces or obtaining long-term medical treatment. According to Roberts, acting Secretary of Homeland Security

340. *Id.* (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)).

341. *Id.*

342. *Id.* at 1901–02.

343. *Id.* at 1903.

344. *Id.* at 1914.

345. *Id.*; see Margulies, *supra* note 151, at 149–50.

346. See Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf’t, Kevin K. McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Joseph B. Maher, Acting Gen. Couns., Ambassador James D. Nealon, Assistant Sec’y of Int’l Engagement, Dep’t of Homeland Sec., and Julie M. Kirchner, Ombudsman, U.S. Citizenship & Immigr. Servs. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (authorizing applications for renewal by DACA recipients whose enrollment would expire no later than March 5, 2018, but barring renewal applications in all cases in which enrollment would expire after that date).

347. *Regents*, 140 S. Ct. at 1914.

348. *Id.*

Elaine Duke should have addressed the feasibility of permitting our hypothetical college student and similar “caught in the middle” recipients to finish their studies, treatments, or service.³⁴⁹ In addition, Chief Justice Roberts observed that rescinding DACA would have had severe collateral impacts for U.S. individuals and entities such as employers, schools, and the U.S. military.³⁵⁰ By declining to address such potential harms, Secretary Duke had failed to consider “relevant factors” and “important aspect[s] of the problem” posed by rescinding the program.³⁵¹

D. THE BIDEN ADMINISTRATION’S DACA RULE

As the Supreme Court’s *Regents* decision did not rule on DACA’s underlying legality, that question remains on the table. After a federal district held that DACA did not fit the INA for reasons similar to those given by the Fifth Circuit in 2015 in its ruling on DAPA, the Biden Administration promulgated a proposed rule authorizing the DACA program.³⁵² The proposed rule and explanation suggest two different ways of viewing DACA. The first vision is tailored to traditional hardship criteria, although substantially larger in sheer numbers than traditional hardship-based deferred action.³⁵³ The second vision is less bounded in rationale, echoing DAPA’s expansive interpretation of protective discretion.³⁵⁴ Only the first option passes muster.

349. *Id.*

350. *Id.*

351. *Id.* at 1905 (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); *id.* at 1913 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). Chief Justice Roberts viewed administrative law doctrine as permitting consideration only of the September 2017 rescission memorandum by acting Homeland Security Secretary Elaine Duke, not a subsequent memorandum issued in June 2018 by Duke’s successor, Kirstjen Nielsen. See Nielsen Memorandum, *supra* note 47; *Regents*, 140 S. Ct. at 1909 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). According to Chief Justice Roberts, the values of agency, candor, and deliberation required focusing solely on the agency’s first explanation of the rescission. Considering the Nielsen memorandum would encourage agencies to provide piecemeal explanations that confuse the public and other stakeholders. *Regents*, 140 S. Ct. at 1909–10. In response, Justice Kavanaugh asserted that Chief Justice Roberts had read *SEC v. Chenery* too broadly. *Id.* at 1934–35 (Kavanaugh, J., dissenting). According to Justice Kavanaugh, *Chenery* would have barred consideration of post hoc explanations by agency lawyers scrambling to bolster a litigation position but would not have precluded consideration of acting Secretary Nielsen’s explanation, which represented the considered view of the DHS’s senior official. *Id.*; cf. Rodríguez, *Reading Regents*, *supra* note 14, at 8 (agreeing with Justice Kavanaugh’s analysis). Assessment of the *Chenery* doctrine in *Regents* is beyond the scope of this Article.

352. *Texas v. United States*, 549 F. Supp. 3d 572, 606–14 (S.D. Tex. 2021), *aff’d in part, vacated in part, and remanded*, 50 F.4th 498 (5th Cir. 2022); Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53152 (Aug. 30, 2022) (codified at 8 C.F.R. pts. 106, 236, 274a).

353. 87 Fed. Reg. at 53155 (citing “humanitarian concerns” and “reliance interests” regarding current DACA recipients); cf. WADHIA, *supra* note 13, at 60 (discussing pre-DACA deferred action based on hardship); Wildes, *supra* note 203, at 823 (same).

354. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736, 53753–59 (Sept. 28, 2021) (codified at 8 C.F.R. pts. 106, 236, 274a).

The long-established practice of hardship-based deferred action provides a precedent for the first, more tailored version of DACA in the final rule.³⁵⁵ While the historical numbers were small, this rationale fits the distinctive challenges faced by DACA recipients, who came to the United States as children and often have no significant ties to any other country.³⁵⁶ The contributions made by DACA recipients, also noted by Chief Justice Roberts in *Regents*,³⁵⁷ serve to highlight the hardships that cessation of such service options would pose.³⁵⁸

These hardship-based arguments are strongest for current DACA recipients, as the explanation for the final DACA rule notes.³⁵⁹ In the context of current recipients, the hardship of terminating employment authorization and related benefits, such as access to education aid, melds with the reliance interests that the Court described in *Regents*.³⁶⁰

The final rule's explanation also canvasses the collateral impacts that termination of eligibility for work authorization would cause, again echoing the Supreme Court's *Regents* analysis.³⁶¹ Current DAPA recipients have paid almost \$9 billion in federal, state, and local taxes; made rent payments of \$2.3 billion and mortgage payments of almost \$600 million; and contributed as doctors, nurses, lawyers, engineers, and teachers.³⁶²

Although the explanation for the proposed rule does not dwell on foreign impacts, those are likely to be substantial. Foreign countries will have difficulty absorbing the number of returnees that wholesale removal of current DACA recipients would spur.³⁶³ Accommodation of current DACA recipients would be

355. See Operations Instructions, *supra* note 203; Meissner Memorandum, *supra* note 203; *supra* notes 203–10 and accompanying text.

356. See 87 Fed. Reg. at 53257 (observing that DACA recipients came to the United States “at a very young age, and many have lived in the United States for effectively their entire lives,” and concluding that the United States is “their only home”); Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092, 46092 (Dec. 4, 1987) (discussing historical numbers).

357. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1914 (2020).

358. 87 Fed. Reg. at 53222 (noting that DACA recipients have to be currently enrolled in school, have a certain level of education, or have record of service in the armed forces of the United States completed by honorable discharge).

359. 86 Fed. Reg. at 53760.

360. See *Regents*, 140 S. Ct. at 1914; 86 Fed. Reg. at 53760 (“Existing DACA recipients have relied on deferred action and employment authorization for years, and planned their lives—and, in many cases, their families’ lives—around them. Without work authorization, many DACA recipients would have no lawful way to support themselves and their families and contribute fully to society and the economy.”).

361. See *Regents*, 140 S. Ct. at 1914; 87 Fed. Reg. at 53169–71.

362. 87 Fed. Reg. at 53174 (also reporting that about 30,000 DACA recipients are healthcare workers, many on the frontlines during the COVID-19 emergency).

363. M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 391–94 (2010) (discussing experiences of returnees, including pressure to assist criminal gangs); Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J.C.R. & C.L. 195, 218–21 (2007) (discussing post-deportation experiences). See generally Matthew Lorenzen, *The*

particularly difficult, given the recipients' dearth of ties to their nominal home countries.

Under a stewardship model, the combination of fit with past practice on hardship-based deferred action, reliance interests and other domestic collateral consequences, and foreign impacts would justify the continuation of DACA for current recipients, including both the reprieve from removal and eligibility for work permits.³⁶⁴ The argument is even stronger if the rule only authorizes a reprieve from removal, given the closeness of "forbearance" of this kind to traditional individual discretion.³⁶⁵ Applying the deference that the *Chevron* doctrine counsels in areas of statutory ambiguity buttresses this view.³⁶⁶

The explanation of the proposed rule does not mention another possible basis for DACA: the President's own power to protect intending Americans under Justice Jackson's second *Youngstown* category of congressional acquiescence.³⁶⁷ In the realm of immigration, assertions of such power occurred during the open door era—admittedly in the absence of a comprehensive legislative framework—in episodes such as Jefferson and Madison's protection of noncitizen mutineers and maritime deserters on human rights grounds, and President Franklin Pierce's rescue of the Hungarian dissident Martin Koszta.³⁶⁸ Theodore Roosevelt and Elihu Root displayed a similar disposition in their deft toggling between protective discretion in the San Francisco school crisis and their regulatory discretion in the Gentlemen's Agreement with Japan. In these

Mixed Motives of Unaccompanied Child Migrants from Central America's Northern Triangle, 5 J. MIGRATION & HUM. SEC. 744, 749–54 (2017) (examining difficult conditions in Central America that drove immigration to the United States and would also pose challenges to states seeking to reintegrate returnees).

364. Even if courts find that DACA is inconsistent with the INA, an injunction that would permit current recipients to continue their enrollment would be consistent with equitable principles. See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("Flexibility rather than rigidity has distinguished [equity]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . .").

365. Cf. 87 Fed. Reg. at 53201 (discussing forbearance as a severable option); *Regents*, 140 S. Ct. at 1911–12 (faulting acting DHS Secretary Duke for failing to consider possibility of continuing policy of forbearance while ending eligibility for work authorization).

