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## Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration

Peter Margulies

*Roger Williams University School of Law*, [pmargulies@rwu.edu](mailto:pmargulies@rwu.edu)

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BANS, BORDERS, AND SOVEREIGNTY:  
JUDICIAL REVIEW OF IMMIGRATION LAW IN  
THE TRUMP ADMINISTRATION

*Peter Margulies*\*

2018 MICH. ST. L. REV. 1

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\* Professor of Law, Roger Williams University School of Law; B.A., Colgate University; J.D., Columbia Law School. I thank Rick Hills, Cristina Rodriguez, and Ilya Somin for comments on a previous draft, and our expert reference librarians Lucinda Harrison-Cox and Stephanie Edwards for their invaluable assistance. I served as co-counsel with Alan Schoenfeld of WilmerHale on amicus curiae briefs submitted in challenges to the September 2017 iteration of President Trump’s travel ban. *See* Brief for Scholars of Immigration Law as Amici Curie Supporting Plaintiffs-Appellees, *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (No. 17-17168), <http://cdn.ca9.uscourts.gov/datastore/general/2017/11/28/17-17168%20-%20Richard%20Boswell%20Amicus%20Brief.pdf> [<https://perma.cc/U5QJ-WD38>] [hereinafter Brief for Immigration Scholars]. A substantially similar brief was filed in the Fourth Circuit in *International Refugee Assistance Project (IRAP) v. Trump*, 2018 U.S. App. Lexis 3513 (4th Cir. Feb. 15, 2018).

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## INTRODUCTION

The early tenure of the Trump Administration has featured robust challenges to the deference that courts have traditionally accorded the political branches in immigration law.<sup>1</sup> In June 2017, the Supreme Court’s per curiam stay order<sup>2</sup> regarding President

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1. That deference extends back to 1889, when the Supreme Court held that Congress had plenary power over immigration. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) [hereinafter *The Chinese Exclusion Case*]; *see also* *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (asserting that decisions of political branches on immigration are “largely immune from judicial inquiry or interference”); *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (citing “political branches’ broad power over the creation and administration of the immigration system”). Compare David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 44 (2015) (discussing the most plausible arguments for judicial deference), with Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61-62 (2015) (arguing that recent Supreme Court decisions relying on constitutional values in interpreting immigration statutes heralded eventual demise of deference).

2. *See* *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017) (ruling that noncitizens abroad otherwise affected by refugee EO were exempted if they had “bona fide relationship” with U.S. person or entity); *see also* *Trump v. Hawaii*, 138 S. Ct. 34, 34 (2017), *aff’d*, *IRAP*, 137 S. Ct. at 2088 (declining to stay portion of district court order barring government from enforcing EO against, *inter alia*, noncitizens abroad granted refugee status and possessing “bona fide relationship” with U.S. person or entity, including U.S. spouse, parent, child, mother or father-in-law, grandparent, grandchild, aunt, uncle, niece, nephew, and cousin, while staying

Trump's second Executive Order (EO-2) on refugees and nationals of six countries<sup>3</sup> did something unprecedented for that tribunal: It crafted an injunction that in effect *required* the admission of a substantial number of foreign nationals that the executive branch had wished to exclude. The indefinite restrictions in EO-2's successor, EO-3, present another challenge to judicial deference.<sup>4</sup> Deference was also under attack in *Sessions v. Morales-Santana*,<sup>5</sup> in which the Supreme Court cited equal protection principles in striking down a provision of the Immigration and Nationality Act (INA) that imposed a gender test on citizenship acquired by persons born out of wedlock abroad to one U.S. citizen parent. These doctrinal stresses call for a new model of judicial review, which this Article calls shared stewardship.

Invocation of stewardship over immigration law fits the subject's potential for change and growth. The formulation of criteria for the classification, admission, and removal of noncitizens requires the engagement of the federal government to fulfill what Hamilton called the "guardianship of the public safety."<sup>6</sup> Immigration policy's impact on public safety is generally the province of the political branches, which have the information, resources, and capacity for quick response necessary for this task.<sup>7</sup> Moreover, the political

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portion of district court order exempting from EO refugees who merely had "formal assurance" of sponsorship from U.S. refugee resettlement agency).

3. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,210 (Mar. 6, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2> [<https://perma.cc/2BPG-FNT2>] (suspending refugee admissions for 120 days and admission of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen for ninety days) [hereinafter EO-2]. On September 24, 2017, as the provisions of EO-2 were about to expire, President Trump issued a new Proclamation imposing an indefinite ban on entry of most immigrants and some countries from an adjusted list of countries. See Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,164 (Sept. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/> [<https://perma.cc/92ZJ-ZUJY>] [hereinafter EO-3].

4. See EO-2, § 2, 82 Fed. Reg. at 13,212. As of October 23, 2017, two U.S. district courts had issued temporary restraining orders of varying scope regarding EO-3. See *IRAP v. Trump*, No. TDC-17-0361, 2017 U.S. Dist. Lexis 171879 \*1, \*141-42 (D. Md. Oct. 17, 2017); *Hawaii v. Trump*, No. 17-99959, 2017 U.S. Dist. Lexis 171242 \*1, \*13-14 (D. Haw. Oct. 17, 2017).

5. 137 S. Ct. 1678, 1679 (2017).

6. See THE FEDERALIST NO. 23, at 155 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

7. See *IRAP*, 137 S. Ct. at 2088 (granting partial stay of lower court injunctions against refugee EO, asserting that "preserving national security is 'an

branches' electoral accountability situates them well to make substantive immigration decisions that shape the composition of community in the United States.<sup>8</sup> For example, this country might wish to promote family reunification but determine that only spousal, parent-child, or sibling relationships suffice.<sup>9</sup> Because those decisions about immigration priorities relate to the fundamental character of the polity itself, such decisions are properly the province of Congress—a broadly representative body that the Framers designed to solicit, consider, and implement community concerns.<sup>10</sup>

Congress has also delegated facets of immigration authority to the executive branch.<sup>11</sup> For example, in a provision invoked by

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urgent objective of the highest order” (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)); *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (discussing “broad power” over immigration); see also THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing Executive’s capacity for “dispatch” and “[d]ecision” (efficient decision making)); see generally Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105 (2014) (applying Hamilton’s perspective to contemporary questions of executive power over immigration); cf. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009) (analyzing factors contributing to judicial deference to executive decisions).

8. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 5 (2006); MICHAEL WALZER, *SPHERES OF JUSTICE* 62 (1983) (noting deep roots of “rule of citizens over non-citizens, of members over strangers”); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1069-70 (1994); Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 370-71 (2008); but see BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 40 (2001) (suggesting that newcomers—even those who enter community without members’ prior consent—can revise and expand conception of democracy “beyond . . . (national) borders” and transcend limiting narrative of “unified demos stabilized by a metaphoric of national kinship”); Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, in *NOMOS LV: FEDERALISM AND SUBSIDIARITY* 83, 89-93 (James E. Fleming & Jacob T. Levy eds., 2014) (arguing that unrestricted migration encourages individuals to acquire and share information about political units and thus tends to enhance public good of sound governance).

9. See 8 U.S.C. § 1151(b)(2)(A)(i) (2011) (defining “Immediate Relatives,” such as spouses, certain parents, and children of U.S. citizen sponsors, who are not subject to annual limits on immigration).

10. See THE FEDERALIST NO. 70, *supra* note 7, at 424 (describing legislature as best suited to “conciliate the confidence of the people and to secure their privileges and interests”).

11. For example, Congress has looked to State Department consular officials abroad to implement Congress’s guidance about the issuance of visas. See 8 U.S.C. § 1182(a)(3) (setting out “[s]ecurity and related grounds” for inadmissibility, including “[t]errorist activities”); see also *Kleindienst v. Mandel*, 408 U.S. 753, 765-

President Trump, Congress has given the President a measure of discretion to bar the entry of “any aliens or of any class of aliens” whose admission would be “detrimental to the interests of the United States.”<sup>12</sup> Presidents have used this power to pursue objectives such as negotiations with foreign states on immigration policy.<sup>13</sup>

However, in immigration as elsewhere, the executive branch should use its delegated power to further Congress’s “overall statutory scheme.”<sup>14</sup> Executive branch measures that instead undermine that plan exceed the scope of Congress’s delegation. Moreover, the political branches’ zeal for public safety, or a prevailing vision of community composition, should not foster what Hamilton called a “spirit of injustice.”<sup>15</sup> That toxic spirit would heedlessly exclude newcomers to the United States or ignore newcomers’ ties to U.S. persons and institutions. Guarding against such excesses, the courts must take a share in stewardship.

As is often case with judicial review, the sticking point is the level of review required. In *Sessions v. Morales-Santana*, Justice Ginsburg, writing for the Court, insisted on the close means-end nexus typically required of measures based on suspect or quasi-suspect attributes such as gender.<sup>16</sup> According to Justice Ginsburg, to justify such legislation, the government “must show . . . ‘that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related

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70 (1972) (applying deferential “facially legitimate and bona fide” standard to adjudicate First Amendment challenge to visa denial); *Kerry*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (deferring to consular decisions about inadmissibility based on national security grounds).

12. See 8 U.S.C. § 1182(f); cf. *IRAP v. Trump*, 857 F.3d 554, 558 (4th Cir. 2017) (reading § 1182(f) narrowly as not authorizing revised refugee EO); *cert. granted and stayed in part*, 137 S. Ct. 2080, 2083 (2017); *vacated as moot*, 138 S. Ct. 353, 353 (2017); *Hawaii v. Trump*, 859 F.3d 741, 777 (9th Cir. 2017) (reading § 1182(f) narrowly), *cert. granted and stayed in part sub nom IRAP*, 137 S. Ct. at 2080; *vacated as moot*, 138 S. Ct. at 353; *Hawaii v. Trump*, 878 F.3d 662, 673 (9th Cir. 2017) (interpreting § 1182(f) narrowly).

13. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165, 188 (1993) (holding that proclamation pursuant to § 1182(f) authorizing interdiction of refugees at sea was not prohibited by INA); sources cited *infra* note 300.

14. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

15. See THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed.); see also THE FEDERALIST NO. 41, at 257-58 (James Madison) (Clinton Rossiter ed.) (recommending that “[a] wise nation” minimize “both the necessity and the danger of resorting to [any means] . . . which may be inauspicious to its liberties”).

16. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017).

to the achievement of those objectives.”<sup>17</sup> Applying this standard, the Court struck down a provision of the INA that required U.S. citizen mothers, compared with fathers, to be physically present in the United States for a shorter period to ensure that children born out of wedlock overseas acquired citizenship at birth. However, the Court expressly declined to apply this robust means-end test to the admission of *foreign nationals*.<sup>18</sup> Signaling the durability of gender-based tests for admission of foreign nationals, Justice Ginsburg cited Congress’s “exceptionally broad power” in this realm.<sup>19</sup>

Unfortunately, besides citing this history, Justice Ginsburg said little about how or why to distinguish the close means-end fit required in *Morales-Santana* from the more casual means-end fit expected of gender classifications elsewhere in immigration law. The *Morales-Santana* Court’s lack of guidance seems all the more puzzling in light of the painstaking provisional remedy regarding the admission of noncitizens that the Court imposed just weeks later in the litigation surrounding President Trump’s EO-2.<sup>20</sup> Shared stewardship offers a more cohesive model for justifying the heightened review in *Morales-Santana* and determining the level of review that is appropriate in other areas. Those additional areas include President Trump’s EO-3, “extreme vetting” of foreign nationals abroad, and retroactive application of grounds for removal that can result in the deportation of longtime legal residents of the United States.<sup>21</sup>

Current judicial and academic accounts of judicial review in immigration law have not provided this cohesive account. As the thin explanation in *Morales-Santana* demonstrates, the Court itself has failed to offer a theory that justifies why certain measures receive searching judicial scrutiny, while others receive deference. The many judicial references to the “broad power” of Congress or the discretion wielded by the Executive have not crystallized into a persuasive approach. By the same token, the “normalization” thesis offered by many immigration scholars<sup>22</sup> fails to comprehensively

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17. *See id.*

18. *Id.* at 1693.

19. *Id.* (citing *Fiallo v. Bell*, 430 U.S. 787, 792, 794 (1977)).

20. *See Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017) (exempting foreign nationals from the revised EO if they had a “bona fide relationship” with a U.S. person or entity).

21. *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-89 (1952).

22. *See Linda Kelly, Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal*



address the countervailing normative factors that courts should consider. Under the normalization thesis, courts should simply treat immigration measures as they would domestic legislation or administrative action. However, while the most thoughtful normalization theorists agree that in some subset of cases a nexus with foreign affairs should trigger heightened deference, in practice, normalization theorists unduly discount the foreign affairs role.<sup>23</sup>

To offer a cohesive normative account that fills the gaps left by immigration case law and commentary,<sup>24</sup> shared stewardship relies

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*Images*, 51 HASTINGS L.J. 557, 559 (2000); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 6 SUP. CT. REV. 255, 262 (1984) (asserting that “it ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations”); Matthew J. Lindsay, *Disaggregating “Immigration Law”*, 68 FLA. L. REV. 179, 225 (2016) (offering the “normalization” thesis); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002); cf. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 614-18 (2017) (discussing premises of normalization thesis while arguing for more complex normative and descriptive account).

23. For example, in one of the most thoughtful articulations of the normalization approach, Professor Legomsky has argued that judicial deference may be appropriate, but only in “the special case in which the court concludes . . . that applying the normal standards of review would interfere with the conduct of foreign policy.” Legomsky, *supra* note 22, at 6. One can read Professor Legomsky’s caveat in one of two ways. Perhaps Professor Legomsky was recommending that courts consider whether the *broad range of cases* like the matter at issue were likely to affect foreign relations in some fashion. This approach actually bears some kinship to the shared stewardship model, although under the latter a challenger would also have to show the presence of other factors. See *infra* notes 25-26 and accompanying text. However, one could also read Professor Legomsky’s caveat as requiring a judicial assessment of the foreign policy *merits* of a challenged measure. Of course, the latter reading would undermine the whole point of deference, which is to delegate assessment of the substantive merits to another entity besides the courts.

24. Another account, the “hybrid” model offered by Professors Rubenstein and Gulasekaram, is an exceptionally promising approach that has widened analysis of factors relevant to judicial review. See Rubenstein & Gulasekaram, *supra* note 22, at 646. However, that breadth stems from the conclusion that immigration law includes too many factors to distill into a single approach. In that sense, although the hybrid model may well capture nuances that shared stewardship fails to address, the hybrid model describes those nuances at the expense of venturing a single normative account that will provide optimal guidance to courts and commentators. For better and worse, that latter goal is the ambition of the shared stewardship model advanced here. A model proposed recently, the “two-principals” approach, regards executive discretion over immigration as of equal importance to Congress’s power. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 104 (2015). However, although this model has also advanced debate

on three factors to trigger heightened review: (1) degree of sovereign interest;<sup>25</sup> (2) number and intensity of collateral impacts; and (3) absence of intelligible limits. When courts find an attenuated sovereign interest, substantial collateral impacts on U.S. persons or entities, and no intelligible limits, courts should apply a more searching brand of review, requiring a tighter means-end fit between the challenged measure and its putative objectives. Often, application of that more rigorous standard would result in invalidation of the measure at issue. Conversely, a looser means-end fit would suffice when there is a significant sovereign interest supporting the measure, collateral impacts are few or nonexistent, and limits on the measure are intelligible. In that event, courts would generally uphold the measure, and let the political process adjudicate its fate.

The three factors that drive the shared stewardship approach require additional explanation. The sovereign interest of the United States inheres both in substantive admission and removal criteria and the probability and gravity of foreign relations consequences. In a democracy, substantive criteria for both admission and removal are at the heart of sovereignty.<sup>26</sup> When Congress has provided a comprehensive framework, courts owe that framework a measure of deference. Moreover, the executive branch's initiatives should be largely interstitial, filling gaps without undermining Congress's overarching structure. The exercise of "predictive judgment"<sup>27</sup> by the Executive about the probability and gravity of adverse diplomatic or security consequences should elicit a measure of judicial deference, particularly when those judgments concern events overseas. However, courts should not clothe *all* immigration rules in crucial

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in useful ways, it is incomplete since it offers few consistent guideposts to distinguish between the actions of specific presidential administrations. A model that views President Obama as a co-principal of Congress can hardly deny that role to President Trump. To the extent that the two principals approach distinguishes between the actions of presidents based on case-by-case analysis, the model dilutes its distinctive claim of full presidential partnership. Moreover, the two principals model by definition has little to say about *constitutional* limits on the authority of Congress. In this respect, the shared stewardship approach offers further guidance.

25. Shared stewardship's framing of this concern owes a debt to Professor Legomsky's approach. See Legomsky, *supra* note 22, at 262. The Article's effort to credit executive branch concerns owes much to the work of David Martin. See generally Martin, *supra* note 1; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983).

26. See WALZER, *supra* note 8, at 61; see also *infra* notes 147-50 and accompanying text (citing sources).

27. *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

sovereign interests that may not fit the particular context the courts encounter.

To demonstrate that more robust review of means-end fit is appropriate, a challenger of an immigration measure should also address the collateral impact of that measure. In the last forty years, that factor has been more salient in the Court's consideration of *state* measures affecting immigration than in analyzing the constitutionality of the INA itself. For example, during the past term the Court, in *Esquivel-Quintana v. Sessions*,<sup>28</sup> read the INA's removal grounds to promote clarity regarding the immigration consequences of criminal convictions, in part to promote fair and efficient plea bargaining in the criminal justice system.<sup>29</sup> Addressing state laws that seek to wrest the initiative in immigration enforcement from the federal government, the Court has cautioned that such measures could have consequences for trade, investment, travel, and diplomacy.<sup>30</sup>

Collateral impacts have not figured as heavily in assessing the constitutionality of federal immigration laws, in part because of the historical deference shown to Congress by the courts, which often casts collateral impacts as by-products that Congress has duly considered and found not to be dispositive.<sup>31</sup> However, on the rare occasions when the Court *has* invalidated federal immigration statutes, one can find gestures to collateral consequences. In *INS v. Chadha*,<sup>32</sup> the Court asserted that permitting a one-house legislative veto to overrule executive decisions on immigration relief would encourage hasty, heedless, or malicious laws, undercutting the "due deliberation" that Hamilton sought in the legislative process.<sup>33</sup> In

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28. 137 S. Ct. 1562 (2017).

29. *Id.* at 1568; *see also* Lee v. United States, 137 S. Ct. 1958, 1969 (2017) (citing *Padilla* in vacating a plea based on the defendant's receipt of inaccurate information from his lawyer regarding the immigration consequences of a criminal conviction, even when evidence that prosecution would introduce at trial was overwhelming); *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (holding that defendant's receipt of clear and competent advice about the immigration consequences of a plea is one element in effective assistance of counsel under the Sixth Amendment); Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1057 (2017) (noting the Court's concern for the orderly functioning of criminal justice).

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

31. *See generally* *Galvan v. Press*, 347 U.S. 522 (1954).

32. 462 U.S. 919 (1983).

33. *Id.* at 947-48 (citing THE FEDERALIST NO. 73, at 458 (Alexander Hamilton) (H. Lodge ed. 1888)).

