

**OBAMA’S RUBY SLIPPERS: ENFORCEMENT DISCRETION IN THE
ABSENCE OF IMMIGRATION REFORM**

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ABSTRACT

This Article explores how Deferred Action for Childhood Arrivals (DACA) emerged both from thwarted efforts at immigration reform and the Supreme Court's highly anticipated decision in *Arizona v. United States*.¹ I argue that DACA not only was adopted in response to repeated failed efforts to pass the DREAM Act; it was also promulgated in anticipation of a possible favorable ruling by the Court on S.B. 1070. In Part I, I examine the current separation of powers crisis in immigration policy. I look at both the context in which DACA was adopted and at challenges to DACA in Court and in Congress. I classify the constitutional arguments against DACA into four different categories: 1) The *Youngstown/Curtiss-Wright* Dichotomy; 2) The Non-Delegation Doctrine Resurrection; 3) The "Take Care" Clause Crisis; and 4) The Notice and Comment Myth. In Part II, I address the federalism crisis. I argue that DACA was aimed at least in part at weakening the potential impact of S.B. 1070 by carving out a class of individuals who the states could not target and placing them in a quasi-legal status that hopefully would immunize them from state enforcement of the immigration laws. I examine deferred action as one of many twilight statuses where beneficiaries enjoy temporary relief from removal, (often) eligibility for work authorization, and (sometimes) the prospect of lawful residency. I look briefly at subfederal responses to DACA, including several states' denial of driver's licenses to DACA recipients. I ultimately conclude that DACA was a justifiable assertion of Executive authority in the face of gridlock in Congress and restrictionism in many states. DACA fell squarely within Executive enforcement powers under an expansive interpretation of congressional and Executive authority that has deep roots in the plenary power doctrine, case law going back over a century, the well-established use of deferred action and similar forms of prosecutorial discretion, and the broad delegation of powers by Congress to the Executive under the Immigration & Nationality Act. In short, like Dorothy's ruby slippers, the Administration's power was there all along. In announcing DACA on the eves of the Court's decision in *Arizona v. United States* and the 2012 elections, the Obama Administration took a bold political move that not only may have won him the election but may have reenergized his Administration, restored balance in the government, and laid the foundation for comprehensive immigration reform. At the same time the Administration in its final term needs to work within the constraints of the Constitution, focus on reform in Congress, and not establish a precedent for unilateralism that will be subject to abuse in future administrations.

¹ *Arizona v. United States*, 132 S. Ct. 2492 (2012).

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return.²

I. INTRODUCTION

The current crisis in American politics and the American legal system is as much a crisis of federalism as it is of separation of powers. Nowhere has this been more evident than in the area of immigration policy. Over the last decade, repeated attempts in Congress at both comprehensive immigration reform ("CIR") and more targeted proposals, including the DREAM Act and AgJobs, met with defeat in Congress despite bipartisan support.³ Anti-immigrant forces in and out of Congress used a range of tactics to defeat reform, from the Senate filibuster, to use of the broadcast media, to mobilization of supporters to shut down Congressional phone lines.⁴

Meanwhile, state and local governments took the regulation of immigrants into their own hands based on a range of theories reducible to the basic argument that the federal government was not adequately enforcing the immigration laws, either because of a lack of resources or a lack of will.⁵ At times,

² *Arizona*, 132 S. Ct. at 2499.

³ See, e.g., Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 469–71 (2005) [hereinafter Gilbert, *Fields of Hope, Fields of Despair*] (discussing institutionalist theories for why the AgJobs Bill of 2003 failed).

⁴ See N.C. Aizenman, *Small-Town America Resists Latino Newcomers*, WASH. POST, June 29, 2007, at A1; Jonathan Weisman, *Immigration Bill Dies in Senate: Bipartisan Compromise Fails to Satisfy the Right or the Left*, WASH. POST, June 29, 2007, at A1; see also Lauren Gilbert, *National Identity and Immigration Policy in the U.S and the European Union*, 14 COLUM. J. EUR. L. 99, 113–14 (2008).

⁵ See, e.g., Carissa Hessick, *Mirror Image Theory in State Immigration Regulation*, SCOTUSBLOG (June 13, 2011), <http://www.scotusblog.com/2011/07/mirror-image-theory-in-state-immigration-regulation/>; Marc Lacey & Salvador Rodriguez, *Arizona Sues Federal Gov-*

states claimed that they were “cooperating” with the federal government in enforcing the immigration laws. In the same breath, state officials argued that they were filling the vacuum left by the federal government’s failure to enforce the law.⁶

Both the U.S. Supreme Court and the Executive Branch responded to these developments in 2012 by reaffirming the central role of the Federal Executive with regard to immigration enforcement. On June 25, 2012, the U.S. Supreme Court, in a 5-3 decision,⁷ struck down three of the four challenged provisions of Arizona’s S.B. 1070, the anti-immigrant legislation that sparked a wave of copycat legislation around the country.⁸ President Barack Obama, in a Statement released that same day, indicated that, while pleased the Court had struck down §§ 3, 5(C), and 6 of S.B. 1070, he was troubled by the decision to dismiss the facial challenge to § 2(B), the “show me your papers” provision.

I remain concerned about the practical impact of the remaining provision of the Arizona law that requires local law enforcement officials to check the immigration status of anyone they even suspect to be here illegally. I agree with the Court that individuals cannot be detained solely to verify their immigration status. No American should ever live under a cloud of suspicion just because of what they look like.⁹

ernment for Failure to Enforce Immigration, N.Y. TIMES (blog) (Feb. 10, 2011, 5:29 PM), http://thecaucus.blogs.nytimes.com/2011/02/10/arizona-plans-to-sue-federal-government/?_r=0.

⁶ Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 187–89 (2012) (discussing lower court decisions finding that states had authority to cooperate in immigration law enforcement); see also S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1435 (2013) (arguing that the gridlock in Congress and subfederal enforcement of the immigration laws are “linked and interdependent” and that anti-immigration forces have worked at various government levels, stalemating Congressional action at the federal level to justify state and local enforcement efforts).

⁷ *Arizona*, 132 S. Ct. at 2510.

⁸ Among the challenged provisions, § 2(B) requires law enforcement officers to attempt to verify a person’s immigration status if reasonable suspicion exists to believe the person is not lawfully in the United States, and, if the person is arrested, to verify the person’s immigration status before the person is released; § 3 made it a state misdemeanor for a noncitizen to fail to register or carry proof of immigration status in violation of federal law; § 5(C) made it a misdemeanor for an “unauthorized alien” to seek or engage in work; and § 6 authorized the warrantless arrest of any person if there were probable cause to believe the person had committed a deportable offense. ARIZ. REV. STAT. ANN. §§ 11-1051; 13-1509; 13-2928; 13-3883 (2010).

⁹ See Press Release, President Barack Obama, Statement by the President on the Supreme Court’s Ruling on *Arizona v. United States* (June 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/25/statement-president-supreme-court-s-ruling-arizona-v-united-states>.

The Court interpreted this provision to only apply where state authorities detain an individual pursuant to an otherwise legitimate stop or arrest.¹⁰ Although it found that § 2(B) was not unconstitutional on its face, it indicated that it could be unconstitutional as applied if detention were prolonged beyond the time required to conduct a lawful stop.¹¹ Nonetheless, by striking down §§ 3, 5(C), and 6 of S.B. 1070, the Court took the teeth out of § 2(B), invoking traditional preemption principles to do so.¹² What struck many as significant was that the five-person majority included Chief Justice John Roberts, who, along with Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor (Justice Elena Kagan recused herself), joined Justice Anthony Kennedy in reaffirming the primacy of the federal government with regard to immigration enforcement.¹³

Perhaps not coincidentally, the Supreme Court's decision in *Arizona* came on the heels of a new directive announced by the Obama Administration only ten days earlier, to grant immigration relief in the form of deferred action to certain young people who had come to the United States as children.¹⁴ After over ten years of fruitless efforts in Congress to pass the DREAM Act into law,¹⁵ the so-called DREAMers decided that it was time to emerge from the shadows and mobilize publicly for some form of immigration relief.¹⁶ With the 2012 elections looming and the stars aligned, the Obama Administration an-

¹⁰ *Arizona*, 132 S. Ct. at 2507.

¹¹ *Id.* at 2509–10.

¹² Reaffirming *Hines v. Davidowitz*, 61 S. Ct. 399 (1941), the Court found that the federal government still occupied the field of alien registration in striking down § 3. *Arizona*, 132 S. Ct. at 2501. It found that § 5(C), making it a state misdemeanor to seek or engage in unauthorized employment, and § 6, permitting warrantless arrests on probable cause that a noncitizen had committed a removable offense, stood as obstacles to federal immigration enforcement. *Id.* at 2503, 2507. Cf. Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 626–34 (2013) (majority nominally applied traditional preemption principles but in fact was applying what she labels “plenary power preemption”).

¹³ *Arizona*, 132 S. Ct. at 2497.

¹⁴ See Memorandum from Janet Napolitano, Secretary, U.S. Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) [hereinafter Napolitano Memo], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

¹⁵ Development, Relief, and Education for Alien Minors Act, S. 3992, 111th Cong. (2010); S. 729, 111th Cong. (2009); S. 774, 110th Cong. (2007); S. 2205, 110th Cong. (2007); S. 1545, 108th Cong. (2003); S. 1291, 107th Cong. (2001).

¹⁶ Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J., Oct. 15, 2012, at A2.

nounced that it would defer many DREAMers' deportation and grant them work authorization.¹⁷

The Administration's announcement of Deferred Action for Childhood Arrivals ("DACA") was met with a backlash in the conservative media and from Republicans in Congress.¹⁸ Even Justice Antonin Scalia criticized it in his dissent in *Arizona*, saying that it would assure immunity from enforcement for thousands of Arizona's 400,000 illegal immigrants.¹⁹ Two months later, Kris Kobach, Kansas' Secretary of State and the mastermind behind the Arizona statute and much of the copycat legislation sweeping the country, filed a complaint against Janet Napolitano, the Secretary of Homeland Security, and John Morton, the director of Immigration and Customs Enforcement ("ICE"), on behalf of several ICE officers claiming that DACA was unconstitutional because it usurped legislative authority and violated the Executive's duty to see that the laws were faithfully executed, and that it violated administrative law.²⁰ The State of Mississippi joined the complaint two months later.²¹ In April 2013, the district court was inclined to grant a preliminary injunction after finding that the ICE plaintiffs were likely to succeed on the merits of their claim, but it requested additional briefing on whether it had jurisdiction in light of the Civil Service Reform Act ("the CSRA").²² On July 31, 2013, it reluctantly dismissed

¹⁷ The new directive applies to a noncitizen who came to the United States while under the age of 16, who continuously resided in the United States for five years prior to announcement of the directive, who is in or has graduated from high school or a GED program or was honorably discharged from the U.S. Armed Forces; who has not been convicted of a felony or significant misdemeanors, or multiple misdemeanors, or is otherwise a threat to national security or the public safety; and who is not above the age of 30. Napolitano Memo, *supra* note 14, at 1.

¹⁸ See, e.g., *O'Reilly Factor: Personal Story* (FOX News television broadcast Aug. 25, 2012), available at 2012 WLNR 18123422 (FOX News anchor Monica Crowley accused President Obama of violating duties as chief law enforcement officer and usurping legislative authority); Letter from Lamar Smith, Chair, House Judiciary Comm., to John Morton, Director, U.S. Department of Homeland Security, Immigration and Customs Enforcement (July 3, 2012) [hereinafter Letter from Lamar Smith], available at <http://judiciary.house.gov/news/pdfs/DreamActLetterICE.pdf> (describing new policy as an amnesty, an overreach of Executive authority, and a magnet for fraud).

¹⁹ *Arizona v. United States*, 132 S. Ct. 2492, 2522 (Scalia, J., dissenting).

²⁰ Complaint, *Crane v. Napolitano*, No. 3:12-CV-03247-O (N.D. Tex. Aug. 23, 2013) [hereinafter ICE Complaint].

²¹ Amended Complaint, *Crane v. Napolitano*, No. 3:12-CV-03247-O, 2012 WL 5199509 (N.D. Tex. Oct. 10, 2012) [hereinafter Amended ICE Complaint].

²² Memorandum Opinion and Order, *Crane v. Napolitano*, No. 3:12-CV-03247-O, 2013 WL 1744422 (N.D. Tex. April 23, 2013) [hereinafter Memorandum Opinion and Order, *Crane v. Napolitano*].

the suit, finding that the CSRA provided the exclusive means for resolution of what amounted to a labor dispute.²³

This Article explores the symbiotic relationship between thwarted efforts at immigration reform, the decision in *Arizona*, and the promulgation of and responses to DACA. I argue that DACA not only was adopted in response to repeated failed efforts to pass the DREAM Act, but was also promulgated in anticipation of a favorable ruling by the Court on S.B. 1070 and designed to ameliorate the potentially harsh effects of that law and similar copycat laws by immunizing a class of individuals, the DREAMers, who the states could not target. I address various constitutional arguments being made regarding DACA. I ultimately conclude that DACA was a justifiable assertion of Executive authority in the face of a constitutional crisis marked by gridlock in Congress and restrictionism in many states. To announce DACA on the eves of the Court's decision in *Arizona v. United States* and the 2012 elections might be seen as what Professor Louis Michael Seidman would call an "act of constitutional disobedience."²⁴ Nonetheless, in embracing the DREAMers and granting them deferred action, the Obama election may have reenergized his Administration, restored balance in the government, and laid the foundation for comprehensive immigration reform.²⁵

There is a small but growing body of work on prosecutorial discretion in the immigration context²⁶ and a substantial body of work on immigration federalism,²⁷ but there is little work that ties the two ideas together. Much of

²³ Order, *Crane v. Napolitano*, No. 3:12-CV-03247-O, 6 (N.D. Tex. July 31, 2013) (dismissing suit for lack of jurisdiction), available at <https://dl.dropboxusercontent.com/u/27924754/Crane75%207-31-13.pdf>.

²⁴ Louis Michael Seidman, Op-Ed., *Let's Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19.

²⁵ At the time of this writing, the U.S. Senate had just passed a comprehensive immigration bill which included a 13-year path to citizenship for many of the 11 million unauthorized immigrants currently living in the United States. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2102 (2013) (as passed by Senate, June 27, 2013).

²⁶ See, e.g., KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (Jan. 17, 2013), available at <http://www.fas.org/sgp/crs/misc/R42924.pdf> [hereinafter CRS Report]; Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 472–73 (2012); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

²⁷ See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local*

the scholarship that does focus on this connection looks at state and local criminal laws that mimic or mirror federal immigration laws²⁸ or examines the federalism and individual rights dimension, focusing, for example, on preemption as a surrogate for equal protection²⁹ or on how preemption analysis obscures the civil rights dimensions of the problem.³⁰ This Article offers a different perspective, operating in the realm of administrative law and separation of powers within the federal government and looking at the respective roles of Congress and the Executive in responding to subfederal immigration restrictionism.³¹ It recognizes the important role political dynamics play in shaping the terms of legal and legislative strategies and the role of rhetoric and heuristics in shaping popular opinion and public acceptance of litigation and legislative outcomes.³²

Power Over Immigration, 86 N.C. L. REV. 1557 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

²⁸ See Jennifer M. Chacón, *Over-Criminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Criminal Law*, 61 DUKE L.J. 251 (2011).

²⁹ See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 125 (forthcoming 2014) (draft on file with author) [hereinafter MOTOMURA, IMMIGRATION OUTSIDE THE LAW]; Lucas Guttentag, *Discrimination, Preemption and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1 (2012), available at <http://www.stanfordlawreview.org/online/discrimination-preemption>; Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1825–26 (2011) [hereinafter Motomura, *The Discretion That Matters*].

³⁰ See Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313 (2012), available at <http://www.law.uci.edu/lawreview/vol2/no1/johnson.pdf>.

³¹ See also Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (examining how the immigration power is allocated between Congress and the Executive, and exploring the asymmetries in immigrant admissions and immigration enforcement, recommending greater formal delegation of *ex ante* screening authority to the President).

³² For an empirical piece recognizing the political dynamics of immigration law and how politics fundamentally alters judicial, scholarly, and public evaluations of immigration federalism, see Ramakrishnan & Gulasekaram, *supra* note 6. I thank my colleague, Patricia Hatamyar Moore, who has examined the use of heuristics to perpetuate the myth of state court class action abuses. Heuristics is the phenomenon by which “the mind automatically attempts to create a coherent story out of the information it has, even if that information is incomplete or invalid.” See Patricia Hatamyar Moore, *Confronting the Myth of State Court Class Action Abuses Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 1 (forthcoming 2014). In reading her paper, I was struck by how Kris Kobach, Arizona Governor Jan Brewer, anti-immigrant groups, the conservative media, and even Justice Scalia have effectively made use of the same phenomenon to generate anti-immigrant sentiment in the public at large. See *Arizona v. United States*, 132 S. Ct. 2492, 2515 (2012) (Scalia, J., dissenting) (“States have the right to protect their borders against foreign nationals, just as they have the right to execute foreign nationals for murder.”); Jeremy Duda, *Goddard, Brewer Debate Jobs, Budget, ‘Headless Bodies,’*

While I agree with recent scholarship identifying the feedback loop connecting statutory schemes, their implementation, and public reactions,³³ I believe that this literature undervalues the central role of the Executive in setting and implementing immigration policy.³⁴ I conclude that, despite a cleverly-designed litigation and media campaign to prove the contrary, DACA was a bold political move that fell squarely within traditional Executive enforcement powers under an interpretation of Congressional and Executive authority over immigration that has deep roots in the plenary power doctrine, case law going back over a century, the established use of deferred action and similar forms of prosecutorial discretion for both individual and group-based relief, and the broad delegation of powers by Congress to the Executive under the Immigration & Nationality Act (“INA”).³⁵

Intriguingly, in crafting and justifying DACA, government insiders and outsiders would be faced with having to rely on many of the same legal arguments that the scholarly community (some of whom were now insiders and others of whom were advocates) had critiqued in other contexts.³⁶ This piece addresses the argument that the Executive had *inherent* power to adopt DACA, independent of power delegated by Congress, given the oft-stated connection

ARIZ. CAPITOL TIMES, Sept. 1, 2010, available at <http://azcapitoltimes.com/news/2010/09/01/goddard-brewer-debate-hinges-on-jobs-budget-and-headless-bodies/>; *FOX News: O'Reilly Factor*, *supra* note 18; see also Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 60 (2013) (arguing that “[t]reating nativism as fixed and the democratic will as something that needs to be stifled is the wrong way to change the trajectory of [immigration [law]]” and that these values have become “so entrenched in our legal culture” that they “must be worked around, not against”).