366. 467 U.S. 837, 842–45 (1984) (explaining that if agency view is not unambiguously foreclosed by the statute, the court will assess whether the agency view is reasonable and should ordinarily defer to the agency's understanding of reasonableness); cf. Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1230–32 (2021) (contending that because of the range of inputs and enhanced accountability to stakeholders, deference regarding immigration decisions is more appropriate for rulemaking than for administrative adjudication).

367. *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see Kavanaugh, *supra* note 286 (discussing weight that courts should attach to past practice); Margulies, *supra* note 18, at 115; Margulies, *supra* note 151, at 137–38; Issacharoff & Morrison, *supra* note 115, at 1922–32 (presenting an expansive view of historical practice and its role in constitutional adjudication); *supra* notes 142–50 and accompanying text (discussing pattern of tailored presidential interventions since the early days of the new republic to protect intending Americans). See generally Landau, *supra* note 115 (discussing the possible integration of *Chevron* and executive innovations in national security and foreign affairs).

368. See *supra* notes 151–55 and accompanying text; Monaghan, *supra* note 155, at 49.

episodes, Congress either acquiesced to or ultimately ratified the President's actions. Moreover, the disruption to foreign relations caused by removal of current DACA recipients also echoes the rationale of presidents, including George H.W. Bush and Barack Obama, who have claimed an exclusive executive power to provide deferred enforced departure ("DED") to certain noncitizens. Under this view, provision of DED turned on safeguarding noncitizens from unsafe conditions in their respective countries of origin. Admittedly, the number of DACA recipients is substantially larger than the number of foreign nationals affected by earlier episodes such as the rescue of Martin Koszta. Moreover, presidents have granted DED based on conditions in individual foreign countries, while DACA recipients claim nationality in a range of foreign states. However, these differences may be a matter of degree rather than kind. In addition, although Congress has not yet ratified protections for childhood arrivals, these protections have enjoyed bipartisan support.³⁶⁹ Framing DACA as another instance of protective presidential power in Justice Jackson's second category is a plausible option for both the executive branch and courts.

Courts considering challenges to the DACA rule should focus on this first, tailored version of the rule's explanation, and reject the more expansive interpretation that the DHS explanation provides. DHS's broader account of protective discretion echoes the flaws of the justification for DAPA. It takes an unduly aggressive and severely incomplete view of historical practice on deferred action, focusing on executive action and either omitting or discounting congressional efforts. For example, the explanation for the rule touts officials' use of EVD to provide an indefinite reprieve from removal to certain noncitizens³⁷⁰ but fails to acknowledge that Congress responded to this practice by limiting EVD to 120 days.³⁷¹ In addition, the DHS explanation expressly discounts the interstitial role of much past deferred action, which served as a bridge to an immigrant visa that would be available within a reasonable time.³⁷²

369. See Ryan Santistevan, *DACA Bill Gets a Mixed Reaction: Measure Would Give 'Dreamers' Citizenship Path*, ARIZ. REPUBLIC (July 24, 2017), <https://www.pressreader.com/usa/the-arizona-republic/20170724/281487866413301> (reporting on the support from Senator Lindsey Graham of South Carolina for the legislative measure protecting childhood arrivals, who discussed DACA recipients' U.S. ties and observed: "They are no more connected with a foreign country than I am").

370. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53187 (Aug. 30, 2022) (codified at 8 C.F.R. pts. 106, 236, 274a).

371. 8 U.S.C. § 1229c(a)(2)(A).

372. 87 Fed. Reg. at 53187 (asserting that the legality of DACA for both current recipients and future applicants fits squarely within past practice regardless of whether DACA is interstitial to expected statutory relief). In its discussion of the Family Fairness program that served as a bridge from IRCA to the Immigration Act of 1990, the explanation fails to mention that when the George H.W. Bush Administration acted in February 1990, bills had already passed each legislative chamber providing similar relief. *Id.*; cf. AM. IMMIGR. COUNCIL,

Finally, the DHS explanation provides a tilted account of the 1987 deferred action regulation issued after IRCA. The explanation relies on the regulation as authority for an expansive view of protective discretion.³⁷³ However, the DACA explanation does not acknowledge the copious disclaimers of expansive impact in the earlier rule's explanation.³⁷⁴ Rule explanations are not transactional expedients; they are key components of an agency's ongoing dialogue with Congress and the public. The skewed account of past practice in the DACA explanation is not the kind of "reasoned analysis" that the Court required of the DACA rescission.³⁷⁵

In sum, DHS's narrower vision of DACA fits the stewardship paradigm, either as a reflection of past practice under the INA or as a "gloss" based on legislative acquiescence under *Youngstown's* second category. Courts should find that, at the very least, relief for current DACA recipients passes muster. That finding will require courts to focus on the tailored version in the DHS's explanation, attaching secondary importance to the explanation's more expansive averments.

E. ENDING THE "REMAIN IN MEXICO" PROGRAM

The scope of protective discretion is also at issue in the Biden Administration's effort to end a measure that began under President Trump: the Remain in Mexico program, more formally called the Migrant

supra note 238, at 1 (listing legislative efforts); *supra* notes 237–39 and accompanying text. In October 2022, the Fifth Circuit held that the 2012 Napolitano memorandum on DACA exceeded the executive branch's authority under the INA. *See Texas v. United States*, 50 F.4th 498, 529–30 (5th Cir. 2022). The court remanded to the district court to decide whether the Biden Administration's final rule on DACA was similarly infirm. *Id.* at 508. In its decision, the court cited the concerns about statutory text and structure that this Article has analyzed. *Id.* at 524–28. Those concerns drew on the points that the Fifth Circuit had made in 2015 in holding that the larger DAPA program conflicted with the INA's framework. *See id.* at 528 (citing *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015)). In addition, as in the 2015 decision on DAPA, the Fifth Circuit in the October 2022 DACA decision found that certain prominent examples of past deferred action, such as the Family Fairness program, were "interstitial" in character, functioning as "bridges" to a legal status that was available within a reasonable time to deferred action recipients. *Id.* at 527; *see Blackman, supra* note 13, at 264–65 (arguing that Family Fairness and similar programs were bridges to a legal status). Importantly, the Fifth Circuit DACA decision did not address foreign policy reasons for preserving DACA and how that could affect executive authority under the INA or under Article II of the Constitution. *See generally Texas*, 50 F.4th 498. In addition, the Fifth Circuit did not address the relevance of previous hardship-based grants of deferred action. *Id.* Finally, because the Fifth Circuit remanded to the district court to assess the DACA final rule, the Fifth Circuit did not decide whether the district court could wield equitable discretion to exempt current DACA recipients from a holding that the final rule exceeded statutory authority. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (discussing parameters of equitable discretion to tailor injunctions to interests of all parties).

373. 87 Fed. Reg. at 53198–99.

374. Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092, 46092 (Dec. 4, 1987) (describing the "small" number of deferred action grantees anticipated by the agency).

375. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020)

Protection Protocols.³⁷⁶ The Fifth Circuit found that the Biden Administration's explanation of its termination decision in June 2021 failed the "reasoned analysis" test that the Supreme Court had outlined in *Regents*.³⁷⁷ The stewardship model would reach a different conclusion, finding that the Biden Administration had adequately addressed framework fit, reliance interests, and other domestic and foreign impacts of ending MPP.

1. Background on MPP and the Trump Administration's Assessment of the Program

MPP was part of the Trump Administration's campaign to reduce asylum claims, which have increased due to increased migration from Central America's Northern Triangle countries (Guatemala, Honduras, and El Salvador). By starting MPP, the Trump Administration sought to bypass a detailed statutory process—expedited removal—that Congress added in 1996 to respond to an increase in immigrants at the southern border.³⁷⁸ Despite its name, the expedited removal process has not always resulted in the rapid return of noncitizens to their home countries.³⁷⁹ Expediting these cases was difficult because the process included protections for asylum seekers.³⁸⁰

To move asylum seekers out of the United States while they awaited hearings on their claims, the Trump Administration started MPP.³⁸¹ For authority, the Trump Administration relied on an INA provision stating that officials "may return" certain new entrants to a country that is "contiguous" to the United States while those foreign nationals await a full hearing before an immigration judge.³⁸² From January 2019 to January 2021, officials used MPP to remove almost 70,000 asylum-seekers to Mexico.³⁸³ Assessing the program, the Trump Administration concluded that MPP reduced both attempts to enter

376. Migrant Protection Protocols Memorandum, *supra* note 43, at 3; Mayorkas June 2021 Memorandum, *supra* note 26, at 1; *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022) (holding that termination of MPP did not conflict with certain provisions of INA).

377. The Biden Administration's Secretary of Homeland Security, Alejandro Mayorkas, issued a second termination memorandum in October 2021, elaborating on themes in the June 2021 document. *See* U.S. DEP'T OF HOMELAND SEC., EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS (2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf [hereinafter Mayorkas October 2021 Memorandum]. In June 2022, the Supreme Court held that courts should consider both memoranda. *Texas*, 142 S. Ct. at 2544–48.

378. 8 U.S.C. § 1225(b)(1).

379. *See* Dep't of Homeland Sec. v. *Thuraissigiam*, 140 S. Ct. 1959, 1966–67 (2020) (discussing reasons for the long duration of many cases that started in expedited removal).

380. § 1225(b)(1)(A)(ii) (requiring an interview by an asylum officer if a noncitizen wishes to claim asylum or expresses a fear of persecution abroad).