*Sessions v. Morales-Santana*,<sup>34</sup> Justice Ginsburg supported the Court's invalidation of a gender-based statute on acquired citizenship by noting the overall "constraining impact" of gender-based stereotypes on human aspirations.<sup>35</sup> Shared stewardship would promote closer consideration of collateral impacts in assessing the scope of Congress's delegation to the executive branch and in constitutional review of immigration statutes, particularly when such statutes undermine long-standing reliance interests.

Courts should also consider whether the power exemplified by a challenged action or measure contains a coherent limiting principle. The imposition of appropriate "external . . . [and] internal controls" that both enable and constrain government is perhaps the central project of American constitutionalism.<sup>36</sup> Case law on judicial deference to Congress regarding immigration too often invokes the risks of imposing limits on Congress's power.<sup>37</sup> Here too, however, there are glimmerings of a different approach in recent cases. In *Zadvydas v. Davis*,<sup>38</sup> the Court cited the Constitution's abhorrence of indefinite detention in holding that the INA permitted only 180 days of detention for a former lawful permanent resident (LPR) awaiting execution of a final order of removal because of criminal convictions.<sup>39</sup> To best vindicate the Framers' vision and extend the

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34. 137 S. Ct. 1678 (2017).

35. *Id.* at 1692-93.

36. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (also noting that "[i]n framing a government . . . you must first enable the government to control the governed; and in the next place oblige it to control itself").

37. See *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

38. 533 U.S. 678 (2001).

39. *Id.* at 682. *Cf.* *Demore v. Kim*, 538 U.S. 510, 531-33 (2003) (Kennedy, J., concurring) (asserting that mandatory detention of an LPR pending adjudication of removability due to criminal convictions was appropriate because the detention would typically be for a reasonable period bounded by issuance of a final order of removal, but leaving open the legality of protracted detention caused by "unreasonable delay" on government's part). In the October 2017 Term, the Court reheard oral argument in a case involving allegations of inappropriate delay pending adjudication of removability. See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). This Article will not discuss detention in depth since the Court's decision will surely provide insights useful for future commentary. Similarly, this Article will defer consideration of whether the Due Process Clause permits restricting the procedural safeguards that govern removal of foreign nationals who are arriving at a port of entry or have recently arrived. Compare *Castro v. U.S. Dep't of Homeland Security*, 835 F.3d 422, 424-28 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017) (asserting that application of minimal safeguards applicable to "expedited removal" is

wisdom of cases like *Zadvydas*, shared stewardship would elevate the importance of intelligible limits in determining the level of means-end fit required.<sup>40</sup>

Shared stewardship yields fresh insights on current issues in immigration jurisprudence. A shared stewardship analysis would find that the indefinite restrictions in President Trump's EO-3 exceeded the power delegated by Congress to the President. Congress's demarcation in the INA of the United States' sovereign interest hinged on the rejection of discriminatory national origin quotas and the prioritization of family reunification.<sup>41</sup> Here, EO-3's indefinite restrictions contrast with the temporary pause in that measure's predecessor, EO-2. While EO-2's brief pause to acquire more information<sup>42</sup> did not undermine Congress's comprehensive immigration framework, EO-3's indefinite ban on admission of

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permissible for noncitizens apprehended one mile north of the U.S.–Mexico border), with Margaret H. Taylor & Kit Johnson, “*Vast Hordes . . . Crowding in Upon Us*”: *The Executive Branch’s Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 193 (2015) (critiquing harshness and risk of error in expedited removal).

40. Intelligible limits may also demonstrate that even when the Court reviews a measure under a stricter standard, that measure is narrowly tailored enough to pass muster. Shared stewardship would consider this factor at an earlier stage, as demonstrating that Congress or the President had shown sufficient *self-restraint* to obviate the need for more searching judicial scrutiny.

41. S. REP. NO. 89-748, at 13 (1965), as reprinted in 1965 U.S.C.C.A.N. 3328, 3332 [hereinafter 1965 Senate Judiciary Committee Report] (declaring that “[r]eunification of families is to be the foremost consideration” in visa allocation and rejecting national origin quotas as lacking the “required degree of flexibility” in promoting family reunification).

42. Imperfect information is a perennial issue in immigration law and policy. See *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017) (detailing false statements by asylum applicant); see also Martin, *supra* note 25, at 184 (noting that in asylum adjudication “[t]he decisionmaker must learn of events in a distant country, as to which few witnesses are likely to be available here, other than the applicant himself. This condition could be seen as an opportunity for the applicant, permitting him to exaggerate past mistreatment by his home government, or, if he is particularly unscrupulous, allowing him to fashion his claim of whole cloth . . .”). Relatively few visa applicants may exploit a decisionmaker's imperfect access to information. However, the government's concern about this issue is not unreasonable on its face. Cf. *Asylum: Additional Actions Needed to Assess and Address Fraud Risks*, U.S. GOV'T ACCOUNTABILITY OFF. 3 (Dec. 2015), <https://www.gao.gov/assets/680/673941.pdf> [<https://perma.cc/QJ4A-4S2L>] (noting that “asylum officers and immigration judges must make decisions, at times, with little or no documentation to support or refute an applicant's claim. These factors create a challenging environment in which adjudicators must attempt to reach the best decisions they can with the information available”).

nationals from designated countries clashes with the INA's bar on discrimination in the issuance of immigrant visas.<sup>43</sup> Without adequate warrant from Congress, EO-3 installed a Middle Eastern variation on the Asia-Pacific triangle quota system that Congress had strictly abjured in the landmark 1965 immigration amendments.<sup>44</sup> Moreover, as an indefinite ban on entry of nationals of the listed countries, EO-3 lacks a limiting principle. No independent review or neutral metric would stop this or any other Administration relying on a similar theory from decreeing a de facto *permanent* ban on immigration from any country found wanting. That unbridled power poses a fundamental challenge to Congress's comprehensive immigration "plan."

Shared stewardship also provides fresh insight on consular "extreme vetting" of visa applicants and retroactive application of removal grounds. Under the shared stewardship approach, the broad discretion of consular officials becomes a source of concern, enabling the evisceration of Congress's visa priorities. Basic procedural fairness emerges as a valuable limit on the otherwise limitless discretion that consular officials exercise. Those factors lead to a critique of the Court's decision in *Kerry v. Din*<sup>45</sup> as being unduly deferential and point the way toward more searching review of the "extreme vetting" that the Trump Administration has promoted.

Shared stewardship also highlights the damage to the substantive design of immigration law wrought by retroactive application of removal grounds.<sup>46</sup> If substantive immigration law aims to shape the community in which we aspire to thrive, it should reflect abiding values, including due regard for reliance interests. Retroactive application unduly discounts the importance of those reliance interests. Moreover, the collateral impact of retroactive application compounds the "spirit of injustice"<sup>47</sup> that Hamilton identified with oppressive legislation. The spread of that toxic spirit

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43. See 8 U.S.C. § 1152(a)(1)(A) (2012).

44. See 1965 Senate Judiciary Committee Report, *supra* note 41, at 14 (noting that for several decades prior to passage of 1965 amendments, immigration statutes had either absolutely barred the immigration and naturalization of Asians or limited *all* visa applicants of Asian descent—including those who were nationals of countries in *other* regions—to a *total* of 2,000 visas annually).

45. 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring).

46. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (upholding retroactive application).

47. THE FEDERALIST NO. 78, *supra* note 15, at 470.

deprives noncitizens of the stake they need to make optimal contributions to U.S. society. The absence of intelligible limits on the harshness of retroactive application, which can lead to the removal of longtime legal U.S. residents, further exacerbates the problem.

This Article is in three Parts. Part I discusses stewardship in immigration law, combining the Framers' insights with the wisdom of formative cases. Part II discusses the factors driving shared stewardship: sovereign interest, collateral impacts, and intelligible limits. Part III applies the model to both current and abiding immigration problems, including gender-based statutes, judicial review of consular decisions, presidential discretion, and the retroactivity of removal grounds. In each context, shared stewardship seeks to nurture due deliberation on governance by each of the three branches.

## I. STEWARDSHIP, GOVERNANCE, AND THE CHALLENGE OF IMMIGRATION LAW

Stewardship of an entity often comes down to one person, who serves as a managing partner or chief executive. In U.S. political history, Theodore Roosevelt's conception of presidential stewardship is the best-known use of the term.<sup>48</sup> However, one can also view stewardship as a product of collaboration, or even of arms-length coordination between different units with overlapping responsibilities. A business organization may allocate duties between a chief executive officer and a board of directors. In a republic, branches with overlapping roles may be said to participate in a scheme of shared stewardship.<sup>49</sup>

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48. See THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 357 (1922). Much of the following discussion is adopted from Margulies, *supra* note 7, at 108.

49. One can argue that this conception merely restates the typical posture of each of the three branches in U.S. constitutionalism. This Article's project is not merely to restate the obvious, but to outline how the branches could and should coexist in the distinctive domain of immigration law, where precedents often suggest that courts play a lesser role than they do in the purely domestic sphere. Similarly, because the model advanced here addresses the distinctive challenges posed by immigration law, it coincides only in part with the work of scholars who have outlined a "fiduciary" theory of democratic governance generally, and judging in particular. See generally Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 701-04 (2013) (discussing the concept of judiciary accountability and judicial duties owed to the people).

### A. The Framers' Stewardship

Hamilton alluded to stewardship in a republic when he wrote in Federalist No. 23 that “government ought to be clothed with all the powers requisite to complete execution of its trust.”<sup>50</sup> Based on this model, Hamilton recommended that the government receive “the most ample authority for fulfilling the objects committed to its charge.”<sup>51</sup> Confirming the accuracy of the stewardship paradigm, Hamilton readily conceded “the responsibility [of the federal government] implied in the duty assigned to it”<sup>52</sup> and identified the federal government as “that body to which the guardianship of the public safety is confided.”<sup>53</sup>

For the Framers, the stewardship metaphor was particularly apt because of the fluid nature of threats to the new republic and the adjustments expected of officials fulfilling their governmental responsibilities. As Hamilton warned, “it is impossible to foresee or to define the extent and variety of national exigencies, and the corresponding extent and variety of the means which may be necessary to satisfy them.”<sup>54</sup> Madison recognized that risks proliferated in the domain of foreign affairs. He warned that safeguards built into the U.S. Constitution will not “chain the ambition or set bounds to the exertions of all other nations.”<sup>55</sup> While the United States and the fifty states that comprise it have a monopoly on the use of force within U.S. borders and the ability to use compulsory process to arrest lawbreakers on U.S. territory, the country must depend on the good will of foreign governments when acting abroad. Those foreign regimes may be hostile, fickle, or simply unable to help.<sup>56</sup> The political branches require some leeway in meeting that challenge.

Nevertheless, Madison's conviction that the political branches needed the means to guard against the “ambition” of hostile or

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50. See THE FEDERALIST NO. 23, *supra* note 6, at 149. The analysis here also owes much to previous work. See Peter Margulies, *Dynamic Surveillance: Evolving Procedures in Metadata and Foreign Content Collection After Snowden*, 66 HASTINGS L.J. 1, 23 (2014).

51. THE FEDERALIST NO. 23, *supra* note 6, at 151.

52. *Id.*

53. *Id.*

54. *Id.* at 149.

55. See THE FEDERALIST NO. 41, *supra* note 15, at 253.

56. See Martin, *supra* note 1, at 42-44 (noting that “[i]n the international arena, U.S. actors generally cannot invoke compulsory process or other reliable coercive means under their own government's control”).



competing states did not mute his concern with the excessive “ambition” of competing branches of the federal government. Madison famously designed the distinct but overlapping domains of the three branches to ensure that “[a]mbition must . . . counteract ambition.”<sup>57</sup> In this vein, Madison observed that stewardship also required protecting freedom from undue restraints. To defuse this risk, Madison advised, “[a] wise nation” will minimize “both the necessity and the danger of resorting to [any means] . . . which may be inauspicious to its liberties.”<sup>58</sup> Hamilton, in Federalist No. 78, seconded Madison’s point, cautioning against the “ill humors”<sup>59</sup> driven by short-term thinking that elevate the fortunes of a faction today at the expense of liberty tomorrow.<sup>60</sup>

Hamilton had a ready remedy for Madison’s concern about threats to liberty: review by an independent judiciary. Fortified by the “permanency in office”<sup>61</sup> and insulation from political pressure that lifetime tenure provides, the federal courts could use their faculty of sound “judgment”<sup>62</sup> to promote the “moderation” needed in a republic.<sup>63</sup> That mix of checks and balances is important in immigration law, despite the integral role in immigration of sovereignty and exigency. To further that mix of checks and balances, immigration requires a system of shared stewardship among the branches.

## B. The Supreme Court Takes a Turn

As an example, consider the Supreme Court’s decision in *INS v. Chadha*.<sup>64</sup> In *Chadha*, the Court struck down an immigration provision that permitted Congress to use the so-called legislative veto. Under the legislation that the Court invalidated, one house of Congress by majority vote could void decisions by the Department of Justice that granted individual noncitizens a lawful status.<sup>65</sup> In

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57. See THE FEDERALIST NO. 51, *supra* note 36, at 322.

58. THE FEDERALIST NO. 41, *supra* note 15, at 257-58.

59. THE FEDERALIST NO. 78, *supra* note 15, at 469.

60. See *id.* at 470 (noting that the scruples embodied by an independent judiciary “operate[] as a check upon the legislative body” by imposing “obstacles to the success of an iniquitous intention” and thereby “mitigating the severity” of “unjust and partial laws”).

61. *Id.* at 466.

62. *Id.* at 469.

63. See *id.* at 466, 469-70.

64. 462 U.S. 917, 956-59 (1983).

65. *Id.* at 925 (citing 8 U.S.C. § 244(c)(2)).

holding that the legislative veto was unconstitutional, the Court stressed that this scheme violated the Constitution's presentment requirement, which mandated that legislation be signed by the President and subject to presidential veto.<sup>66</sup> Exploring the reasons for requiring joint action by Congress and the executive branch, the Court cited Hamilton's elaboration of the stewardship rationale in Federalist No. 73.<sup>67</sup> Hamilton defended presentment to the President as promoting "due deliberation" in the enactment of statutes.<sup>68</sup> According to Hamilton, the President's election by the entire country would reduce the influence on the chief executive of the locally instilled "spirit of faction" that can distort the legislative process.<sup>69</sup> By introducing the President—a player without local bias—into the legislative mix, the Framers sought to "increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."<sup>70</sup>

The Court's decision in *Chadha* acknowledges the risks inherent in legislative action on immigration.<sup>71</sup> Second-guessing administrative decisions by a one-house majority could be biased or hasty, per the Framers' fear. Judicial review curbing the one-house veto of administrative action was an act of stewardship to temper the ill effects that the Framers had sought to prevent.

Justice Powell's concurrence in *Chadha* stressed the stewardship rationale. Justice Powell suggested that the one-house veto, by making it easier for Congress to target individuals whom Congress didn't like, violated the Bill of Attainder Clause.<sup>72</sup> Describing the haste of Congress's action in *Chadha*'s case, Justice

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66. *See id.* at 946-47, 958.

67. *Id.* at 947.

68. THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

69. *Id.*

70. *Chadha*, 462 U.S. at 947-48 (quoting THE FEDERALIST No. 73, *supra* note 68, at 458). Construing the Framers' vision, Joseph Story, a Justice of the Supreme Court and the foremost constitutional scholar of the early nineteenth century, observed that

[p]ublic bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous. . . . [A] legislature] . . . rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations on society.

*Id.* at 949-50 (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION 383-84 (1859)).

71. *Id.* at 958-59.

72. *Id.* at 961-63, 965-66 (Powell, J., concurring).

Powell noted that the measure's House sponsors had not even distributed the text of the resolution to the entire House membership because of time pressure.<sup>73</sup> For Justice Powell this jettisoning of "normal procedures" increased the risk of "arbitrary and ill-considered action."<sup>74</sup> The *Chadha* majority expressed concern that once such impulses infiltrated the legislative process, proponents of "oppressive" laws would have the upper hand.<sup>75</sup> Thwarting this ominous trend toward oppressive "efficiency"<sup>76</sup> was vital for the vulnerable immigrants that Congress might have targeted in the measure that the *Chadha* Court struck down. In addition, the ease of second-guessing progressive executive decisions could have injured citizens and lawful residents. Invalidating the law spared citizens and lawful residents from those dire consequences.

### 1. *Stewardship and Levels of Review*

Judicial review under the shared stewardship model often entails a key threshold inquiry: determining the appropriate level of judicial scrutiny.<sup>77</sup> As in equal protection, probing judicial review requires that the political branches show a close nexus between ends and means.<sup>78</sup> For example, in adjudicating classifications based on gender, the Court has required that measures be substantially related to achievement of an important governmental objective.<sup>79</sup> However, in other settings, the Court has been far more deferential, settling for a looser connection between government's goals and the measures the political branches have chosen to achieve those ends.<sup>80</sup>

Determining the level of judicial review is crucial for all stakeholders in immigration cases. If review is too searching, the political branches will be subject to persistent judicial second-guessing. That paralyzes policymakers and effectively neutralizes the

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73. *Id.* at 964 n.6.

74. *Id.*

75. *Id.* at 947.

76. *Id.* at 959.

77. Choosing a standard of review was not necessary in *Chadha*, in which the Court merely asked if the legislative veto provisions at issue violated the presentment requirement and other constraints on Congress's authority under Article I. *Id.* at 944.

78. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017).

79. *Id.*

80. *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (outlining "facially legitimate and bona fide" standard).

virtues of decisiveness and dispatch that Hamilton identified.<sup>81</sup> On the other hand, unduly lax judicial review will encourage excess and abuse by the political branches that Hamilton branded as inculcating a toxic “spirit of injustice.”<sup>82</sup> A recurring difficulty in immigration jurisprudence is the Court’s inability to coherently explain when and why a particular level of judicial review applies to actions by the political branches.

The tension between the competing risks of overly intrusive judicial review and unduly deferential judicial review reflects shifting conceptions of the deliberation that courts should expect of the political branches.<sup>83</sup> The fit between ends and means is a hallmark of deliberation. The Framers were familiar with Aristotle and other sources of classical wisdom.<sup>84</sup> Aristotle viewed deliberation as linked to practical judgment.<sup>85</sup> Enlarging on this

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81. In *Ziglar v. Abbasi*, the Court took this view in a different context involving remedies for allegedly inappropriate detention of Muslim immigrants after 9/11, 137 S. Ct. 1843, 1851 (2017). Justice Kennedy, writing for the Court, announced a restrictive test for when the Court would entertain suits for damages directly under the Constitution, as it did for law enforcement search and seizure excesses in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Abbasi*, 137 S. Ct. at 1851, 1865. Justifying this restrictive test, Justice Kennedy warned a looser test for recognizing suits for damages against officials in national security cases might “cause an official to second-guess difficult but necessary decisions.” *Id.* at 1861; see also Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 282 (noting that undue exposure to suits for damages can lead to excessive risk aversion by public officials); cf. Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 202 (2010) (suggesting test for availability of *Bivens* actions in national security cases). My point here is not to justify *Abbasi*, which takes an unduly cramped view of the availability of suits for damages under the Constitution as a remedy for official overreaching. See Steve Vladeck, *The Incoherence of the Normative Case Against Bivens*, LAWFARE (June 21, 2017, 2:53 PM), <https://www.lawfareblog.com/incoherence-normative-case-against-bivens> [<https://perma.cc/QNK3-BYCD>]. Rather, I cite *Abbasi* simply as a recent example of reasoning on the costs of judicial remedies in an immigration-related case.