³³ See, e.g., Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 29–30 (2012), available at <http://www.law.uci.edu/lawreview/vol2/no1/cuellar.pdf>.

³⁴ *Id.* at 6 (describing the presidency as having “surprisingly limited capacity to drastically change the immigration status quo through executive action”).

³⁵ Cf. David Rubenstein, *Immigration Structuralism: A Return to Form*, 9 DUKE J. CONST. L. & PUB. POL’Y 101, 106 (2013) (arguing that nonbinding Executive enforcement policies do not qualify as “laws” and are not made “in pursuance of” the Constitution and thus have neither the force of law nor preemptive effect); Peter Margulies, *Taking Care of Immigration: Presidential Stewardship, Prosecutorial Discretion and the Separation of Powers*, Roger Williams Legal Studies Paper No. 133 (Feb. 11, 2013) (working paper on file with the *West Virginia Law Review*) (rejecting prosecutorial discretion as a basis for DACA but finding that the use of Executive power was justified under a stewardship model of Executive authority).

³⁶ See, e.g., Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307 (2000) (currently Chief Counsel of USCIS); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (principal author of Law Professors’ Letter, *infra* note 45, justifying the use of Executive authority to grant relief from removal to the DREAMers).

between the regulation of immigration and foreign affairs.³⁷ The Supreme Court identified this source of power in many of its early decisions.³⁸ It also arguably is consistent with the Supreme Court's language in *Arizona* emphasizing the importance of broader foreign policy considerations in analyzing immigration preemption.³⁹ At the same time, an inherent powers argument is not only of questionable historical accuracy,⁴⁰ but it has allowed the Court in the past to uphold immigration policies treading on the civil rights of noncitizens that would be unconstitutional in any other context.⁴¹ It appears that both DACA's supporters and the Department of Homeland Security have been reluctant to embrace an inherent powers rationale, focusing instead on Congress' broad delegation of power to the Executive, on historic practice, and on DACA as an exercise of prosecutorial discretion consistent with the existing framework announced a year earlier by ICE Director John Morton in what became known as the "Morton Memo."⁴²

During the 2008 presidential primaries, when Barack Obama was being favorably compared to Martin Luther King, Jr., Hillary Clinton drew political fire when she claimed that without President Lyndon B. Johnson, none of the civil rights reforms would have been possible: "Dr. King's dream began to be realized when President Johnson passed the Civil Rights Act It took a president to get it done."⁴³ Although intended at the time as a criticism of then-candidate Obama, her words, ironically, have proven prophetic. Without

³⁷ See, e.g., Cox & Rodríguez, *supra* note 31, at 475–76 (indicating that by mid-20th century, the Court thought that the President possessed at least some power to regulate immigration without Congressional authorization, and even despite Congressional action).

³⁸ See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Fong Yue Ting v. United States*, 149 U.S. 698, 705–07 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 604–06 (1889).

³⁹ *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

⁴⁰ Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26–33 (1972).

⁴¹ *Matthews v. Diaz*, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

⁴² Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens (June 17, 2011) [hereinafter *Morton Memo*], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Defendant's Opposition to Plaintiffs' Application for Preliminary Injunctive Relief at 12, *Crane v. Napolitano*, No. 3:12-CV-3247-O, 2012 WL 6633751 (N.D. Tex. Dec. 19, 2012) [hereinafter *Defendant's Opposition*, *Crane v. Napolitano*].

⁴³ Sarah Wheaton, *Clinton's Civil Rights Lesson*, N.Y. TIMES (blog) (Jan. 7, 2008), <http://thecaucus.blogs.nytimes.com/2008/01/07/civilrights/> (last visited Sept. 11, 2013).

DREAMers' courage in coming out of the shadows and risking deportation, the Administration would not have considered such a bold move. Indeed, in the years leading up to DACA, Obama officials repeatedly told advocates that, while they supported the DREAM Act, it was up to Congress to pass it into law.⁴⁴ Although the 2012 elections increased pressure on the Administration to respond favorably, without legal cover, it also is unlikely that the Administration would have acted. The law professors' letter, drafted by Professor Hiroshi Motomura of UCLA and signed by 96 law professors, which laid out a legal argument for why Executive action was within the scope of Executive power, provided that cover.⁴⁵ Like Dorothy's ruby slippers, the Administration's power was there all along.

Part I focuses on separation of powers. I address several of the constitutional arguments being made against DACA, particularly in light of severe criticisms from both the right and the left of President Obama's bold assertion of Executive powers in other contexts.⁴⁶ I recount the story of DACA,⁴⁷ then examine the litigation brought by Kris Kobach on behalf of several ICE officers challenging DACA. I also examine the context in which DACA was adopted, focusing in particular on the impasse in Congress for over a decade on immigration reform. I address four different arguments being made against DACA, which I categorize as 1) The *Youngstown/Curtiss-Wright* Dichotomy; 2) The Non-Delegation Doctrine Resurrection; 3) The "Take Care" Crisis; and 4) The Notice and Comment Myth. I also look briefly at a recent effort in the U.S.

⁴⁴ Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES, Dec. 1, 2012, at A1; see also Olivas, *supra* note 26, at 472–73 (describing how in 2011, when a group of U.S. Senators sent a letter to President Obama urging that he not target DREAM Act-eligible students, DHS Secretary Janet Napolitano responded that, as sympathetic as they were, no category of Prosecutorial Discretion would be employed for groups of individuals).

⁴⁵ See Letter from Immigration Law Professors to President Obama, Executive Authority to Grant Administrative Relief to Dream Act Beneficiaries (May 28, 2012) [hereinafter Law Professors' Letter], available at <http://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf>.

⁴⁶ At the annual meeting of the American Association of Law Schools ("AALS") in January 2013 in New Orleans, Professors Michael McConnell and Richard Pildes discussed President Obama's expansive use of Executive powers during the Constitutional Law section breakfast. See ASS'N. AM. L. SCH., *Presidential Power under the George W. Bush and Barack Obama Administrations*, 2013 Annual Meeting (Jan. 5, 2013), <http://aals.org/am2013/FinalProgram2013.pdf>.

⁴⁷ Although I was one of the 96 signatories to the Law Professors' Letter, and was in email correspondence with Professor Motomura at the time, I rely largely on several of the better news accounts in telling the story of how DACA was adopted. Professor Motomura has corroborated my retelling of the story, while providing background information to fill in some of the details regarding his role in brainstorming with the DREAMers and drafting the Law Professors' Letter. E-mail from Hiroshi Motomura, Professor of Law, UCLA (March 8, 2013, 1:07 PM) (on file with the author) [hereinafter First E-mail from Hiroshi Motomura].

House of Representatives to defund both DACA and administration of the Morton Memo.⁴⁸

Part II focuses on the federalism crisis. It looks at the relationship between the Court's impending decision in *Arizona v. United States* and the Administration's announcement of DACA. It explores how DACA was adopted largely in anticipation of a possible favorable ruling by the Court on S.B. 1070, and was aimed at weakening the impact of S.B. 1070 and other copycat laws by carving out a class of individuals eligible for relief from deportation who the states could not touch. I demonstrate why the use of deferred action to provide temporary relief from removal to the DREAMers was consistent with the exercise of prosecutorial discretion over the last 40 years. I examine deferred action as just one of many twilight statuses utilized by the immigration authorities where beneficiaries enjoy temporary relief from removal, (often) eligibility for work authorization, and (sometimes) the prospect of lawful residency. I briefly look at subfederal responses to DACA, including several states' reluctance to issue driver's licenses to persons granted deferred action under DACA, and the legal arguments being made to challenge such practices.

The *Crane v. Napolitano*⁴⁹ lawsuit, the refusal to issue driver's licenses to DACA recipients, and efforts in the Republican-dominated House of Representatives to defund DACA can all be seen as part of a broader strategy by immigration restrictionists to undermine the Administration's use of prosecutorial discretion as an enforcement tool. I conclude that while DACA was within the scope of Executive authority and justified in light of these dual crises in separation of powers and federalism, the Administration's actions fell just within the outer perimeters of Executive Power. In its final term, the Administration must strive to work within the constraints of the Constitution, to focus on reform in Congress, and to not establish a precedent for unilateralism that will be subject to abuse in future administrations.

⁴⁸ See 159 CONG. REC. H3208–3212, 3222, 3225 (2013) (amendment, debate, and vote to defund DACA and administration of the Morton Memo).

⁴⁹ Order, *Crane v. Napolitano*, No. 3:12-CV-03247-O, at 6 (N.D. Tex. July 31, 2013) (dismissing suit for lack of jurisdiction), available at <https://dl.dropboxusercontent.com/u/27924754/Crane75%207-31-13.pdf>.

II. DACA, COMPREHENSIVE IMMIGRATION REFORM AND OUR SEPARATION OF POWERS CRISIS

A. *DACA and the DREAMers: A Brief Background*

For many years, they lived in the shadows, depending on immigrant advocates to lobby for the DREAM Act in Congress.⁵⁰ They had come to this country as children, brought here in most cases by their parents. Many had grown up in this country, learning English, going to school, and thinking of themselves as Americans, many even believing that they were. Then, when it came time for higher education, many learned that they were not eligible for financial aid or in-state tuition, because they were not here legally.⁵¹ Most lacked the means to become lawful immigrants, since they had not been inspected and admitted, and thus were inadmissible and ineligible to adjust status in the United States.⁵² Many who had turned 18 had begun to accrue unlawful presence, and thus would be subject to the 3-year and 10-year unlawful presence bars if they attempted to leave and reenter on a visa.⁵³

In mid-2001, the Bush Administration indicated that it supported comprehensive reform, including the possible legalization of millions of undocumented persons.⁵⁴ Senators Orrin Hatch and Dick Durbin are credited with introducing the first DREAM Act that same year.⁵⁵ That first DREAM Act, as

⁵⁰ See, e.g., William E. Gibson, *Senator is Giving Controversial New Immigrant Bill a Chance*, ORLANDO SENTINEL, May 16, 2012, at A1 (“‘These kids have been in legal limbo for far too long, and their lives have been on hold for far too long,’ said Cheryl Little, executive director of Americans for Immigrant Justice, based in Miami, which represents ‘dreamers’ and other immigrants. We need to extend a lifeline to them now. Even if it’s temporary relief at this point . . .”); David Goldstein, *Missouri Student Faces Deportation—Again*, KAN. CITY STAR, May 25, 2006, at A4 (“‘There is an immigration war going on in Congress,’ said Josh Bernstein of the National Immigration Law Center. ‘In a war, you take the children off the battlefield. You don’t care which side they are on. They should be out of harm’s way.’”); Jordan, *supra* note 16, at A2 (“‘Previously, undocumented immigrants largely stayed out of the spotlight, leaving others to speak on their behalf so as not to risk exposing their illegal status. ‘We wanted the freedom to be everyday Americans,’ says Ms. Pacheco, 27 years old, a leader of the . . . Dreamer[s].”).

⁵¹ See Jordan, *supra* note 16, at A2; Julia Preston, *Students Press for Action on Immigration*, N.Y. TIMES, May 31, 2012, at A14. There is a large body of literature on the DREAMers, both in the media and more scholarly literature. Much of this literature is discussed in Olivas, *supra* note 26, at 519–22.

⁵² Immigration and Nationality Act (INA) § 245(a), 8 U.S.C. § 1255(a) (2012).

⁵³ INA § 212(a)(9)(B)(i)–(iii)(I), 8 U.S.C. § 1182(a)(9)(B)(i)–(iii)(I) (2012).

⁵⁴ David Sanger, *Mexico’s President Rewrites the Rules*, N.Y. TIMES, Sept. 8, 2001, at A1.

⁵⁵ Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001); see also Press Release, Durbin Statement on DREAM Act and Administrative Action to Help Young Immigrants (June 15, 2012), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=070d1061-66c4-45ef-bb34-41da7e1e7d40>.

introduced in the Senate, was fairly limited in scope. It would have allowed certain young people who had not yet attained the age of 21, who had been physically present in the United States for at least five years, who were attending institutions of higher education, and who were persons of good moral character to adjust status to lawful permanent residency and eventually apply for citizenship.⁵⁶ Other immigration reforms were being considered as well, including AgJobs legislation for agricultural workers.⁵⁷ September 11, 2001, brought all efforts at immigration reform to an immediate halt, but even after that, many advocates believed that reform was possible.⁵⁸

The potential beneficiaries of the DREAM Act⁵⁹ were the very individuals that the Court had embraced in *Plyer v. Doe*,⁶⁰ overturning a Texas law denying public school education to the children of the undocumented. The Court expressed concern about the creation of a “shadow population,”⁶¹ a “permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”⁶² It was particularly troubled about denying educational benefits to the children of such individuals, who could not be held accountable for their parents’ misconduct. It found it “difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”⁶³ Furthermore, it recog-

⁵⁶ S. 1291 § 3.

⁵⁷ Gilbert, *Fields of Hope, Fields of Despair*, *supra* note 3, at 440–41.

⁵⁸ Christine Stapleton, *Bush Bypassed Bill by Growers, Farmworkers*, PALM BEACH POST, Jan. 13, 2004, at 1A.

⁵⁹ Over time, the requirements for relief under the DREAM Act have remained relatively constant, while reflecting the fact that many of the potential beneficiaries of the Act in 2001, when the law was first introduced, are now adults, many in their thirties. The current version of the DREAM Act, as passed in the U.S. Senate, for example, would allow for the adjustment of status to lawful permanent residency of certain persons who 1) first entered the United States while under the age of sixteen; 2) have acquired a high school degree or its equivalency; 3) have received a degree in higher education, completed at least two years towards a bachelor’s degree, or served at least four years in the armed services; 4) have been in “registered provisional immigrant” status for at least five years; and 5) have successfully complete a national security and criminal background check. S. 744, 113th Cong. § 2103 (as passed by Senate, June 27, 2013). This version would allow for streamlined procedures for persons granted relief under DACA. *Id.* § 2103(b). Some versions would have required that the applicant be under a certain age to qualify, with that age advancing with the passage of time. *See, e.g.*, DREAM Act of 2011, S. 952, 112th Cong. § 3(b)(1)(F) (requiring that applicant be under the age of 35 on the date of Act’s enactment).

⁶⁰ 457 U.S. 202 (1982).

⁶¹ *Id.* at 218.

⁶² *Id.* at 218–19.

⁶³ *Id.* at 220.

nized that, “[i]n light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported”⁶⁴ Applying what appeared to be intermediate scrutiny in striking down the law,⁶⁵ the Court concluded that it was “difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of employment, welfare, and crime.”⁶⁶

While *Plyer v. Doe* eloquently set forth why this discrete group of children should not be denied a K-12 public education, it could not solve the problem of what happened when they reached adulthood.⁶⁷ This was a matter for Congress and the Executive. Many of these children went on to graduate at the top of their class but found themselves ineligible for financial aid or in-state tuition.⁶⁸ They became the very shadow-population the Court in *Plyer* had warned against. A discrete and insular minority, they could not vote, faced possible deportation if they advocated publicly, and had to rely on others to represent them before Congress. For several years, however, despite various setbacks, it looked hopeful that the DREAM Act would be passed, either on its own or as part of a comprehensive bill.⁶⁹

The turning point probably came in 2007, where, despite broad bipartisan efforts to pass the Secure Borders Act, including backing from the Bush Administration, the legislation failed because, notwithstanding majority support in both houses, the legislation was unable to survive a cloture vote in the Senate.⁷⁰ Despite polls indicating that most Americans supported the DREAM Act and comprehensive immigration reform,⁷¹ anti-immigrant forces, including a

⁶⁴ *Id.* at 226. For a thoughtful discussion of the complexities of unlawful presence and the relationship among *Plyer v. Doe*, birthright citizenship, the DREAM Act, and full-scale legalization, see Hiroshi Motomura, *Making Legal: The DREAM Act, Birthright Citizenship, and Broad-scale Legalization*, 16 LEWIS & CLARK L. REV. 1127 (2012).

⁶⁵ *Plyer*, 457 U.S. at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”).

⁶⁶ *Id.*

⁶⁷ For a powerful account of the story of *Plyer v. Doe* and its implications for the DREAM Act, see MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN (2012) [hereinafter OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND].