381. *Texas*, 142 S. Ct. at 2535.

382. § 1225(b)(2)(C).

383. *See* Mayorkas June 2021 Memorandum, *supra* note 26, at 1.

the United States and the incidence of unfounded asylum claims.³⁸⁴ As evidence for the latter point, Trump Administration officials asserted that many asylum applicants in MPP had withdrawn or abandoned their claims.³⁸⁵

2. *The Biden Administration's Contrasting Assessment*

The Biden Administration had a far more skeptical evaluation of MPP. It disagreed with the Trump Administration on whether MPP had actually lowered irregular entries into the United States.³⁸⁶ In addition, the Biden Administration disagreed with the Trump Administration on the impact of MPP on asylum protections, the role of parole, and the foreign impacts of the program.

a. *MPP's Uncertain Role in Reducing Irregular Entries*

Responding to the Trump Administration's claim that MPP had lowered entries, Biden Administration Homeland Security Secretary Mayorkas disputed MPP's role. In his June 2021 memorandum, Mayorkas was imprecise about this point, saying only that border encounters varied from month to month.³⁸⁷ Mayorkas's October 2021 memorandum was more specific, noting that Mexico had lowered entry rates by ramping up its own immigration enforcement efforts.³⁸⁸ Moreover, the October memorandum noted that, even at MPP's height, U.S. immigration officials handled 80% of prospective entrants under non-MPP programs.³⁸⁹ Taken together, these points suggested that other factors besides MPP helped to reduce attempted border crossings during the relevant period. Given that managing border flows is one aspect of framework fit, Mayorkas's assessment of causation indicated that, in this respect, ending MPP would not undermine the INA's guiding premises.

b. *MPP's Harm to Asylum Protections: Calculating in Absentia Removal Rates*

Conversely, Mayorkas asserted that MPP had undermined another pillar of the INA: asylum protection. Instead of agreeing with Trump Administration officials that the abandonment of asylum claims demonstrated the claims' lack of merit, Mayorkas viewed the rate of in absentia removal orders—removal orders that immigration judges (“IJ”) entered when applicants did not appear in

384. See U.S. DEP'T OF HOMELAND SEC., ASSESSMENT OF THE MIGRANT PROTECTION PROTOCOLS (MPP) 2–3 (2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf.

385. *Id.*

386. Mayorkas October 2021 Memorandum, *supra* note 377, at 23.

387. Mayorkas June 2021 Memorandum, *supra* note 26, at 3.

388. Mayorkas October 2021 Memorandum, *supra* note 377, at 23.

389. *Id.*

court—as evidence that dangerous conditions in Mexico were impeding meritorious applications.³⁹⁰

In his October 2021 memorandum, Mayorkas supported this point by showing that the in absentia removal rate in MPP cases was 60% higher than the rate in non-MPP cases.³⁹¹ To draw this conclusion, Mayorkas adopted the work of scholars who had concluded that the government’s method for calculating the in absentia removal rate in non-MPP cases resulted in excessively high estimates.³⁹²

A short detour into simple statistical comparisons is useful to clarify this point. The rate of occurrence of any phenomenon is a fraction that compares the absolute number of occurrences—the numerator in the fraction—with some larger number—the fraction’s denominator.³⁹³ In this comparison, the denominator is important. A denominator that is artificially low will translate into an overall rate that is artificially high. Consider the example of the percentage of days of the week that are workdays. Assume that the numerator is five—the absolute number of working days in the average week. We would compare that numerator with the denominator of seven—the total number of days in the week, including the weekend. The rate of working days to days in the week would be 5/7—a little over 70%. But suppose that a social scientist calculating this rate arbitrarily reduced the total number of days in a week from seven to five. The fraction would then be 5/5 (1/1), meaning that 100% of days in the week are workdays. Since that denominator omits the weekend, the denominator is artificially low. Because of that low denominator, the resulting percentage of working days to total days of the week is artificially high.

Now apply that analysis of denominators to the non-MPP in absentia removal rate in immigration court. Historically, the immigration court has used annual case completions as its denominator. It has computed the in absentia removal rate by comparing the annual number of in absentia removal orders to the annual number of *completed* cases—cases that resulted in some final disposition, including a grant or denial of asylum on the merits.³⁹⁴ The immigration law scholars whom Mayorkas cited have argued persuasively that the denominator in this fraction—total annual completed cases—was artificially low, much like the undercount of total days of the week that would result from omitting the weekend.

390. *Id.* at 12–13. Mayorkas explained that MPP participants were “exposed to extreme violence and insecurity at the hands of transnational criminal organizations that prey on vulnerable migrants as they waited in Mexico” for immigration hearings. *Id.* at 12.

391. *Id.* at 18–19 & n.78.

392. Ingrid Eagly & Steven Shafer, *Measuring in Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 851–57 (2020).

393. *Id.* at 845.

394. Mayorkas October 2021 Memorandum, *supra* note 377, at 18–19 & n.78.

The denominator that the immigration court has used is artificially low because it does not include most cases in immigration court. The vast majority of the 1.5 million immigration cases in the pipeline take several years to complete: a case placed on the calendar in March 2022 will not receive a merits hearing until at least March 2025.³⁹⁵ Those cases progress slowly, with preliminary hearings or other activity short of a final order.³⁹⁶ Most of these cases entail cooperation from the noncitizen who is the subject of the proceeding.³⁹⁷ Increasing the denominator to include all pending cases would reflect this ongoing activity. Increasing the denominator while keeping constant the numerator—actual in absentia removal orders—lowers the non-MPP in absentia removal rate. But MPP cases, in contrast, move on an accelerated schedule that results in completion within a year.³⁹⁸ As a result, the higher figure for MPP in absentia removals is accurate. Thus, measured with a more accurate method, the MPP in absentia removal rate was 60% higher than the non-MPP rate, suggesting that a significant number of MPP asylum applicants abandoned well-founded or at least colorable claims.³⁹⁹ The lower grant rates for asylum in MPP—1.1% for MPP compared with 2.7% for non-MPP cases during this period—also tended to show a tilt away from humanitarian relief.⁴⁰⁰ Secretary Mayorkas acted well within his expertise in relying on this analysis to show the adverse impact of MPP on asylum protections.

c. The Role of Parole

Another issue of framework fit concerned the availability of parole, which Congress has restricted to decisions made on a “case-by-case” basis for “compelling” reasons in the “public interest.”⁴⁰¹ As Secretary Mayorkas pointed out, successive presidential administrations, including President Trump’s, have used parole on a case-by-case basis to right-size the total noncitizen detainee population with available detention beds.⁴⁰² That process involves an array of factors, including assessing a given detainee’s flight risk and dangerousness.⁴⁰³ Those decisions are, by definition, decisions that officials can only make on a

395. Chishti & Gelatt, *supra* note 258 (noting a daunting immigration backlog).

396. Eagly & Shafer, *supra* note 392, at 845 (“[There is a] very large number of pending cases in which individuals attend court hearings for years before a decision is reached . . .”).

397. *Id.* at 845–46.

398. See Mayorkas October 2021 Memorandum, *supra* note 377, at 18.

399. *Id.* at 18–20.

400. *Id.* at 20.

401. 8 U.S.C. § 1182(d)(5).

402. Mayorkas October 2021 Memorandum, *supra* note 377, at 28–29.

403. *Id.* at 29.

case-by-case basis. Barring parole in such instances would limit parole in a fashion that is inconsistent with the INA's framework.⁴⁰⁴

d. Foreign and Local Impacts

The June and October Mayorkas memoranda also discussed both domestic and foreign collateral impacts. Each document addressed the effect of ending MPP on local communities.⁴⁰⁵ In addition, MPP's adverse impact on the "important bilateral relationship" with Mexico was a focus of the June 2021 Mayorkas memorandum.⁴⁰⁶ MPP entailed removing around 70,000 residents of third-world countries—primarily in Central America—from the United States to Mexico.⁴⁰⁷ Transfer of a small city's worth of people to Mexican territory required Mexico's consent.⁴⁰⁸ As Mayorkas stated in each memorandum, this consent comes at a cost; obtaining consent requires the United States to make concessions.⁴⁰⁹ A huge program like MPP also generates opportunity costs, distracting officials from other urgent tasks such as transnational cooperation to end drug smuggling.⁴¹⁰ A cabinet official who notes such costs and decides to avoid them is surely providing the reasoned explanation that the Supreme Court sought in *Regents*.

404. In contrast, the Fifth Circuit, in its decision finding the Biden Administration's reasons for ending MPP to be inadequate, viewed parole unduly narrowly. *See Texas v. Biden*, 20 F.4th 928, 996 (5th Cir. 2021) (asserting that parole is available only within "narrow parameters," without suggesting any set of facts that would justify parole). This cramped view of parole led the Fifth Circuit to, in essence, *require* that the government use its 8 U.S.C. § 1225(b)(2)(C) "contiguous territory" authority. *Texas*, 20 F.4th at 995 (emphasis added). That requirement amounted to finding that the use of contiguous territory authority was mandatory, even though the Fifth Circuit conceded that this authority was "discretionary" in nature. *Id.* A discretionary use of authority cannot be mandatory: discretion always entails an option, albeit one that the government may need to explain. The Fifth Circuit's conflating of mandatory and discretionary programs was a sure sign that it had not accurately assessed the framework fit of ending MPP.