82. THE FEDERALIST NO. 78, *supra* note 15, at 470.

83. Scholars have also been resourceful and inventive in framing these shifts in structural decisions as a dialectic between rules and standards. See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 349-51 (2016).

84. Cf. HANNAH ARENDT, ON REVOLUTION 203 (Penguin ed. 1990) (discussing the familiarity of the American founding generation with classical sources).

85. See ARISTOTLE, NICOMACHEAN ETHICS 152 (Martin Ostwald trans., Bobbs-Merrill 1962) (“[T]he capacity of deliberating well about what is good and advantageous for oneself is . . . typical of . . . practical wisdom.”).

notion, Aristotle commented that practical wisdom resides in the ability to “calculate well with respect to some worthwhile end”<sup>86</sup> that is “attainable . . . by action.”<sup>87</sup>

Hamilton’s appreciation of deliberation reflected comparable premises. In Federalist No. 23, in extolling the virtues of placing the federal government in charge of the national defense, Hamilton noted that in any plan for governance, “the *means* ought to be proportioned to the *end*.”<sup>88</sup> Therefore, much depends on the closeness of the nexus between ends and means that a court requires.

In this past term, the Supreme Court has endorsed a similar practical vision for immigration law. In *Sessions v. Morales-Santana*,<sup>89</sup> the Court struck down a provision of the INA that imposed a gender-based condition on citizenship acquired at birth by a child born out of wedlock abroad to a U.S. citizen parent and a foreign national.<sup>90</sup> The provision that the Court invalidated required at least five years of physical presence in the United States for U.S. citizen fathers to pass citizenship to children born abroad, while requiring only one year of physical presence in the United States for U.S. citizen mothers to accomplish the same result.<sup>91</sup> According to Justice Ginsburg, who wrote the opinion of the Court, the provision was infirm because it lacked deliberation’s signature nexus between means and ends.<sup>92</sup> If the end that Congress envisioned was ensuring

86. *Id.* at 152.

87. *Id.* at 157. Aristotle proposed such rules of deliberation in order to curb demagogic appeals in ancient Athens, which ironically had as their locus Athenian courts. See BRYAN GARSTEN, *SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT* 121 (2006) (noting Aristotle’s view that the courts were “a forum in which . . . leaders would stir up the people”). Requiring a close fit between posited ends and the means proposed to achieve those ends is one way that modern courts seek to curb contemporary demagogic appeals.

88. THE FEDERALIST NO. 23, *supra* note 6, at 153.

89. 137 S. Ct. 1678 (2017).

90. *See id.* at 1682, 1698, 1700-01. In such cases, the U.S. citizen parent might be an individual born abroad to married U.S. citizen parents or born in the United States to one or more parents who subsequently moved abroad. *Id.* at 1687-88 (discussing facts); *id.* at 1695 n.18 (citing 8 U.S.C. § 1401(c) (2012)).

91. *See id.* at 1686-87. Under the provision relevant to the respondent in *Morales-Santana*, who was born in 1962, Congress required that a U.S. citizen father accrue *ten* years of physical presence in the United States, including five years after age fourteen. *Id.* at 1687 n.3. Congress subsequently amended the law to shorten the requirement for fathers to five years, including at least two after age fourteen. *See* 8 U.S.C. § 1401(g) (2012); *see also id.* § 1409(c) (requiring far shorter period of presence in the United States for citizen mother).

92. *Morales-Santana*, 137 S. Ct. at 1690 (noting that to pass constitutional muster, legislation that “differentiates on the basis of gender must show . . . ‘that the

that a child born abroad was “American in character” and thus worthy of citizenship,<sup>93</sup> requiring a substantial period of U.S. presence by the parent was a legitimate if somewhat rough measure of the parent’s stake in the child’s American identity.<sup>94</sup> However, requiring a substantial period of U.S. presence for a U.S. citizen *father* but not a U.S. citizen *mother* “scarcely serve[s] the posited end.”<sup>95</sup>

To illustrate this disparity, Justice Ginsburg compared two hypothetical examples. The first was a U.S. citizen mother who had been physically present in the United States for the statutory one-year period at some point prior to her nonmarital child’s birth abroad, but never returned to the United States after her child’s birth. The second example concerns a U.S. citizen father who at the time of the child’s birth abroad is just days short of the substantially longer statutory presence period required of fathers and then eventually returns to the United States to raise the child.<sup>96</sup> The first child acquired U.S. citizenship at birth; the second did not. However, as Justice Ginsburg noted, this “anachronistic” scheme<sup>97</sup> depends on one of two attenuated rationales: (1) the premise, so dubious today that the government did not advance the argument, that “unmarried men take more time to absorb U.S. values than unmarried women do,”<sup>98</sup> or (2) the assumption that while an unwed U.S. citizen father

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[challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives”) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996) (relying on the Equal Protection Clause of the Fourteenth Amendment in striking down male-only admission policy at Virginia Military Institute)).

93. *Id.* at 1692 (citation omitted); *cf. To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 43, 431 (1940) (statement of Richard W. Flournoy, Assistant Legal Adviser, State Department); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134, 2134 (2014).

94. *Morales-Santana*, 137 S. Ct. at 1692 (rooting presence requirements in reasonable congressional desire to ensure that U.S. citizen parent could “counteract the influence of the alien parent”). While one can argue even about the empirical soundness of this view, the *Morales-Santana* Court accepted this logic as an across-the-board rationale for U.S. residency requirements. *Id.* at 1695 (accepting, at least for purposes of argument, that Congress wished to “serve an interest in ensuring a connection between the foreign-born nonmarital child and the United States”).

95. *Id.*

96. *Id.*

97. *Id.* at 1693.

98. *Id.* at 1695.

needs more time in the United States to counter the “competing national influence”<sup>99</sup> of the foreign national mother, unwed foreign national fathers “care little about, indeed are strangers to, their children,”<sup>100</sup> thereby requiring far less U.S. presence by U.S. citizen mothers as a counterweight to foreign influence.<sup>101</sup> The Court believed that this stereotype of the absent unwed father was inaccurate regarding foreign national fathers, just as it was inaccurate for unwed U.S. citizen fathers.<sup>102</sup> This “[l]ump characterization”<sup>103</sup> lacked the “close means-end fit”<sup>104</sup> required by the Equal Protection Clause’s deliberative ideal.

Another decision from this past term, *Maslenjak v. United States*,<sup>105</sup> focused on means-end fit as a device for understanding legislative intent in an immigration case. The *Maslenjak* Court addressed whether the government had to show that a false statement in the course of a noncitizen’s naturalization was “material” in order to obtain a conviction.<sup>106</sup> Justice Kagan, writing for the Court, analyzed the statutory language prohibiting false statements to “procure” naturalization.<sup>107</sup> According to Justice Kagan, this language implied a “means-end relation” between the false statement and attainment of the goal of U.S. citizenship.<sup>108</sup> Requiring the government to show such a “means-end relation” ensured that a jury could not convict a defendant for false statements that were incidental or irrelevant to obtaining naturalization. For example, an applicant for naturalization might lie about a past speeding violation.<sup>109</sup> Since a speeding violation would not in any case be dispositive in this context, such a statement would not materially assist in gaining naturalization. At most, it might buttress the applicant’s vanity or avoid embarrassment.

According to Justice Kagan, it was reasonable to assume that Congress envisioned a more robust “causal relation”<sup>110</sup> between ends

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1693 n.13 (citing studies showing that unwed fathers “assume responsibility for their children in numbers already large and notably increasing”).

103. *Id.* at 1695.

104. *Id.* at 1696.

105. 137 S. Ct. 1918, 1921 (2017).

106. *See id.* at 1932.

107. *See* 18 U.S.C. § 1425(a) (2012).

108. *See Maslenjak*, 137 S. Ct. at 1925.

109. *See id.* at 1927.

110. *See id.* at 1925.

and means as a predicate for a conviction that could result in jail time and revocation of naturalization. The *Maslenjak* Court attributed to Congress a concern for the close fit of ends and means that Aristotle and Hamilton saw as integral to deliberation. A more attenuated link between ends and means would not fit the model of deliberation that the *Maslenjak* Court read into the immigration statute.

## 2. Conflicts and Contradictions in the Current Paradigm

If *Morales-Santana* and *Maslenjak* heralded the embrace of deliberative means-end rationality that characterizes much non-immigration adjudication under the Equal Protection Clause, the account of immigration law reflected in these cases from the Court's October 2016 term might be a tale of triumph for the "normalization" thesis, which urges the convergence of immigration with mainstream precedent. However, the convergence story does not explain these cases. Indeed, Justice Ginsburg, writing for the Court in *Morales-Santana*, pointedly distinguished the Court's decision on acquired citizenship from decisions involving Congress's "'exceptionally broad power' to admit or exclude aliens."<sup>111</sup> In those more deferential cases, the Court did *not* require the familiar means-end fit of deliberative rationality. However, while the *Morales-Santana* Court made clear that convergence is not the order of the day, the Court was far less clear in articulating the *justification* for that disparate treatment.

In *Morales-Santana*, Justice Ginsburg cited two decisions supporting the downgrading of the means-end fit test in the admission of foreign nationals. In *Fiallo v. Bell*,<sup>112</sup> the Court, forty years before *Morales-Santana*, had upheld a provision, since amended, that authorized visas for children born abroad out of wedlock to *mothers* who were U.S. citizens or LPRs at the time of the visa application. However, the Court did not make visas available to similarly situated children of U.S. citizen or LPR fathers.<sup>113</sup> The *Fiallo* Court justified a less rigorous standard of review with gender-based generalizations comparable to the "[I]ump characterization"

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111. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017) (citing *Fiallo v. Bell*, 430 U.S. 787, 792, 794 (1977)).

112. See 430 U.S. at 800.

113. See *id.* at 788-89. The statute had the same impact on visa eligibility for foreign national fathers of U.S. citizen or LPR children born out of wedlock. *Id.* at 789.



that the Court rejected in *Morales-Santana*.<sup>114</sup> In *Nguyen v. INS*,<sup>115</sup> the Court asserted that it was applying the rigorous standard that the Court subsequently applied in *Morales-Santana* in upholding the constitutionality of a provision that required that a U.S. citizen father acknowledge a child born out of wedlock abroad in order for that child to be deemed to have acquired U.S. citizenship at birth.<sup>116</sup> Justice Ginsburg had joined Justice O'Connor's vigorous dissent in *Nguyen*,<sup>117</sup> in which the nominal standard of review appeared at first blush to make little difference; almost a quarter-century after *Fiallo*, the Court justified this gender-based disparity with the same gender stereotypes that *Fiallo* had cited.<sup>118</sup>

Taken together, *Fiallo* and *Nguyen* illustrate *Morales-Santana*'s lack of a clear justification for distinguishing the acquired citizenship at issue in *Morales-Santana* from the admission or exclusion of foreign nationals at issue in *Fiallo*. First, consider Justice Ginsburg's argument that Congress's power over admission of foreign nationals requires greater deference.<sup>119</sup> That reasoning is painfully artificial. It is not at all clear why Congress's power to determine which foreign-born individuals acquire U.S. citizenship at birth merits less deference than its power to admit or exclude foreign nationals. After all, the Court decided in *Morales-Santana* that Congress *lacked* the power to permit a shorter period of physical presence in the United States for the children of U.S. citizen mothers,

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114. Compare *id.* at 799 (asserting that in excluding fathers Congress was motivated by the "perceived absence . . . of close family ties" between fathers and children born out of wedlock and with the "serious problems of proof" that "lurk in paternity determinations"), with *Morales-Santana*, 137 S. Ct. at 1695. Whether or not proving paternity was difficult in 1977, it is clearly straightforward in 2017 because of DNA testing, rendering the "scientific" analysis in *Fiallo* suspect.

115. 533 U.S. 53 (2001).

116. See *id.* at 59-60. The statute, still part of the INA, does not require an acknowledgment from a similarly situated U.S. citizen mother. See 8 U.S.C. § 1409(a)(4)(B) (2012).

117. See 533 U.S. at 74.

118. See *id.* at 66-67 (asserting that the requirement of paternal acknowledgment merely ensured that father and child would have the opportunity to meet and bond, thus replicating the "opportunity, inherent in the event of birth as to the mother-child relationship"). The *Nguyen* Court asserted that DNA testing was no substitute for proof of this parent-child bond, which it viewed as "inherent" for mothers but not fathers. *Id.* at 66. But see *id.* at 74-97 (O'Connor, J., dissenting) (critiquing majority's rationale); see generally Kelly, *supra* note 22 (criticizing influence of stereotypes in the acquired citizenship cases).

119. *Morales-Santana*, 137 S. Ct. at 1697-99.

as opposed to fathers.<sup>120</sup> That decision had one salient result, at least prospectively: More children of U.S. citizen mothers born out of wedlock abroad would, in the absence of further congressional action, be *foreign nationals*. Nowhere in *Morales-Santana* did the Court even try to describe why Congress's power to admit or exclude foreign nationals is more worthy of deference than its power to choose which individuals *born abroad* could acquire citizenship. This distinction is particularly puzzling because the Constitution expressly grants Congress the power to regulate the naturalization of noncitizens.<sup>121</sup> In contrast, no specific provision in the Constitution grants Congress the power to regulate noncitizens' entry or admission.<sup>122</sup>

Moreover, the *Morales-Santana* Court failed to acknowledge that the mix of citizens and foreign nationals is a zero-sum game. For immigration and citizenship purposes, there are only two kinds of people: citizens and foreign nationals. If there are more citizens, there are fewer foreign nationals to admit or exclude. Conversely, if there are fewer citizens, as after *Morales-Santana*, there are *more* foreign nationals. If Congress has the power to "admit or exclude" noncitizens, as *Morales-Santana* acknowledged, arguably it should also have the power to increase or decrease the *aggregate numbers* of noncitizens by determining which persons born abroad are in fact U.S. citizens.<sup>123</sup> In this sense, the *Morales-Santana* Court's definition of Congress's power to admit or exclude foreign nationals appears arbitrary, formalistic, and a questionable predicate for the Court's distinction between insistence on means-end fit and a more deferential standard of review.

Matters do not get clearer with consideration of *Nguyen's* approach. While the Court purported to apply a less deferential

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120. *Id.* at 1699-1700.

121. See U.S. CONST. art. I, § 8, cl. 4. Admittedly, the naturalization of a foreign national is different from the acquisition of U.S. citizenship at birth of a person born abroad, but the Court has often treated them as springing from the same source of congressional authority. See *Rogers v. Bellei*, 401 U.S. 812, 823 (1971). In any case, these two processes for conferring citizenship are surely closer to each other than naturalization is to admission or exclusion of foreign nationals.

122. See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 13-14 (1996); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 23 (2010); James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 386 (2010).

123. *Morales-Santana*, 137 S. Ct. at 1693.

standard in that case, the Court's reasoning belied that claim. The *Nguyen* Court cited, *inter alia*, "the importance of assuring that a biological parent-child relationship exists."<sup>124</sup> However, as Justice O'Connor opined in her *Nguyen* dissent, these notions were badly outdated in 2001<sup>125</sup> because of the prevalence of DNA testing. Conducting immigration law as if science were stuck in the 1950s is not necessary to preserve the design of our immigration laws or react to exigency in foreign affairs. It is true that the requirement in *Nguyen* of "acknowledgment" is less onerous than the U.S. presence requirement at issue in *Morales-Santana*.<sup>126</sup> However, the *Morales-Santana* Court did not justify why that difference in degree was significant, if both requirements were products of invidious stereotypes, as Justice Ginsburg clearly believed when she joined Justice O'Connor's dissent in *Nguyen*.<sup>127</sup> Perhaps the consequences of the stereotyped judgment matter, but apart from asserting that the harshness of the consequence made a difference, Justice Ginsburg devoted little or no space in her opinion for the Court in *Morales-Santana* to explaining why that difference was dispositive.

In other words, the decisions of the October 2016 term demonstrate that distinctions in the degree of deference shown by courts still matter in immigration law. However, those decisions shed little light on what drives those distinctions. This lack of guidance is troubling because of the wide range of contexts in which courts encounter immigration measures enacted or implemented by the political branches. Shared stewardship provides a more reliable and consistent guide.

## II. SHARED STEWARDSHIP AND JUDICIAL REVIEW OF IMMIGRATION MEASURES

Shared stewardship helps a court determine what level of deliberative rationality it should apply to immigration measures.

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124. *Nguyen v. INS*, 533 U.S. 53, 62 (2001).

125. *Id.* at 80 (O'Connor, J., dissenting) (citing "virtual certainty of a biological link that modern DNA testing affords").

126. *Morales-Santana*, 137 S. Ct. at 1694 (describing acknowledgment requirement as "easily met").

127. *See id.* at 1693. Indeed, Justice Ginsburg's opinion in *Morales-Santana* seemed to support the continued perception of the gender-based acknowledgment requirement as invidious, given the track record of unwed fathers acknowledging their children in the United States. *See id.* at 1693 n.13. If unwed fathers are acting like responsible parents, there seems to be little basis for presuming them to be irresponsible when the law makes no such presumption for women. *See id.*

Requiring a close means-end relation may result in a measure's invalidation, as *Morales-Santana* indicates.<sup>128</sup> On the other hand, judicial review that rejects in theory or practice the need for a tight means-end fit will fortify the measure against legal challenges, as decisions such as *Fiallo* and *Nguyen* show.<sup>129</sup> Deciding the level of deliberative rationality that courts should expect entails three factors with roots in the Framers' thought and in Supreme Court precedent. Those factors are: (1) the degree of sovereign interest; (2) the extent of collateral impacts on U.S. persons or entities; and (3) the presence or absence of intelligible limits on the power of the political branches. The test is conjunctive; to trigger more searching review, a challenger of government action would have to demonstrate that *all* of the elements are present. I address each in turn.

#### A. Sovereign Interests: Rhetoric and Reality

Since the Treaty of Westphalia, states have been central players in international law. To participate in the community of nations, states must be able to exercise certain sovereign imperatives. As we shall see below, these imperatives include the power to set criteria for membership in the national community and that community's safety and security. These dimensions were understood by the Framers. Moreover, each facet has figured heavily in the case law, perhaps even to a fault.<sup>130</sup>

The Framers carefully considered the government's role in regulating immigration in the new republic. They were aware of the great international law scholar Emmerich de Vattel's view that control of immigration was a logical corollary to "rights of domain and sovereignty."<sup>131</sup> As Vattel noted, "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state."<sup>132</sup> In Federalist No. 42, Madison vigorously defended the proposal that Congress regulate naturalization—the process of granting citizenship

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128. *See id.* at 1683-84.

129. *See Fiallo v. Bell*, 430 U.S. 787, 792-93 (1977); *Nguyen*, 533 U.S. at 72-73.

130. *See Legomsky*, *supra* note 22, at 263 (arguing that the Supreme Court has been too deferential).

131. EMER DE VATTEL, *THE LAW OF NATIONS* 309 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 2008).

132. *Id.*

to persons born abroad who subsequently entered the United States.<sup>133</sup> For Madison, a “uniform rule” for naturalization throughout the United States was crucial.<sup>134</sup> Because citizens enjoyed the freedom to travel among the states, permitting each jurisdiction to set its own naturalization rules would be a recipe for chaos.<sup>135</sup> While the Framers’ views and early practice on migration control generally are more muddled,<sup>136</sup> Madison’s warning on the need for federal regulation of naturalization demonstrates that the Framers viewed power over immigration as integral to sovereignty.