⁶⁸ Jordan, *supra* note 16, at A2.

⁶⁹ OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, *supra* note 67, at 82.

⁷⁰ Carl Hulse & Robert Pear, *Immigrant Bill, Lacking 15 Votes, Stalls in Senate*, N.Y. TIMES, June 8, 2007, at A1.

⁷¹ NAT’L IMMIGR. F., *While Debate Rages, the Public Continues to Support Realistic Immigration Solutions*, (Dec. 10, 2007), <http://www.immigrationforum.org/images/uploads/PollingSummary0407.pdf>.

number of talk-show radio hosts, mobilized supporters to flood Congress with calls, shutting down Senate phone lines during the Senate vote.⁷²

After that, despite efforts to pass a free-standing DREAM Act, by 2010, political intransigence prevailed in Congress.⁷³ Thus, while President Obama announced his support for the DREAM Act in the summer of 2010 just months before the elections, and Senate Majority Leader Harry Reid made a lukewarm attempt at seeing it through, their efforts proved unsuccessful largely because by that time winning the midterm elections became more important for both parties than immigration reform.⁷⁴ After the midterm elections, the focus in Congress shifted to the 2012 elections, with even former Republican supporters of immigration reform, like Senators John McCain and Lindsay Graham, opposing the DREAM Act and efforts at comprehensive reform.⁷⁵

The 2010 elections, when Republicans won control of the House while retaining significant numbers in the Senate, was probably the watershed year for the DREAMers, who realized that, at least for the present, Congress could not be counted on to pass legislation.⁷⁶ The focus needed to shift to the Administration, which had courted the Latino vote but thus far had failed to deliver on its promises of reform. It also became clear to many individuals who were high school students when these efforts began but were now in their mid-to-late twenties that time was running out. Excluded from the political process, relying on immigration advocates had not proven adequate to achieve their goals.⁷⁷ The time had come for the DREAMers to transform into a social movement, to engage in marches, protests, and even acts of civil disobedience, and to tell their personal stories, even if it meant risking detention and deportation.⁷⁸

DREAMers around the country began to organize in their communities, eventually forming United We Dream, whose leadership consisted of undocumented youth. Rather than remaining in the shadows, many “came out” in public events.⁷⁹ Despite warnings from supporters of the potential consequences,

⁷² Julia Preston, *Grass Roots Roared and Immigration Plan Collapsed*, N.Y. TIMES, June 10, 2007, at A1.

⁷³ See Editorial, *Dream Time*, N.Y. TIMES, Sept. 19, 2010, at A30 (describing poisoned climate for legislative reform and limited prospects for DREAM Act).

⁷⁴ Peter Baker, *Obama Urges Fix to ‘Broken’ Immigration System*, N.Y. TIMES, July 1, 2010, at A12; Julia Preston, *Democrats Reach Out to Hispanics on Immigration Bill*, N.Y. TIMES, Sept. 17, 2010, at A15.

⁷⁵ Julia Preston, *Republicans Reconsider Position on Immigration*, N.Y. TIMES, Nov. 10, 2012, at A12.

⁷⁶ Jordan, *supra* note 16, at A2.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Frank Sharry, *How Did We Build an Immigrant Movement? We Learned from Gay Rights Advocates*, WASH. POST OUTLOOK, March 24, 2013, at B01.

they felt that publicizing their plight, gaining support within immigrant communities, and even shaming the Obama Administration into acting had become their only viable strategy.⁸⁰ Without the Latino vote, Barack Obama could lose the 2012 elections and, without more than promises from the Administration, the DREAMers and their supporters could not be counted on to deliver that vote.⁸¹ As late as mid-April 2012, members of the Administration, including Valerie Jarrett, the President's Senior Advisor, and Cecilia Muñoz, the President's domestic policy advisor and the former Vice-President for Research, Advocacy and Legislation at the National Council of La Raza, told the DREAMers that the President lacked the legal authority to grant relief from deportation, and that this was a matter for Congress. One of the Connecticut DREAMers, Lorella Praeli, the director of advocacy for United We Dream, replied, "With all due respect, I disagree."⁸²

Approximately one month later, UCLA law professor Hiroshi Motomura reached out to a number of immigration law professors to ask who might be willing to sign on to a letter to the Administration explaining why it was within the Executive's prosecutorial discretion to grant relief from deportation to the DREAMers. Professor Motomura drafted the letter with the assistance of Jessica Karp, an attorney at the National Day Labor Organizing Network, after a meeting with a group of DREAMers in the Los Angeles area. The DREAMers described to him how members of the Administration had told them that the Administration lacked the authority to provide relief and that this was a matter for Congress to resolve.⁸³ The DREAMers had done their research, and already were familiar with different forms of prosecutorial discretion that might be available, so Professor Motomura's discussion with them was more in the nature of a brainstorming session where they explored the pros and cons of each approach.⁸⁴ At the end of the discussion, the group asked him if he would be willing to draft a letter to the Administration laying out this analysis, and forward it on to other immigration law professors for signatures.⁸⁵ Shortly after this initial contact, Professor Motomura forwarded a draft letter on to those who had indicated an interest in signing, asking for feedback.⁸⁶ A week later, on May 29, 2012, a group of DREAMers and their attorneys meeting with

⁸⁰ *Id.*

⁸¹ Julia Preston, *Immigration Vote Leaves Obama's Policy in Disarray*, N.Y. TIMES, Dec. 18, 2010, at A35.

⁸² Preston, *supra* note 44, at A1.

⁸³ First E-mail from Hiroshi Motomura, *supra* note 47.

⁸⁴ E-mail from Hiroshi Motomura, Professor of Law, UCLA (June 24, 2013, 1:04 PM) (on file with author).

⁸⁵ First E-mail from Hiroshi Motomura, *supra* note 47.

⁸⁶ E-mail from Hiroshi Motomura, Professor of Law, UCLA (May 23, 2012, 2:19 AM) (on file with author).

White House officials hand-delivered a finalized version of the letter, signed by 96 law professors.⁸⁷

The letter laid out why the Administration had legal authority to grant the DREAMers as a group relief from deportation. It described three possible forms of relief: deferred action, parole in place, and deferred enforced departure.⁸⁸ The letter explained that INA § 103(a) gave the Secretary of Homeland Security broad authority to administer and enforce the immigration laws.⁸⁹ The letter described how deferred action was a form of prosecutorial discretion that the Executive Branch had exercised at least since 1971, as federal courts have acknowledged its existence at least since the mid-1970s.⁹⁰

It went on to describe how both parole and deferred enforced departure, while granted on a case-by-case basis, had been used by the Executive to benefit groups of individuals seeking immigration relief.⁹¹ Parole had been granted to large groups of Cubans in 1980 and 1994, and Haitian orphans in 2010.⁹² Deferred enforced departure had been granted by almost every Administration since Dwight D. Eisenhower to at least one group of noncitizens.⁹³ The letter described how under each of these forms of relief, recipients were eligible for work authorization.⁹⁴ It emphasized that it was neither addressing the policy consequences nor recommended a particular form of relief.⁹⁵ Rather, it explained these different options, described their historical and legal bases, and laid out why it was within the President's Executive powers under the INA and within Homeland Security's prosecutorial discretion to grant, on a case-by-case basis, group-based relief.

The Letter gave the White House the legal cover it needed.⁹⁶ On June 15, 2012, barely two weeks after this meeting and receiving the letter, Janet Napolitano announced the Administration's new policy of "Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as

⁸⁷ E-mail from Hiroshi Motomura, Professor of Law, UCLA (May 29, 2012, 3:46 AM) (on file with author); *see also* Bertrand Gutierrez, *Law Professors' Letter May Have Swayed Obama*, WINSTON-SALEM J., June 26, 2012, *available at* http://www.journalnow.com/news/local/article_f5df40ee-138f-53d3-aef1-a4d0b0923cf5.html.

⁸⁸ Law Professors' Letter, *supra* note 45, at 1–3.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.*

⁹¹ *Id.* at 3.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1–3.

⁹⁵ *Id.* at 1.

⁹⁶ Gutierrez, *supra* note 87.

Children.”⁹⁷ Several aspects of the Department of Homeland Security’s⁹⁸ new policy are worth noting:

The Napolitano Memo, which is directed to the heads of Customs and Border Patrol (CBP), U.S. Citizenship and Immigration Services (USCIS), and Immigration and Customs Enforcement (ICE), emphasizes that the directive granting deferred action involves an exercise of prosecutorial discretion within the Secretary’s powers;⁹⁹

It describes why this group of individuals, brought here as children, is not within DHS’s enforcement priorities;¹⁰⁰

It sets forth specific criteria for granting relief, on case-by-case basis, to qualifying individuals;¹⁰¹

It provides specific instructions for how ICE, CBP and USCIS are to treat qualifying individuals who are stopped or detained, as well as how it should handle the cases of individuals already in removal proceedings.¹⁰²

It instructs USCIS to come up with a process for submitting and processing applications, and orders that USCIS begin implementing this process within 60 days.¹⁰³

It instructs that, for persons granted deferred action, USCIS should accept applications for work authorization.¹⁰⁴

Finally, the memo indicates that the directive “confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of existing law. I have done so here.”¹⁰⁵

⁹⁷ Napolitano Memo, *supra* note 14.

⁹⁸ The Department of Homeland Security, created in 2002 in response to the World Trade Center attack, integrates 22 different federal departments and agencies into one unified department, including those functions previously administered by the Immigration and Naturalization Service (“INS”), which are now handled by U.S. Citizen & Immigration Services (“USCIS”), which provides immigration services, Immigration & Customs Enforcement (“ICE”), which enforces the immigration laws internally, and Customs & Border Patrol (“CBP”), which enforces the laws at the border and ports of entry. *See Creation of the Department of Homeland Security*, U.S. DEP’T HOMELAND SEC., <http://www.dhs.gov/creation-department-homeland-security> (last visited Sept. 11, 2013).

⁹⁹ Napolitano Memo, *supra* note 14, at 2.

¹⁰⁰ *Id.* at 1–2.

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 2–3.

¹⁰⁴ *Id.* at 3.

¹⁰⁵ *Id.*

Secretary Napolitano characterized DACA as a general statement of policy and carefully fit it within the existing framework for exercising prosecutorial discretion announced almost exactly one year earlier by ICE Director John Morton.¹⁰⁶ The Morton Memo, also a product of intensive efforts by immigration advocates and scholars,¹⁰⁷ provided “guidance on the exercise of prosecutorial discretion to ensure that the Agency’s immigration enforcement resources were focused on the agency’s enforcement priorities” and set out a non-exhaustive list of 19 factors that ICE officers should consider in determining whether an exercise of prosecutorial discretion was warranted, including but not limited to:

1. The agency’s civil immigration enforcement priorities
2. The person’s length of presence in the United States
3. The circumstances of the person’s arrival and the manner of his or her entry, particularly if he or she came as a young child
4. The person’s pursuit of education in the United States
5. Service in the military
6. The person’s criminal history
7. Whether the person poses a threat to national security or public safety
8. The person’s ties and contributions to the community, including family relations
9. Eligibility for immigration relief
10. Cooperation with law enforcement.¹⁰⁸

While these prosecutorial discretion factors clearly contemplated the plight of the DREAMers, and would have allowed and even encouraged ICE field officers to exercise discretion in individual cases, they did not require them to do so, and thus left open the possibility that many individuals who were low enforcement priorities still faced the threat of apprehension by ICE or state and local officers and placement in removal proceedings. By setting out clear criteria for deferred action for DACA-eligible individuals, DHS cabined the discretion of ICE and its field agents and placed it within the control of USCIS, DHS’s adjudicatory arm.

¹⁰⁶ Morton Memo, *supra* note 42.

¹⁰⁷ See Doris Meissner & Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course*, MIGRATION POL’Y INST., 2009, at 25, http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf; Donald Kerwin, Doris Meissner & Margie McHugh, *Executive Action on Immigration: Six Ways to Make the System Work Better*, MIGRATION POL’Y INST., 14–19 (2011), <http://www.migrationpolicy.org/pubs/administrativefixes.pdf>; Wadhia, *supra* note 26; see also Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 SAN DIEGO L. REV. 819 (2004).

¹⁰⁸ Morton Memo, *supra* note 42, at 4.

B. Challenges to DACA's Constitutionality

A conservative backlash quickly followed. In his dissent in *Arizona*, Justice Antonin Scalia asserted that the new policy would assure immunity from enforcement for thousands of Arizona's 400,000 illegal immigrants.¹⁰⁹ A week later, on July 3, 2012, Lamar Smith, Chair of the House Judiciary Committee, sent a letter to John Morton, the director of ICE, labeling the new policy an "amnesty," "an overreach of executive branch authority," and a "magnet for fraud."¹¹⁰ In August, Kris Kobach filed a complaint against Napolitano and Morton on behalf of several ICE officers claiming that DACA was unconstitutional because it usurped legislative authority and violated the Executive's duty to "take Care that the Laws be faithfully executed," and that it violated administrative law because it had been issued without notice and comment rulemaking in violation of the Administrative Procedures Act.¹¹¹ The ICE plaintiffs, including Chris Crane, the head of ICE's union, claimed that DACA forced them to choose between enforcing an illegal policy or defying orders from their superiors and risking possible job loss.¹¹² The State of Mississippi joined the complaint two months later, arguing that it was injured by the fiscal cost of the "illegal aliens" who were allowed to remain in the State pursuant to the Directive and the Morton Memo.¹¹³ On January 24, 2013, District Court Judge Reed O'Connor, a George W. Bush appointee, granted in part and denied in part Homeland Security's motion to dismiss, finding that Mississippi's asserted fiscal injury was purely speculative¹¹⁴ and dismissing several of the ICE officers' claims on standing grounds.¹¹⁵ It ruled, however, that the ICE plaintiffs had

¹⁰⁹ *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012).

¹¹⁰ Letter from Lamar Smith, *supra* note 18, at 1 (describing new policy as an "amnesty," "an overreach of executive branch authority," and a "magnet for fraud").

¹¹¹ ICE Complaint, *supra* note 20, at 2.

¹¹² *Id.* at 3.

¹¹³ Amended ICE Complaint, *supra* note 21, at 3.

¹¹⁴ *Crane v. Napolitano*, 920 F. Supp. 2d 724, 745–46 (N.D. Tex. 2013) ("Mississippi's asserted fiscal injury is purely speculative because there is no concrete evidence that the costs associated with the presence of illegal aliens in the state of Mississippi have increased or will increase as a result of the Directive or the Morton Memorandum.").

¹¹⁵ It dismissed their claims that they would be forced to violate their oath, *id.* at 736 ("if an alleged violation of one's oath 'is the only consequence that flows from *upholding* a challenged law, a plaintiff cannot establish standing by suggesting that a *refusal* to uphold the law will result in injury"); that that they were burdened by having to comply with the law, *id.* at 738 ("Here, the ICE Agent Plaintiffs do not suffer any financial burden or harm to their personal property interests by complying with the Directive and the Morton Memorandum and deferring action against Directive-eligible aliens. They simply must change the way they conduct their duties while performing their jobs as ICE agents."); and that they were injured by USCIS' power to grant work authorization, *id.* at 742 (finding no standing to challenge USCIS issuance of employment au-

constitutional and prudential standing to move forward with their central argument: that they could be disciplined or fired from their jobs because of their refusal to comply with an illegal and unconstitutional policy.¹¹⁶ On April 23, 2013, the Court found that the ICE plaintiffs were likely to succeed on the merits of their claim that DACA violated various interlocking provisions of INA § 235¹¹⁷ but it requested additional briefing on whether it had jurisdiction in light of the Civil Service Reform Act (“the CSRA”).¹¹⁸ Three months later, it dismissed the suit, finding that the CSRA and the collective bargaining agreement between the ICE union and DHS provided the exclusive means for resolution of their dispute.¹¹⁹ At the same time, it scolded the U.S. government for not properly briefing the issue and for “unreasonably expend[ing] so much of this Court’s time.”¹²⁰ Kris Kobach claimed victory in the face of this defeat, arguing that the District Court’s April 23 ruling that Crane was likely to prevail on the merits would remain as precedent.¹²¹

C. *DACA and Separation of Powers*

DACA and the litigation that has followed raise a number of important constitutional issues regarding the scope of Executive authority. In light of recent concerns raised by both conservatives and liberals that the Obama Administration has, in many cases, exceeded the scope of Executive power, these arguments warrant serious attention.¹²² The often overlapping arguments

thorization where ICE plaintiffs not involved in process and where they failed to articulate how issuance of employment authorization harmed them personally).

¹¹⁶ *Id.* at 740–41 (Where ICE Agent Plaintiffs stated intention to engage in a course of conduct prohibited by rule, Plaintiffs had standing to challenge that rule, even absent a specific threat of enforcement; where “Plaintiffs [were] asserting their own right to be free from adverse employment consequences” and where “alleged injury is sufficiently concrete, . . . the Court is satisfied that . . . Plaintiffs were not asserting generalized policy grievances.”).

¹¹⁷ Memorandum Opinion and Order, *Crane v. Napolitano*, *supra* note 22, at 1. It seemed poised to grant injunctive relief, but deferred ruling until the parties had provided additional briefing on whether the Court lacked jurisdiction on the basis that the suit was barred as a federal employment dispute subject to the remedies provided by the Civil Service Reform Act. *Id.* at 19.