405. According to the June memorandum, the most effective way to address any adverse impact on border communities from additional persons who might need municipal services is collaboration with government and nonprofit groups to "connect migrants with short-term supports that . . . facilitate[s] their onward movement to final destinations away from the border." Mayorkas June 2021 Memorandum, *supra* note 26, at 5. Since local governments derive their power from state law, this discussion of local interests also implicated state concerns. The October 2021 Mayorkas memorandum made these connections between state and local interests expressly clear. It mentioned costs that states might incur regarding driver's licenses, education, healthcare, and law enforcement. *See* Mayorkas October 2021 Memorandum, *supra* note 377, at 24. Mayorkas wrote that the DHS had collaborated with state, local, and tribal officials on addressing those projected impacts. *Id.* In particular, Mayorkas mentioned substantial federal coronavirus testing efforts and federal aid to the placement of released noncitizens and their families at locations in the U.S. interior. *Id.* Moreover, Mayorkas discussed extensive federal law enforcement aid on drug trafficking and transnational crime. *Id.* at 25.

406. Mayorkas June 2021 Memorandum, *supra* note 26, at 6.

407. *Id.* at 1.

408. *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022)

409. Mayorkas October 2021 Memorandum, *supra* note 377, at 29–30.

410. *Id.*

3. *The Supreme Court's Decision*

In June 2022, in a 5–4 vote, the Supreme Court gave Secretary Mayorkas a preliminary but important victory in his effort to roll back MPP.⁴¹¹ Chief Justice Roberts's opinion for the Court, together with Justice Kavanaugh's concurrence, did not definitively address the sufficiency under the APA of Secretary Mayorkas's stated reasons for ending the Trump Administration program.⁴¹² In particular, the Court left for another day whether Secretary Mayorkas's October 2021 memorandum, which the Court agreed to consider, had adequately addressed border states' reliance interests in MPP's continuation.⁴¹³ However, the Court held that neither the text nor structure of the INA precluded MPP's termination.⁴¹⁴ Moreover, the Court indicated that foreign policy justifications for ending MPP should trigger judicial deference.⁴¹⁵

a. *Framework Fit and MPP*

Without using the term “framework fit,” Chief Justice Roberts's opinion for the Court, joined in this respect by Justice Kavanaugh, carefully unpacked the relevant statutory provisions' language, structure, and context in finding that the statute did not require continuation of MPP. Chief Justice Roberts started with the text of the provision on contiguous-territory return, which states that immigration officials “may return” the noncitizen to a foreign state that borders the United States such as Mexico.⁴¹⁶ The term, “may,” the Chief Justice observed, generally “connotes discretion.”⁴¹⁷ Surveyed in this light, contiguous-territory return is part of immigration officials' toolkit to deal with shifting border conditions, not a mandate that requires compliance.⁴¹⁸

For Chief Justice Roberts, the statutory “may return” phrase's signal of discretion prevailed over language in a neighboring subsection, which stated that a noncitizen at the border who was not “clearly” admissible—usually because the noncitizen lacked a visa authorizing a visit or a permanent stay—“shall be detained.”⁴¹⁹ Most prospective entrants at the southern border are asylum

411. *See Texas*, 142 S. Ct. 2528; *see also id.* at 2548 (Kavanaugh, J., concurring) (agreeing with the analysis in Chief Justice Roberts's opinion); *id.* at 2560 (Barrett, J., dissenting) (disagreeing with Chief Justice Roberts's interpretation of the threshold procedural issue but agreeing on merits).

412. *See id.* at 2543–44 (majority opinion).

413. *See id.* This was presumably one of the issues that the district court would address on remand. *Id.*

414. *Id.*

415. *Id.* at 2543.

416. *See id.* at 2541 (citing 8 U.S.C. § 1225(b)(2)(C)).

417. *Id.* (citation omitted).

418. *Id.*

419. 8 U.S.C. § 1225(b)(2)(A).

seekers who are not clearly admissible in this sense.⁴²⁰ The state plaintiffs challenging MPP's termination asserted that this subsection's mandatory language created a stark binary choice for immigration officials: either detain noncitizens who had presented themselves at the border or return them to Mexico to await removal hearings under the contiguous-territory return authority provided in 8 U.S.C. § 1225(b)(2)(C).⁴²¹

b. The Interaction of Contiguous-Return Authority and Parole

The relationship between the “may” language in the contiguous-territory return provision and the “shall” language in the subsection on detention led Chief Justice Roberts to a third provision of the INA, 8 U.S.C. § 1182(d)(5), which governs parole. Under this provision, which applies to the custody of noncitizens arrested at the border, the government may release noncitizens from detention on a “case-by-case basis” for “urgent humanitarian reasons or significant public benefit.”⁴²² Chief Justice Roberts viewed the INA's delegation to immigration officials of authority to parole noncitizens at the border as supporting Secretary Mayorkas's position that contiguous-territory return was discretionary.⁴²³ As Chief Justice Roberts saw it, Congress had provided the executive branch with a range of tools to handle border issues. Contiguous-territory return was part of the toolkit; so was parole.⁴²⁴ Past practice confirmed this view of parole as one tool in the toolkit: as Chief Justice Roberts observed, “[e]very administration, including the Trump and Biden administrations, has utilized . . . [parole] authority to some extent.”⁴²⁵ Moreover, Congress's longstanding pattern of appropriations confirmed that Congress could not have believed that detention was required for all noncitizens at the border. For decades, Chief Justice Roberts noted, Congress's budget allocation for detention facilities had “fallen well short” of the sum needed to fund detention of this large group.⁴²⁶ Inferring that Congress understood that its appropriations were insufficient for this purpose, Chief Justice Roberts also inferred that legislators had never expected that immigration officials would seek to do the impossible.⁴²⁷

420. *Cf.* *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1966–67 (2020) (discussing substantial increase of asylum claimants at the U.S. border who seek humanitarian protection because they lack visas that would facilitate entry and legal status).

421. *Texas*, 142 S. Ct. at 2541 (explaining state plaintiffs' position); *see id.* at 2553–56 (Alito, J., dissenting) (articulating statutory arguments favoring plaintiffs' view).

422. Officials may grant parole to a refugee seeking a haven from persecution abroad only for “compelling reasons in the public interest.” 8 U.S.C. § 1182(d)(5)(2).

423. *See Texas*, 142 S. Ct. at 2543 (majority opinion).

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

The existence of parole authority, the history of its exercise, and the consistently moderate level of appropriations for detention suggested a balanced view of the interaction of contiguous-territory return, detention, and parole. The statutory limits on parole showed that the discretion of immigration officials was not absolute.⁴²⁸ But Congress's express grant of parole authority as an alternative to detention confirmed that the INA did not require a binary choice between detention and contiguous-territory return.⁴²⁹

Chief Justice Roberts cited the statutory history of the contiguous-territory provision to highlight that the binary-choice scenario did not fit Congress's plan.⁴³⁰ As Chief Justice Roberts recounted, Congress included the contiguous-territory return provision as an afterthought, not as a crucial pillar of border policy.⁴³¹ Enactment of the provision followed a 1996 decision by an administrative tribunal, the Board of Immigration Appeals (BIA), that had altered the status quo on enforcement regarding certain Mexican nationals.⁴³² Prior to the decision, immigration officials had used contiguous-territory return in a small number of cases involving deportation of Mexican nationals who were lawful U.S. residents.⁴³³ In these relatively rare cases, the Mexican national had continued to live in Mexico and had commuted to the United States for work.⁴³⁴ From time to time, as with the noncitizen in the BIA case, U.S. immigration officials sought to deport noncitizens due to alleged immigration violations such as possession of or trafficking in illegal drugs.⁴³⁵ In dealing with allegedly deportable Mexican nationals who had continued to live in Mexico while commuting to the United States for employment purposes, U.S. immigration officials had customarily returned the noncitizen to Mexico to await a hearing on the deportation charge.⁴³⁶ Since the noncitizens in this group lived in Mexico anyway, the net effect of the "return" was simply to bar the noncitizen from entering the United States while the deportation hearing was pending. However, in the 1996 case, the BIA held that immigration officials lacked statutory authority for this temporary measure.⁴³⁷ As Chief Justice Roberts described, Congress enacted the contiguous-territory return provision to expressly grant

428. *Id.* (observing that official discretion to grant parole was "not unbounded").

429. *Id.*

430. *Id.* at 2542.

431. *Id.* at 2542–43.

432. *Id.* (discussing the 1996 BIA decision, *Sanchez-Avila*, 21 I. & N. Dec. 444, 465 (1996) (en banc)).

433. *Id.*; see *Sanchez-Avila*, 21 I. & N. Dec. at 445–47.

434. See *Sanchez-Avila*, 21 I. & N. Dec. at 445–47.

435. *Id.* at 445 (explaining that immigration officials sought to remove *Sanchez-Avila* because of alleged "involvement with controlled substances").

436. *Sanchez-Avila*, 21 I. & N. Dec. at 461–62; cf. *Saxbe v. Bustos*, 419 U.S. 65, 72–73 (1974) (discussing status of noncitizens who with U.S. officials' permission commuted from a home in Mexico to work in the United States).