In *The Chinese Exclusion Case*,<sup>137</sup> the Supreme Court held that Congress’s power over the admission of foreign nationals to the United States was a core element of U.S. sovereignty.<sup>138</sup> To demonstrate this point, Justice Field, writing for the Court, alluded to threats that a more limited conception of sovereignty could not counter.<sup>139</sup> Justice Field invoked an account of stewardship that had much in common with the Framers’ view. According to Field, the “highest duty of every nation” resided in efforts to “preserve its independence, and give security against foreign aggression and encroachment.”<sup>140</sup> Field added that the specter of “aggression and encroachment” could arise both from decisions made by foreign

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133. See THE FEDERALIST NO. 42, at 264-71 (James Madison) (Clinton Rossiter ed., 1961).

134. See *id.* at 267.

135. *Id.* at 270 (warning that if naturalization were done at the state level, a state with a need to attract more residents would in effect be able to set naturalization standards for all the other jurisdictions, requiring grants of citizenship for persons whose conduct was sufficiently “obnoxious”—perhaps including commission of crimes—to merit denying naturalization by other states with more rigorous standards).

136. See generally Pfander & Wardon, *supra* note 122; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

137. *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

138. *Id.* at 603-04 (observing that the U.S. government’s power to “exclude aliens from its territory” is not open to question and “is an incident of every independent nation . . . [i]f [a nation] could not exclude aliens it would be to that extent subject to the control of another power”). Compare Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 127-32 (2002) (critiquing the vision of sovereignty and immigration advanced by Justice Field, who wrote for the Court in *The Chinese Exclusion Case*), with Martin, *supra* note 1, at 35-38 (offering qualified defense of portion of holding dealing with admission of foreign nationals).

139. *The Chinese Exclusion Case*, 130 U.S. at 606.

140. *Id.*

governments, such as attacks on the United States, and by uncontrolled migration that could consume resources or shift the agendas of U.S. officials.<sup>141</sup> For Field, addressing either threat was fundamental to sovereignty.

While Justice Field's view of the relationship between immigration controls and sovereignty is primarily defensive—reasoning backward from potential threats to the powers necessary to avert those threats—there is a more positive account of the relationship between immigration and sovereignty that is rooted in notions of community and membership. This view, most closely associated with the contemporary philosopher Michael Walzer, views a state as an entity that seeks to form and maintain bonds of belonging among persons who participate in the state's governance and culture.<sup>142</sup> This conception draws on analogies to family, neighborhood, and voluntary organizations.<sup>143</sup> Such bonds do not necessarily imply that the community must or should be homogeneous—indeed, the Fourteenth Amendment's guarantee of birthright citizenship,<sup>144</sup> including the children of undocumented immigrants, assures that heterogeneity will be the rule. Moreover, one could assert that certain criteria for admission of immigrants—such as those based on gender—are so arbitrary or invidious that they are inimical to the community's identity. In addition, one can also argue, despite a long line of Supreme Court cases,<sup>145</sup> that once the state has admitted a foreign national as an immigrant authorized to permanently and lawfully reside in the United States, it would be unfair to subject that person to post-admission changes in grounds for *removal* from the country.<sup>146</sup> That said, most immigration scholars across the ideological spectrum accept that the admittedly

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141. *Id.* Justice Field's language was more vivid and arguably invidious, conjuring up images of massive migration from Asia that resonated with pervasive anti-Asian stereotypes that Justice Field, in his political career, had helped to spawn. *See id.* (expressing fear about "vast hordes" of migrants "crowding in upon us"). *Cf.* Cleveland, *supra* note 138, at 115-16 (discussing Field's hopes to win the Presidency and how his immigration stance complemented those ambitions).

142. *See* WALZER, *supra* note 8, at 31-64; Cox, *supra* note 8, at 371-76.

143. *See* Martin, *supra* note 25, at 193.

144. *See* United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898).

145. *See, e.g.,* Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952).

146. *See* Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 242 (1983) (noting the argument that LPRs commit themselves to the U.S. community, thus triggering "mutual obligations [that] arise because of physical proximity and a sense of sharing in a common enterprise").

arbitrary parameters entailed in sovereignty, such as physical borders, give rise to some authority to select attributes among foreign nationals applying for admission to that state, including those foreign nationals who aspire to permanent membership.

In a constitutional republic or democracy in which popular participation is integral to governance, that authority is even more important. As Hiroshi Motomura has put it, “[A] democracy must have the power to shape and preserve itself as a community of individuals who share interests and values.”<sup>147</sup> To fulfill those goals, “a democracy must have the power to grant or refuse membership to newcomers, as well as the power to say that members can do some things that nonmembers cannot.”<sup>148</sup> The Court’s recent affirmation of Congress’s power over the admission of noncitizens<sup>149</sup> was surely informed by this sense that the power to shape a community’s future through such decisions is an important dimension of democratic governance.<sup>150</sup>

If such decisions are essential to democratic governance, they should generally be made by the political branches, which are majoritarian in character and hence closer to the people, compared with the unelected judiciary.<sup>151</sup> If the voters believe that Congress’s choices about admission criteria are unwise—either because they are

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147. MOTOMURA, *supra* note 8, at 5.

148. *Id.*

149. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

150. Different factions may have different visions of that community, which trigger contests in the political arena. For example, some in Congress believe that family reunification—a prime imperative for U.S. immigration law for decades—is less important than ensuring that the country has an ample supply of foreign nationals with skills that are useful for economic development. *See Reforming American Immigration for Strong Employment (RAISE) Act*, S. 354, 115th Cong. § 4(a)(1)(A) (2017) (proposing elimination of immigrant visas for parents of U.S. citizens); *cf.* David Nakamura, *Trump, GOP Senators Introduce Bill to Slash Legal Immigration Levels*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/08/02/trump-gop-senators-to-introduce-bill-to-slash-legal-immigration-levels/> [<https://perma.cc/5G8X-EXCR>] (detailing criticism of bill, which would reduce legal immigration and shift remaining legal immigration away from family-based visas and toward noncitizens who placed high with scoring system stressing English proficiency, education levels, and job skills).

151. Justice Jackson articulated this view in *Harisiades*. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (noting that immigration policy is “vitality and intricately interwoven with . . . the conduct of foreign relations, the war power, and the maintenance of a republican form of government” that it is “entrusted to the political branches” and “largely immune from judicial inquiry or interference”). *See also Galvan v. Press*, 347 U.S. 522, 530 (1954) (reiterating importance of deference).

too restrictive or not restrictive enough—the people can make their own choices at the ballot box. In contrast, because of the federal judiciary’s protections, such as lifetime tenure, the people have no such leverage over the courts.

Deference is particularly important for what the Court has called “[p]redictive judgment”<sup>152</sup> regarding the probability and gravity of a risk. In exigent situations, the impact of possible harm may be grave, time is of the essence, and probability is often difficult to estimate accurately.<sup>153</sup> In such situations, the Executive’s ability to respond with due Hamiltonian “dispatch”<sup>154</sup> is vital. For example, in *Sale v. Haitian Centers Council*,<sup>155</sup> the Supreme Court upheld an EO mandating the interdiction of vessels containing Haitians seeking to travel to the United States after a coup in Haiti precipitated widespread fear of persecution in that country.<sup>156</sup> Justice Stevens, writing for the Court, strongly implied that in exigent situations, the President’s capacity for quick and comprehensive information-gathering was owed a measure of deference by the courts. For Justice Stevens, the attempted “mass migration[]” of one country’s nationals to another country<sup>157</sup> without the second country’s prior consent was just such an exigent circumstance.

## B. Managing Collateral Impacts

Immigration decisions often affect other individuals, entities, and institutions beyond the parties to a case.<sup>158</sup> Since stewardship

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152. See *Dep’t. of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

153. See *Chesney*, *supra* note 7, at 1380-85.

154. See THE FEDERALIST NO. 70, *supra* note 7, at 424.

155. 509 U.S. 155 (1993).

156. *Id.* at 163-66, 188.

157. *Id.* at 187-88; *cf. id.* at 185 (quoting Dutch delegate to conference on the drafting of the Refugee Convention as asserting, without disagreement from fellow participants, that Convention did not impose duties on states regarding “attempted mass migration” flows “across frontiers”).

158. See Lisa Grow Sun & Brigham Daniels, *Externality Entrepreneurism*, 50 U.C. DAVIS L. REV. 321, 330 (2016) (in environmental context, observing that landowner who destroys wetlands generates negative externalities such as increased flooding for adjacent landowners; in school financing arena, aggregate effect of reducing school funding in individual school districts yields negative externalities for society as a whole in the form of a less educated work force); Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 124-25 (2015) (noting that bank runs that put pressure on financial system can result from aggregated impact of individual decisions by short-term lenders to call in short-term loans; government deposit insurance can ease short-term lenders’ concerns and



concerns itself with this broader range of stakeholders, collateral impacts should be central. Moreover, collateral impacts can be intangible, encompassing harm to reliance interests or the narrowing of perspectives caused by gender bias.<sup>159</sup>

The Supreme Court, as we have already seen, has frequently cited potential collateral impacts in immigration cases. In *Plyler v. Doe*,<sup>160</sup> the Court warned that state laws prohibiting undocumented children from attending public schools would exacerbate the larger social problems of crime and unemployment.<sup>161</sup> Collateral impacts have also been key in so-called “crimmigration” cases, in which the Court has analyzed the interaction of the immigration and criminal justice systems.<sup>162</sup> The Court has enhanced clarity on what criminal convictions trigger an LPR’s deportation. That clarity vindicates reliance interests and minimizes the adverse effects that uncertainty would trigger for the functioning of criminal justice.<sup>163</sup>

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prevent bank runs, but can result in different negative externality of “moral hazard” in which lenders make unduly aggressive loan decisions knowing government will bail them out because they are too big to fail; and cascade of bad loans leads to financial crisis).

159. See generally *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

160. 457 U.S. 202 (1982).

161. *Id.* at 230. *Cf.* *Arizona v. United States*, 567 U.S. 387, 395 (2012) (asserting that overzealous enforcement of immigration law by state law enforcement officials acting without federal guidance may adversely affect U.S. trade, capital from foreign investors, and revenue from foreign tourism).

162. See *Cade*, *supra* note 29, at 1057; see generally *Juliet Stumpf, Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009).

163. See *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017). In *Lee*, the Court cited a defendant’s ineffective assistance of counsel under the Sixth Amendment in vacating the defendant’s plea to possessing the drug ecstasy with intent to distribute. The defendant’s lawyer had failed to inform the defendant that plea would lead to removal. *Id.* at 1965. Chief Justice Roberts, writing for the Court, noted that “[t]he decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea.” *Id.* at 1966. The petitioner, Chief Justice Roberts observed, viewed avoiding removal as “the determinative factor.” *Id.* at 1967. Since the defendant faced near-certain removal pursuant to the plea bargain offered by the prosecution, and the defendant therefore had nothing material to lose, Chief Justice Roberts noted that “common sense,” *id.* at 1966, would dictate that such a defendant reject the plea and instead opt to throw a “Hail Mary” pass at trial. *Id.* at 1967. Vacating *Lee*’s plea vindicated his reliance interest in receiving competent legal advice on the consequences of a plea deal. *Id.* at 1962.

Encouraging defense lawyers’ diligence on immigration consequences serves the interests of efficient criminal justice adjudication by maximizing the chances for a defense attorney to bargain successfully with the prosecution for a plea that avoids the defendant’s removal. *Cf.* *Padilla v. Kentucky*, 559 U.S. 356, 373

Immigration actions that injure reliance interests can also have negative collateral impacts. Concern with reliance interests is as old as the Framers. Hamilton wrote of the corrosive effect on individual initiative of government measures that reflected a “spirit of injustice.”<sup>164</sup> In a prescient discussion, Hamilton warned that impinging on reliance interests for short-term gain can have grave long-term effects.<sup>165</sup> Hamilton posited an ideal—the “[c]onsiderate” person,<sup>166</sup>—who understands that while a shortsighted government policy may make her “a gainer today,” the same individual may by “tomorrow [be] the victim of a spirit of injustice.”<sup>167</sup> That volatility has spillover effects for the entire polity. As Hamilton remarked, the “inevitable tendency of . . . a spirit [of injustice] is to sap the foundations of public and private confidence and . . . introduce in its stead universal distrust and distress.”<sup>168</sup> The moderating “temper” of

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(2010) (observing that stakeholders’ knowledge of immigration consequences of pleas may promote “agreements that better satisfy the interests of both parties”); Cade, *supra* note 29, at 1057 (noting that the Court has “encourag[ed] actors in . . . criminal proceedings to evaluate the potential immigration consequences in their framing of charges, pleas, and sentences”). From this perspective, the approach in *Lee* will reduce adjudication costs over the long haul, thus minimizing the adverse impact of removal grounds on the administration of criminal justice. *Cf.* *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (noting that the Court employs a “categorical approach” to assess whether criminal convictions render a noncitizen removable; looking to the necessary elements of the crime under the governing statute rather than at “specific facts underlying the crime” promotes certainty, predictability, and uniformity, rather than relegating defendants to guesswork).

164. THE FEDERALIST NO. 78, *supra* note 15, at 470.

165. Hamilton’s discussion does not single out concern about reliance interests. However, the status of reliance interests, including those of good-faith holders of title to land pursuant to the treaty with Britain that ended the Revolutionary War, was a salient issue in a celebrated case that Hamilton successfully litigated in New York prior to the Constitution’s enactment that presaged the advent of judicial review after the Constitution’s ratification. *See Rutgers v. Waddington* (N.Y. Mayor’s Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 392, 393 (Julius Goebel, Jr. ed., 1964); *cf.* Daniel M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 963-66 (2010) (discussing significance of *Rutgers v. Waddington* for judicial review in the United States); Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT’L L.J. 1, 18-19 (2013) (same).

166. *See* THE FEDERALIST NO. 78, *supra* note 15, at 470.

167. *Id.*

168. *Id.*

the courts<sup>169</sup> is therefore a crucial element in maintaining stewardship.

Early immigration cases demonstrated a keen appreciation for Hamilton's insight. In *Chew Heong v. United States*,<sup>170</sup> the Supreme Court construed a restrictive immigration statute targeting Chinese lawfully residing in the United States as operating prospectively.<sup>171</sup> Echoing an approach pioneered by Hamilton in the pre-Constitution case, *Rutgers v. Waddington*,<sup>172</sup> the elder Justice Harlan, writing for the Court, cited the U.S. treaty with China ratified prior to the statute.<sup>173</sup> That treaty permitted Chinese nationals lawfully working in the United States to travel to China and then return to the United States "at their pleasure."<sup>174</sup> Although the Court had already recognized that Congress can legislate inconsistently with treaty obligations when it states its intent clearly, Harlan found the statute unclear and therefore read it as being consistent with the "inviolable fidelity" owed treaties under international law.<sup>175</sup> In arriving at this interpretation, Harlan rejected a contrary reading of the statute that would have excluded Chinese laborers who had left the United States temporarily pursuant to the treaty and then sought readmission without a certificate that Congress had subsequently required of returning Chinese laborers.

According to Harlan, retroactive application of the certificate requirement would have violated not only the United States' treaty with China, but also canons of construction disfavoring retroactivity. As Justice Harlan explained, to prevent unfair surprise, protect reliance interests, and ensure that "rights previously vested are [not] injuriously affected," courts will require a clear statement that Congress wishes to give a statute affecting such rights retroactive effect.<sup>176</sup> Taking this view, Justice Harlan reiterated, guarded against the violation of "previously acquired rights"<sup>177</sup> and all the ills that the Framers ascribed to that breach of trust.

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169. *Id.*

170. 112 U.S. 536 (1884).

171. *Id.* at 538.

172. See THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 165, at 392.

173. *Id.* at 393.

174. See *Chew Heong*, 112 U.S. at 550.

175. *Id.*

176. *Id.* at 559.

177. *Id.* at 560.

In analyzing statutes in which Congress clearly stated its intent to require retroactive application, the Court has unfortunately not followed *Chew Heong v. United States*. Indeed, the Court has repeatedly stated since shortly after *Chew Heong* was decided that deportation is not a criminal punishment and the Constitution's Ex Post Facto Clause therefore did not apply to removal grounds enacted into law *after* an act of a noncitizen that triggered removability under the new law.<sup>178</sup> In this line of cases, the Court has failed to heed Hamilton's warning about the corrosive impact of the "spirit of injustice" caused by oppressive legislation.<sup>179</sup> This Article will argue that the Due Process Clause should be read as barring such statutes.<sup>180</sup> However, while the Court has declined to read the Constitution as forbidding retroactive application of removal grounds, in statutory interpretation it has nonetheless followed *Chew Heong* and consistently read *ambiguous* statutes as purely prospective in application.<sup>181</sup>

In these statutory cases, the Court has continued to acknowledge the concerns that Hamilton articulated about unfair legislation. In *INS v. St. Cyr*,<sup>182</sup> Justice Stevens, writing for the Court, explained that the presumption against retroactivity is rooted in "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."<sup>183</sup> In noting the "timeless and universal human appeal"<sup>184</sup> of this notion, Justice Stevens observed that retroactive legislation had two serious collateral impacts. First, implicitly echoing Hamilton's concern about the "ill humors" that

178. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

179. THE FEDERALIST NO. 78, *supra* note 15, at 470.

180. See *infra* notes 401-26 and accompanying text.

181. See *Vartelas v. Holder*, 566 U.S. 257, 261 (2012); cf. Daniel Kanstrom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1898-99, 1908 (2000) (explaining political and legal dynamics of harsh immigration laws and suggesting appropriate judicial responses); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 153-54 (1998) (arguing that the Constitution forbids retroactive application); see generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549-50 (1990) (arguing that courts have relied on statutory interpretation to smooth hard edges of plenary power doctrine).

182. See 533 U.S. 289 (2001).

183. *Id.* at 316 (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

184. *Id.* (quoting *Kaiser*, 494 U.S. at 855 (Scalia, J., concurring)).

can drive pernicious legislation<sup>185</sup> and *Chadha*'s concern with the wages of legislative haste,<sup>186</sup> Justice Stevens cautioned that retroactive legislation could be a "means of retribution against unpopular groups or individuals."<sup>187</sup> Moreover, Justice Stevens added, retroactive legislation deprives people of "confidence about the legal consequences of their actions."<sup>188</sup> Just as Hamilton predicted that unfair laws would "sap the foundations of public and private confidence,"<sup>189</sup> the Court warned that retroactive application would cut against the grain of a "free, dynamic society"<sup>190</sup> and suppress "creativity in both commercial and artistic endeavors."<sup>191</sup> Vigilance regarding similar collateral impacts is a vital component of shared stewardship.

### C. Intelligible Limits: Self-Imposed Controls by the Political Branches

Shared stewardship also considers whether the political branches have provided intelligible limits to their assertions of power. Courts distrust a government position that fails to indicate clear limits.<sup>192</sup> On the other hand, a diligent attempt by government to limit its own power can mark a particular unit in government as a good steward that does not require judicial assistance.

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185. THE FEDERALIST NO. 78, *supra* note 15, at 470.