¹¹⁸ *Id.*

¹¹⁹ Order, *Crane v. Napolitano*, No. 3:12-CV-03247-O, at 6 (N.D. Tex. July 31, 2013) (dismissing suit for lack of jurisdiction), *available at* <https://dl.dropboxusercontent.com/u/27924754/Crane75%207-31-13.pdf>.

¹²⁰ *Id.* at 7.

¹²¹ Julia Preston, *Judge Dismisses Suit to End Deportation Deferrals*, N.Y. TIMES, Aug. 1, 2013, at A12.

¹²² See, e.g., Robert Delahunty & John Yoo, *Dream On: The Obama Administration’s Non-Enforcement of Immigration Laws, The Dream Act and the Take Care Clause*, 91 TEX. L. REV. 781, 799 (2013) (challenging DACA as violating the “Take Care Clause” on the basis that “it

surrounding DACA can be classified into at least four familiar types of constitutional claims:

The Youngstown/Curtiss-Wright Dichotomy: whether the Executive's powers in enacting DACA were at their lowest ebb because the Executive was acting contrary to the will of Congress, or instead whether the President was acting pursuant to his inherent powers.

The Non-Delegation Doctrine Resurrection: that the Executive usurped legislative authority by issuing a directive in the absence of "intelligible principles."

The "Take Care" Clause Crisis: that by ordering ICE officers not to place into removal proceedings DACA-eligible individuals, the Executive violated its duty to see that the immigration laws were faithfully executed.

The Notice and Comment Myth: that by issuing a directive with clear eligibility criteria the Administration created a substantive rule requiring notice and comment under the Administrative Procedures Act.

Each of these arguments implicates separation of powers and raises questions regarding the proper role of the Executive in administering the immigration laws. The first three are largely constitutional, while the fourth derives from administrative law.

1. The *Youngstown/Curtiss-Wright* Dichotomy

The first two arguments are closely-related but distinct, but both address the same question of whether the Executive Branch usurped legislative authority in promulgating DACA. Indeed, DACA, in setting forth clear eligibility criteria for relief,¹²³ differed significantly from the Morton Memo, which set forth 19 non-exhaustive factors that an ICE officer *could* consider in deciding whether to exercise discretion.¹²⁴

For anyone versed in *Youngstown Sheet & Tube*,¹²⁵ the famous steel seizure case which dealt more broadly with the question of whether and when

would be implausible and unnatural to read the Clause as creating a power in the President to deviate from strict enforcement of the laws.").

¹²³ Napolitano Memo, *supra* note 14, at 1.

¹²⁴ Morton Memo, *supra* note 42, at 4.

¹²⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 701 (1952) (Vinson, J., dissenting).

the President can exercise inherent power, DACA should raise the question of whether the President's actions were illegal because he was acting contrary to the will of Congress.¹²⁶ In *Youngstown*, the Court ruled that President Harry S. Truman exceeded the scope of his powers when he ordered the seizure of U.S. steel mills during the Korean War in order to avoid a work stoppage that could interfere with the war effort. It found that he was acting neither within the scope of his powers as Commander in Chief¹²⁷ nor his powers as delegated by Congress.¹²⁸ Both the Court's opinion and several of the concurring opinions, including Justice Robert Jackson's famous "zone of twilight" concurrence,¹²⁹ rely on the fact that Congress, during the debate over the Taft-Hartley Act, had considered and rejected an amendment that would have authorized the President to seize the means of production where a labor dispute threatened curtailment or cessation of production in a pivotal industry.¹³⁰ Critics of DACA, including the ICE officers in their complaint,¹³¹ argue that Congress considered and rejected various versions of the DREAM Act, whose eligibility criteria DACA closely mirrors.¹³² Thus, the argument goes, under Jackson's "zone of

¹²⁶ *Id.* at 637–38 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . .”).

¹²⁷ *Id.* at 587 (“Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.”).

¹²⁸ *Id.* at 585–86.

¹²⁹ *Id.* at 634–60. Justice Jackson's famous concurrence posits three distinct scenarios: 1) “When the President acts pursuant to express or implied authorization [from] Congress,” his power is at its greatest; 2) When the President acts in the absence of Congressional authority, there is a “zone of twilight” where he and Congress “may have concurrent authority,” and where Congressional “inertia, indifference or quiescence” may justify independent Executive action; and 3) Where the President acts contrary to the express or implied will of Congress, his power is “at its lowest ebb.” *Id.* at 634–38.

¹³⁰ *Youngstown* consists of Justice Black's opinion of the Court and several concurring opinions, making it difficult to identify exactly where the Court stood on the issue of Executive power. Justice Black's opinion, however, in which Justice Jackson joins, indicates that Executive authority must “stem either from an act of Congress or from the Constitution itself.” *Id.* at 585. The Court indicates that there was no statute authorizing the President to take possession of property nor “any act of Congress to which our attention has been directed from which such a power can fairly be implied.” *Id.* Several Justices point out that Congress rejected an amendment that would have authorized such seizures in cases of emergency. *See id.* at 586 (Black, J.); *id.* at 600–01 (Frankfurter, J., concurring); *id.* at 639 (Jackson, J., concurring). For the floor debate over and vote on Senator Javits's proposed amendment, see 93 CONG. REC. 3637–45 (1947).

¹³¹ ICE Complaint, *supra* note 20, at 17–18.

¹³² *See Delahunty & Yoo, supra* note 122, at 788–89.

twilight,” when the Executive promulgated DACA, it was acting contrary to the will of Congress.¹³³

This analogy, while perhaps superficially appealing, is inapposite. Unlike Taft-Hartley, which was heavily debated before being passed and which accorded significant powers to Congress to resolve labor disputes,¹³⁴ the DREAM Act was never enacted into law. Notwithstanding majority support at several key junctures in both houses, Senate cloture rules requiring a supermajority to break a threatened filibuster repeatedly prevented it from coming to a vote.¹³⁵ By comparison, as Justice Felix Frankfurter points out in his concurrence in *Youngstown*, an amendment providing the President with the authority to seize a pivotal industry threatened with a work stoppage was “voted down after debate, by a vote of more than three to one.”¹³⁶

It is thus not accurate to say that the Executive was acting contrary to the will of Congress when it announced DACA. Rather, the promulgation of DACA in the face of Congressional gridlock arguably falls within Justice Jackson’s twilight zone, which allows the President to act in cases of “congressional inertia, indifference or quiescence,” particularly where Congress and the Executive enjoy concurrent authority.¹³⁷ The line between Congressional opposition or inertia and acquiescence is not always a bright one. Indeed, Justice Fred Vinson suggests in his dissenting opinion that *Youngstown* was more a case of Congressional acquiescence, since the President sent a “[m]essage to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action”¹³⁸ and Congress did not take steps to stop him. In promulgating DACA, the Executive Branch acted in the face of congressional gridlock and inertia. Rather than taking steps to undo Executive action, immediately after the 2012 elections Congress began to discuss the contours of

¹³³ *Id.*

¹³⁴ *Youngstown*, 343 U.S. at 656–60 (Burton, J., concurring).

¹³⁵ OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, *supra* note 67, at 69–71.

¹³⁶ *Youngstown*, 343 U.S. at 600–01 (Frankfurter, J., concurring); *see also* 93 CONG. REC. 3645 (1947).

¹³⁷ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); *see also* Margulies, *supra* note 35, at 15–16 (arguing that while DACA is not justified as falling within the Executive’s prosecutorial discretion, it may be justified under a stewardship paradigm consistent with *Youngstown* that allows the President to act provisionally to preserve Congress’ ability to legislate and to protect “intending Americans” from violations by wayward states).

¹³⁸ *Youngstown*, 343 U.S. at 701 (Vinson, J., dissenting). Professor Margulies’ stewardship model, discussed *supra* text accompanying note 35, seems largely consistent with arguments made by Justice Vinson in his dissent in *Youngstown*, who argued that the President’s actions were justified because he kept Congress fully informed, indicated his intent to abide by any action of Congress, and was merely taking temporary action to preserve the defense programs that Congress had enacted until Congress could act. *Id.* at 703; *see* Margulies, *supra* note 35, at n.66.

comprehensive immigration reform,¹³⁹ which would eventually include a special fast track to provisional status and permanent residency for DACA recipients.¹⁴⁰ In short, the Executive's actions broke the gridlock between the two branches, spurring a new commitment to reform.

Consideration of *Youngstown* also raises the question of whether the President had *inherent* authority to regulate immigration. Unlike regulation of the domestic means of production where the Court in *Youngstown* found that the President's powers must stem "either from an act of Congress or from the Constitution itself,"¹⁴¹ the Court has repeatedly stated that the regulation of immigration implicates the foreign affairs power.¹⁴² In their recent study on *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, Congressional Research Service authors raise the question of whether the President has *extra-constitutional* powers to regulate immigration that go beyond powers specifically delegated because of the implication for foreign affairs.¹⁴³ This would anchor the regulation of immigration firmly within Justice Jackson's twilight zone,¹⁴⁴ with possible overlapping authority of both Congress and the Executive, particularly in light of the fact that there is no specifically-enumerated *immigration* power in the Constitution.¹⁴⁵ Thus, under this ap-

¹³⁹ Preston, *supra* note 75, at A12.

¹⁴⁰ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2102, §§ 2101–2103 (2013) (creating new status of Registered Provisional Immigrants ("RPI") and providing that DACA recipients will be immediately eligible for RPI status pending a background clearance and for adjustment to lawful permanent residency after five years, as compared to ten years for most other applicants); see also Michael D. Shear & Ashley Parker, *Senate Group's Immigration Plan Would Alter Waiting Periods*, NY TIMES, March 17, 2013, at A11 (discussing how most noncitizens qualifying under the Senate proposal would have to wait ten years to obtain lawful permanent residency, but could apply for citizenship three years after that).

¹⁴¹ *Youngstown*, 343 U.S. at 585.

¹⁴² See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Fong Yue Ting v. United States*, 149 U.S. 698, 705–07 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 604–06 (1889).

¹⁴³ See CRS Report, *supra* note 26, at 3–6; see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) ("[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . .").

¹⁴⁴ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁴⁵ See, e.g., *Knauff*, 338 U.S. at 542 ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the Executive power to control the foreign affairs of the nation."). Cf. Margulies, *supra* note 35, at 13 (arguing that while the Constitution does not mention immigration specifically, where it mentions matters related to immigration, it consigns them to Congress).

proach, the President could regulate aspects of immigration, particularly those touching on foreign affairs, even without a specific delegation of authority from Congress, unless Congress acted to limit him. Even then, this would raise the question of the extent to which Congress may limit the Executive's exercise of enforcement discretion when it comes to certain aspects of immigration policy touching directly on foreign affairs.¹⁴⁶

Interestingly, despite precedent decisions and historical practice suggesting the inherent foreign affairs power as a possible source of Executive authority, neither DACA's advocates nor members of the Administration appear to have relied on this type of "inherent authority" argument to justify DACA, perhaps in light of the long line of immigration cases where the Executive used this power arbitrarily and despotically and yet the Court declined to assert its power of judicial review.¹⁴⁷ Moreover, the President's inherent foreign affairs power identified in *United States v. Curtiss-Wright Export Corp.*¹⁴⁸ stands on shaky ground, with legal scholars questioning the underlying premise that this sovereign power over foreign affairs did not depend on its being specifically enumerated in the Constitution but rather passed from the Crown "to the colonies in their collective and corporate capacity as the United States of America."¹⁴⁹ Professor Louis Henkin has pointed to the numerous specific powers with regard to foreign affairs enjoyed by both Congress and the President¹⁵⁰ while other scholars have underscored that before we became one nation, we were a loose confederation, and that independent states had to give up their

¹⁴⁶ One example of this was President Carter's decision in 1980 to parole into the United States over 100,000 Cubans who arrived during the Mariel boatlift. Congress had just passed the Refugee Act of 1980, which set forth procedures and numerical limits for admitting refugees as well as standards for granting asylum. The new law prohibited the Attorney General from paroling a refugee into the United States absent "compelling reasons in the public interest with respect to that particular alien." Despite this prohibition, President Carter paroled large groups of Cubans (as well as many Haitian asylum seekers) into the United States in response to what was arguably an "unforeseen emergency," but using parole as the mechanism seemed contrary to the letter and spirit of the recently-passed Refugee Act. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 884–86 (5th ed. 2009). Many of these individuals would eventually qualify for asylum, others were eligible for residency under the Cuban Adjustment Act, others would require special legislation in order to remain, and still others would be deemed excludable and allowed to remain under Orders of Supervision until they could be returned to Cuba. Still others who were deemed a danger to the community would be subject to indefinite detention. See T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 *GEO. IMMIGR. L.J.* 365, 376–77 (2002).

¹⁴⁷ See, e.g., *Mezei*, 345 U.S. at 215–16; *Knauff*, 338 U.S. at 543; *Fong Yue Ting*, 149 U.S. at 714; *Ekiu*, 142 U.S. at 663–64; *Chae Chan Ping*, 130 U.S. at 602.

¹⁴⁸ 299 U.S. 304 (1936).

¹⁴⁹ *Id.* at 316.

¹⁵⁰ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 22–24 (1972).

sovereignty over foreign affairs as a condition of joining the Union.¹⁵¹ Furthermore, it is noteworthy that the Supreme Court has side-stepped the issue of whether the President has inherent authority over foreign affairs by finding that Congress has authorized or acquiesced in such exercise of Executive authority.¹⁵²

Furthermore, as we will see in Part 3 below, the Executive enjoys constitutionally-based powers to Take Care that the laws are faithfully executed, consistent with his obligations under Article II.¹⁵³ It is quintessentially an Executive function under the Constitution to enforce the laws. Under a Separation of Powers approach, this may serve as an additional limit on both Congress' and the Judiciary's ability to restrict the exercise of enforcement discretion.

2. The Non-Delegation Doctrine Resurrection

A distinct but related argument concerning the usurpation of Congress' lawmaking authority is that, even if Congress delegated broad rule-making authority to the Executive with regard to immigration, it did not provide the Executive with "intelligible principles" for making such rules. Indeed, § 103(a)(3) of the INA gives the Secretary broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as [s]he deems necessary for carrying out [her] authority under the provisions of this Act."¹⁵⁴ If anything pushed the constitutional envelope, it was arguably this provision of the INA. The Court has frequently recited that Congress, in delegating lawmaking authority to the Executive, must provide "intelligible principles" by which the Executive is to exercise its law-making authority.¹⁵⁵ An argument could be made that § 103(a)(3) did not provide the Executive with such principles.

Since the mid-1930s, however, with the Supreme Court's New Deal shift to a more expansive interpretation of Congress' powers, virtually every delegation of lawmaking authority by Congress to the Executive has been upheld, and the non-delegation doctrine has been considered moribund, at best.¹⁵⁶

¹⁵¹ See, e.g., Berger, *supra* note 40, at 26–33; David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467, 479–90 (1946).

¹⁵² See *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring and dissenting) (noting weaknesses in Government's claim of inherent, extra-statutory authority to detain); see also *Dames & Moore v. Regan*, 453 U.S. 654, 661–62 (1981) (long continued Executive practice of settling claims by Executive agreement, acquiesced in by Congress, raises presumption that actions taken pursuant to Congress' consent).

¹⁵³ CRS Report, *supra* note 26, at 16.

¹⁵⁴ INA § 103(a)(3), 8 U.S.C. § 1103(a)(3) (2012).

¹⁵⁵ See, e.g., *Whitman v. Am. Trucking Ass'n., Inc.*, 531 U.S. 457 (2001).

¹⁵⁶ CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 335 (4th ed. 2011).

Indeed, in *Whitman v. American Trucking Ass'n.*,¹⁵⁷ the Court reaffirmed the intelligible principle rule while at the same time upholding a delegation of legislative power to the Environmental Protection Agency and giving numerous examples of cases where it had found an intelligible principle to exist. "In short," the Court concluded, "We have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"¹⁵⁸ While there has been scholarship over the years calling for a revival of the non-delegation doctrine,¹⁵⁹ it seems unlikely that the Court would do so in an immigration matter, where Congress, since the late nineteenth century, has exercised plenary authority to regulate immigrants and to delegate power, as it sees fit, to the Executive, with only limited judicial review.¹⁶⁰ Moreover, the argument laid out earlier that the President also has inherent authority rooted in his foreign affairs power is relevant here as well.¹⁶¹ DACA's critics, in arguing that the Executive has usurped Congress' lawmaking role, have not only attempted to breathe new life into outmoded constitutional arguments rejected by the Court since the mid-1930s, but they have also given, at best, limited weight to a long line of immigration law cases recognizing the special role of both political branches in making and enforcing the immigration laws.¹⁶²

¹⁵⁷ 531 U.S. 457 (2001).

¹⁵⁸ *Whitman*, 531 U.S. at 474–75 (quoting with approval *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

¹⁵⁹ THEODORE J. LOWI, *THE END OF LIBERALISM* 297–98 (1969) (early proposal that courts revive the nondelegation doctrine to make Congress accountable for major decisions); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 195–97 (1993); Peter Aranson, Ernest Gellhorn & Glen Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63–67 (1982) (calling for a renewed application of the non-delegation doctrine); David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL'Y 31 (2013) (calling for revival of robust form of the nondelegation doctrine within administrative law); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Non-delegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236 (2005) (arguing that the traditional non-delegation doctrine, while almost never applied properly by government actors, reflects a real principle embedded in the Constitution).

¹⁶⁰ See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Fong Yue Ting v. United States*, 149 U.S. 698, 705–07 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 604–06 (1889).