437. *Sanchez-Avila*, 21 I. & N. Dec. at 462.

immigration officials this power.⁴³⁸ In other words, the contiguous-territory provision was a technical fix for a problem at the fringes of immigration enforcement. In Congress's plan, the provision occupied a "humble role." It was not the sole alternative to detention that the binary-choice scenario depicted.⁴³⁹

In addition to stressing framework fit, Chief Justice Roberts also flagged the integral relationship between MPP's termination and the President's foreign affairs authority under Article II of the Constitution.⁴⁴⁰ Taking heed of the discussion in Secretary Mayorkas's October 2021 memorandum, Chief Justice Roberts commented that forcing the Administration to continue MPP would place a "significant burden" on the President's capacity to engage in diplomacy with Mexico.⁴⁴¹ Continuing the program would dominate diplomatic exchanges with Mexico, since the United States could not return noncitizens to Mexico's territory without that country's consent.⁴⁴² The United States would have to make concessions to gain Mexico's consent.⁴⁴³ One U.S. concession might be easing pressure on Mexico to cooperate with the United States on other difficult issues, such as combating transnational drug gangs.⁴⁴⁴ According to Chief Justice Roberts, it would be incongruous to infer that Congress intended to "tie the hands of the Executive" to such a degree.⁴⁴⁵ In his concurrence, Justice Kavanaugh seconded this reasoning, warning about the dangers of an approach to statutory interpretation that would cast Congress as encouraging federal courts to "improperly second-guess the President's Article II judgment with respect to American foreign policy and foreign relations."⁴⁴⁶

The Court's decision did not address the state challengers' reliance interests in continuation of MPP.⁴⁴⁷ However, the Court analyzed framework fit and foreign affairs impacts with care and insight. In this sense, *Biden v. Texas* is consistent with the stewardship approach to executive discretion.

V. REGULATORY DISCRETION: THE TRAVEL BAN AND TITLE 42

Having discussed exercises of protective discretion, this Part analyzes regulatory discretion in terms that reject the internal-external divide. Even regarding noncitizens who are merely seeking to enter the United States, the

438. *Texas*, 142 S. Ct. at 2542.

439. *Id.*

440. *Id.* at 2543.

441. *Id.*

442. *Id.*

443. *Id.*

444. See Mayorkas October 2021 Memorandum, *supra* note 377, at 29–30.

445. *Texas*, 142 S. Ct. at 2543.

446. *Id.* at 2549 (Kavanaugh, J., concurring).

447. *Id.* (noting that the APA requires a reasonable explanation of agency decisions).

stewardship model continues to apply framework fit. As a result, the stewardship model parts company with the Supreme Court's recent decision in *Trump v. Hawaii* upholding President Trump's travel ban.⁴⁴⁸ This Part then analyzes the Title 42 program started by President Trump and continued by President Biden, arguing that the Title 42 program also fails to comply with framework fit.

A. THE TROUBLE WITH THE TRAVEL BAN

The Supreme Court relied heavily on the internal-external divide in *Trump v. Hawaii*,⁴⁴⁹ upholding President Trump's travel ban targeting certain majority-Muslim countries. The ban flowed from then-candidate Trump's 2016 campaign promise for a "total and complete shutdown of Muslims entering the United States."⁴⁵⁰ While the travel ban did not have the blanket effect that Trump seemed to envision, it had major adverse collateral impacts that persist to this day.⁴⁵¹ The Court's interpretation of the INA unduly discounted the ban's lack of framework fit.⁴⁵²

Admittedly, the statutory authority for the travel ban appears to be quite broad. Chief Justice Roberts, who wrote for the Court, found that the INA provision on which President Trump relied, which empowers suspension of any entry that the President determines to be "detrimental to the interests of the

448. 138 S. Ct. 2392 (2018).

449. *Id.* The travel ban did not cover the biggest majority-Muslim countries: Indonesia and Pakistan, or India which has the largest Muslim population. *Cf. id.* at 2421 (noting that countries included in the travel ban included "just 8% of the world's Muslim population"). The ban also included North Korea and officials in Venezuela and their families and associates. *Id.* at 2405. The Court upheld the third iteration of the travel ban; earlier versions had encountered judicial resistance, requiring a third attempt. *Id.* at 2403–04.

450. *Id.* at 2417.

451. Ramirez, *supra* note 24.

452. Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 159 (2019). Other scholars have disagreed with the position taken in this Part, asserting that the travel ban was consistent with the INA, although some of those scholars have argued that the ban was either unconstitutional or inconsistent with liberal democratic principles, even if the challengers lacked a judicial remedy. *See, e.g.,* Josh Blackman, *The 9th Circuit's Contrived Comedy of Errors in Washington v. Trump*, 95 TEX. L. REV. ONLINE 221, 239–40 (2017) (arguing that the travel ban was a valid exercise of delegated power under the INA); *see also* Rodríguez, *Reading Regents*, *supra* note 14, at 19–20 (agreeing with the Court that the ban was valid under the INA, but contending that the animus in Trump's campaign rhetoric was inextricably intertwined with the ban, which thus violated the Establishment Clause); *cf.* Eidelson, *supra* note 336, at 1793–94, 1793 n.218 (arguing that in light of voters' knowledge of Trump's "total and complete shutdown" remarks prior to 2016 election, the Court's holding was consistent with the political accountability principle that the author viewed as central in *Regents* to invalidating the DACA rescission). Other scholars have focused on the constitutional issue and found the travel ban wanting. *See* Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 219–22 (2020) (asserting that President Trump's animus should have moved the Court to find an Establishment Clause violation); Ray, *supra* note 12, at 53–69 (arguing that President Trump's animus was problematic and arguing for a more refined judicial approach to invalidating animus-based measures).

United States,”⁴⁵³ “exudes deference in every clause.”⁴⁵⁴ Deferring to the Trump Administration’s framing, Chief Justice Roberts described the travel ban as a step that a multiagency task force had recommended to improve vetting of visa applicants.⁴⁵⁵ The Chief Justice was correct that vetting is vital.⁴⁵⁶ But a closer investigation of the travel ban’s lack of framework fit, its paper-thin national security justification, and its adverse impact on reliance interests reinforce the need for more robust review.

A stewardship approach would acknowledge the importance to the statutory scheme of both the suspension provision and a nondiscrimination provision that Congress added in its landmark 1965 amendments to the INA.⁴⁵⁷ In the nondiscrimination provision, Congress provided that no individual shall “be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth or place of residence.”⁴⁵⁸ The nondiscrimination provision was a key component of the 1965 legislation, which stressed family reunification through the visa system and cleansed the INA of the invidious national origin quota system.⁴⁵⁹ The quota system had long hindered family reunification with stifling limits on immigration from certain areas, including Asia.⁴⁶⁰ To prevent exercises of executive discretion from evolving into a backdoor quota, Congress inserted the antidiscrimination provision in the statute.⁴⁶¹

453. 8 U.S.C. § 1182(f).

454. *Hawaii*, 138 S. Ct. at 2408.

455. *Id.* at 2404–05.

456. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-50, ASYLUM: ADDITIONAL ACTIONS NEEDED TO ASSESS AND ADDRESS FRAUD RISKS 3 (2015), <https://www.gao.gov/assets/680/673941.pdf> (discussing incidence of fraud); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 184 (1983) (explaining the obstacles to accurate adjudication presented by asylum applicants who fabricate or exaggerate their claims); see *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017) (describing the blatant deception of an asylum applicant claiming her husband had been persecuted when in fact he was not a victim of persecution, but instead had participated in wartime atrocities against others); *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020) (arguing that the risk of fraud is significant in asylum cases). While many of the sources cited here focus on asylum, the high stakes and information gaps in this area suggest that the problem of fabrication or incomplete information can occur in connection with any immigration application.

457. See Chin, *supra* note 94, at 279–83.

458. 8 U.S.C. § 1152(a)(1)(A).

459. S. REP. NO. 89-748, at 13 (1965) (accompanying H.R. 2580, 89th Cong. (1965)).

460. *Id.* at 14 (noting that for forty years, the INA had either barred the immigration and naturalization of Asians or consigned a hopelessly low annual grant of 2,000 visas to this group).