186. See *INS v. Chadha*, 462 U.S. 919, 948 (1983).

187. *St. Cyr*, 533 U.S. at 315; *cf. id.* at 315 n.39 (citing Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000)) (discussing noncitizens' inability to vote and resulting lack of political power to contravene this tendency).

188. *St. Cyr*, 533 U.S. at 316 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994)).

189. THE FEDERALIST NO. 78, *supra* note 15, at 470.

190. *St. Cyr*, 533 U.S. at 316 (citing *Landgraf*, 511 U.S. at 265-66).

191. *Id.*

192. This search for articulable limits is a ubiquitous aspect of judicial reasoning. *Cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001) (discussing judicial focus on practical implementation of constitutional norms and values); Chesney, *supra* note 7, at 1362-64 (explaining the need for articulable and manageable rules); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1291-92 (2006) (discussing how the Court shapes doctrine to ensure that it can apply manageable standards to evaluate government action); see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (discussing importance of viewing separation of powers disputes in light of Framers' plan for a "workable government").

The Framers stressed the importance of articulable limits on government. Madison's structural focus on ensuring that "ambition . . . [would] counteract ambition" between the branches<sup>193</sup> is but the most celebrated example. Hamilton's praise for judicial review as obliging a hasty or iniquitous legislator to "qualify"—i.e., limit—efforts to pass unjust laws<sup>194</sup> is in much the same vein.

This search for intelligible limits has been crucial to the Supreme Court's approval of measures in regarding national security. For example, in *Holder v. Humanitarian Law Project*,<sup>195</sup> the Court noted, in the course of upholding a statute that barred material support of foreign terrorist groups, that Congress had to some degree tailored the statute to First Amendment concerns, by not including domestic groups.<sup>196</sup> Furthermore, Congress only prohibited aid *to* the group, not more generic activity designed for public consumption, such as journalism, scholarship, or human rights monitoring, which might have conferred an occasional incidental benefit on a DFTO.<sup>197</sup> Similarly, in *United States v. United States District Court (Keith)*,<sup>198</sup> in the course of holding that warrantless wiretapping of alleged domestic national security threats violated the Fourth Amendment, the Court suggested in dicta that its reasoning only applied to the domestic realm; the Court declined to opine on the role of the Fourth Amendment in surveillance of purely foreign individuals or entities.<sup>199</sup> In the Article III cases, the Court has assessed the constitutionality of certain non-Article III tribunals established by Congress that lacked the safeguards of federal courts, such as lifetime tenure. The Court has been far more likely to uphold

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193. THE FEDERALIST No. 51, *supra* note 36, at 322.

194. THE FEDERALIST No. 78, *supra* note 15, at 471.

195. 561 U.S. 1 (2010).

196. *Id.* at 35 (noting that the statute at issue applied only to "foreign terrorist organizations" and that a "limited number" of such groups are designated as such by the Executive Branch pursuant to the statute).

197. *Id.* at 31-33, 36-40.

198. 407 U.S. 297 (1972).

199. *Id.* at 321-22 (stressing that the Court's holding "involves only the domestic aspects of national security," not the "activities of foreign powers or their agents"); *id.* at 322 n.20 (citing sources suggesting that warrantless surveillance might be permissible in latter case); *cf.* Trevor W. Morrison, *The Story of United States v. United States District Court (Keith): The Surveillance Power*, in PRESIDENTIAL POWER STORIES 287, 300-01 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (noting that Justice Powell, who wrote the Court's opinion in *Keith*, had served on an American Bar Association committee that issued a report that Justice Powell cited for the proposition that warrantless wiretapping was permissible with respect to foreign powers).

Congress's handiwork when those tribunals operated only in cabined areas, such as territorial courts, courts martial, or the efficient resolution of financial matters that the federal government could plainly regulate.<sup>200</sup>

In the immigration realm, a similar impulse has long been influential. In an early case, *Wong Wing v. United States*,<sup>201</sup> the Court held that the imprisonment at hard labor for up to one year of a Chinese national not lawfully entitled to reside in the country was impermissible without an indictment by a grand jury and a judicial trial.<sup>202</sup> In so holding, the Court rejected the government's argument that both the offense designated by Congress and the sentence prescribed in the statute were analogous to vagrancy offenses, which at that time did not require the safeguards described above.<sup>203</sup> The Court rejected this analogy as not providing sufficient limits on the political branches' power, just as the Court rejected the analogy to temporary detention *pending* adjudication of a foreign national's removability.<sup>204</sup> While detention for this limited purpose was appropriate,<sup>205</sup> the Court in *Wong Wing* rejected detention with a punitive purpose imposed *after* a finding of removability. The inability to cabin such a claimed power was a substantial factor in the Court's reasoning.<sup>206</sup>

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200. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855-56 (1986) (noting narrow spectrum of claims that agency, in place of state or federal court, could adjudicate); *Palmore v. United States*, 411 U.S. 389, 407 (1973) (holding that Congress could create non-Article III courts in the District of Columbia to adjudicate "strictly local" issues, but suggesting in dicta that the outcome would have been different if Congress had sought to create non-Article III courts to adjudicate matters of "constitutional and . . . general concern"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 545-47 (1962) (discussing Chief Justice John Marshall's justification for permitting non-Article III territorial courts); cf. *Stern v. Marshall*, 564 U.S. 462, 493-94 (2011) (citing forum's lack of limits in invalidating provision of bankruptcy law that permitted non-Article III tribunal to hear tort claims).

201. 163 U.S. 228 (1896).

202. *Id.* at 238.

203. *Id.* at 234, 238.

204. *Id.* at 235-36.

205. Temporary detention prior to adjudication was merely an incident of removal proceedings, akin to holding certain criminal defendants without bail if a court determined that they presented a flight risk. See *id.* at 235. Such a remedy merely ensured that the proceeding would be completed, and prevented the subject of the proceeding from undermining the purpose of the proceeding by fleeing the jurisdiction.

206. Cf. *United States v. Witkovich*, 353 U.S. 194, 201 (1957) (ruling that power to question a foreign national subsequent to entry of final order of removal

In a more recent decision, *Zadvydas v. Davis*,<sup>207</sup> the Court cited the absence of limits in setting the maximum period that the government could detain a noncitizen who was already subject to a final order of removal.<sup>208</sup> The *Zadvydas* Court, in an opinion by Justice Breyer, found that the government lacked the power to detain noncitizens in this posture for longer than six months. According to Justice Breyer, that window of time was the maximum time the Constitution permitted for the government to show that the actual physical removal of the noncitizen was reasonably likely, given countervailing factors such as the refusal of the noncitizen's country of origin to agree to his or her return.<sup>209</sup> Justice Breyer rejected the government's argument that neither the INA nor the Constitution imposed a limit on post-final order detention.<sup>210</sup> He asserted that accepting this argument would amount to sanctioning "indefinite" detention and thus would raise substantial questions of constitutionality.<sup>211</sup>

#### D. Summary

In sum, shared stewardship hinges more searching review on whether the political branches have shown themselves to be fit stewards in the immigration realm. That inquiry does not depend on the policy merits of a challenged measure, or on precise accounting

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was limited to questions regarding the noncitizen's readiness to appear for execution of the removal order and did not extend to free-floating questions about the noncitizen's associations and relationships).

207. 533 U.S. 678, 702 (2001).

208. *Id.* at 701-02.

209. *Id.* at 689.

210. *Id.* at 690.

211. *Id.* at 689. Justice Breyer also noted that the government's proposed construction of the statute authorizing post-final order detention was not limited to certain classes of noncitizens, such as "suspected terrorists," but instead applied to any noncitizen "ordered removed for many and various reasons, including tourist visa violations." *Id.* at 691. In addition, the Court noted that under the government's reading the noncitizen could seek relief against excessive detention only in administrative proceedings, which were not subject to "significant . . . judicial review." *Id.* at 692. These multiple failures to impose limits helped persuade the Court that the government's position was not consistent with the statute or the Constitution. *Cf.* *Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) (asserting that mandatory detention of an LPR *pending* adjudication of removability due to criminal convictions was appropriate because the detention would typically be for a reasonable period bounded by issuance of a final order of removal, but leaving open the legality of protracted detention caused by "unreasonable delay" on government's part).



of the measure's ultimate means-end fit. Rather, the model asks whether the challenged measure demonstrates that the political branches have acted with the heedful perspective on governance that the Framers envisioned. The indicia of sovereign interest, collateral impacts, and intelligible limits provide signposts in that key inquiry. To ensure that judicial review is not unduly intrusive, the test is conjunctive; the challenger will have to show that each element cuts against the claims of adequate stewardship made by the political branches. If the challenger can show each element, the degree of means-end fit required will be such that virtually any measure will fail the test. However, if the challenger cannot show each element, the looser fit required will, in the multi-variable realm of immigration law, almost always lead to upholding the measure challenged. The best test for the model itself is its work in practice.

### III. APPLYING THE SHARED STEWARDSHIP MODEL

A model is only as good as the justification it provides in the real-world arena of longstanding problems encountered by the courts. This Part applies the shared stewardship model to four important issues in immigration law: gender-based criteria in admission and citizenship; vetting of visa applicants by consular officials; presidential power over immigration; and retroactive application of grounds for removal. I discuss each in turn.

#### A. Gender-Based Criteria

The Court's decision this term in *Sessions v. Morales-Santana* struck down a gender-based statutory provision on acquired citizenship that had become increasingly difficult to justify. However, the Court's rationale for distinguishing the measure invalidated in *Morales-Santana* from other gender-based measures that the Court had previously upheld was short on persuasive force and normative coherence. The shared stewardship model seeks to remedy that deficit.

First, the model would straightforwardly acknowledge that the sovereign interest of the United States in such distinctions is low. As Justice Ginsburg eloquently noted in *Morales-Santana*, the Court has repeatedly and with good reason expressed skepticism about gender distinctions in almost every other sphere of American law.<sup>212</sup> None

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212. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1684 (2017).

cope with exigent circumstances or contribute in an appreciable way to a vision of membership in the national community that is anything more than arbitrary. The presence of gender-based distinctions in any nook or cranny of immigration and citizenship law is at best an awkward anachronism, and at worst an ongoing reproach that the court and the political branches are not doing their jobs in a constitutional republic.

Moreover, as Justice Ginsburg lucidly explained in *Morales-Santana*, gender-based distinctions have adverse collateral effects that are severe, albeit intangible in character. For example, Justice Ginsburg recognized that “[o]verbroad generalizations . . . have a constraining impact.”<sup>213</sup> In purporting to distinguish between the respective predispositions of men and women toward nurturing the young, rules embodying such stereotypes may “create a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver.”<sup>214</sup> These rules also send a constraining signal to men who hope to transcend stereotypes through the “exercise [of] responsibility for raising their children.”<sup>215</sup> Enshrined in the august provinces of the U.S. Code, such provisions send an inauspicious message about gender equality, independent of their impact on the parties.

The criterion that makes the difference for the level of means-end fit required is the presence of intelligible limits. Justice Ginsburg was correct in *Morales-Santana* to describe the parental acknowledgment requirement upheld by the Court in *Nguyen* as “minimal”<sup>216</sup> and “easily met.”<sup>217</sup> Viewed from an *ex ante* perspective, fathers who wish to ensure that their children can be deemed to have acquired U.S. citizenship at birth need only provide a sworn writing acknowledging paternity before the child reaches the age of eighteen.<sup>218</sup> While not everyone potentially affected by this provision has read it or is knowledgeable about its content, ignorance of the law may extend to *any* provision of the U.S. Code. In providing for the simple expedient of a sworn acknowledgment and allowing the better part of twenty years after the child’s birth to fulfill this criterion, Congress has shown a willingness to operate

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213. *Id.* at 1692-93.

214. *Id.* (citing *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003)).

215. *Id.*

216. *Id.*

217. *Id.*

218. 8 U.S.C. § 1409(a)(4)(B) (2012).

under intelligible limits that demonstrates adequate stewardship. Viewed under the less demanding standard that the Court applied in practice in *Nguyen*, the provision passes muster. The more onerous requirement of years spent in the United States in *Morales-Santana* showed no similar sense of limits and thus merited the more searching scrutiny that the Court employed.

A lack of limits also marked the since-repealed exclusion from visa preferences of children born out of wedlock to U.S. citizen or LPR fathers. At the time that the Court decided *Fiallo v. Bell*, the INA included severe restrictions on the admission of most individuals who were not considered “Immediate Relatives”—spouses, “children,” and certain parents—of U.S. citizens or LPRs.<sup>219</sup> Other relatives would be subject to onerous quota limits that entailed lengthy waits.<sup>220</sup> To get a sense of the multi-year waits in store for persons not in the Immediate Relative category, consider the current situation of offspring over twenty-one years of age, whom the INA refers to as “unmarried sons [or] daughters.”<sup>221</sup> The priorities for admission of this group reflect Congress’s view that reunification of *adult* children with U.S. citizen or LPR parents is less pressing than reunification of minor children with their parents.<sup>222</sup> The respective waits for an unmarried son or daughter of a citizen<sup>223</sup> or LPR<sup>224</sup> are substantial: Under current conditions, the wait will be a minimum of almost seven years, and a maximum of over *twenty* years.<sup>225</sup> Those

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219. *Fiallo v. Bell*, 430 U.S. 787, 789-90 (1977).

220. *Id.* The INA also required adult relatives not included in the Immediate Relative category to undergo labor certification—a lengthy and selective process that determines whether a noncitizen abroad has distinctive job skills that will assist U.S. employers while not displacing U.S. workers. *Id.* To get a sense of the multi-year waits in store for persons not in the Immediate Relative category, consider the current situation of offspring over twenty-one years of age, whom the INA refers to as the “unmarried sons or daughters” of citizens, 8 U.S.C. § 1153(a)(1) (2012), or LPRs, § 1153(a)(2)(B).

221. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (discussing this category in the INA).

222. *Id.*

223. 8 U.S.C. § 1153(a)(1).

224. *Id.* § 1153(a)(2)(B).

225. *See Visa Bulletin for July 2017*, 10 U.S. DEP’T OF STATE 2, [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_July2017.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_July2017.pdf) [<https://perma.cc/S4AH-UTY5>] (listing visa applications that are now considered “current” from most countries for entry into the United States as those filed in either December 2010 (for unmarried sons or daughters of U.S. citizens) or November 2010 (for unmarried sons or daughters of LPRs); for Mexico, a high-immigration country, the wait is much longer (January 1996 for the unmarried sons or daughters of citizens)).

waits are too protracted to qualify as intelligible limits. The provision upheld in *Fiallo* demonstrates a degree of heedlessness unworthy of the fit steward.<sup>226</sup> That concern, not the longstanding but mechanical distinction between acquisition of citizenship at birth and admission of noncitizens cited by the *Morales-Santana* Court, should have prevailed in *Fiallo*.

## B. “Extreme Vetting”: The Reviewability of Consular Decisions

While Congress generally sets criteria for the admission or exclusion of foreign nationals, the State Department’s overseas consular officers determine whether individual noncitizens fit within these criteria.<sup>227</sup> The “extreme vetting” that President Trump has indicated will follow and supplement his Executive Orders would occur at the consular level. A shared stewardship approach would require a closer means-end fit for some consular processing procedures, including those that U.S. officials implement as part of the Trump Administration’s “extreme vetting.”

Legislation, case law, and practical necessity have coalesced to cede a substantial measure of discretion to U.S. consular officers processing noncitizens’ visa applications. Even though Congress mandated in 1965 that no person should be “discriminated against”<sup>228</sup> regarding issuance of an immigrant visa, Congress subsequently explained that nothing in the nondiscrimination provision would restrict the Secretary of State’s authority over procedures applicable to visa processing.<sup>229</sup> As recently as 2015, a concurring opinion by Justice Kennedy reiterated that in this area, Congress had “assigned discretion to the Executive.”<sup>230</sup>

The practicalities of visa processing make some form of deference inevitable. U.S. consular officials process millions of visa applications every year.<sup>231</sup> In the course of this demanding endeavor, U.S. officials determine whether foreign nationals qualify for family-

226. Under the law in place at the time *Fiallo v. Bell* was decided, the only way to avoid similar protracted waits was for the citizen or LPR father to marry a citizen or LPR and persuade his spouse to petition for his son or daughter as a “stepchild.” See *Andrade v. Esperdy*, 270 F. Supp. 516, 518-19 (S.D.N.Y. 1967).

227. *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring).

228. 8 U.S.C. § 1152(a)(1)(A).

229. *Id.* § 1152(a)(1)(B).

230. *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (citing *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972)).

231. *Cf. Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197-99 (2014) (discussing procedure for processing certain family-based immigrant visas).

based immigrant visas, based on claimed relationships with close U.S. relatives; immigrant employment visas, based on a foreign national's skill and ability to fill a market niche in the United States without displacing U.S. workers;<sup>232</sup> and nonimmigrant student and tourist visas. In addition, U.S. consular officials must determine whether a visa applicant is inadmissible for one or more of a plethora of grounds listed in the INA, including health factors, public safety, and national security.<sup>233</sup> An unduly low threshold for judicial review of consular officials' work would inhibit timely visa processing and exponentially increase the workload of the federal courts.<sup>234</sup>

All that said, the Supreme Court has recently opened the door a crack on reviewing visa processing; the shared stewardship approach would open the door wider, although only in reviewing procedures to ensure basic fairness. In *Kerry v. Din*, the concurrence opinion authored by Justice Kennedy *assumed* without deciding the issue that a U.S. citizen had an interest cognizable under the Due Process Clause in the fair and accurate processing of her Immediate Relative petition for her spouse.<sup>235</sup> A U.S. consulate in Pakistan had denied her petition, citing the INA provision excluding persons who have engaged in "terrorist activities."<sup>236</sup> However, the consulate gave no further explanation<sup>237</sup> of the facts supporting the denial or even of the *specific statutory subsection* among the ten included in the provision,

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232. 8 U.S.C. § 1153(b).

233. *Id.* § 1182.

234. *Cf. Morfin v. Tillerson*, 851 F.3d 710, 711 (7th Cir. 2017) (noting that "for more than a hundred years courts have treated visa decisions as discretionary and not subject to judicial review for substantial evidence and related doctrines of administrative law").

235. *Din*, 135 S. Ct. at 2139. Justice Kennedy was joined by Justice Alito. Having assumed that due process applied, Justice Kennedy then found that the government had already provided due process to the noncitizen. *Id.* at 2141. Justice Kennedy thus concurred in the result reached in Justice Scalia's opinion, joined by Chief Justice Roberts and Justice Thomas. Justice Scalia had found that due process did not apply at all because within the framework of immigration law, in which Congress had plenary power over admission of noncitizens, the U.S. citizen sponsor had no cognizable liberty interest in association with her noncitizen spouse. *Id.* at 2134-36. Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, dissented. The four dissenting Justices would have held both that the U.S. citizen sponsor had a cognizable liberty interest *and* that the government had failed to provide Din with the process she should have received. *Id.* at 2141-42.

236. *Id.* at 2139 (Kennedy, J., concurring) (citing 8 U.S.C. § 1182(a)(3)(B)).