¹⁶¹ For an excellent discussion of the extent to which both Congress and the President enjoy broad authority to regulate immigration, see Cox & Rodríguez, *supra* note 31, at 465 *et seq.*

¹⁶² For a thorough exploration of the merits of a more formalist approach to Executive powers in the context of immigration enforcement and of the relationship between separation of powers and federal preemption, see Rubenstein, *supra* note 35, at 107 (arguing that if the Executive's exercise of enforcement discretion crosses into lawmaking, then it is void under separation-of-powers principles, and thus cannot qualify for preemption, but that if the Executive's exercise of

3. The “Take Care” Clause Crisis

DACA critics also argue that the Executive is violating his constitutional duty to “take Care that the laws be faithfully executed”¹⁶³ by ordering ICE officers, pursuant to this directive, not to detain or place into removal proceedings certain otherwise removable individuals who appear to be DACA-eligible.¹⁶⁴ According to this argument, an officer who feels bound by his duty to follow the law faces discipline, suspension, and possible job loss if he or she refuses to follow the Napolitano directive.¹⁶⁵ This position has been taken by John Yoo and Robert Delahunty, who argue in their piece in the *Texas Law Review* that “it would be implausible and unnatural to read the Clause as creating a power in the President to deviate from strict enforcement of the laws.”¹⁶⁶ Indeed, we see this approach in Justice Hugo Black’s opinion of the Court in *Youngstown*, which takes a more formalistic view of Executive power, finding that “[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”¹⁶⁷ In an arguable parallel to DACA, Justice Black wrote that President Truman’s order “does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.”¹⁶⁸ In the immigration context, these arguments ignore the central role of the Executive in setting immigration enforcement priorities, the use of various forms of prosecutorial discretion in immigration matters for at least half-a-century,¹⁶⁹ as well as the Supreme Court’s affirmation of the role of discretion in *United States v. Arizona*.¹⁷⁰ Similarly, in the area of criminal law, the exercise of prosecutorial discretion under the “Take Care” clause has been recognized by the Court as quintessentially an Executive function under the Constitution.¹⁷¹ Notwithstanding the growth of the Administra-

prosecutorial discretion is not lawmaking, then it has no preemptive effect under the Supremacy Clause). *But see* Cox & Rodríguez, *supra* note 31, at 474 n.46 (suggesting that the language in the line of cases asserting Congress’ plenary authority over immigration was motivated in part by a desire to enforce a more viable theory of the now outmoded nondelegation doctrine).

¹⁶³ U.S. CONST. art. II, § 3.

¹⁶⁴ *See* ICE Complaint, *supra* note 20, at 19.

¹⁶⁵ *See id.* at 10–12.

¹⁶⁶ Delahunty & Yoo, *supra* note 122, at 799.

¹⁶⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

¹⁶⁸ *Id.* at 588.

¹⁶⁹ *See* Law Professors’ Letter, *supra* note 45, at 2–3.

¹⁷⁰ *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

¹⁷¹ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“The Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge

tive State, the other two branches of the federal government are limited in their ability to check the Executive in exercising prosecutorial discretion in carrying out its constitutional role.¹⁷²

More specifically, as David Martin points out in an online piece in the *Yale Law Journal*, this argument that DACA is unconstitutional because the President cannot deviate from strict enforcement of the laws also shows a remarkable (and almost disingenuous) lack of understanding regarding the history and meaning of the three supposedly interlocking provisions upon which the ICE Plaintiffs rely in their lawsuit.¹⁷³ The ICE Plaintiffs come up with what David Martin describes as a “syllogistically neat statutory theory” that is “deeply flawed.”¹⁷⁴ They rely on three provisions of § 235 of the INA which deal with the inspection of applicants for admission. One of the provisions, INA § 235(a)(1), is a relatively new addition to the INA, part of a major overhaul of the immigration laws in 1996. David Martin was General Counsel of the INS at the time, on leave from the University of Virginia Law School, and was pivotal in redrawing the line between the grounds of excludability and grounds of deportability at “admission” rather than at “entry.”¹⁷⁵ This resulted in noncitizens who entered without inspection (“EWIs”) being treated upon apprehension as applicants for admission with fewer procedural protections. Thus, § 235(a)(1) provides that “an alien present in the United States who has not been admitted . . . shall be deemed . . . an applicant for admission.”¹⁷⁶

Versions of the other two provisions have been part of the INA at least since its adoption in 1952.¹⁷⁷ They deal with the procedures by which applicants for admission are inspected and admitted by an “examining immigration

his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’ As a result, ‘[t]he presumption of regularity supports’ their prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’” (citations omitted).

¹⁷² See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (overturning use of legislative veto as check on enforcement discretion in immigration matters because it violated bicameralism and presentment). But see Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. (forthcoming 2014) (arguing that the President’s refusal to enforce duly-enacted statutes—what they term “Presidential inaction”—will often dictate national policy, yet receive virtually none of the checks and balances that apply to Presidential action).

¹⁷³ David Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L. J. ONLINE 167, 169 (Dec. 2012), available at <http://www.yalelawjournal.org/images/pdfs/1119.pdf>.

¹⁷⁴ *Id.*

¹⁷⁵ The proposal to draw the line at admission was originally advanced in T. ALEXANDER ALENIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POL’Y* 342–47 (1st ed. 1985).

¹⁷⁶ INA § 235(a)(1), 8 U.S.C. §1225(a)(1) (2012) (emphasis added).

¹⁷⁷ Martin, *supra* note 173, at 177.

officer” and detained and placed into proceedings if they are not “clearly and beyond a doubt entitled to be admitted.”¹⁷⁸ Traditionally, these provisions were applied to “arriving aliens” stopped at a port of entry or otherwise detained while attempting to make an illegal entry.¹⁷⁹ Section 235(a)(3) provides that “[a]ll aliens . . . who are applicants for admission or otherwise seeking admission or readmission . . . shall be inspected by immigration officers.”¹⁸⁰ Section 235(b)(2)(A) provides that “in the case of an alien who is an applicant for admission, if the *examining immigration officer* determines that an alien *seeking admission* is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under section 240.”¹⁸¹ The ICE officers challenging DACA read these three provisions together as mandating that ICE must detain and place into removal proceedings any apprehended noncitizens who entered without inspection because they are deemed to be applicants for admission who are not clearly and beyond a doubt entitled to be admitted.¹⁸² In his April decision in *Crane v. Napolitano*, District Court Judge Reed O’Connor was persuaded by the ICE plaintiffs’ argument based on his own textualist analysis of the various provisions in INA § 235 but gave virtually no attention to the legislative history or the context in which the 1996 changes were adopted.¹⁸³ In a footnote, he criticized the Government for its “cursory analysis of the issue” and found that it had not “sufficiently presented the statutory construction issue to the Court for determination.”¹⁸⁴

Martin’s article, which was not referenced in the Court’s decision, explained in some depth why this interpretation of INA § 235 was not consistent with Congress’ intent and would lead to absurd results if implemented. The language *deeming* aliens who had not been inspected and admitted to be “applicants for admission” was included to avoid situations where an EWI might claim during removal proceedings that he was not applying for admission and thus not removable. Martin indicates that this provision was designed to increase enforcement discretion with regard to whether to place EWIs into removal proceedings, not to cabin it.¹⁸⁵ Moreover, strict application of the rule would lead to absurd results where officers, in order to pick up every EWI they

¹⁷⁸ INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A) (2012).

¹⁷⁹ Martin, *supra* note 173, at 179–80.

¹⁸⁰ INA § 235(a)(3), 8 U.S.C. § 1225(a)(3) (2012).

¹⁸¹ INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A) (2012) (emphasis added).

¹⁸² ICE Complaint, *supra* note 20, at 9.

¹⁸³ Memorandum Opinion and Order, *Crane v. Napolitano*, *supra* note 22, at 11–19. The Court deferred ruling on the ICE Plaintiffs’ Application for Preliminary Injunction until the parties had provided the Court with additional briefing regarding the effect of a Collective Bargaining Agreement and the Civil Service Reform Act on the Court’s jurisdiction. *Id.* at 37.

¹⁸⁴ *Id.* at 7 n.8.

¹⁸⁵ Martin, *supra* note 173, at 177.

encountered, would have to ignore federal enforcement priorities and directives from their superiors.¹⁸⁶ Martin emphasizes that it is the agency, not each individual enforcement officer, who must make decisions about resource allocation and broader policy concerns.¹⁸⁷

This analysis is also consistent with the Court's approach to selective prosecution claims, both in the criminal and agency context. The Court has said that it is the "special province" of the Executive to "take Care that the Laws be faithfully executed" and that such claims challenging prosecutorial discretion are generally unsuitable for judicial review.¹⁸⁸ In the agency context, the Court has found that agencies are "better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."¹⁸⁹

Indeed, where a statute is ambiguous on its face, *Chevron, USA v. Natural Resources Defense Council*¹⁹⁰ requires that an agency's interpretation of that statute be entitled to deference. The relationship among the various provisions of INA § 235 is, at a minimum, ambiguous. The requirement that an "alien seeking admission [who] is not clearly and beyond a doubt entitled to be admitted . . . shall be detained"¹⁹¹ arguably only applies to so called "arriving aliens" attempting an entry, and not to EWIs, who are only "deemed to be" applicants for admission. The language in INA § 235(b)(2)(A) refers to the role of the "examining immigration officer" in determining whether "an alien seeking admission" is entitled to be admitted. This language has repeatedly been used in the regulations to reference the "examining immigration officer" at a port of entry, not ICE agents in the field.¹⁹² Furthermore, the regulations implementing this provision apply the mandatory detention provision only to arriving aliens, not to noncitizens who previously entered without inspection and admission.¹⁹³ The district court's entire analysis as to why DACA is beyond the scope of Executive power hinges, despite this ambiguity, on its conclusion that the inter-

¹⁸⁶ See *id.* at 183–84.

¹⁸⁷ *Id.* at 183.

¹⁸⁸ *Armstrong*, 517 U.S. at 464 .

¹⁸⁹ *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

¹⁹⁰ 467 U.S. 837, 844 (1984).

¹⁹¹ INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A) (2012) (emphasis added); see also CRS Report, *supra* note 26, at 22.

¹⁹² See, e.g., 8 C.F.R. § 235.1(b) (providing rules for inspection of arriving aliens at ports of entry by examining immigration officers as well as at other entry points); 8 C.F.R. § 235.2(b) (providing that examining immigration officer may defer further examination where an alien seeking admission may be eligible for parole); 8 C.F.R. § 235.3(b)(2) (setting forth role of examining immigration officer in processing applicants for admission subject to expedited removal).

¹⁹³ See 8 C.F.R. § 235.3(c) ("[A]ny arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the Act.").

locking provisions of INA § 235 must be read together to eliminate prosecutorial discretion when it comes to the detention of EWIs and their placement into proceedings.

This interpretation is not only contrary to the structure and purpose of the 1996 immigration reforms, but also to the U.S. Supreme Court's decision less than a year earlier in *Arizona v. United States*.¹⁹⁴ The Supreme Court, in upholding § 2B while striking down the other provisions, reaffirmed the central role of the federal government in setting enforcement priorities. It is worth repeating the quote from the beginning of this piece:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.¹⁹⁵

This language, read in the context of the Court's decision on S.B. 1070, suggests that discretion is not just a power for the immigration judge to exercise in deciding whether an immigrant in removal proceedings is eligible for discretionary relief. Rather, as INS Commissioner Doris Meissner recognized over ten years ago in issuing guidelines for the exercise of prosecutorial discretion,¹⁹⁶ it is a function to be exercised from the very beginning in deciding whether to place a noncitizen into proceedings.¹⁹⁷ It does not just involve application of the law to the equities in a formal adjudication. It involves policy judgments about who to detain and who to remove.¹⁹⁸ If executive officers like

¹⁹⁴ 132 S. Ct. 2492 (2012).

¹⁹⁵ *Id.* at 2499.

¹⁹⁶ See, e.g., Memorandum from Doris Meissner, Comm'r of Immigration and Naturalization Serv., on Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter Meissner Memo], available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view>.

¹⁹⁷ See *id.* at 3, 5.

¹⁹⁸ Since the 1996 reforms and since the Meissner Memo laid out criteria for the exercise of prosecutorial discretion, Congress, despite legislating in other areas of immigration law, has not overturned the Executive's exercise of enforcement discretion with regard to EWIs, thus putting a legislative gloss on whether the mandatory detention rules in INA § 235(b)(2)(A) for persons

John Morton and Janet Napolitano can make these policy choices, they must have the power to be able to instruct their officers in the field to enforce these priorities and to discipline them if they disobey orders. The ICE Plaintiffs have argued, incredibly, that they can disregard the orders of their superiors and take the law, as they interpret it, into their own hands.¹⁹⁹

4. The Notice and Comment Myth

The ICE Complaint claims that the DACA directive violates the Administrative Procedures Act (“APA”) through conferral of a benefit without proper notice and comment.²⁰⁰ The basic argument seems to be that DACA sets forth clear eligibility criteria and confers a benefit (in the form of deferred action and work authorization) on those who meet the criteria. In so doing, it is “quintessentially a ‘rule’ under the Administrative Procedures Act.”²⁰¹ The Secretary, the argument goes, has not issued a notice of proposed rulemaking or promulgated a final rule. Thus, the directive is not a rule under the APA.²⁰²

In the same short paragraph, the ICE Plaintiffs argue both that DACA is “quintessentially a ‘rule’” under the APA, and at the same time that the “[d]irective is not a rule.”²⁰³ It is unclear whether this confusing paragraph is the result of poor draftsmanship, disingenuousness about the rulemaking process, or an inadequate understanding of administrative law and the role of legislative and nonlegislative rules. Although the use of policy memoranda and guidelines by legacy INS and by USCIS and ICE has been the subject of frequent criticism as evading notice and comment procedures under the Administrative Procedures Act,²⁰⁴ it has been in use for years. It arguably falls within

“seeking admission” were intended to apply to EWIs once they were “deemed . . . applicants for admission” under INA § 235(a)(1). *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 661–62 (1981) (long continued Executive practice, acquiesced in by Congress, raises presumption that actions taken pursuant to Congress’ consent).

¹⁹⁹ *But see Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564 (5th Cir. 2008) (Louisiana Commissioner lacked standing to challenge constitutionality of state law which he alleged violated Constitution); *Finch v. Miss. State Med. Ass’n, Inc.*, 585 F.2d 765, 775 (5th Cir. 1978) (Mississippi governor lacked standing to challenge state law whose enforcement, he believed, would cause him to violate his oath).

²⁰⁰ ICE Complaint, *supra* note 20, at 19.

²⁰¹ *Id.* at 20.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See Questions and Answers: USCIS American Immigration Lawyers Association (AILA) Meeting, March 19, 2009*, U.S. DEP’T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGR. SERV. 2–3 (March 19, 2009), available at http://www.uscis.gov/files/nativedocuments/aila_aao_qa_19march09.pdf.

the “general statement of policy” exception to rule-making under the APA²⁰⁵ and more specifically, the Secretary of Homeland Security’s powers under § 103(a)(3) to “establish such regulations; . . . *issue such instructions; and perform such other acts* as [s]he deems necessary for carrying out [her] authority under the provisions of this Act.”²⁰⁶

DACA no doubt created a new rule for conferring deferred action on certain childhood arrivals otherwise subject to removal, but that begs the question of whether it amounted to a legislative rule with binding effect requiring notice and comment rulemaking, or simply guidance to immigration officers in exercising their prosecutorial discretion in enforcing the immigration laws. In applying the general statement of policy exception, the D.C. Circuit, whose test has been the most generally followed, has looked to whether the rule is legally binding or leaves the agency free to exercise its discretion, how the Agency has characterized the rule, the language used in the rule itself, and whether the rule has been published in the Federal Register or Code of Federal Regulations.²⁰⁷

The Napolitano Memo emphasizes that the criteria for relief must be satisfied “before an individual is considered for an exercise of prosecutorial discretion”²⁰⁸ The last paragraph of the Directive emphasizes that it “confers no substantive right, immigration status or pathway to citizenship.”²⁰⁹ Subsequently, in notices published on the Department of Homeland Security website, the agency has emphasized that DACA recipients do not enjoy “lawful immigration status,” but at the same time, will not be treated as “unlawfully present.”²¹⁰ Including this language does not, of course, definitively resolve the question of whether DACA violated the APA. Courts, in considering this issue, may look at the extent to which the new guidance was mandatory for field of-

²⁰⁵ See 5 U.S.C. § 553(b)(3)(A). In *Am. Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980), the D.C. Circuit cites to the Attorney General’s Manual on the Administrative Procedure Act (1947), which defines “general statements of policy” under the APA as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Id.*

²⁰⁶ INA § 103(a)(3), 8 U.S.C. § 1103(a)(3) (2012) (emphasis added).

²⁰⁷ See William Funk, *When is a “Rule” a Regulation? Marking a Clear Line Between Non-Legislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 662–63 (2002).

²⁰⁸ Napolitano Memo, *supra* note 14, at 1.

²⁰⁹ *Id.* at 3.

²¹⁰ *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 18, 2013) [hereinafter *DACA FAQs*], <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD> (“although deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time”).

ficers²¹¹ and at how many individuals who otherwise met the criteria were not granted deferred action, to see whether DHS intended the memo to be binding on its officers.²¹² On the other hand, DHS may still be able to argue that, even if binding on its field agents, this involves prosecutorial discretion rather than the creation of a formal legal status, thus falling within the “general statement of policy” exception.