461. Successive presidents had urged Congress to end the quota system. See, e.g., 98 CONG. REC. 8021, 8083 (1952) (recounting President Truman’s message on his veto—which Congress overrode—of the quota-ridden 1952 McCarran-Walter Act, in which Truman warned that “the present quota system . . . discriminates, deliberately and intentionally, against many of the peoples of the world”); CONG. RSCH. SERV., U.S. IMMIGRATION LAW AND POLICY: 1952-1979, at 15 (1979) (quoting Message from the President Relative to Immigration Matters, H.R. Doc. No. 85-85, at 1 (1957)) (reporting on the remonstrance from President

In the Supreme Court's decision upholding the travel ban, the internal-external distinction muted the force of the antidiscrimination principle. While Chief Justice Roberts read the suspension provision broadly, he read the antidiscrimination provision narrowly.⁴⁶² For Chief Justice Roberts, the antidiscrimination provision was largely ministerial in nature. It governed only the initial granting of a visa, not executive policies like the travel ban that might effectively nullify or preclude visa approvals from entire countries.⁴⁶³ This was a narrow and parched reading of a provision that Congress had inserted into the INA to highlight the United States' rejection of invidious immigration policies.⁴⁶⁴

President Trump's travel ban represented the backsliding into quotas that the 1965 Congress sought to deter. Despite the antiterrorism veneer of the ban, its effects were markedly overinclusive. As Justice Sotomayor noted in her dissent, the ban covered individuals, including young children and aged parents, for whom terrorist activity was either unlikely or impossible.⁴⁶⁵ Moreover, as Justice Breyer remarked in his dissent, the waiver system outlined in the ban was not effective, leaving otherwise qualified visa applicants—usually close relatives of U.S. citizens or LPRs—with virtually no recourse.⁴⁶⁶ In addition, the ban's putative concern with problems such as the covered nations' identity-management practices departed from reality, in which covered nations, like Iran, showed diligence in reporting lost or stolen passports, while nations that the ban did not cover, such as China, India, and Russia, were notoriously poor at this task.⁴⁶⁷ Finally, past practice under the suspension provision had been far more targeted, usually involving compliance with international obligations, like sanctioning accused war criminals and implementing bilateral agreements

Eisenhower to Congress that the quota system “operate[d] inequitably”); Letter on Revision of the Immigration Laws from John F. Kennedy, U.S. President, to the President of the Senate and Speaker of the House (July 23, 1963) (observing that the national origins quota system was “an anachronism . . . [that] discriminates among applicants for admission into the United States on the basis of accident of birth”); President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964) (“[A] nation that was built by the immigrants of all lands can ask those who now seek admission: ‘What can you do for our country?’ But we should not be asking: ‘In what country were you born?’”).

462. *Trump v. Hawaii*, 138 S. Ct. 2392, 2414–15 (2018).

463. *Id.*

464. See SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 20–21 (2019) (arguing that the Supreme Court read the suspension provision, 8 U.S.C. § 1182(f), “in isolation from the rest of the statute”). In holding that the travel ban did not violate the Establishment Clause, the Court found that the “vetting” rationale that the government had advanced was sufficient under the deferential “facially legitimate and bona fide” standard that the Court has used in constitutional challenges to visa decisions. *Hawaii*, 138 S. Ct. at 2418–20; see *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (applying standard); *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring).

465. *Hawaii*, 138 S. Ct. at 2445.

466. *Id.* at 2433.

467. Bier, *supra* note 42; see Brief for Amicus Curiae The Cato Institute in Support of Respondents at 13, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (discussing sources).

with other states.⁴⁶⁸ The travel ban fit a time-honored recipe for the fruits of demagoguery, but it did not fit the statute.

The internal-external distinction modeled in *Hawaii* assumes that courts and norms can restrict invidious appeals like those of Trump to the outside realm, leaving the purely domestic realm untouched. But this view is naïve. For politicians prone to demagoguery, the outside realm is merely a proving ground for a formula that they will also seek to exploit in the domestic arena.⁴⁶⁹ Giving the President excessive leeway in the outside realm sends the dangerous signal that demagoguery is good politics and habits of deliberation are a needless burden.⁴⁷⁰ Robust application of the framework fit criterion in the “outside”

468. COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 62 (discussing prior examples, including President Obama’s ban on persons responsible for instability in Libya). The Supreme Court had previously upheld a broad order involving interdiction of vessels in the Caribbean carrying asylum seekers from Haiti. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160 (1993) (upholding an order authorizing U.S. Coast Guard to “intercept vessels engaged in the . . . transportation” of Haitian nationals who were inadmissible under the INA because they lacked visas for entry). The interdiction effort followed an agreement between the United States and Haiti to cooperate in stopping vessels engaged in this often-dangerous journey. *See Agreement on Migrants—Interdiction, U.S.-Haiti*, Sept. 23, 1981, 33 U.S.T. 3559, 3559 (providing for the “establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti”). The agreement specifically referred to the “need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees.” *Id.*; *see* Harold Hongju Koh & Michael J. Wishnie, *The Story of Sale v. Haitian Centers Council: Guantánamo and Refoulement*, in *HUMAN RIGHTS ADVOCACY STORIES* 385, 388, 402–10 (Deena R. Hurwitz, Margaret L. Satterthwaite & Doug Ford eds., 2009) (arguing that the interdiction upheld by the Supreme Court was illegal under U.S. and international law but recognizing the role of U.S.-Haiti agreement). President Reagan had invoked the INA’s suspension authority pressure on the Cuban government to live up to a 1984 agreement on immigration from Cuba. *Hawaii*, 138 S. Ct. at 2413. As part of that agreement, Cuba had agreed to accept the return of members of the Mariel Boatlift—a mass migration episode in 1980—who had committed crimes after admission to this country. *See* Maryellen Fullerton, *Cuban Exceptionalism: Migration and Asylum in Spain and the United States*, 35 U. MIAMI INTER-AM. L. REV. 527, 561–62 (2004). President Carter had imposed restrictions on Iranian nationals, including students, in the United States after the seizure of U.S. diplomatic personnel in Teheran and their detention by Iran’s government. *See Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979) (upholding restrictions). The seizure and detention of U.S. diplomatic personnel violated both an agreement between Iran and the United States and the core international law principle of diplomatic immunity. *Id.* at 747–48.

469. *See Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2559–76 (2019) (finding that Department of Commerce Secretary Wilbur Ross’s rationale for seeking to add a citizenship question to the census was “contrived” and that “the evidence tells a story that does not match the explanation the Secretary gave for his decision”).

470. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (in holding that Guantánamo detainees had access to writ of habeas corpus, warning of danger in granting the political branches the “power to switch the Constitution on or off at will”); *see* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1075–76 (2003) (noting that geographic boundaries are “permeable” in the dispersion of power, including emergency power); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1227–28 (1996) (arguing that power exercised in outside zones such as U.S. detention facilities at Guantánamo Bay Naval Base in Cuba can also affect domestic realm); *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, 279–81 (2002) (arguing that the conception of sovereignty developed to justify

realm sends the positive message that deliberation is an indispensable attribute of democratic governance.

Applying the framework fit criterion in both the internal and external realms instills habits of deliberation more effectively than plenary discretion's carveout for decisions resulting from animus.⁴⁷¹ The focus on express animus leaves too much room to maneuver for a President who is as bigoted as President Trump but possesses a bit more tact. Given broad power to suspend entries "detrimental" to the United States, a President who wishes to promulgate a sweeping bar like the travel ban will merely have to ask senior appointees to convene a task force like the one that Trump assembled. While it seems logical that the travel-ban task force was influenced by Trump's stance during the campaign, a President with more skill in managing the bureaucracy may well be able to drive a similar result with less inflammatory rhetoric. Indeed, the use of open-ended authority to cloak animus is precisely the problem with laws that the Supreme Court has held are unconstitutionally vague.⁴⁷² Viewed in this light, the plenary discretion model's carveout for animus is actually a roadmap for bigoted but bureaucratically adept politicians. The stewardship model's application of framework fit is a far more effective fix.

The ban also undermined the reliance interests of U.S. citizens and LPRs. Sponsors make plans in the hopes that they will be reunited with close family members through the visa system. However, since the travel ban was indefinite and visa applicants can "age out" of certain visa categories, the ban hampered family reunification, even once President Biden lifted the ban in the early days of his Administration.⁴⁷³ For example, when noncitizen "children" of U.S. citizens turn twenty-one, they age out of the "immediate relative" category and must then wait in line, sometimes for years, because Congress has viewed reunification with parents in the United States as less urgent for adult children abroad.⁴⁷⁴ The travel ban thus frustrated family reunification, not just while the ban was in effect, but also in the intermediate and long term.⁴⁷⁵ Collateral

Congress's plenary power over immigration subsequently shaped the definition of presidential power). *But see* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963 (2020) (upholding a statute that in practice precluded judicial review, including habeas corpus, for asylum seekers apprehended at U.S. border and found by administrative officers to lack a "credible fear" of persecution in their home countries).

471. See COX & RODRÍGUEZ, *THE PRESIDENT*, *supra* note 14, at 235 (arguing for invalidating travel ban based on evidence of animus).

472. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (cautioning that vague laws do not provide adequate notice of what conduct the law prohibits and therefore amount to merely a "parchment barrie[r]" against arbitrary power" (quoting *THE FEDERALIST* NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961))).

473. See Ramirez, *supra* note 24.

474. See *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 49–51 (2014) (discussing the problem of aging out under the INA's visa categories and limited relief that Congress had provided).

475. See Ramirez, *supra* note 24.

impacts extended to every person and entity in the United States with ties to both the visa sponsors and beneficiaries.