237. *Id.*

which with applicable cross-references include “dozens” of possible reasons.<sup>238</sup>

In determining that the consulate’s failure to give more specific reasons did not violate due process (even assuming due process was applicable), Justice Kennedy applied the test that the Supreme Court had articulated in the 1972 case of *Kleindienst v. Mandel*<sup>239</sup> regarding a First Amendment challenge to a visa denial: whether the government had provided a “facially legitimate and bona fide” justification.<sup>240</sup> Determining that the consular decision met this standard, Justice Kennedy cited the long tradition of deference to consular decisions, the risk of inappropriate disclosure of U.S. intelligence sources and methods, and the noncitizen visa applicant’s history of work for the Taliban government in Afghanistan.<sup>241</sup> While Justice Kennedy acknowledged that the noncitizen’s ministerial work for the Taliban might well be “insufficient” in itself to support the visa denial, he asserted that it at least showed a “facial connection to terrorist activity.”<sup>242</sup>

A shared stewardship approach would have required more searching judicial review of the consular office’s refusal to provide more specific reasons for the denial. First, the collateral impact of this decision on a U.S. citizen was substantial and grievous—the U.S. citizen sponsor here was deprived of the ability to live in the United States with her spouse. Moreover, the consulate’s refusal to give reasons lacked an intelligible limiting principle. Consider the consulate’s refusal to provide the U.S. citizen petitioner with the specific statutory subsection that supported the denial of her application. As Justice Breyer noted in his dissent, the aggregated subsections within the “terrorist activity” inadmissibility section “cover a vast waterfront” of conduct.<sup>243</sup> The absence of any factual explanation plus the plethora of acts potentially covered by the terrorist activity bar conferred vast discretion on the consular officer and forced the petitioner and her spouse to guess about how to respond. If due process requires an effective opportunity to counter

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238. *Id.* at 2145 (Breyer, J., dissenting).

239. 408 U.S. 753, 754 (1972).

240. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring).

241. *Id.* at 2140-41.

242. *Id.* at 2141. The noncitizen had apparently worked as a clerk for the Taliban government. *Id.* at 2146 (Breyer, J., dissenting).

243. *Id.* at 2146 (citing, *inter alia*, *Singh v. Wiles*, 747 F. Supp. 2d 1223, 1227 (W.D. Wash. 2010) (alleging that noncitizen had engaged in material support of terrorist organization by offering its members lodging on the floor of a temple)).

adverse decisions with evidence and argument, the general denial that Justice Kennedy endorsed substantially reduced this opportunity.<sup>244</sup>

Nor would a fuller explanation have impaired Congress's design or hindered the executive branch's ability to respond to exigencies abroad. While protection of sources and methods is a legitimate concern under the INA and in other contexts, the facts of the case provide little support for Justice Kennedy's conclusion that a fuller explanation would have revealed sources and methods. The consulate could have provided a fuller explanation merely by citing the applicant's work as a clerk for the Taliban and classifying that as material support of a terrorist group.<sup>245</sup> That explanation would at least have provided the petitioner and the applicant with enough information to attempt to counter the denial, perhaps by showing that the applicant had worked for the government *before* the Taliban took power and had no other affiliation with them, had done only ministerial work required of any clerk, and had not known of or participated in any violent activities. Providing this information would have enhanced the statute's design by supplying all stakeholders with clearer information on the architecture of Congress's choices.<sup>246</sup>

Moreover, providing more information to visa applicants about reasons for a denial can also *enhance* responses to exigent situations abroad. In *Din* or similar cases, *incorrect* information may have

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244. *Id.* at 2144-45.

245. See 8 U.S.C. § 1182(a)(3)(B)(iv) (2012) (defining specific acts that constitute engaging in terrorist activity).

246. Justice Kennedy noted that Congress had expressly exempted visa denials based on terrorism or national security concerns from a requirement that the government provide a visa applicant with the relevant specific provisions on inadmissibility. See *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (citing 8 U.S.C. § 1182(b)(3)). However, this provision does not *mandate* that the government *withhold* such information; it merely states that the general default disclosure requirement does not apply. See § 1182(b)(3). Moreover, even *if* the statute required withholding this information, shared stewardship would nonetheless require disclosure under most circumstances. One can envision situations where concern for sources and methods would permit nondisclosure of certain information supporting a visa denial. For example, a rejected visa applicant would not be entitled to disclosure of the identity of informants who had cooperated with consular officials. However, the government should have to provide more support than it did in *Din* for the claim that mere disclosure of a statutory *subsection* will out a government informant. See *Din*, 135 S. Ct. at 2132 (plurality opinion).

triggered the denial.<sup>247</sup> Terrorist watch lists often include significant errors, with ineffectual procedures for correcting the record.<sup>248</sup> If visa processing includes access to such material, “garbage in” may yield “garbage out.” Giving an applicant more information about the basis for a denial may flush out such mistakes. Maintaining incorrect information in U.S. government databases can waste officials’ time and effort and distract officials from worthy leads. Reducing those costs enhances U.S. security.

The above analysis also suggests a concern with vetting procedures for *all* countries that the Trump administration put in place after the issuance of EO-2.<sup>249</sup> One worry is that the vetting procedures will be discriminatory, raising renewed concerns about compliance with § 1152(a)(1)(A), which bars discrimination.<sup>250</sup> A related concern is that the procedures will be unduly cumbersome and intrusive. For example, consular officials may be instructed to put all visa applicants from particular countries into the Security Advisory Opinion (SAO) process, which entails additional layers of screening.<sup>251</sup> That alone will add months to visa processing. Similarly, consular officials might be instructed to ask intrusive questions about Sharia law, allegiance to the U.S. Constitution, or knowledge of U.S. history or civics. The former questions, because

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247. See *Privacy Impact Assessment for the Visa Security Tracking System*, U.S. DEP’T OF HOMELAND SEC. 7 (Aug. 27, 2009), [https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_ice\\_vsptsnet.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_vsptsnet.pdf) (noting possibility of inaccurate information) [<https://perma.cc/998T-KQPD>]. While the citizen sponsor in *Din* did not dispute that her spouse had worked for the Taliban as a clerk, consular officials could have based the denial on other material. See *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring). Although Justice Kennedy viewed that fact as a sufficient basis for finding the denial to be bona fide, Justice Kennedy may have attached undue weight to this single factor. See *id.*

248. See *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 760 (S.D.N.Y. 2015); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1141-43 (D. Or. 2014); *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014); see also Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1326 (2016) (discussing litigation over no-fly lists); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1599 (2016) (discussing problem of inaccurate information and insufficient opportunity to correct the record); cf. *Abdelfattah v. Dep’t of Homeland Sec.*, 787 F.3d 524, 529-31, 536-39 (D.C. Cir. 2015) (describing lawful-resident Plaintiff’s suffering of repeated security checks that may have been prompted by incorrect information in government databases and holding that Plaintiff could seek relief under U.S. law).

249. See generally EO-2, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

250. 8 U.S.C. § 1152(a)(1)(A) (2012).

251. See *supra* note 247 and accompanying text (discussing privacy impacts of SAO process).



they single out a particular religion to which a majority of a given state's nationals belong, might well be discriminatory under § 1152(a)(1)(A), and might also be the kind of institutionalized preference for one religion over another that should trigger more searching scrutiny.<sup>252</sup>

The collateral impact of such visa obstacles on U.S. sponsors is substantial, since those persons will have to endure additional delays in being reunited with close relatives. Leeway about procedures under section 1152(a)(1)(B) should not become a license for procedures that are discriminatory, intrusive, or unduly dilatory.<sup>253</sup> One way of addressing this would be to require a certification that the consular official has a “reasonable and articulable suspicion” that seeking an SAO is appropriate. If necessary, a court could consider a submission of such information in camera.<sup>254</sup> Another alternative, based on the treatment of removal under *Zadvydas*, would be to establish a presumptively reasonable period—say six months or 180 days—for the duration of processing.<sup>255</sup> Beyond this period, a delay in processing would be considered presumptively *not* bona fide or legitimate.

Other aspects of visa processing may also be excessive under the INA. For example, the Trump Administration has announced that it will require certain visa applicants to produce substantially more information in the course of consular processing, including five years of social media platforms and identifiers (“handles”) and fifteen years of residential addresses and employment records.<sup>256</sup> That period of time seems unduly burdensome and lacks a clear limiting principle. Many people will not have records that go back that far. Retrieving all the information required will be difficult, if not impossible, requiring each visa applicant to become an amateur detective. Moreover, each piece of information may produce additional delays, as consular officials scrutinize inconsistencies and omissions. That process may result in visa processing grinding to a halt. Such procedures might be appropriate for a targeted subset of a

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252. 8 U.S.C. § 1152(a)(1)(A).

253. § 1152(a)(1)(B).

254. See *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring).

255. See *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

256. *Supplemental Questions for Visa Applicants*, U.S. DEP'T OF STATE 2-3, [http://www.nafsa.org/\\_/File/\\_/amresource/DS5535.pdf](http://www.nafsa.org/_/File/_/amresource/DS5535.pdf) [<https://perma.cc/4MYD-BYAV>] (last visited Feb. 19, 2018); Carol Morello, *Some Visa Applicants Are Asked for Social-Media Names*, WASH. POST, June 2, 2017, at A03.

given country's nationals, if *other information* regarding those visa applicants suggests a heightened risk of terrorist activity. However, broad-brush application of such procedures could have a substantial collateral impact, amounting to a de facto cessation in visa processing.

Broad-brush use of these burdensome procedures would also not serve U.S. sovereign interests. It would not enhance consular officials' ability to respond to exigent circumstances beyond the ability available through more tailored inquiries. Moreover, unchecked vetting would also upset the carefully wrought design of the INA, triggering § 1152(a)(1)(A), the INA's nondiscrimination provision.<sup>257</sup> Under a shared stewardship model, courts should require that the Executive demonstrate a closer means-end fit for "extreme vetting" of this type.

### C. Executive Orders and Actions on Immigration

As the Supreme Court recently acknowledged,<sup>258</sup> courts have often accorded a measure of deference to the Executive regarding national security and foreign affairs.<sup>259</sup> In the immigration context, courts have generally displayed deference both when construing a statutory delegation to the President<sup>260</sup> and in considering the interaction of executive action and constitutional norms.<sup>261</sup> Yet, judicial deference has never been absolute.<sup>262</sup> Because of its clash

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257. See 8 U.S.C. § 1152(a)(1)(A).

258. See *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017). The Court fashioned its stay of President Trump's second travel ban in *IRAP* after appellate courts largely upheld the injunctions entered below. See *Hawaii v. Trump*, 859 F.3d 741, 756 (9th Cir. 2017); *IRAP v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017); cf. *Hawaii v. Trump*, No. 17-17168, 2017 U.S. App. LEXIS 26513, at \*13-14 (9th Cir. Dec. 22, 2017) (invalidating EO-3 as contrary to INA).

259. *IRAP*, 137 S. Ct. at 2088 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)) (noting that "[t]he interest in preserving national security is 'an urgent objective of the highest order'"); *id.* at 2089 (citing *Haig v. Agee*, 453 U.S. 280, 307 (1981)) (noting that in context of equitable balancing required for stay of decision below regarding the admission of refugees with no previous ties to the United States, "the balance tips in favor of the Government's compelling need to provide for the Nation's security").

260. See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 158 (1993).

261. See *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring); *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972).

262. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (holding that executive branch could not detain noncitizens subject to final orders of removal

with the text, structure, and purpose of the INA, deference is inappropriate for EO-3, the indefinite ban announced by President Trump in September 2017 on entry of most immigrants and certain nonimmigrants from specific countries.<sup>263</sup>

1. *President Trump's Measures Regarding Entry of Foreign Nationals: Factual Background*

In 2017, President Trump took three distinct actions regarding entry of foreign nationals. He issued an EO in January (EO-1), a revised EO (EO-2) in March, and a Proclamation in September (EO-3).<sup>264</sup> The first EOs were temporary, while EO-3 is indefinite in duration, subject to internal review every 180 days.<sup>265</sup> As we shall see, the indefinite character of EO-3 tips it over the edge into conflict with the INA. Before explaining that conclusion, it will be useful to set out the factual background of each of the three measures and—by way of contrast—briefly discuss the legal merits of now-expired EO-2.

In late January 2017, President Trump issued EO-1, temporarily suspending entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—and all persons granted refugee status abroad.<sup>266</sup> The EO suspended entry for the seven-country nationals for ninety days, and entry of refugees for 120 days.<sup>267</sup> The original order encompassed current visa-holders (VHs), such as doctors or students returning from holiday break abroad.<sup>268</sup> The order also did not expressly exempt returning LPRs.<sup>269</sup> As a result, airports became sites of chaos, as VHs and others were detained and in some cases summarily removed

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when there was no reasonable prospect of physically returning those individuals to their country of origin).

263. See EO-3, 82 Fed. Reg. 45,161, 45,161 (Sept. 24, 2017).

264. See generally Exec. Order 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) [hereinafter EO-1]; EO-2, 82 Fed. Reg. 13,209 (Mar. 6, 2017); EO-3, 82 Fed. Reg. 45,161.

265. See EO-1, § 3, 82 Fed. Reg. at 8,978; EO-2, § 2, 82 Fed. Reg. at 13,212 (Mar. 6, 2017); EO-3, § 4, 82 Fed. Reg. at 45,169.

266. *Trump v. IRAP*, 137 S. Ct. 2080, 2083 (2017).

267. *Id.*

268. See *Washington v. Trump*, 847 F.3d 1151, 1159-60 (9th Cir. 2017).

269. See *id.* at 1165 (finding that the EO did not expressly exempt LPRs and that subsequent statements by White House Counsel disclaiming intent to include LPRs did not bind the Executive).

despite lawful commitments in the United States, such as enrollment in colleges and service at U.S. hospitals.<sup>270</sup>

After the Ninth Circuit upheld an injunction against EO-1, President Trump issued EO-2 in early March. EO-2 stated that the pause in admissions was designed to “improve . . . screening and vetting protocols,” as well as protocols for visa and refugee processing,<sup>271</sup> and ensure that inadequately screened or vetted persons did not enter the United States as that review took place. In addition, the revised EO expressly exempted LPRs and current VHs, took Iraq off the list of countries whose nationals were affected, and instituted a waiver program for refugees based on the “national interest,” compliance with international agreements or understandings, hardship, and other factors.<sup>272</sup>

After decisions by the Fourth and Ninth Circuits that in large part upheld injunctions entered against the revised EO, the Supreme Court in June issued a per curiam stay of the injunctions.<sup>273</sup> That stay exempted from the revised EO foreign nationals with a “bona fide relationship” with a U.S. person or entity.<sup>274</sup> Clarifying its order in July, the Supreme Court held that the term, “bona fide relationship,” included a broad range of relatives, including parents, children, spouses, siblings, in-laws, grandparents, grandchildren, aunts, uncles, nieces, and nephews, but did not include the refugee resettlement agencies that had entered into sponsorship agreements regarding particular persons abroad already granted refugee status.<sup>275</sup> However, after issuance of EO-3, the Supreme Court ruled that the challenges to EO-2 filed in the Fourth and Ninth Circuits were moot. The Court also vacated the Fourth and Ninth Circuits’ decisions.

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270. See *id.* at 1157.

271. See EO-2, § 1(a), 82 Fed. Reg. 13,209, 13,209 (Mar. 6, 2017).

272. See *id.* § 3(a), at 13,213 (exemption of LPRs); *id.* § 3(b)(i), at 13,213 (exemption of VHs); *id.* § 1(g), at 13,211 (list of nations affected); *id.* § 6(c), at 13,215 (waiver provisions); *id.* § 6(b), at 13,216 (lowering refugee cap).

273. *Trump v. IRAP*, 137 S. Ct. 2080, 2083 (2017).

274. *Id.* at 2088. Justice Thomas, joined by Justices Alito and Gorsuch, dissented from the portion of the stay order granting this relief to noncitizens otherwise affected by the revised EO. *Id.* at 2090 (Thomas, J., dissenting in part).

275. See *Trump v. Hawaii*, 138 S. Ct. 34, 34 (2017); Peter Margulies, *Refugee EO Update: The Supreme Court Hands Each Side a Partial Victory*, LAWFARE (July 19, 2017), <https://www.lawfareblog.com/refugee-eo-update-supreme-court-hands-each-side-partial-victory> [https://perma.cc/8C79-734W] (analyzing the Supreme Court’s July 19 order); see also *Trump v. Hawaii*, 138 S. Ct. 49, 49-50 (2017) (staying injunction that had barred implementation of EO-2 for refugees whose only tie to the United States was through resettlement agency); *Trump v. IRAP*, 138 S. Ct. 353, 353 (2017) (vacating decision below as moot).

Because the earlier EOs were temporary, President Trump issued EO-3 in September 2017.<sup>276</sup> In contrast to the earlier EOs' temporary duration, EO-3 is indefinite in duration, although it is subject to review every 180 days.<sup>277</sup> In addition to being indefinite in duration, EO-3 makes some changes to the mix of listed countries and to the categories of foreign nationals from those countries affected by the measure. It suspends entry of both immigrants and some or all classes of nonimmigrants from Chad, Iran, Libya, North Korea, Syria, and Yemen.<sup>278</sup> The administration dropped Sudan from the list. In addition, EO-3 bars the entry of immigrants from Somalia, subjects Iraqi nationals to heightened screening, and bars nonimmigrant entry of certain Venezuelan government officials and their families.<sup>279</sup> To provide some room for official discretion despite the restrictions, EO-3 also provides a waiver process, which requires a foreign national otherwise covered by the EO to demonstrate that the bar to entry would result in undue hardship, that she does not present a threat, and that her entry would be in the national interest.<sup>280</sup> EO-3 does permit the admission of most refugees<sup>281</sup> and students, who receive nonimmigrant visas.

## *2. President Trump's Measures in Statutory Context*

Under the INA, the legality of President Trump's measures restricting entry hinges on reading the INA as a "harmonious

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276. See generally EO-3, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

277. See *id.* § 4, at 13,215.

278. *Id.* § 1(g), at 13,211.

279. *Id.* §§ 1(g), 2(h)(ii), 2(f)(i), at 13,211-13.

280. *Id.* § 3(c), at 45,168. In December 2017, the Ninth Circuit affirmed a Hawaii district court's injunction against EO-3. *Hawaii v. Trump*, 878 F.3d 662, 673 (9th Cir. 2017), *cert. granted*, 2018 U.S. Lexis 759 (Jan. 19, 2018); see also *International Refugee Assistance Project (IRAP) v. Trump*, 2018 U.S. App. Lexis 3513 (4th Cir. Feb. 15, 2018) (affirming Maryland district court's injunction against EO-3). Earlier in December, the Supreme Court—without opining on the merits—stayed all injunctions against EO-3 pending further review at the Court. See *Trump v. IRAP*, 138 S. Ct. 542, 542 (2017).

281. President Trump also issued a new Executive Order on refugees that was accompanied by a memorandum that allegedly suspended refugee admissions and related immigration from several countries, including some also listed in EO-3. See generally *Doe v. Trump*, No. C17-0178, 2017 U.S. Dist. LEXIS 211377 (W.D. Wa. Dec. 23, 2017) (invalidating provisions of refugee Executive Order and accompanying memorandum that imposed categorical per-country limits on refugee admissions and admission of close relatives accompanying or "following to join" refugees).

whole.”<sup>282</sup> That inquiry starts with three subsections that I detail below. However, the inquiry ultimately involves a broader consideration of the INA’s structure and purpose.