In earlier sections, I have underscored the reluctance of advocates and policymakers to rely on an inherent foreign affairs powers argument in justifying DACA.²¹³ Nonetheless, this type of argument may be particularly useful as a defense to the notice and comment claim. The APA contains an explicit exception to notice and comment rulemaking where it involves “a military or foreign affairs function of the United States.”²¹⁴ Announcing DACA without notice and comment is arguably consistent with the broader authority the Executive has enjoyed in issuing immigration rules in light of their implications for foreign affairs. While some have argued against applying the foreign affairs exception loosely in the immigration context, particularly where there is no obvious link to foreign affairs,²¹⁵ it has frequently been invoked in rulemaking.²¹⁶ In light of the Supreme Court’s decision in *Arizona* underscoring the impact of immigration regulation on foreign affairs, if it can be shown that DACA had major foreign policy implications that were considered in drafting the rule, it may also fit within the foreign affairs exception.

²¹¹ The Directive, as applied to ICE officers who encounter DACA-eligible individuals in the field or in the context of removal proceedings, is quite specific with regard to what they are instructed to do. *Id.* at 2.

²¹² *Am. Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980) (so-called policy statement that in purpose or effect narrowly limits administrative discretion will be taken for a binding rule of substantive law).

²¹³ See *supra* note 147 and accompanying text.

²¹⁴ 5 U.S.C. § 553(a)(1) (2012).

²¹⁵ See Rubenstein, *supra* note 35, at 164; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 60–61 (2012) (arguing that deferred action should be subject to notice and comment rulemaking).

²¹⁶ See, e.g., Final Rule, Designation of Taiwan for the Visa Waiver Program, 77 Fed. Reg. 64409, 64410 (Oct. 22, 2012) (“DHS is of the opinion that this final rule is also excluded from the rulemaking provisions of 5 U.S.C. § 553 as a foreign affairs function of the United States, because it advances the President’s foreign policy goals”); Final Rule, Visas: Issuance of Full Validity L Visas to Qualified Applicants, 77 Fed. Reg. 8119 (Feb. 14, 2012) (invoking foreign affairs exception to notice and comment rule-making); Final Rule, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 76 Fed. Reg. 23477 (April 27, 2011) (invoking foreign affairs exception). *But see* Final Rule, Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536 (Jan. 3, 2013) (rulemaking subject to Notice & Comment).

D. *DACA and Congressional Limits*

While the U.S. Senate was busy preparing to debate comprehensive immigration reform on the Senate floor, on June 6, 2013, the U.S. House of Representatives passed an amendment to H.R. 2217, the Department of Homeland Security Appropriations Act of 2014, by a vote of 224 to 201 to prevent any government funds from being used to implement DACA or the Morton Memo.²¹⁷ It later passed H.R. 2217 by a vote of 245-182.²¹⁸ In supporting the amendment, Rep. Steve King (R-IA) made a telling comment: “We initiated this litigation. We’re moving it through the court system. But we can never catch up through the litigation process the things that the President has usurped that are the legislative authority that we have.”²¹⁹

An interesting question arises as to whether this was an example of Congress asserting a legitimate check on Executive power, or whether this amendment was part of a broader legal strategy. Rep. King’s use of “we” suggests the latter. Indeed, the *Crane* lawsuit, efforts in Congress to defund DACA, and, as seen below, states’ denial of driver’s licenses to DACA recipients, might all be best understood as part of a multi-pronged strategy to thwart the Administration’s use of prosecutorial discretion as an enforcement tool.²²⁰

III. A SOLUTION TO THE FEDERALISM CRISIS?
ARIZONA AND THE DREAMERS

A. *Arizona v. United States: Textbook Preemption*

In *Arizona v. United States*, a clear majority of the Court applied textbook preemption principles to strike down three of the four provisions of S.B. 1070 and to raise serious concerns regarding the fourth. The decision invoked both field and obstacle preemption principles in striking down §§ 3, 5(C) and 6.²²¹ Reaffirming *Hines v. Davidowitz*,²²² the classic 1941 decision overturning Pennsylvania’s alien registration law, it found that § 3 of S.B. 1070, which made it a state misdemeanor for a noncitizen to fail to register under federal immigration law, was *field* preempted, because Congress had adopted a “single integrated and all embracing system” that precluded the states from “comple-

²¹⁷ See 159 CONG. REC. H3325 (2013) (vote to defund DACA and Morton Memo).

²¹⁸ See H.R. 2217, 113th Cong. (as passed by House of Representatives, June 6, 2013).

²¹⁹ 159 CONG. REC. H3210 (daily ed. June 5, 2013) (statement of Rep. King) (emphasis added); see also *id.* at H3208–3212, 3222, 3225 (amendment, debate and vote to defund DACA).

²²⁰ Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES, Nov. 13, 2011, at A16 (discussing ICE officer obstruction to implementation of Morton memo).

²²¹ See generally *Arizona v. United States*, 132 S. Ct. 2492 (2012).

²²² 131 S. Ct. 1968 (2011).

ment[ing] federal law or enforc[ing] additional or auxiliary regulations.”²²³ The majority raised concerns that if Arizona’s provision were upheld, then “every state could give itself independent authority to prosecute federal registration violations”²²⁴

In striking down on *obstacle* preemption grounds § 5(C), the provision making it a crime for a noncitizen to solicit, apply for or work without authorization, the Court examined the text, structure and legislative history of the 1986 Immigration Reform and Control Act (“IRCA”) in determining Congressional purpose, thus backtracking somewhat from *Chamber of Commerce v. Whiting*,²²⁵ where it expressed skepticism about using legislative history to interpret the meaning of the express preemption provision.²²⁶ In *Arizona*, it found that in passing IRCA, Congress made a “deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment,”²²⁷ and that a state law criminalizing the workers themselves was an obstacle to the regulatory regime Congress had chosen.²²⁸

Similarly, in striking down on obstacle preemption grounds § 6, the provision allowing for warrantless arrests of noncitizens who commit removable offenses, it found that Arizona had attempted to give its own officers greater authority to enforce the immigration laws than Congress had given to trained federal immigration officers.²²⁹ Federal law creates limited situations where state and local authorities can enforce federal immigration laws, such as pursuant to § 287(g) agreements that provide for the certification and adequate training of state officers.²³⁰ By authorizing state officers to decide whether a noncitizen should be detained for being removable, Arizona violated the principle that such enforcement decisions should be left up to the federal government.²³¹

²²³ *Id.* at 2495 (quoting Hines, 312 U.S. at 66–67, 74).

²²⁴ *Id.* at 2502.

²²⁵ 131 S. Ct. 1968 (2011).

²²⁶ *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 1283 n.4 (2002)). The Court in *Whiting* described the House Report as “a rather slender reed” from “one House of a politically divided Congress.” *Whiting*, 131 S. Ct. at 1980. Justice Roberts, writing for the majority, upheld the challenged provisions of the Legal Arizona Workers Act, concluding that Arizona’s licensing scheme was *not* preempted by federal law since Arizona had taken the route least “likely to cause tension with federal law” by relying on federal standards in targeting employers who employ unauthorized workers. *Id.* at 1987.

²²⁷ *Arizona*, 132 S. Ct. at 2504.

²²⁸ *Id.* at 2505.

²²⁹ *Id.*

²³⁰ INA § 287(g), 8 U.S.C. § 1357(g) (2012).

²³¹ *Arizona*, 132 S. Ct. at 2506.

Finally, while the Court found that § 2(B), the “show me your papers” provision, was not unconstitutional on its face, it left open the possibility that it could be challenged as applied, particularly in situations involving racial profiling and violations of the Fourth Amendment’s prohibition on unreasonable searches and seizures.²³² Section 2(B) requires that state officers make a “reasonable attempt” to determine the immigration status of anyone they stop, detain or arrest where reasonable suspicion exists that the person is unlawfully present.²³³ The Court interpreted this provision narrowly to only apply where state authorities detain an individual pursuant to an otherwise legitimate stop or arrest.²³⁴ It indicated that it would raise constitutional difficulties if § 2(B) were utilized to detain individuals solely for an immigration violation or for purposes of verifying their immigration status, or if an otherwise lawful detention for a traffic violation, for example, were prolonged beyond the time required to conduct a lawful stop.²³⁵ At some point, the Court indicated, a reasonable stop could turn into an unlawful seizure triggering greater Fourth Amendment protections.²³⁶ Although the Court suggested that law enforcement could take an individual into custody if there were independent criminal grounds for doing so, it said that it would “disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.”²³⁷

Perhaps most significantly for future cases, despite Arizona’s arguments that the challenged provisions were not preempted because they mirrored federal immigration law, the majority appears to have rejected this theory as well as the notion that Arizona was simply cooperating in enforcement. In striking down § 6, the Court wrote:

There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state of-

²³² *See id.* at 2509.

²³³ 2010 Ariz. Legis. Serv. ch. 113 § 2(B) (West) (S.B. 1070).

²³⁴ *Id.*

²³⁵ *Id.* at 2509.

²³⁶ *Id.* at 2516 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

²³⁷ *Id.* at 2497. It is worth noting here that the Ninth Circuit struck down all four provisions, with the three-person panel unanimously overturning the provisions making it a state crime to fail to “complete or carry” a federal alien registration document or to seek or engage in unauthorized employment. *United States v. Arizona*, 641 F.3d 339, 354–57 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (Dec. 12, 2011). Judge Bea would also have upheld §§ 2(B) and 6. *Id.* at 369–91. His position on §§ 2(B) and 6 thus coincided with Justice Alito’s position on these provisions. *Arizona*, 132 S. Ct. at 2524–25 (Alito, J., concurring and dissenting).

ficers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.²³⁸

The majority's deference in *Arizona* to Congress and the Executive with regard to immigration enforcement and its articulation of the serious foreign policy consequences of patchwork state and local immigration laws contrasted with the Court's posture during oral argument in April, when Solicitor General Donald Verilli, Jr. was peppered with questions regarding the federal government's failure to enforce the immigration laws:

Scalia, J.: "[T]he [federal] Government can set forth the rules concerning who belongs in this country. But if, in fact, somebody who does not belong in this country is in Arizona, Arizona has—has no power? What—what does sovereignty mean if it does not include the ability to defend your borders?"

Roberts, C.J.: "And what the state is saying, here are people who are here in violation of Federal law, you make the decision. And if your decision is you don't want to prosecute those people, fine, that's entirely up to you. That's why I don't see the problem with section 2(B)."

Sotomayor, J.: "[W]e're going to stay just in 2(B), if the [federal] government says, we don't want to detain the person, they have to be released for being simply an illegal alien, what's wrong with that?"

Alito, J.: "How can a state officer who stops somebody or who arrests somebody for a nonimmigration offense tell whether that person falls within the Federal removal priorities without making an inquiry to the Federal government?"²³⁹

In response, during oral argument, Solicitor General Verilli identified three different groups who were subject to state immigration regulations: 1) those within the federal government's enforcement priorities, such as immigrants with serious criminal convictions or persons previously deported; 2) those in some sort of twilight or quasi-legal status, like applicants for asylum, U visas or adjustment of status; and 3) those without legal status, including illegal entrants not within the federal government's enforcement priorities who

²³⁸ *Arizona*, 132 S. Ct. at 2507.

²³⁹ See Transcript of Oral Argument at 35, 41, 45–46, 52–53, *Arizona*, 132 S. Ct. 2492 (No. 11-182), available at www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf.

might eventually benefit from some sort of legalization program.²⁴⁰ According to Solicitor General Verilli, the challenged sections of Arizona's S.B. 1070 interfered with federal enforcement priorities regarding the last two categories.

While Arizona argued that it was merely cooperating in enforcing federal immigration law, the Court focused on the statement of purpose in S.B. 1070's preamble, which was to adopt a policy of "attrition through enforcement" by discouraging and deterring the 1) unlawful entry; 2) unlawful presence; and 3) economic activity of undocumented immigrants.²⁴¹ The Court ultimately concluded that Arizona was not just cooperating in enforcement, but was essentially enforcing its own immigration policy. Even Justice Samuel Alito, while embracing the warrantless arrest provision in § 6 of S.B. 1070, conceded that if the state persists in detaining an individual that the federal government has communicated is not within its enforcement priorities, this would not be cooperative enforcement.

In evaluating S.B. 1070, it is useful to break down its purposes into these three distinct goals and identify the means chosen for achieving these goals. This can be represented by the following chart. The boxes with an "X" indicate those situations where the means chosen appear rationally related to achieving the particular state goal. Thus, § 2(B)'s "show me your papers" provision was targeted at identifying not just persons unlawfully present, but also illegal entrants and persons working without authorization. It was intended to work hand-in-hand with the other provisions by giving state and local officers the authority to arrest and detain noncitizens for having committed a range of immigration violations.

²⁴⁰ *Id.* at 68–69. *But see* Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIG. POL'Y CTR., 3–4 (July 20, 2011), <http://www.ilw.com/articles/2011,0805-wadhia.pdf> (indicating that June 2010 ICE Memo includes recent illegal entrants as an enforcement priority).

²⁴¹ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

| Ends | Means Chosen | | | |
|---|---|--|---|--|
| “Attrition Through Enforcement” Discourage & Deter: | §2(B) – If lawful stop/arrest + R/S unlawfully present, make reasonable attempt to verify status; if arrested, verify status before release | §3 – misdemeanor to fail to “complete or carry an alien registration document” in violation of federal law | §5(C) – misdemeanor for unauthorized alien to seek or engage in work in State | §6 – allows for warrantless arrests if P/C to believe person has committed any public offense that makes him removable |
| Unlawful entry | x | | | x |
| Unlawful presence | x | x | x | |
| Economic activity | x | | x | x |

The majority resolved the question of what power the state has to “cooperate” with federal immigration authorities by upholding §2(B) on its face while striking down §§ 3, 5(C), and 6. It concluded that states can require law enforcement officers to attempt to verify a person’s immigration status pursuant to an otherwise lawful stop and to *communicate* that information to federal authorities,²⁴² but that they should stay out of the business of arresting noncitizens for immigration violations, absent specific authorization from federal authorities.²⁴³ The Court’s decision, while leaving § 2(B) intact, weakened its impact. By striking down §§ 3, 5(C), and 6, the Court limited states’ ability to turn certain federal offenses into state crimes or to arrest an individual for civil violations of federal immigration law. If the State could not make it a crime for a noncitizen to work without authorization or fail to carry immigration documents, it would lose its basis for taking the noncitizen into custody pursuant to an otherwise lawful stop. Reasonable suspicion would justify checking immigration status, but not prolonging the detention or making an arrest.²⁴⁴ Similarly, without § 6, state law enforcement authorities could not make an arrest based solely on the immigration violation.²⁴⁵

²⁴² *Arizona*, 132 S. Ct. at 2508; *see also* 8 U.S.C. § 1357(g)(10)(A) (2012).

²⁴³ *Arizona*, 132 S. Ct. at 2507.

²⁴⁴ *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

²⁴⁵ While “illegal entry” is a crime under federal immigration law, “unlawful presence” and working without authorization are not. Thus, the arrest powers under § 6, even if they had been upheld, could not have been used to further Arizona’s last two goals, and would have put un-

The Court did not find it necessary to address whether “illegal entry,” a federal crime, could be made a state crime, thus, justifying a noncitizen’s arrest where probable cause could be established during the initial stop.²⁴⁶ Under § 2(B), this would provide a basis to continue to detain the noncitizen until his or her immigration status had cleared. The Court did suggest, however, that making an arrest based solely on an immigration violation would raise serious constitutional concerns.²⁴⁷ Without the power to charge undocumented immigrants with state immigration offenses or to arrest them for violations of federal immigration law, state officials are limited to stopping and arresting immigrants only if they have an independent basis under state law for doing so.

Ultimately, by acknowledging the central role of the federal government in immigration enforcement while upholding § 2(B), the Court sent mixed signals to the states. While the Court validated prosecutorial discretion and federal enforcement priorities, these “show me your papers” laws preserve a role, as Professor Motomura has pointed out, for state and local officers (as well as rogue ICE agents) to define the parameters of immigration enforcement.²⁴⁸ Justice Alito, in his concurring and dissenting opinion, in an apparent allusion to Professor Motomura’s work, disagreed, writing that “the discretion that ultimately matters is not whether to verify a person’s immigration status but whether to act once the person’s status is known.”²⁴⁹ According to this argument, the discretion that matters is what federal authorities do once state authorities notify them that they have an undocumented immigrant in custody.²⁵⁰ Although the Court did not specifically deal with the relationship among the various provisions in INA § 235 as applied to EWIs, both the majority as well as Justice Alito in his concurrence rely heavily on their determination that, even if state or local officers report that they have detained unlawful entrants or other immigration violators, the Executive Branch retains enforcement discretion in deciding whether to take action against such individuals.²⁵¹ It is difficult to

trained state and local law enforcement officers in the position of analyzing federal immigration law to determine whether the noncitizen had committed a removable offense.

²⁴⁶ *Arizona*, 132 S. Ct. at 2509. Hiroshi Motomura has thoughtfully addressed some of the enforcement problems raised by giving states the power to criminalize federal immigration violations. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 29, at 68–73; Motomura, *The Discretion That Matters*, *supra* note 29, at 1825–26.

²⁴⁷ *Arizona*, 132 S. Ct. at 2497.