While foreign impacts were more diffuse, they were still significant. The images of chaos from the first iteration of the travel ban painted the United States as a country descending into illiberal and unthinking bias.⁴⁷⁶ Perhaps the ban also made a couple of countries more amenable to cooperation with U.S. consular officials. But the ban did more to crystallize resentment of the United States.⁴⁷⁷

B. FRAMEWORK FIT AND TITLE 42

With the *Hawaii* case as background, issues regarding the Title 42 program present themselves with bolder relief. Under the Title 42 program, the government has removed noncitizens apprehended at the U.S. border without affording those individuals a hearing and the opportunity to seek humanitarian relief such as asylum.⁴⁷⁸

The provision at issue, which Congress first enacted in 1893, entails a determination by the Surgeon General that a “communicable disease in a foreign country” presents a “serious danger of the *introduction* of such disease into the United States,” and that this danger of “introduction” of disease is increased by the “introduction of persons or property from such country.”⁴⁷⁹ In that event, the Surgeon General may “prohibit in whole or in part” the “introduction of persons” from such countries to “avert such danger.”⁴⁸⁰ Citing this statutory authority, President Trump’s Director of the Centers for Disease Control (CDC) issued an interim final rule on March 20, 2020, that blocked entry at the southern and northern borders when the Director believed that entry would “present a risk of transmission of a communicable disease,” even if the disease “has already been introduced” into the United States.⁴⁸¹ The interim rule became effective immediately, followed by a final rule later in 2020.⁴⁸² In addition to suspending

476. See also *Trump v. Hawaii*, 138 S. Ct. 2392, 2445 (2018) (Sotomayor, J., dissenting) (discussing discrimination at core of travel ban).

477. This was the fear of the foreign policy experts—mainly those from Democratic administrations but including prominent officials who had served under presidents of both parties—who signed a letter to President Trump criticizing the ban. See Lara Jakes, *Trump’s Revised Travel Ban Is Denounced by 134 Foreign Policy Experts*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/politics/trump-travel-ban-denounced-foreign-policy-experts.html>. While courts do not decide questions of law based on polls or focus groups, the broad-based criticism of the ban by former senior policymakers did reflect the lack of a plausible national security case for the measure.

478. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 731–32 (D.C. Cir. 2022).

479. 42 U.S.C. § 265 (emphasis added).

480. *Id.*

481. *Huisha-Huisha*, 27 F.4th at 725.

482. Order Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806, 65806 (Oct. 16, 2020).

the entry of such individuals, the order also required the transfer of such individuals back to the contiguous country from which they entered the United States, or to their home country.⁴⁸³

The government's broad reading of Title 42 authority is problematic because of the extensive framework of humanitarian protections that Congress established in the INA. With the enactment of the Refugee Act of 1980 and the Convention Against Torture (CAT) some years later, noncitizens gained the right to seek humanitarian protection against removal.⁴⁸⁴ These protections stemmed from Congress's determination in the Refugee Act and subsequent legislation to implement the established international principle of non-refoulement, which bars the return of individuals to a country where they will be at risk for persecution or torture.⁴⁸⁵

The commitment to humanitarian protection is a pillar of the INA. Since 1996, when Congress provided for the "expedited removal" of noncitizens apprehended at the border, expedited removal has included detailed procedures to ensure that noncitizens can seek humanitarian relief. Asylum seekers receive additional processing, including an interview by an asylum officer.⁴⁸⁶ Further steps apply if an asylum officer finds that the applicant has a "credible fear" of persecution.⁴⁸⁷ Upon a finding of credible fear, asylum applicants receive a full hearing before an IJ in the U.S. Department of Justice.⁴⁸⁸ Asylum applicants whose claims are denied by an IJ can appeal to an administrative appellate tribunal, the BIA, and can then seek judicial review.⁴⁸⁹ This carefully crafted provision on expedited removal fails to mention Title 42. Similarly, other provisions of the INA that provide humanitarian protections include exceptions, but none concern public health.⁴⁹⁰

483. *Id.* at 65812.

484. 8 U.S.C. § 1229a(c)(4).

485. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) ("One of Congress' primary purposes [in enacting the Refugee Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.").

486. 8 U.S.C. § 1225(b)(1)(A)(ii).

487. *Id.* § 1225(b)(1)(B)(ii).

488. *Id.* § 1229a(c)(4).

489. *Id.* § 1252(a)(2)(D), (b)(4).

490. *See, e.g., id.* § 1158(b)(2)(A) (listing exceptions to asylum, including an applicant's own participation in persecution, commission of a "particularly serious crime" that renders the applicant a "danger to the community of the United States," or "reasonable grounds" for believing that the applicant is a "danger to the security of the United States"); *id.* § 1231(b)(3)(B) (listing identical exceptions for nonasylum humanitarian protections from removal). The D.C. Circuit relied on the nature and scope of these nonasylum humanitarian protections in finding that removal of a noncitizen under Title 42 required an inquiry into whether, upon removal, that individual faced the risk of persecution or torture. *Huisha-Huisha*, 27 F.4th at 725. In particular, the D.C. Circuit focused on a remedy called withholding of removal, which is similar to asylum but has a higher standard of proof and does not provide a path to LPR status, and relief under the CAT, which hinges on proof by a preponderance of the evidence that the noncitizen will undergo torture upon removal. *Id.* (citing 8 U.S.C.

With this comprehensive framework as a background, courts should infer that Congress did not condition eligibility for asylum or other humanitarian protections on the CDC's unreviewable discretion.⁴⁹¹ The major questions doctrine counsels that silence weighs against discretion.⁴⁹² Flipping that presumption would undermine the INA's framework. The collateral and foreign impacts of Title 42 also sound in a key humanitarian protection: the program signals to domestic and international audiences that the United States will extinguish those protections despite the manifest global need for humanitarian safeguards.

Under Title 42's public health authority, officials could take steps to tailor refugee protections to the current emergency. For example, officials could require testing, masking, and administration of vaccines. Officials could also set up facilities with appropriate social distancing in border areas for the short-term public health processing and monitoring of asylum seekers. Other countries,

§ 1231(b)(3)(A)); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2282 (2021) (explaining that by regulation, a noncitizen can raise withholding or CAT claims to bar removal to a particular country). Each of these remedies directly limits the government's power to physically remove noncitizens, even when the country has a final order finding that a particular noncitizen is removable. See *Huisha-Huisha*, 27 F.4th at 725. A noncitizen who has received withholding or CAT protection cannot be removed to a country where persecution or torture is more likely than not, although the government *can* remove that individual to another country where such risks are not present. See *Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020); *Guzman Chavez*, 141 S. Ct. at 2283. The D.C. Circuit found that Title 42 operated to render a covered noncitizen removable, and that asylum, a discretionary defense to removal, was not applicable. *Huisha-Huisha*, 27 F.4th at 728–31. However, the D.C. Circuit found that the nonasylum protections of withholding of removal and the CAT limited the government's ability to physically remove otherwise-removable noncitizens. *Id.* at 731–32. In this sense, the D.C. Circuit's decision recognized that Title 42—unless it included these nonasylum protections—failed the framework fit criterion. More recently, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia found that the initiation of the Title 42 program by the Trump Administration was arbitrary and capricious under the APA because officials had failed to follow the approach taken in a 2017 rule regarding quarantine of U.S. citizens. See *Huisha-Huisha v. Mayorkas*, No. 21-100, 2022 U.S. Dist. LEXIS 207282, at *23–29 (D.D.C. Nov. 15, 2022), *stay and cert. granted sub nom.* *Arizona v. Mayorkas*, 143 S. Ct. 478 (Dec. 27, 2022). Based on this finding, Judge Sullivan ordered vacatur of the Title 42 program. The 2017 agency approach required a finding that the policy was the least restrictive means for containing the disease at issue. *Id.* The response to COVID-19 entailed removal of noncitizens who were at or near the border and had not yet entered the country, while the 2017 rule involved quarantine of U.S. citizens within the United States. Despite this arguable difference, the district court found that COVID-19 policy fit under the rubric of “other public health measures” that the 2017 rule governed. *Id.* at *23–24. The Supreme court granted certiorari in late December 2022 on the procedural issue of whether states objecting to the Biden Administration's effort to end the Title 42 program could intervene in *Huisha-Huisha*. See *Arizona*, 143 S. Ct. at 478 (explaining scope of grant of certiorari and accompanying stay of Judge Sullivan's vacatur); *cf. id.* at 478–79 (Gorsuch, J., dissenting) (asserting that stay and grant of certiorari were inappropriate, since the waning of COVID-19's spread had undermined the Title 42 program's public health rationale and the urgency of state petitioners' request to intervene).

491. Ilya Somin has argued that a statute that permitted such broad discretion would be infirm under the nondelegation doctrine. See Ilya Somin, *Nondelegation Limits on Covid Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases*, 15 N.Y.U. J.L. & LIBERTY 658, 674–82 (2022).

492. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

such as those in the European Union, have used such approaches.⁴⁹³ Tailoring would harmonize statutory public health authorities with the INA's humanitarian protection framework.⁴⁹⁴ The D.C. Circuit found in March 2022 that the Title 42 program had to preserve certain humanitarian protections of noncitizens from persecution.⁴⁹⁵

In April 2022, the CDC decided to terminate the Title 42 program.⁴⁹⁶ In support of its decision, the CDC cited the availability of alternative measures such as testing and vaccines.⁴⁹⁷ In May 2022, a federal district court enjoined the termination of Title 42, asserting that the termination had to first go through the APA's notice and comment process.⁴⁹⁸

493. Brief of Amicus Curiae United Nations High Commissioner for Refugees in Support of Plaintiffs-Appellees and Affirmance at 24–29, *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022) (No. 21-5200).