The first provision, 8 U.S.C. § 1182(f) (the “entry provision”), authorizes the President to “suspend the entry of all aliens or any class of aliens” when that entry is “detrimental to the interests of the United States.”<sup>283</sup> This provision, enacted during the Cold War as part of the 1952 Immigration Act, was intended as a delegation to the Executive to limit the admission of persons or groups that might endanger U.S. security.<sup>284</sup> In a 1986 opinion, then-judge Ruth Bader Ginsburg characterized the President’s authority under § 1182(f) as “sweeping.”<sup>285</sup> Reinforcing the Executive’s discretion in visa processing, in 1996 Congress enacted 8 U.S.C. § 1152(a)(1)(B) (the “procedures provision”), which empowers the Secretary of State to “determine the procedures for the processing of immigrant visa applications,”<sup>286</sup> including the location mandated for filing particular documents.

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

283. 8 U.S.C. § 1182(f) (2013).

284. *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 158-59 (1993) (upholding order authorizing interdiction at sea of foreign nationals seeking to enter the United States without a legal status); *see generally* *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979) (holding that regulation requiring all postsecondary students who were natives or citizens of Iran report regarding their status was constitutional as response to Iran’s seizure of U.S. embassy in Tehran); *see also* *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992) (asserting that § 1182(f) “clearly grants the President broad discretionary authority to control the entry of aliens into the United States”); *Sesay v. INS*, 74 Fed. App’x 84, 86-88 (2d Cir. 2003) (deferring to administrative decision that appellant was not eligible for asylum because presidential proclamation under § 1182(f) precluded his entry into United States); *cf.* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief*, CONG. RESEARCH SERV. 1, 3-12 (2017) (discussing background and past practice regarding § 1182(f)). The Supreme Court has also asserted in dicta that the power to exclude foreign nationals is granted by Article II of the Constitution. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (asserting that “exclusion of aliens is a fundamental act of sovereignty . . . stem[ming] not alone from legislative power but . . . inherent in the executive power to control the foreign affairs of the nation”).

285. *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986). Similar authority resides in 8 U.S.C. § 1185(a)(1), which states that it is “unlawful . . . to depart” or enter the United States except pursuant to “reasonable rules [and] regulations” promulgated by the President. 8 U.S.C. § 1185(a)(1) (2012).

286. 8 U.S.C. § 1152(a)(1)(B) (2012); *see* *Vietnamese Asylum Seekers v. Dep’t of State*, 104 F.3d 1349, 1350 (D.C. Cir. 1997) (holding that Secretary of State had authority under this provision to prospectively require filing of certain

However, the text, structure, and legislative history of the INA also curb the President's discretion. In the groundbreaking 1965 Immigration Act, Congress added an anti-discrimination provision declaring that no individual shall "be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth or place of residence."<sup>287</sup> The exceptions to the anti-discrimination provision are narrowly crafted.<sup>288</sup> Congress placed the nondiscrimination provision in the vital portion of the statute that sets overall limits on annual legal migration to the United States.<sup>289</sup> Moreover, Congress in the 1965 amendments to the immigration statute stressed the importance of family reunification and a pivot from the discriminatory national origin quotas that had shaped prior immigration law.<sup>290</sup> In addition, Congress has prescribed detailed provisions for the admission of nonimmigrants such as students, tourists, and business visitors.<sup>291</sup> Congress carefully calibrated these nonimmigrant provisions to optimize the benefits to

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Vietnamese asylum applications at consulates located in countries to which applicants had been repatriated after initial negative screening, rather than in Hong Kong). This decision was the culmination of extensive litigation, including an argument in the Supreme Court prior to Congress's adding the "procedures" provision to clarify the law. *Id.* at 1350-51; see also Josh Blackman, *The Legality of the 3/6/17 Executive Order, Part I: The Statutory and Separation of Powers Analysis*, JOSH BLACKMAN'S BLOG (Mar. 11, 2017), <http://joshblackman.com/blog/2017/03/11/the-legality-of-the-3617-executive-order-part-i-the-statutory-and-separation-of-powers-analysis/> [https://perma.cc/4254-P497] (discussing course of *Vietnamese Asylum Seekers* litigation under "National Origin Discrimination" heading, including government's discussion at Supreme Court of need for executive discretion and Congress's role in overriding earlier decision that curbed that discretion). In the litigation concerning Vietnamese asylum seekers, the D.C. Circuit ultimately held that the designation of specific consulates for receipt of Vietnamese asylum applications did not constitute prohibited discrimination. See *Vietnamese Asylum Seekers*, 104 F.3d at 1353 (holding that, given Congress's enactment of "procedures" provision, it was "clear" that the nondiscrimination provision did not bar the procedural decisions made by the Secretary of State in that case).

287. 8 U.S.C. § 1152(a)(1)(A).

288. See 8 U.S.C. § 1101(a)(27)(D) (2014) (certain overseas employees of the U.S. government, including certain Taiwanese nationals), *id.* § 1101(a)(27)(E)-(G) (certain Panamanian nationals who performed work in the Panama Canal Zone before or at the time of the Panama Canal Treaty of 1977 ceding ownership of the canal to Panama).

289. 8 U.S.C. § 1152(a)(2) (setting per-country level at seven percent of total annual global immigration level for the family preference, employment, and diversity immigrant categories).

290. See *infra* notes 312-26 and accompanying text.

291. See 8 U.S.C. § 1184 (2015).

the country yielded by each kind of nonimmigrant. An indefinite bar to entry of certain nonimmigrants upsets Congress's comprehensive framework.

Reading § 1182(f) in light of the INA as a whole suggests sensible limits on the President's authority. Section 1182(f) is interstitial in character. It allows the President to act quickly and decisively when situations require an exigent response.<sup>292</sup> Under this conception, temporary action will often be permissible. However, indefinite or permanent actions require a more substantial justification since those actions are more likely to interfere with the INA's overall plan.

### *3. An Interstitial Use of Statutory Authority: EO-2 and Congress's Framework*

EO-3's predecessor, March 2017's EO-2, differed substantially from EO-3 in temporal scope. While EO-3 is indefinite in duration—albeit subject to review every 180 days—EO-2 was temporary.<sup>293</sup> Its per country limits lasted only ninety days, while its bar on admission of refugees lasted 120 days. The limited duration of EO-2 harmonized it with Congress's plan.

Recall that under the shared stewardship model, a court will require that a challenged government action exhibit a close means-end relation if that action: (1) does not serve the sovereign interests of the United States, (2) imposes collateral impacts on U.S. persons or institutions, and (3) has no limiting principle.<sup>294</sup>

Even in the absence of presidential action under § 1182(f), the ordinary working of immigration law provides rudimentary security safeguards when an immigrant seeks admission to the United States at a port of entry such as an airport or border crossing. For example, suppose an arriving noncitizen has a valid visa as an Immediate Relative of a U.S. citizen. As mentioned in our earlier discussion of consular processing and "extreme vetting," to grant that visa, a consular official abroad would have had to also find that the noncitizen was not excludable for any of the reasons set out in the INA, such as commission of crimes abroad, the likelihood of requiring public assistance, having a communicable disease such as

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292. See 8 U.S.C. § 1182(f) (2013).

293. See EO-2, § 1(b), 82 Fed. Reg. 13,209, 13,209 (Mar. 6, 2017). Cf. EO-3, § 4, 82 Fed. Reg. 45,161, 45,169 (Sept. 24, 2017).

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



tuberculosis, or a history of material support of foreign terrorist groups.<sup>295</sup> Nevertheless, despite this consular determination of eligibility, an immigration official in the course of inspection at a point of entry may determine that the noncitizen is inadmissible based on new data or facts that the consular official missed.<sup>296</sup>

The President's power to deny "entry" under § 1182(f) gives the President authority to address threats in a fashion that is more tailored and proactive than the statutory bases for exclusion in the INA itself.<sup>297</sup> However, past practice illustrates that presidents have used the power granted by § 1182(f) in a tailored, often temporary way. Presidents have invoked § 1182(f) against relatively discrete groups, such as associates of the former Panamanian leader, Manuel Noriega.<sup>298</sup> Presidents have also used § 1182(f) to address exigent situations in foreign affairs. For example, President Carter invoked the provision in order to require all Iranian postsecondary students in the United States to report after the Iranian government held U.S. Embassy personnel as hostages in 1979.<sup>299</sup> President Reagan invoked § 1182(f) to halt most otherwise-eligible Cuban nationals' entry into the United States after Cuba reneged on an immigration accord.<sup>300</sup> In addition, as the Supreme Court discussed in *Sale v. Haitian Centers Council*, presidents Ronald Reagan, George H.W. Bush, and Bill Clinton invoked § 1182(f) to interdict inadmissible foreign nationals on the high seas heading for the United States.<sup>301</sup> No prior President had used § 1182(f) to indefinitely restrict the entry of otherwise admissible nationals from multiple named countries, as President Trump has sought to do.

Against this backdrop, the temporary bar to entry in EO-2 narrowly passed muster under shared stewardship, largely because of its temporary nature. Consider the sovereign interests factor. According to EO-2, the pause was designed to prevent further admissions based on information that was not fully reliable, while agencies such as the State Department, the Department of Homeland

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295. 8 U.S.C. § 1182.

296. *See generally id.* (detailing grounds of inadmissibility).

297. *See id.* § 1182(f).

298. *See Manuel, supra* note 284, at 10.

299. *See* Brief for Immigration Scholars at 24-29, *Hawaii v. Trump*, 878 F.3d 662 (2017) (No. 17-17168) (discussing past practice regarding § 1182(f)).

300. *See Manuel, supra* note 284, at 10. Presidents Carter and Reagan tailored their decrees to exempt close relatives of U.S. citizens. *See IRAP v. Trump*, 2018 U.S. App. Lexis 3513, at 128-29 (4th Cir. Feb. 15, 2018).

301. *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 160-67 (1993).

Security, and the Director of National Intelligence conducted a “worldwide review” to determine what, if any, additional information would be required from all or some foreign countries to ensure that a visa applicant was not a “security or public-safety threat.”<sup>302</sup> According to EO-2, each listed country was “a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.”<sup>303</sup>

Turbulent country conditions can substantially impair refugee and visa processing. When conditions are difficult, the information deficits that complicate consular decisions and refugee determinations<sup>304</sup> become even more difficult to manage. For example, turbulence may snarl access to records that substantiate a visa application. As decision-makers working without documentation rely more on applicants’ own accounts, the risk of unreliable narratives increases. The Supreme Court’s decision in *Maslenjak v. United States*<sup>305</sup> demonstrates that asylum claimants are not always reliable narrators. In *Maslenjak*, an asylum applicant egregiously misrepresented facts, casting her spouse as a victim of persecution when in fact the applicant’s spouse was complicit in horrendous atrocities.<sup>306</sup> Cases like *Maslenjak* illustrate that the effort to improve screening is not inherently unreasonable or invidious. Nor is a pause in entry to ensure proper screening of visa applicants from the countries subject to such turbulent conditions on the ground.

A pause of reasonable duration would also be consistent with shared stewardship’s search for limiting principles. EO-2’s stated duration of ninety and 120 days for six-country nationals and

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302. EO-2, § 2, 82 Fed. Reg. 13,209, 13,212 (Mar. 6, 2017).

303. *Id.* § 1(d), at 13,210. *See also id.* § 1(e)(ii), at 13,211 (“Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias . . . Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions . . . The Libyan government provides some cooperation with the United States’ counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters.”).

304. *See* Martin, *supra* note 25, at 184.

305. *See* *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017).

306. *Id.* (holding that trial judge had delivered improper instruction in trial of defendant on making false statements to obtain naturalization, and noting that defendant had lied to obtain asylum by asserting that her husband had sought to avoid being drafted into the Bosnian Serb Army in the early 1990s and had suffered persecution as a result, while in fact her husband had been an officer in a unit that helped massacre 8,000 Bosnian civilians).

refugees, respectively, demonstrated its limited scope. In its stay order, the Supreme Court announced that it “fully expect[ed]” that the government would finish its review and relay any new requirements to foreign governments within the brief “life” of EO-2.<sup>307</sup> The Court’s language strongly suggested that it would not regard the “worldwide review” rationale as a colorable justification for a *new* EO of the same scale or for seriatim temporary reviews. Without a fresh rationale, shared stewardship would find that any new, similar EO lacked an intelligible limiting principle.

Although collateral impacts alone will not invalidate a measure under a shared stewardship test, the collateral impacts of EO-2 were nonetheless substantial. As the Supreme Court’s stay order upholding portions of the injunctions against the revised EO made clear, EO-2 had significant adverse consequences for U.S. persons. Without the Court’s modifications exempting from the EO grandparents, grandchildren, uncles and aunts, nieces and nephews, and other relatives of U.S. persons,<sup>308</sup> EO-2 would have adversely affected U.S. relatives of noncitizens, who would have had to endure delay in reuniting with family members.<sup>309</sup> Moreover, although the Court’s orders regarding EO-2 did not reflect this,<sup>310</sup> U.S. refugee resettlement agencies providing sponsorship assurances to refugees also suffered, since their operations and funding were interrupted.<sup>311</sup>

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307. *Trump v. IRAP*, 137 S. Ct. 2080, 2089 (2017).

308. *See id.* (ruling that noncitizens abroad otherwise affected by refugee EO were exempted if they had “bona fide relationship” with U.S. person or entity); *see also Trump v. Hawaii*, 138 S. Ct. 34, 34 (July 19, 2017) (clarifying scope of stay order).

309. The family members abroad, as foreign nationals with no other ties to the United States, lack constitutional rights. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (holding that noncitizens abroad with no ties to the United States lacked Fourth Amendment rights). The Supreme Court has held that foreign nationals detained at the Guantanamo Bay Naval Base in Cuba—a facility under the exclusive control of the U.S. military—have access to habeas corpus. *See Boumediene v. Bush*, 553 U.S. 723, 723 (2008). *Cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861-62 (2017) (citing *Boumediene* as connoting limits on the deference accorded political branches’ decisions about national security and foreign affairs). The foreign nationals covered by the revised EO are not detained by the United States. Therefore, holding that they are directly protected by the U.S. Constitution would require an expansion of the Court’s holding in *Boumediene*.

310. *See Hawaii*, 138 S. Ct. at 34 (declining to include refugee resettlement agency assurances in category of “bona fide relationship” with U.S. person or entity that under stay order required exemption from revised EO).

311. *See Alex Aleinikoff, What Does the Supreme Court’s Decision on the Trump Executive Order Mean for Refugees?*, PUB. SEMINAR (June 27, 2017),

#### 4. *The Perils of Indefinite Executive Measures: The INA and EO-3*

In September 2017, EO-2 gave way to EO-3. The latter's indefinite restrictions contrast sharply with EO-2's temporary duration. In addition to imposing collateral impacts that are far more severe than EO-2's, the indefinite character of EO-3's restrictions undermine the sovereign interests articulated in the INA's "overall scheme" and lack any coherent limiting principle.

Consider EO-3's clash with Congress's scheme. The transformational 1965 Immigration Act amendments had two salient features: They abolished the discriminatory national origin quotas that had marred U.S. immigration law for four decades and prioritized family reunification. The INA sets out a detailed architecture for immigrant admissions that prioritizes close family relationships.<sup>312</sup> As the U.S. Senate Judiciary Committee noted in its report on the 1965 amendments, the revisions to the statute included a "new system of allocation based on a system of preferences which extends priorities . . . to close relatives of U.S. citizens and [LPRs]," along with certain "members of the professions, arts, and sciences," those with skills or other attributes needed in the U.S. economy, and refugees.<sup>313</sup> In crafting a new system, the Committee's Report declared that "[r]eunification of families is to be the foremost consideration."<sup>314</sup> Thus, in setting criteria for membership in the U.S. community, Congress sought to serve the interests of U.S. citizens and LPRs with close family members overseas.

By the same token, the 1965 amendments decisively rejected the system of national origin discrimination that had governed the issuance of immigration visas since 1924.<sup>315</sup> These quotas governed all areas of the world, apart from the Western Hemisphere.<sup>316</sup> According to the Senate Judiciary Committee, Congress's own experience demonstrated that the quota system lacked the "required

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<http://www.publicseminar.org/2017/06/what-does-the-supreme-courts-decision-on-the-trump-executive-order-mean-for-refugees/#.WaQDXj6GOp0> [<https://perma.cc/3ENZ-U6WQ>] (arguing that the equitable balancing required in a stay order should also respect the importance of refugee resettlement agency assurances to overall refugee processing). *Cf. IRAP*, 137 S. Ct. at 2087 (outlining standard for stay pending appeal) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

312. See 8 U.S.C. §§ 1151, 1153 (2012).

313. See 1965 Senate Judiciary Committee Report, *supra* note 41, at 11.

314. *Id.* at 13.

315. See *id.* at 11-12.

316. *Id.* at 12-13.

degree of flexibility” to “permit the reuniting of families.”<sup>317</sup> Because of this shortcoming, the Committee noted, Congress had, in the past, resorted to “special legislation” to be appropriately “generous and sympathetic” to families’ needs.<sup>318</sup> The continued resort to such special legislation since 1952 accounted for the admission of nearly two-thirds of all immigrants entering the United States.<sup>319</sup> In sparing Congress from the need for this continual and disruptive recourse to special legislation, the Judiciary Committee pointedly praised the 1965 amendments’ replacement of the national origin quota system with a family-based visa program that was to be “fair, rational, humane, and in the national interest.”<sup>320</sup>

The 1965 Judiciary Committee Report also stressed the particularly adverse impact of quota provisions governing the so-called Asia-Pacific triangle, which included China, Japan, Korea, and other countries. Until 1952, racial restrictions in the immigration statute had barred naturalization of most Asian noncitizens and suppressed immigration.<sup>321</sup> The 1952 statute, while eliminating race as a bar, subjected nationals from the Asia-Pacific triangle to particularly narrow and rigid quotas. A total of only 2,000 visas per year were available to the aggregate of all countries in the region.<sup>322</sup> Moreover, the 1952 Act also provided that the immigration to the United States of persons of Asian ancestry anywhere in the world would count against the 2,000-person quota applicable to the Asia-Pacific triangle. In other words, persons of Asian descent who were nationals of countries in other regions, such as Europe, Africa, the Caribbean, or Latin America, had to fit within the 2,000-person Asian-Pacific triangle quota.<sup>323</sup> The 1965 amendments repealed all vestiges of this noxious system.<sup>324</sup> The Judiciary Committee report

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317. *Id.* at 13.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 14.

322. *Id.*

323. *Id.* at 14-15. A few years before the 1965 amendments, Congress removed the 2,000-person limit. However, it continued to subject immigration of persons of Asian descent anywhere in the world to the limits of the new Asian-Pacific triangle quota. *Id.*

324. *Id.* at 15.

declared that in the future, there would be “no differentiation”<sup>325</sup> in the treatment of Asian immigrants.<sup>326</sup>

The 1965 legislation and other subsequent amendments also consolidated the grounds for excluding foreign nationals from the United States. Over time, the list of grounds for inadmissibility has grown to include many factors, ranging from traditional factors like likelihood of becoming a public charge<sup>327</sup> to the various terrorism exclusions discussed by the Supreme Court in *Kerry v. Din*.<sup>328</sup> Although the list has grown, Congress deliberated over all additions, including the terrorism provisions added after September 11.