²⁴⁸ See Motomura, *The Discretion That Matters*, *supra* note 29, at 1848 (arguing that the discretion that matters is initial decision to check individual’s immigration status, because it is that decision that sets relentless wheels of immigration removal in motion).

²⁴⁹ *Arizona*, 132 S. Ct. at 2526 (Alito, J., dissenting).

²⁵⁰ *But see* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 29, at 118 (arguing that if Justice Alito is right, federal discretion to not enforce limits the ability of state and local police, through ordinary stops and arrests, to make immigration law on the ground).

²⁵¹ See Transcript of Oral Argument, *supra* note 239, at 41, 45–46.

reconcile this analysis with the ICE plaintiffs' arguments in *Crane v. Napolitano* or with the district court's decision in April 2013.²⁵²

Arizona v. United States was a watershed decision because it reaffirmed a model of federalism that accords deference to Congress in regulating immigration and in delegating broad rule-making authority to the Executive. The dissenting justices, in contrast, would have embraced a shared sovereignty model of federalism that would have shown much greater deference to Arizona's efforts to deter illegal immigration—what Arizona legislators described as “attrition through enforcement.”²⁵³ Justice Scalia spoke repeatedly of states' inherent sovereign authority to control their borders,²⁵⁴ described Arizona as being under siege,²⁵⁵ equated illegal entrants with invaders,²⁵⁶ and argued that the founders' original intent was to enable the States to regulate immigration and prevent “the intrusion of obnoxious aliens”²⁵⁷ Justice Alito argued more narrowly that it would give the federal government unprecedented power if it could preempt state law based on federal enforcement priorities alone.²⁵⁸

The majority, in contrast, emphasized throughout the relationship between regulating immigration and foreign policy concerns. This discussion was notably absent from the Ninth Circuit's opinion, although it was the focus of Judge John Noonan's concurrence.²⁵⁹ It was also a focus of amici briefs cited by the Court, including a brief filed by Argentina and another by former Secretary of State Madeleine Albright.²⁶⁰ Responding to Justice Scalia's central argument that individual states have inherent sovereignty to control their borders, the Court writes, “It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to

²⁵² Memorandum Opinion and Order, *Crane v. Napolitano*, *supra* note 22, at 11–19.

²⁵³ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

²⁵⁴ *Arizona*, 132 S.Ct. at 2511 (Scalia, J., dissenting).

²⁵⁵ *Id.* at 2522.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 2512 (quoting Letter from James Madison to Edmund Randolph (Aug. 27, 1782), in 1 THE WRITINGS OF JAMES MADISON 226 (1900)). Furthermore, Justices Scalia and Thomas would have only found preemption where federal law expressly preempts state law or where state law is in direct conflict with federal law. *Arizona*, 132 S.Ct. at 2514, 2522 (Scalia, J., and Thomas J., dissenting).

²⁵⁸ *Id.* at 2528 (Alito, J., dissenting). Justice Alito would have placed greater weight on the presumption against preemption where the federal government regulates in an area of traditional state concern, such as employment or the enforcement of criminal laws. *Id.* at 2524–35 (Alito, J., dissenting).

²⁵⁹ *United States v. Arizona*, 641 F.3d 339, 367–69 (9th Cir. 2011) (Noonan, J., concurring).

²⁶⁰ *Arizona*, 132 S. Ct. at 2498.

confer and communicate on this subject with one national government, not the 50 separate States.”²⁶¹

While focusing on the foreign policy consequences of patchwork immigration laws, the majority also underscored the ties that bind many immigrants to our communities, raising concerns regarding immigrants caught up in the dragnet of state and local enforcement efforts.²⁶² Its language hearkened back to Justice William Brennan’s famous opinion in *Plyer v. Doe*, striking down a Texas law precluding undocumented children from attending public school.²⁶³ The Court in so doing, appeared to embrace a model of immigration, what Professor Motomura calls “immigration as affiliation,”²⁶⁴ that would offer a pathway to legal status to undocumented persons who have put down roots, raised families, and shown themselves to be reliable and productive members of society.²⁶⁵ It is a model consistent with the cornerstone goals of comprehensive immigration reform. The Court’s decision thus implicates how lower courts should address the legal issues surrounding DACA, the federal government’s prosecutorial discretion policy, ongoing state and local enforcement efforts, and the prospects for comprehensive immigration reform.

B. The Impact of DACA on “Show Me Your Papers” Laws and Other State Policies

The Court in *Arizona* during oral argument suggested that federal enforcement priorities alone may not have preemptive effect.²⁶⁶ It acknowledged, however, that there may be twilight statuses, like applicants for asylum, U visas or adjustment of status, deferred action, or extended voluntary departure, where people may be considered “lawfully present” even though they lack formal legal status.²⁶⁷ Indeed, over the years, deferred action has been one of many twilight statuses utilized by the immigration authorities where beneficiaries enjoy

²⁶¹ *Id.*

²⁶² *Id.* at 2502.

²⁶³ *Plyer v. Doe*, 457 U.S. 202 (1982).

²⁶⁴ HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 10–11 (2006) [hereinafter MOTOMURA, AMERICANS IN WAITING]; MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 29, at 155–156 (on file with author).

²⁶⁵ MOTOMURA, AMERICANS IN WAITING, *supra* note 264, at 11.

²⁶⁶ See *supra* note 239 and accompanying text.

²⁶⁷ This suggestion is consistent with arguments made by Michael Olivas and others that there are PRUCOL (“permanently residing under color of law”) statuses in the immigration laws where persons do not have legal *status* but are still deemed to be lawfully present and potentially eligible for certain state and federal benefits. See Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J. C. & U. L. 435, 454 (2004).

temporary relief from removal, (often) eligibility for work authorization, and (sometimes) the prospect of lawful residency. In announcing DACA, the Administration effectively moved DACA-eligible individuals from Solicitor General Verilli's third priority group, those noncitizens without legal status, including illegal entrants who are not within the federal government's enforcement priorities, into his second group, those in some sort of twilight or quasi-legal status. Deferred action appeared intended to immunize DACA recipients from state and local efforts to enforce the immigration laws against them.²⁶⁸

The Administration attempted to address the continuing threat of state and local enforcement against DACA recipients by making such individuals eligible for issuance of an employment authorization document ("EAD").²⁶⁹ In theory, the possession of an unexpired EAD would prove sufficient to rebut any suspicion—reasonable or otherwise—by state or local police that the person was not lawfully present; it would also serve as a basis under most state laws adopted in conformity with the federal REAL ID Act to grant such recipients of deferred action driver's licenses.²⁷⁰

The response from the States to DACA has been illuminating and illustrates that the federalism crisis is far from over. Just a few examples should suffice. While a majority of states are granting driver's licenses to recipients of deferred action under DACA,²⁷¹ both the Governors of Arizona and Michigan initially announced that they would not because the Napolitano Memo stated that DACA conferred no substantive right or immigration status.²⁷² Therefore,

²⁶⁸ *But see* Rubenstein, *supra* note 35, at 106 (arguing that if the Executive's exercise of prosecutorial discretion is not lawmaking, then it has no preemptive effect under the Supremacy Clause).

²⁶⁹ *See* Napolitano Memo, *supra* note 14, at 3.

²⁷⁰ The REAL ID Act of 2005, Pub. L. 109-13, Div. B, 119 Stat. 302, established federal standards for state issuance of driver's licenses, providing that a state must require evidence of lawful status before issuing a driver's license, which was defined to include proof of U.S. citizenship, lawful permanent resident status, conditional residency, a valid, unexpired nonimmigrant visa, an approved application for asylum or refugee status, a pending or approved application for temporary protected status, *approved deferred action status*, or a pending application for adjustment of status. *Id.* at § 202(c)(2)(B) (emphasis added). Passage of the REAL ID Act also suggested that the issuance of driver's licenses, traditionally a matter of state concern, had acquired a federal dimension, thus implicating preemption principles and the reach of the Supremacy Clause. *See, e.g.,* Abrams, *supra* note 12, at 639–40.

²⁷¹ *Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for Driver's Licenses?*, NATIONAL IMMIGRATION LAW CENTER (June 19, 2013), <http://www.nilc.org/document.html?id=831> (indicating that 45 states have either confirmed that DACA recipients are eligible for driver's licenses or have been issuing licenses to persons in this group).

²⁷² *See* Janice K. Brewer, *Ariz. Exec. Order 2012-06, Re-affirming Intent of Arizona Law in Response to the Federal Government's Deferred Action Program* (Aug. 15, 2013) *available at* http://azgovernor.gov/dms/upload/EO_081512_2012-06.pdf; Charlise Dewey, *State Will Not*

these States concluded, recipients were not lawfully present and not eligible for driver's licenses. The ACLU and MALDEF sued the Arizona Governor in late November on behalf of DACA recipients, arguing that Arizona's policy was preempted by federal law and violated equal protection because Arizona granted driver's licenses to all other deferred action recipients, and that Arizona could not, under federal preemption, come up with its own definition of lawful presence that did not match the federal definition.²⁷³ A similar lawsuit was brought against the Secretary of State of Michigan.²⁷⁴

When the federal government clarified the Napolitano Memo to confirm that DACA recipients would be considered "lawfully present" under the immigration laws even though DACA conferred no substantive rights or legal status,²⁷⁵ the State of Michigan reversed its position, announcing that, in light of the federal government's lawful presence determination, it would provide driver's licenses to persons granted deferred action under DACA.²⁷⁶ In May 2013, in response to a motion to dismiss filed by the State of Arizona, the District Court dismissed the challengers' preemption arguments but upheld their equal protection claim.²⁷⁷ It found that federal enforcement priorities alone could not preempt state laws regulating the issuance of driver's licenses,²⁷⁸ but that the State of Arizona had no rational basis for denying driver's licenses to persons eligible for relief under DACA while granting them to other similarly-situated immigrants who had received EADs.²⁷⁹ Analyzing at length what level of scrutiny to apply, it concluded that rational basis with a bite was the appro-

Grant Driver's Licenses to DACA Immigrants, GRAND RAPIDS BUS. J. (Oct. 19, 2012), available at <http://www.grbj.com/articles/74634-state-will-not-grant-drivers-licenses-to-daca-immigrants>.

²⁷³ Complaint for Declaratory and Injunctive Relief, *Ariz. Dream Act Coal. v. Brewer*, 12-CV-02546, 2013 WL 2128315 (D. Ariz. Nov. 29, 2012) [hereinafter ADAC Complaint].

²⁷⁴ Complaint for Declaratory, Injunctive, and Other Relief, *One Mich. v. Johnson*, 12-CV-155551 (E.D. Mich., Dec. 19, 2012), ECF No. 1.

²⁷⁵ See *supra* note 210 and accompanying text.

²⁷⁶ Niraj Warikoo, *Michigan Secretary of State Does U-Turn: Will Grant Driver's Licenses to Qualifying Immigrants*, DETROIT FREE PRESS, Feb. 1, 2013, available at <http://www.freep.com/article/20130201/NEWS06/130201083/Michigan-secretary-of-state-does-U-turn-will-grant-driver-s-licenses-to-qualifying-immigrants>.

²⁷⁷ *Ariz. Dream Act Coal. v. Brewer*, No. CV12-02546, 2013 WL 2128315, at *24–25 (D. Ariz., May 16, 2013). In late March 2013, Governor Brewer argued that Arizona did not have to issue driver's licenses to DACA recipients granted deferred action, because DACA was an abuse of Executive power. Fernanda Santos, *State Defends Immigrant License Limits*, N.Y. TIMES, Mar. 23, 2012, at A13.

²⁷⁸ See *Brewer*, 2013 WL 2128315, at *7.

²⁷⁹ *Id.* at *18.

ropriate standard, particularly where Governor Janice Brewer's actions appeared to be driven by her opposition to DACA as a "backdoor amnesty."²⁸⁰

A final troubling example involves the State of North Carolina. The Department of Motor Vehicles ("DMV") announced that it would issue driver's licenses to DACA recipients after first requesting a legal opinion from the State Attorney General, who concluded in February 2013 that DACA recipients were legally present and thus eligible for driver's licenses. The DMV initially announced that it would issue driver's licenses to DACA recipients but that the license would include a prominent pink strip and the words "NO LAWFUL STATUS" directly above the person's name.²⁸¹ The ACLU challenged the policy as "stigmatiz[ing] people who are in the U.S. legally with an unnecessary marker that could lead to harassment, confusion, and racial profiling."²⁸² North Carolina ultimately relented on the pink strip but the license states on its face in red letters directly above the driver's name: "LEGAL PRESENCE NO LAWFUL STATUS."²⁸³

The district court's decision in the Arizona case and the matter in North Carolina underscore that questions regarding the scope of federal preemption in immigration matters are far from settled, and that litigants need to pursue both preemption claims as well as equal protection arguments in confronting state and local laws targeted at noncitizens without formal legal status. The State of Arizona's posturing appears to be part of a well-orchestrated attempt to shore up the legal arguments being made in *Crane v. Napolitano* and to further undermine the use of prosecutorial discretion as an enforcement tool, but its position on the driver's license issue only underscores the flawed analysis in these cases.

The basic argument in each of these cases is that the Administration lacked the authority to grant deferred action to this group-based category. The reality is that, as many scholars have underscored in their research and as the Law Professors' Letter emphasizes, deferred action in particular has been used as a tool for granting relief from removal since at least the early 1970s, and has

²⁸⁰ *Id.*; see also *United States v. Windsor*, 133 S. Ct. 2675 (2013) (applying heightened rational basis to strike down § 3 of the Defense of Marriage Act, which effectively denied federal marriage benefits to same-sex couples legally married under State law, as a violation of equal protection under the due process clause of the Fifth Amendment).

²⁸¹ ASSOCIATED PRESS, *Pink Stripe on Illegal Immigrant North Carolina Licenses Eyed*, CHARLOTTE NEWS ONLINE (Feb. 21, 2013), <http://www.wcnc.com/news/politics/Pink-stripe-on-NC-illegal-immigrant-licenses-eyed-192349941.html>.

²⁸² *Id.*

²⁸³ Associated Press, *North Carolina: Pink License Dropped*, N.Y. TIMES, Mar. 22, 2013, at A19; Gustavo Valdes, *North Carolina Debuts Driver's Licenses for Undocumented Immigrants*, CNN NEWS (March 25, 2013), <http://www.cnn.com/2013/03/25/us/north-carolina-immigrant-licenses>.

been recognized by the federal government at least since the mid-1970s.²⁸⁴ Indeed, Congress specifically recognized deferred action in the REAL ID Act as proof of lawful presence in setting forth rules for state issuance of driver's licenses.²⁸⁵ Moreover, it has been used in the past to grant relief from removal to certain groups of individuals, including survivors of domestic violence with approved VAWA self-petitions who are not immediately eligible to adjust and certain widows of U.S. citizens who are not eligible for immigration status.²⁸⁶

Furthermore, while the INA creates several statutory exceptions to persons who otherwise would be considered "unlawfully present," including minors, asylum seekers, beneficiaries of family unity, battered women and children, and victims of trafficking,²⁸⁷ *as a matter of prosecutorial discretion*, the Adjudicator's Field Manual has extended the list of exceptions to the accrual of unlawful presence to include a number of other categories, including persons with pending applications for adjustment of status, extensions or change of status, or temporary protected status; or persons granted voluntary departure, stays of removal, deferred action or delayed enforced departure.²⁸⁸ The Adjudicator's Field Manual explicitly distinguishes being in unlawful status from accruing unlawful presence.²⁸⁹ Thus a person can *only* accrue unlawful presence if he or she is in unlawful status, but, *as a matter of prosecutorial discretion*, a person can be in unlawful status without accruing unlawful presence.²⁹⁰ On the other hand, persons with orders of supervision, which generally consist of persons

²⁸⁴ Law Professors' Letter, *supra* note 45, at 2 n.5.

²⁸⁵ See The REAL ID Act of 2005, Pub. L. 109-13, Div. B. § 202(c)(2)(B), 119 Stat. 302 (2005).

²⁸⁶ Press Release, Dep't Homeland Sec., DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), <http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>.

²⁸⁷ See INA § 212(a)(9)(B)(iii), 8 U.S.C. § 1182(a)(9)(B)(iii) (2012). "Unlawful presence" is a term of art in the INA used specifically to refer to situations where an immigrant will be subject to a 3-year bar from the United States for having been unlawfully present in the United States for more than 180 days or a 10-year bar for unlawful presence for a year or more. See INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2012). The statutory bars are triggered by departure from the United States, and are subject to the foregoing statutory exceptions and the policy exceptions discussed below.

²⁸⁸ USCIS ADJUDICATOR'S FIELD MANUAL ch. 40.9.2 (b)(2)-(3) (2009), reproduced at 86 IR at 1420-70 (May 18, 2009) [hereinafter AFM], available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-17138/0-0-0-18383.html>. The Adjudicator's Field Manual will be overhauled in the near future and included in a single, online, centralized U.S. Policy Manual. *USCIS Begins Transition to Centralized Policy Manual*, USCIS (Jan. 7, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d58459009ccfb310VgnVCM100000082ca60aRCRD&vgnnextchannel=d58459009ccfb310VgnVCM100000082ca60aRCRD>

²⁸⁹ AFM, *supra* note 288, at ch. 40.9.2 (a)(2).