494. Outside of the asylum context, the CDC tailored its Title 42 order by exempting unaccompanied alien children (UACs). As the CDC explained in its August 2021 order, the government has successfully mitigated the spread of COVID-19 among UACs through testing, quarantine, and treatment. U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Diseases Exists 17 (Aug. 2, 2021), https://www.cdc.gov/coronavirus/2019-ncov/downloads/CDC-Order-Suspending-Right-to-Introduce-Final_8-2-21.pdf [hereinafter CDC August 2021 Order]. Due to this assessment, the CDC concluded that exempting UACs from the Title 42 program would not result in harm to border communities. *Id.* at 17–18. The CDC's exercise of protective discretion to exempt UACs' merits deference is consistent with special provisions for unaccompanied minors in the INA. *See, e.g.*, 8 U.S.C. § 1101(a)(27)(J) (providing a path to LPR status for an unaccompanied noncitizen child where reunification with one or both of the child's parents is not feasible due to "abuse, neglect, abandonment" or similar factors). In addition, the CDC's discussion of UACs' amenability to treatment, testing, and other clinical measures addressed the collateral impacts that the challengers to the UAC exception asserted. CDC August 2021 Order, *supra*, at 15–17. Exempting UACs from Title 42 also eased foreign impacts, since it relieved Mexico or other countries of the need to assume responsibility for a substantial group of vulnerable minors. In light of these and related factors, the CDC terminated the Title 42 order as it applied to UACs—a stronger and more definitive action than the exemption that had been in place. *See* U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Public Health Reassessment and Immediate Termination of Order Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Diseases Exists with Respect to Unaccompanied Noncitizen Children 7–9 (Mar. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren-update.pdf> (replacing the exemption of UACs with termination of order regarding this particular group, and providing detailed reasons). The CDC's partial termination responded to a recent U.S. district court decision holding that the CDC had failed to exercise reasoned decisionmaking in its exemption of UACs. *See Texas v. Biden*, 589 F. Supp. 3d 595, 619–20 (N.D. Tex. 2022). Like the Fifth Circuit's decision on the proposed MPP termination in *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), the district court's order took an unduly narrow view of the government's justifications for this policy. Moreover, the district court's decision failed to acknowledge the INA's special solicitude for UACs. Both the district court's decision and the Fifth Circuit's decision blocking the termination of MPP failed to display adequate deference to the exercise of protective discretion.

495. *Huisha-Huisha*, 27 F.4th at 731–32.

496. Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19941, 19941–42 (Apr. 6, 2022) [hereinafter CDC April 2022 Memorandum].

497. *Id.* at 19942.

498. *See Louisiana v. Ctrs. for Disease Control & Prevention*, No. 22-CV-00885, 2022 U.S. Dist. LEXIS 91296, at *49–63 (W.D. La. May 20, 2022). This holding would require input from all stakeholders and

The stewardship model would uphold the CDC's exercise of programmatic discretion to end the Title 42 program, based on the same factors that made Title 42's initiation suspect. The CDC's own explanation of the termination was less concrete, particularly on framework fit. But its explanation was satisfactory as a whole, including analysis incorporated by reference from the D.C. Circuit's decision on Title 42.⁴⁹⁹

On framework fit, the CDC's assessment cited the D.C. Circuit's holding that the Title 42 program had to accommodate nonasylum humanitarian protections such as withholding and CAT relief.⁵⁰⁰ Implementing the D.C. Circuit's holding would have required time for adjudication of these humanitarian requests. Taking that time would have caused delays in Title 42 removals.⁵⁰¹ These delays would have impeded the speedy, categorical removals that the Title 42 program sought. The CDC's discussion would have been even more persuasive if it had acknowledged that the INA's framework *required* adjudication of humanitarian claims. Hamstrung by its prior legal position that adjudication of humanitarian claims was *not* required, the government did not make this argument.⁵⁰² However, the CDC's assessment arguably incorporates this point by reference to the D.C. Circuit's decision.

While the district court enjoining the termination of Title 42 cited the state plaintiffs' reliance interests, those interests were minimal.⁵⁰³ The CDC noted that the frequent administrative review of the policy, dating back to the Trump Administration, should have signaled to states that the policy was subject to modification or outright termination.⁵⁰⁴ Moreover, the court decisions resulting from challenges to the Title 42 program highlighted the legal uncertainty surrounding the program and the tenuous nature of reliance interests.⁵⁰⁵

consideration by the CDC of stakeholder positions; it would thus substantially delay the termination of the Title 42 program. Because the court found as a procedural matter that the termination required resort to the APA notice and comment process, the court did not reach the states' substantive claim that the termination was arbitrary and capricious under the APA—the point that the Supreme Court relied on in *Regents*. See *id.* at *48–49. However, the district court indicated that the termination might also be infirm under the arbitrary and capricious standard. *Id.* at *61–62. The court reserved this question, but stated its concerns, especially regarding the CDC's lack of express discussion of alternatives to outright termination of the program. *Id.* at *62. However, the court's stress of the need to discuss alternatives to termination was inapposite. *Id.* at *62–63. The CDC stated its view that Title 42 simply no longer served a public health purpose. CDC April 2022 Memorandum, *supra* note 496, at 19955. This conclusion suggests that a reversion to ordinary immigration law and enforcement was the only sensible step available, especially since the INA already includes authority to deny admission to noncitizens with serious communicable diseases. 8 U.S.C. § 1182(a)(1)(A)(i).

499. See CDC April 2022 Memorandum, *supra* note 496, at 19953–55.

500. *Id.*

501. *Id.* at 19954 (noting that adjudicating claims to humanitarian protections would impose “significant practical constraints on the government’s ability to expel [many arriving noncitizens] . . . quickly”).

502. I am indebted to Ilya Somin for noting this point.

503. *Ctrs. for Disease Control & Prevention*, 2022 U.S. Dist. LEXIS 91296, at *42–43.

504. CDC April 2022 Memorandum, *supra* note 496, at 19953.

505. *Id.* at 19953–54.

Finally, as noted above, both implementation and termination of the Title 42 program inevitably involved the foreign affairs of the United States.⁵⁰⁶ Both implementation and termination entailed “ongoing discussions” with Canada, Mexico, and other countries about the interaction of immigration and the COVID-19 pandemic.⁵⁰⁷ Courts are ill-suited to assess those discussions.

In sum, as with the MPP case, the injunction against termination of the Title 42 program unduly discounted framework fit and foreign affairs concerns. The injunction also exaggerated state reliance interests. Based on these factors, the injunction against the Title 42 program’s termination interfered with the lawful exercise of executive discretion.

CONCLUSION

The scope of executive discretion over immigration law has been a subject of debate for over a century. Unfortunately, courts have too often compounded confusion. This Article aims to provide ground rules for fixing discretion’s scope.

Clarifying the scope of discretion requires a distinction between individual discretion in particular cases and programmatic discretion that uses broad categories. Within programmatic discretion, some policies are protective, aiding noncitizens. Other policies are regulatory, seeking to limit entry and hasten removals. Most presidents have toggled between the protective and regulatory modes. President Donald Trump broke this mold, focusing exclusively on regulatory measures such as the travel ban, MPP, and Title 42, along with seeking to rescind DACA.

Current approaches to discretion are ill-equipped to address excesses of a future President who follows President Trump’s lead. Moreover, our current toolkit would not adapt well to a President who sought to wield unchecked protective power. Asymmetry characterizes most current approaches to executive discretion. In federal appellate courts, the Fifth Circuit engages in probing scrutiny of any protective measure, as it did with both the Obama Administration’s unduly expansive DAPA program and the Biden Administration’s termination of MPP. In contrast, the Ninth Circuit has robustly reviewed President Trump’s regulatory measures, including MPP, but has signaled that it would give the President a blank check in the protective realm. The ethos of immigration scholars has gravitated toward this approach. The Supreme Court has long practiced a different kind of asymmetry, demarcating the internal-external divide.

506. *Id.* at 19956.

507. *Id.*

To properly assess executive discretion, courts should start from three key values that a stewardship model endorses: accountability to Congress, continuity, and transparency. Asymmetrical models fail to follow these values. Recently, professors Cox and Rodríguez have advanced a plenary discretion model, which is consistent in deferring to the executive branch on both protective and regulatory measures. However, this consistency comes at a price. The plenary discretion model unduly elevates the President to a co-principal in immigration law, thereby unduly discounting accountability to Congress, continuity, and transparency—although debits just narrowly exceed benefits on that final metric.

The stewardship model relies on three criteria: framework fit, protection of reliance interests, and mitigating foreign impacts. This model cabins both regulatory and protective discretion, although the model provides a more relaxed test for protective measures due to their roots in traditional individual discretion and in past practice regarding aid to intending Americans. In addition, the stewardship model applies these criteria across the board, rejecting the internal-external distinction.

Under the stewardship model, the Mayorkas enforcement guidelines, the termination of MPP, and the continuation of DACA would survive scrutiny, although the much larger DAPA program would rightly fall by the wayside. This model would also have resulted in the invalidation of President Trump's travel ban. Additionally, it would have found that the Title 42 program did not fit the INA's detailed framework of humanitarian protections.

Use of the stewardship model will not end the perennial debate about executive discretion. But it will structure that debate in a way that upholds continuity, transparency, and accountability to Congress. Those are useful achievements in any era.