²⁹⁰ *Id.*

with final orders of removal who cannot be removed to their homeland, as well as applicants for ten-year cancellation of removal are eligible for work authorization²⁹¹ but continue to accrue unlawful presence.²⁹²

The point is that, in addition to the *statutory* exceptions to unlawful presence in INA § 212(a)(9)(B)(iii), the Department of Homeland Security, *as a matter of prosecutorial discretion*,²⁹³ has a long list of *policy* exceptions²⁹⁴ where, even though a noncitizen may not enjoy lawful *status*, he or she is considered to be here pursuant to a period of stay authorized by the Secretary of Homeland Security, and thus, does not accrue unlawful *presence*.²⁹⁵ In other cases, certain persons with pending applications for relief may be eligible for work authorization but continue to accrue unlawful presence. All of these individuals enjoy a quasi-legal status which permits them to remain in the United States while their status is pending. In general, the exceptions to unlawful presence do not cure any previous period of unlawful presence, and lawful presence is deemed to end once it is determined that they are no longer eligible to remain in the United States, such as when an application for extension of stay or for asylum has been denied.²⁹⁶

In short, granting deferred action to certain childhood arrivals is nothing new. Both legacy INS and the Department of Homeland Security have, over the years, used their prosecutorial discretion to grant temporary relief from removal to broad categories of noncitizens who may (or may not) be eligible for immigration relief in the future. Sometimes this includes eligibility for work authorization; sometimes, as with applicants for asylum whose cases have been pending for less than 180 days, it does not.²⁹⁷ Sometimes these individuals may be eligible for legal status in the future; sometimes, as with most persons with final removal orders and orders of supervision, they will not.²⁹⁸ Often DHS must balance policy considerations, such as deterring frivolous asylum claims, against humanitarian considerations, in deciding how to structure relief. But in many of these cases, the Agency has acted pursuant to its prosecutorial discre-

²⁹¹ See 8 C.F.R. § 274a.12(c)(10), (c)(18) (2013).

²⁹² AFM, *supra* note 288, at ch. 40.9.2(b)(1)(D), (b)(6).

²⁹³ *Id.* at ch. 40.9.2(a)(2) (emphasis added).

²⁹⁴ *Id.* at ch. 40.9.2(b)(3) (emphasis added).

²⁹⁵ *Id.* at ch. 30.9.2(b)(1) (emphasis added).

²⁹⁶ *Id.* at ch. 40.9.2(b)(4).

²⁹⁷ INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2012).

²⁹⁸ This does not necessarily preclude persons with Orders of Supervision from being eligible for future relief, if, for example, a statutory fix provided for such relief. *See, e.g.*, Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, Title II, §§ 201-202, 111 Stat. 2130 (1997) (providing that certain nationals of Nicaragua and Cuba present in the United States who have previously been ordered removed could, notwithstanding such order, apply for adjustment of status).

tion rather than pursuant to statute. President Obama's power to grant deferred action to certain childhood arrivals and to set the terms of relief was there all along.

IV. DACA AND THE LIVING CONSTITUTION

DACA was a justified assertion of Executive authority in the face of a constitutional crisis marked by gridlock in Congress and growing restrictionism in many states. By 2012's year end, with Congress and the Executive approaching the fiscal cliff, scholars and political pundits raised concerns about whether our current political system was beyond repair.²⁹⁹ Indeed, in an Op-Ed in *The New York Times* on December 30, 2012, titled provocatively *Let's Give Up on the Constitution*, Professor Seidman argues that "[o]ur obsession with the Constitution has saddled us with a dysfunctional political system, kept us from debating the merits of divisive issues and inflamed our public discourse."³⁰⁰ He argues that in several groundbreaking Supreme Court decisions, including *Brown v. Board of Education*,³⁰¹ *Miranda v. Arizona*,³⁰² *Roe v. Wade*,³⁰³ and *Romer v. Evans*,³⁰⁴ the Court has been accused of ignoring the Constitution. To announce DACA on the eves of the Court's decision in *Arizona v. United States* and the 2012 elections might be what Professor Seidman would describe as an act of constitutional disobedience. Seidman concludes, however, that, in many of these cases, ignoring the Constitution helped us to grow and prosper.³⁰⁵

The Obama Administration did not, however, ignore the Constitution. It ignored the narrow, originalist interpretation urged by DACA's critics, who largely have relied on formalistic, syllogistic arguments and the structure and function of the original Constitution of 1787, while studiously ignoring, with the exception, perhaps, of the anti-commandeering principles found in the Tenth Amendment, the rights protected in the Bill of Rights and the post-Civil War Reconstruction Amendments. Indeed, they have ignored how the Reconstruction Amendments changed our original charter both structurally and ideologically, redefining the very concept of "personhood" and the rights of the in-

²⁹⁹ Jennifer Steinhauer, *A Showdown Long Foreseen*, N.Y. TIMES, Dec. 31, 2012, at A1.

³⁰⁰ Seidman, *supra* note 24, at A19.

³⁰¹ 347 U.S. 483 (1954).

³⁰² 384 U.S. 436 (1966).

³⁰³ 410 U.S. 113 (1973).

³⁰⁴ 517 U.S. 620 (1996).

³⁰⁵ Seidman, *supra* note 24, at A19.

dividual vis-à-vis the state.³⁰⁶ The district court's ruling against Arizona's denial of driver's licenses to DACA recipients on equal protection grounds is thus particularly encouraging.³⁰⁷ For similar reasons, the Administration's actions, while stretching Executive powers to their limits, were necessary and appropriate in light of restrictionists' "linked and interdependent"³⁰⁸ efforts to simultaneously challenge federal enforcement policies like DACA and the Morton Memo, block reform in Congress, and implement state and local regulations infringing on immigrants' most basic rights, all through a combination of litigation, legislative, and media strategies.

Indeed, Kris Kobach and his allies in Congress, in the media, in the ranks of ICE, and even on the courts have made effective use of rhetoric and heuristics to taint people's understanding of the legal issues.³⁰⁹ Their arguments may resonate with the average citizen who thinks he or she has a basic understanding of American government, but on closer examination their arguments are deeply flawed. Take for example the exchange below, which occurred when Fox News first covered the ICE lawsuit on *The O'Reilly Factor*. Kobach and Chris Crane engaged in this dialogue with Monica Crowley, who was standing in for Bill O'Reilly:

CROWLEY: Kris Kobach, the *unilateral action* coming from this administration in this regard, it seems to intervene [sic] directly federal immigration law as it currently stands and is therefore *illegal*. Is that what you are arguing in this lawsuit?

KRIS KOBACH (R), KANSAS SECRETARY OF STATE: Yes, that's right, Monica. It's *illegal* on multiple levels. But the three main reasons its *illegal* is first of all, there is a federal statute that already says that ICE agents like Chris Crane have to put certain aliens into removal proceedings. Not may, but

³⁰⁶ See generally Juan Perea, *Review, Race and Constitutional Law Casebooks: Recognizing the Pro-Slavery Constitution*, 110 MICH. L. REV. 1123 (2012). As Juan Perea points out, it was not just Justice Taney who believed slaves were property, but some of our most revered framers. Indeed, in Federalist No. 54, in explaining the 3/5ths clause, James Madison discussed how the proposed Constitution properly treated slaves in part as property and in part, as persons. *Id.* at 1123. While the 13th Amendment abolished slavery, the 14th Amendment overturned the original Constitution's denial of personhood to the original slaves and their descendants. This concept of personhood under the 14th Amendment has gradually been extended to embrace other marginalized groups, including women, immigrants, gays, and the disabled.

³⁰⁷ *Ariz. Dream Act Coal. v. Brewer*, No. CV12-02456, 2013 WL 2128315, at *20 (D. Ariz. May 16, 2013).

³⁰⁸ See Ramakrishnan & Gulasekaram, *supra* note 6, at 1435.

³⁰⁹ Lauren Gilbert, *The Rhetoric of Immigration Reform*, IMMIGRATION DAILY (June 26, 2013), <http://discuss.ilw.com/content.php?2124-Article-The-Rhetoric-of-Immigration-Reform-by-Lauren-Gilbert>.

shall place them in removal proceedings. *It's ordering agents to violate that federal law.*

It's also *illegal* because it violates the Administrative Procedure Act. If they had statutory authority to do this in the Obama administration, they would have had to promulgate a regulation and have a commentary. They didn't do any of that. And then thirdly, *it violates the separation of powers.*

As you know, there have been two dozen DREAM Act bills in Congress. And none of them have passed. Congress clearly understands that *only the legislative branch of the federal government can do this. Not the executive branch.*

But it appears that *Obama is trying to do this through executive fiat and our Constitution does not allow that.*

CROWLEY: And, Kris Kobach, on that point, I mean, *the President of the United States as head of the Executive Branch is supposed to be the nation's chief law enforcement officer. So shouldn't he be upholding the law rather than, number one, going around the legislative branch to make up his own laws and, secondly, uphold existing law? I mean, he seems to be acting so extra-constitutionally here.*³¹⁰

Barely a month after DACA was announced, anti-immigrant forces launched a destructive attack in the courts, in the media, in the states, and eventually in Congress, playing on the public's worst fears, using the Constitution and heuristics as their side-arms. They misconstrued INA § 235 to concoct a duty on the part of ICE officers to arrest *all* noncitizens present without admission, ignored the Executive's power to set enforcement priorities in carrying out the law, applied an outdated version of the non-delegation doctrine, and overlooked critical exceptions to notice and comment rulemaking, all to persuade the public that the Obama Administration was acting extra-constitutionally. The Administration undoubtedly knew that this backlash would come. It thus took a bold political move with uncertain consequences.

Ideally, a better and more permanent solution would have been to work with Congress to enact the DREAM Act. The danger with prosecutorial discretion is that it can always be reversed. Immigration reform had become impossible, however, even when it enjoyed majority support in both houses. Indeed, from a formalist perspective, the Senate cloture rule requiring a super-majority

³¹⁰ FOX News: O'Reilly Factor, *supra* note 18.

in the Senate to cut off debate on a bill and allow it to come to a vote³¹¹ arguably violates the “single, finely wrought, and exhaustively considered, procedure” that the Framers created.³¹² Nonetheless, it has been justified on the basis of the Senate’s authority to make its own rules, and challenges in court have been dismissed as nonjusticiable.³¹³ Along the same lines, although the Framers might never have contemplated the broad delegation of rule-making powers to the Executive in matters of immigration, this has been U.S. policy for well over 100 years. To challenge it now in the context of DACA and efforts at comprehensive immigration reform seems more designed to perpetuate the dual crises of federalism and separation of powers than to resolve them.

V. CONCLUSIONS

It is a bit ironic that scholars who had criticized the breadth of the plenary power doctrine and judicial deference to Executive authority on immigration matters at least acquiesced in its use here. Perhaps that should give us pause. At a minimum, we must urge the Administration to focus on *legislative* solutions, and to avoid establishing a precedent for unilateralism that will be subject to abuse in future administrations. Like Dorothy’s ruby slippers, great power can be used not only for good, but to oppress. It is not inconceivable that the U.S. Supreme Court could set limits on enforcement discretion or at least on its preemptive effect, as suggested by federal litigation on DACA in Arizona and Texas in 2013. A legislative solution thus seems critical as a way to limit obstructionism at the state and local level and by ICE officers in the field.

In *Arizona v. United States*, by acknowledging the ties that bind immigrants to our communities rather than focusing strictly on their formal legal status, a Supreme Court majority validated a model of immigration, what Profes-

³¹¹ S. COMM. ON RULES AND ADMIN., 113TH CONG., STANDING RULES OF THE SENATE R. XXII (2012) [hereinafter Senate Rule XXII].

³¹² *INS v. Chadha*, 462 U.S. 919, 921 (1983). In February 2013, President Obama made his frustration with the cloture vote explicit, when Republicans prevented a vote on his nominee for Secretary of Defense, Chuck Hagel, a Republican and war hero, from coming to a vote. According to a piece in *The New Yorker*, the President said,

We’ve never had a Secretary of Defense filibustered before. There’s nothing in the Constitution that says that somebody should get sixty votes The Republican minority in the Senate seems to think that the rule now is that you have to have sixty votes for everything. Well, that’s not the rule.

Hendrik Hertzberg, *State of the (G.O.P.) Union*, THE NEW YORKER, Feb. 25, 2013, at 25; see also Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 468 (2011).

³¹³ Bondurant, *supra* note 312, at 507–08; see, e.g., *Common Cause v. Biden*, 909 F. Supp. 2d 9, 31 (D.D.C. 2012) (dismissing challenge to Senate cloture rule brought by several members of the House of Representatives and potential beneficiaries of the DREAM Act on standing and political question grounds).

sor Hiroshi Motomura calls “immigration as affiliation,”³¹⁴ that would offer a pathway to legal status to undocumented persons within our borders who have put down roots, raised families, and shown themselves to be reliable and productive members of society.³¹⁵ It is a model of immigration consistent with repeated efforts at comprehensive immigration reform which embrace “earned adjustment” or “earned citizenship” as heuristic alternatives to the vilified “amnesty,”³¹⁶ offering a route to lawful permanent residency and ultimately, citizenship, to many of the 11 million undocumented immigrants living within our borders and abiding by our laws.³¹⁷ Indeed, as talks in Congress on immigration reform began almost immediately after the 2012 elections, the Administration made it clear that it would not accept a legislative fix that did not include a pathway to lawful permanent residency.³¹⁸ When on January 28, 2013, a group of eight U.S. senators announced a Bipartisan Framework for Comprehensive Immigration Reform which included a “path to citizenship” it was a moment of both hope and striking familiarity.³¹⁹

If DACA serves as a stepping stone to passage of the DREAM Act and comprehensive immigration reform, then this bold assertion of Executive authority will have lasting impact. Indeed, the impasse between Congress and the Executive was one of the stated reasons for state and local governments taking the regulation of immigrants into their own hands. The 2012 elections and the Republican Party’s apparent coming to terms with the consequences of its failure to court the Latino vote appear to have ended the stalemate, at least for the

³¹⁴ MOTOMURA, AMERICANS IN WAITING, *supra* note 264, at 10–11. DACA and the DREAM Act also are consistent with Professor Motomura’s “immigration as contract” model, whereby noncitizens must meet certain minimum requirements and fulfill a set expectations and obligations in order to receive and continue to qualify for immigration relief. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 29, at 170.

³¹⁵ See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

³¹⁶ Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 177 (2010) (embracing the concept of amnesty as a necessary component of any comprehensive immigration reform, while focusing on how legislation might be crafted to maximize the agency’s ability to manage the amnesty while dealing with the challenges of a large undocumented population).

³¹⁷ See, e.g., Comprehensive Immigration Reform Act, S.1348, 110th Cong. (2007).

³¹⁸ Julia Preston, *Obama Will Seek Citizenship Path with One Fast Push*, N.Y. TIMES, Jan. 13, 2013, at A1.

³¹⁹ Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet and Flake, Bipartisan Framework for Comprehensive Immigration Reform (Jan. 28, 2013), http://www.flake.senate.gov/documents/immigration_reform.pdf; Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/>.

time being.³²⁰ At the time of this writing, the U.S. Senate had recently passed comprehensive immigration reform,³²¹ but its passage in the House of Representatives was far from certain.³²²

DACA was conceived both from acts of civil disobedience by the DREAMers³²³ and an expansive interpretation of Executive powers by the Administration that, rather than resulting in the DREAMers' detention and deportation, recognized their rightful place in our society. The release of the film version of *Les Misérables*³²⁴ in 2012 dramatically depicts how, in any social movement, it always is possible that things can, and often do, go terribly wrong. When the DREAMers began to come out of the shadows and to engage in acts of civil disobedience, my first impulse was that, for some, this would end badly. I knew from history and experience that the sacrifices made by people on the front lines who are willing to risk their lives to challenge the existing status quo are what eventually make a difference. As a lawyer, I was hesitant to advise a client to take such a step.

Nonetheless, once the DREAMers decided that civil disobedience was their only available option, the opinion letter signed by 96 law professors was consistent with those objectives. It emerged as the quintessential blend of scholarship, activism, and professional responsibility.³²⁵ It underscored that as lawyers and legal scholars perhaps we have become too wedded by our opponents to narrow interpretations of the law and the rules of engagement. Similarly, in announcing DACA, the Obama Administration did not ignore the Constitution, but rather the constricted, originalist, hidebound version imposed by immigration formalists. This country's ongoing crises in separation of powers and federalism implicate immigrants' rights both at the state and national level, and call for courageous solutions by Government, advocacy groups, and the academic community that recognize the ways in which our country has been

³²⁰ Preston, *supra* note 75, at A12.

³²¹ Ashley Parker, *Senate 68 to 32, Passes Overhaul or Immigration*, N.Y. TIMES, June 28, 2013, at A1.

³²² Jonathan Weismann, *G.O.P. in House Leaves Immigration Bill in Doubt*, N.Y. TIMES, June 26, 2013, at A18; *see also* Julia Preston & Ashley Parker, *Democrats Aim to Restore Immigration to Agenda*, N.Y. TIMES, Oct. 19, 2013, at A10 ("As the fiscal crisis subsided and the government went back to work [following the government shutdown], President Obama and other leading Democrats were quick to say that an immigration overhaul should be back on the agenda in Congress.").

³²³ *See* Julia Preston, *Young Immigrants Want 'Dream Warrior' Army*, N.Y. TIMES, Dec. 6, 2012, at A19; *see also* Jordan, *supra* note 16, at A2.

³²⁴ LES MISÉRABLES (Universal Studios 2012).

³²⁵ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

shaped by “the stories, talents and lasting contributions of those who crossed oceans and deserts to come here.”³²⁶

³²⁶ Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).