The “entry provision” cited by President Trump, § 1182(f), is part of the statutory section that deals with grounds for inadmissibility.<sup>329</sup> In times of crises or transnational disputes, § 1182(f) allows the President to fill gaps, acting interstitially to supplement the express exclusion grounds in the statute or identify particular individuals or groups whom consular processing might not flag or whose entry might undermine other foreign policy goals.<sup>330</sup> However, the logic and structure of Congress’s detailed inadmissibility provisions suggest that Congress has not delegated to the President the power to create new standing additions to the exclusion grounds. The de facto addition of exclusion grounds by executive order would not fall under the rubric of statutory implementation or enforcement. Instead, it would amount to redrafting the statute itself.

EO-3 also exceeds the power delegated by Congress to set “procedures” for visa issuance.<sup>331</sup> The “procedures” provision was a legislative response to particular litigation involving the Secretary of State’s power to designate consulates for the receipt of Vietnamese asylum claims.<sup>332</sup> The “procedures” provision would allow the

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325. *Id.*

326. See Alan Hyde, *The Nondiscrimination Obligation of Immigration and Nationality Act Section 202(a)(1)(A)* 1, 13, 18 (Rutgers Univ. School of L., Soc. Sci. Research Network, Working Paper No. 2932605), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2932605](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932605) [<https://perma.cc/AR56-K76R>] (providing analysis of the nondiscrimination provision in the INA).

327. See 8 U.S.C. § 1182(a)(4) (2013).

328. *Id.* § 1182(a)(3); see also *Kerry v. Din*, 135 S. Ct. 2128, 2131, 2140 (2015).

329. 8 U.S.C. § 1182(f).

330. *Id.*

331. See 8 U.S.C. § 1152(a)(1)(B).

332. See *Vietnamese Asylum Seekers v. Dep’t of State*, 104 F.3d 1349, 1350-51 (D.C. Cir. 1997); Blackman, *supra* note 286.

government to obtain additional information from visa applicants. For example, the administration could have established tailored procedures that addressed potential information deficits by requiring more explanation or documentation, including certifications by government agencies in the applicant's country of origin or affidavits from government officials. Further information requirements, such as the disclosure of social media "handles" for some visa applicants, might be appropriate to ensure that there is no evidence of inadmissibility based on terrorist ties or other factors. However, EO-3 goes well beyond setting procedures. It categorically bars virtually all eligible applicants from most listed countries from receipt of immigrant visas and some nonimmigrant visas. The possibility of a shortfall in information about some visa applicants does not justify a de facto material alteration in the INA's underlying substantive criteria for visa eligibility and admission to the United States. The "procedures" provision is too slender a reed to do this heavy work.<sup>333</sup>

EO-3's provision of waivers does not remedy its clash with the INA. To obtain a waiver, a noncitizen from the affected countries must show that: (1) denying entry would cause the noncitizen "undue hardship"; (2) entry would not pose a threat to the United States; and (3) entry would be "in the national interest."<sup>334</sup> The waiver's test also undermines the INA's framework. Consider the second criterion: requiring the noncitizen show he or she is not a threat.<sup>335</sup> Under usual consular procedure, a consular official will review materials submitted as a matter of course by the visa applicant, such as an employment history or criminal record.<sup>336</sup> If that history raises an issue, the consular official will inquire further. For example, in *Kerry v. Din*, the consular official apparently had questions about the applicant's tenure as a clerk for a government office run by the Taliban.<sup>337</sup> However, beyond producing documents such as an employment history, consular processing does not require that the visa applicant prove a negative, i.e., that he or she is not a threat. Proving a negative is often difficult. It is straightforward only regarding health, where a doctor's exam will demonstrate the absence of communicable diseases such as tuberculosis. However,

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333. See 8 U.S.C. § 1152(a)(1)(B).

334. EO-3, § 3(c)(i), 82 Fed. Reg. 45,161, 45,168 (Sept. 24, 2017).

335. *Id.* § 3(c)(i)(B), at 45,168.

336. See 8 U.S.C. § 1182(a)(3) (2013).

337. 135 S. Ct. 2128, 2131-32 (2015).

there is no doctor's exam for rebutting an administrative presumption that an individual is a threat to national security.

The first and third waiver criteria introduce elements that do not figure at all in visa decisions under the INA. Congress knew how to require a showing of "hardship" under the statute.<sup>338</sup> It has done so in several other immigration provisions, such as the requirement that undocumented noncitizens applying for a remedy called "cancellation of removal" show "exceptional and extremely unusual hardship" to a close family member who is a citizen or LPR.<sup>339</sup> However, the INA does not require any showing of hardship by ordinary visa applicants overseas. Similarly, a visa applicant who qualifies for a family-based, employment, or other visa and is not excludable because of a criminal record, a communicable disease, or other factors need not also show that his or her admission would be in the "national interest" of the United States. The INA's scheme treats this as a given if the visa applicant's admission promotes family reunification with relatives in the United States, economic competitiveness for U.S. businesses, or other purposes contemplated by the statute. Requiring a further showing adds new hurdles to visa processing that Congress has not intended.

In addition to its clash with the sovereign interests Congress has carefully inscribed in the INA, EO-3 imposes substantial collateral impacts on U.S. persons. Because of its indefinite duration, EO-3's collateral impacts on U.S. citizens and LPRs far exceed the effects wrought by EO-2's temporary restrictions. Moreover, EO-3 relies on an interpretation of the "entry" provision, § 1182(f), which lacks an intelligible limiting principle.<sup>340</sup> The temporary restrictions in EO-2 at least had clear temporal end-points. In contrast, EO-3's restrictions are indefinite. Damage to the INA from a temporary, one-time restriction on admissions is inherently contained. The same cannot be said of the imposition of indefinite restrictions that are subject only to internal review within the executive branch.

### 5. *EO-3 and More Searching Review*

Since EO-3 does not fit shared stewardship's criteria for relaxed review, it requires more searching scrutiny. EO-3 cannot meet that more exacting standard. Its blunt means are far too

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338. EO-3, § 3(c)(i)(A), 82 Fed. Reg. at 45,168.

339. See 8 U.S.C. § 1229b(b)(1)(D) (2012).

340. See 8 U.S.C. § 1182(f).



imprecise to effectively reduce foreign nationals' terrorism-related conduct in the United States. In responding to this threat, EO-3 manages to be both markedly under- and over-inclusive.<sup>341</sup> This is true with respect to both its analysis of conditions in the listed countries and the fit between its restrictions and the track-record of foreign nationals in the United States who have committed terrorism-related offenses.

First, consider the Proclamation's application of its stated criteria regarding country conditions.<sup>342</sup> Those criteria are three-fold. EO-3 purports to value a state's responsibility for identity-management protocols, such as using electronic passports embedded with the passport-holder's biographic and biometric data and informing other countries and international organizations about lost or stolen passports. Second, EO-3 purports to consider whether a state shares national security and public-safety information, such as data about terrorism or security threats.<sup>343</sup> Third, EO-3 cites the importance of national security and public-safety risk assessment, including whether a state accepts the return of its own nationals when U.S. immigration officials have obtained a final order of removal for those individuals.<sup>344</sup>

From one angle, EO-3 is notably over-inclusive.<sup>345</sup> Several countries affected by EO-3 use identity-management protocols of the kind that the Proclamation requires. For example, four of the listed countries—Iran, Libya, Somalia, and Venezuela—issue electronic passports.<sup>346</sup> The international law enforcement agency, Interpol, reported in 2014 that Iran was “very strong” in its efforts to share information on lost or stolen passports,<sup>347</sup> while Libya, Somalia, Syria, and Venezuela all share substantial information.<sup>348</sup> With respect to sharing national security and public-safety information,

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341. See *IRAP v. Trump*, 265 F. Supp. 3d 570, 610 (D. Md. 2017).

342. See EO-3, § 1(c), 82 Fed. Reg. at 45,168.

343. *Id.*

344. *Id.*

345. See David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, CATO AT LIBERTY (Oct. 9, 2017, 2:07 PM), <https://www.cato.org/blog/travel-ban-based-executive-whim-not-objective-criteria> [<https://perma.cc/KM8U-22NN>]. Analyst David Bier of the Cato Institute has undertaken the most diligent and methodical review of EO-3's criteria. See *id.*

346. See *id.*; ICAO Public Key Directory (PKD) Participants, INT'L CIV. AVIATION ORG. (ICAO), <https://icao.int/Security/FAL/PKD/Pages/ICAO-PKDParticipants.aspx> [<https://perma.cc/8WCN-WA2T>] (last visited Feb. 19, 2018).

347. See Bier, *supra* note 345.

348. See *id.*

Chad and Yemen use a U.S.-devised system—the Personal Identification Secure Comparison and Evaluation System (PISCES)—to report terrorist incidents.<sup>349</sup> While Iran does not use this system, it does coordinate with the Iraqi government and with Syria in the armed conflict with ISIS, in which the United States also participates.<sup>350</sup> It is logical to infer that such coordination entails some information-sharing. Whether U.S. officials consider that degree of information-sharing to be sufficient is difficult to discern from the face of EO-3, which provides no objective baseline for this factor regarding the frequency or volume of information-sharing expected.

EO-3 is also over-inclusive regarding national security risk indicators. One factor here is a country's willingness to permit readmission of nationals of that country who have received final orders of removal from the United States.<sup>351</sup> Without that cooperation, U.S. officials cannot effectively conduct removal of noncitizens whose conduct has violated U.S. immigration laws. Only one of the listed countries—Iran—has been listed recently as failing to provide such cooperation.<sup>352</sup>

EO-3's list is also markedly under-inclusive in applying its criteria to countries around the globe. Almost 100 countries—including scores not on the list—did not issue electronic passports, and many others permitted their nationals to use old paper passports still in their possession.<sup>353</sup> Moreover, over 150 countries either rarely or never report lost or stolen passports to international authorities.<sup>354</sup> In addition, all but one of the countries that fail to cooperate in

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349. *Id.*; *Country Reports on Terrorism 2016*, U.S. DEP'T OF STATE (July 2017), <https://www.state.gov/documents/organization/272488.pdf> [<https://perma.cc/KT8A-ZTZN>] (describing Chad and reporting on Yemen).

350. *See* Bier, *supra* note 345.

351. *See* EO-3, § 1(c)(iii), 83 Fed. Reg. 45,161, 45,168 (Sept. 24, 2017).

352. *See* Bier, *supra* note 345.

353. *See id.*; *ICAO Public Key Directory (PKD) Participants*, *supra* note 346.

354. *See* Bier, *supra* note 345; *Passport Fraud: An International Vulnerability: Subcomm. on Border and Mar. Sec. of the H. Comm. on Homeland Sec.* (2014) (testimony of Alan Bersin, PLCY Office of Int'l Affairs Assistant Sec'y & John Wagner, CBP Office of Field Operations Acting Deputy Assistant Comm'r), <https://www.dhs.gov/news/2014/04/04/written-testimony-plcy-office-international-affairs-and-cbp-office-field-operations> [<https://perma.cc/LZ74-ATCH>].

readmission of nationals subject to U.S. removal orders are not on the list.<sup>355</sup>

EO-3's restrictions also fail to fit the pattern of terrorism-related offenses in the United States. Noncitizens from the countries listed in the Proclamation accounted for under fifteen percent of terrorism-related federal offenses committed within the United States, such as material support of a foreign terrorist group.<sup>356</sup> The cohort of offenders from the listed countries was small in absolute terms. Moreover, it represented an exceedingly small fraction of the total number of individuals admitted to the United States from each listed country. Since March 2011, the federal government has documented terrorism-related conduct located primarily in the United States—including acts of violence—involving approximately forty foreign-born individuals.<sup>357</sup> According to a draft study prepared by the Department of Homeland Security, native-born U.S. citizens were more likely to commit such offenses than foreign-born U.S. persons from all other countries combined.<sup>358</sup>

Moreover, because terrorism is a low-incidence crime in which base rates are very low in any national population, detecting signals of terrorist tendencies in any such cohort is exceptionally difficult: The sorting task is analogous to finding the proverbial needle in a haystack. Compounding the problem, the bulk of foreign-born individuals in the United States who had committed terrorism-related offenses of any kind had been in the country for years prior to their arrest, suggesting that more rigorous vetting would not have helped

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355. Bier, *supra* note 345; Stephen Dinan, *Trump Presses More Countries Take Back U.S. Deportees in Immigration Success*, WASH. TIMES (May 16, 2017), <https://www.washingtontimes.com/news/2017/may/16/countries-refusing-us-deportees-cut-from-20-to-12> [<https://perma.cc/7YVP-SHXA>].

356. *See Most Foreign-born, US-Based Violent Extremists Radicalized After Entering Homeland; Opportunities for Tailored CVE Programs Exist*, OFF. OF INTELLIGENCE & ANALYSIS, U.S. DEP'T OF HOMELAND SEC. 5 (Mar. 2017), <http://www.msnbc.com/rachel-maddow-show/trms-exclusive-dhs-document-undermines-trump-case-travel-ban> [<https://perma.cc/S6FL-8J78>] [hereinafter *DHS Draft Study II*].

357. *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, U.S. DEP'T OF HOMELAND SEC. 1 (2017), <https://fas.org/irp/eprint/dhs-7countries.pdf> [<https://perma.cc/B7EL-2VN5>] [hereinafter *DHS Draft Study I*]. This group encompasses persons across a spectrum of immigration and citizenship status. *See DHS Draft Study II, supra* note 356, at 3 (listing eighty-eight foreign-born violent extremists between March 2011 and December 2016). The sample does *not* include criminal conduct focused overseas, such as departing the United States to join a terrorist organization. *Id.* Those numbers are also small in absolute terms.

358. *See DHS Draft Study I, supra* note 357, at 1.

identify such individuals.<sup>359</sup> Furthermore, in this group, foreign nationals from the countries covered by EO-3 were less than twenty-five percent of the total.<sup>360</sup> Those numbers indicate that EO-3 is markedly under-inclusive in certain respects, omitting countries such as Bangladesh, Bosnia-Herzegovina, Kenya, Pakistan, and Uzbekistan that together accounted for substantially more terrorism-related conduct than countries listed in the Proclamation.<sup>361</sup>

In addition, EO-3 is markedly over-inclusive. For example, it covers children under fifteen years of age.<sup>362</sup> Beyond a disqualifying communicable disease and a record of petty criminal offenses, it is difficult to imagine that a minor below the age of fifteen could have engaged in conduct that renders him or her inadmissible. Nevertheless, EO-3 excludes members of this cohort, in effect throwing out the baby with the bathwater.

In sum, EO-3's indefinite duration, impact on U.S. families, and undermining of the INA disqualify it for shared stewardship's deferential review. Consequently, assessment of EO-3 requires application of a more searching standard. EO-3 lacks the precise means-end fit required under this more robust review. It therefore exceeds the power that Congress delegated to immigration officials.

#### 6. *EO-3 and the Establishment Clause*

If President Trump's campaign, post-election, and post-inaugural statements are at the very least part of the backdrop for a statutory analysis of the revised EO, they play an even more prominent role in addressing whether the revised EO clashes with the Establishment Clause. Here, as with the statutory issue, both the government and the EO's challengers have taken extreme positions. The government has asserted that President Trump's statements are simply irrelevant to the Establishment Clause issue.<sup>363</sup> In contrast, the Fourth Circuit selected a skewed subset of statements by candidate,

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359. See *DHS Draft Study II*, *supra* note 356, at 7.

360. *Id.* at 5; see also EO-3, § 1(h)(ii), 83 Fed. Reg. 45,161, 45,164 (Sept. 24, 2017) (listing the countries included in the travel ban).

361. See *DHS Draft Study II*, *supra* note 356.

362. See EO-3, § 3(c)(iv)(E), 82 Fed. Reg. 45,161, 45,169 (Sept. 24, 2017).

363. See Peter Margulies, *The Fourth Circuit and the Refugee EO: Establishing Confusion*, LAWFARE (May 26, 2017, 1:15 PM), <https://www.lawfareblog.com/fourth-circuit-and-refugee-eo-establishing-confusion> [<https://perma.cc/454S-Q9EQ>].

President-elect, and President Trump and Trump surrogates.<sup>364</sup> A shared stewardship model would consider all of Trump's statements but would require a uniform showing of religious animus absent in this case to trigger more searching means-end scrutiny. In the multi-dimensional arena of foreign affairs, requiring a lesser showing to make out an Establishment Clause violation would license rampant judicial second-guessing of legislative and executive decisions and impair the sovereign interests of the United States.

As in the statutory context, it is useful to note that a legal analysis that requires a uniform showing of religious animus does not entail ethical, moral, or political support for statements made on the campaign trail or subsequently by President Trump. One could view even a single statement, such as then-candidate Trump's call for a "total and complete shutdown of Muslims entering the United States,"<sup>365</sup> as antithetical to the best view of American politics and public service. However, a legal test should not engender unintended consequences that undermine the Framers' goal of a "workable government,"<sup>366</sup> particularly in the complex realm of foreign policy. That is where the EO critics' Establishment Clause arguments fall short.

Application of the Establishment Clause to national security, foreign policy, and immigration risks interference with sovereign interests because of the multiplicity of factors that trigger government action in this dynamic arena.<sup>367</sup> The Establishment Clause prohibits government actions intended to and likely to produce injury or aid to religion.<sup>368</sup> However, the Supreme Court has oscillated between tests under the Establishment Clause, producing little in the way of coherent guidance.<sup>369</sup> The Court's kaleidoscopic

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364. That court also interpreted ambiguous statements as favoring the EO's challengers. *Id.*

365. See *IRAP v. Trump*, 857 F.3d 554, 594 (4th Cir. 2017).

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

367. See *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (citing "political branches' broad power" over immigration).

368. See *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

369. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court announced a test for an Establishment Clause violation. *Id.* at 612-13 (stating that, to withstand an Establishment Clause challenge, a measure (1) must have a "secular" purpose, (2) cannot have a "primary effect" that "advances nor inhibits" religion, and (3) must not promote "excessive government entanglement" with religion). However, in *Van Orden*, the Court discounted the *Lemon* factors as "no more than

Establishment Clause case law may have to suffice as a template for the states, towns, and school districts that comprise the bulk of Establishment Clause defendants. However, the scattered rays of insight one can gather from this shifting jurisprudence do not serve well as a template for a sound foreign policy.

For a graphic illustration of the Supreme Court's own reticence in applying its complex Establishment Clause precedents to a case with even modest national security ramifications, consider *Salazar v. Buono*.<sup>370</sup> In *Salazar*, Justice Kennedy, writing for a plurality of the Court,<sup>371</sup> found no violation of the Establishment Clause in Congress's transfer of a small parcel of land within the Mojave National Preserve to a private group to maintain a World War I memorial featuring a Latin cross. After expressing doubt that the "reasonable observer" test for government endorsement of religion adequately addressed the importance of private religious observance,<sup>372</sup> Justice Kennedy noted that whether the cross conveyed a sectarian message would be "assessed in the context of all relevant factors."<sup>373</sup> According to Justice Kennedy, the cross at issue in *Salazar* "evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten."<sup>374</sup> As a result, Justice Kennedy found that invalidating the land transfer would not reflect the appropriate level of "[r]espect for a coordinate branch of Government."<sup>375</sup>

Those same concerns should prompt even greater concern when a measure comprises part of the ongoing foreign affairs of the United States. A lower threshold for proving violations of the Establishment Clause would cast doubt on many executive and legislative moves in the foreign policy realm.<sup>376</sup> Untangling religious from neutral factors is a difficult task.

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helpful signposts." 545 U.S. at 686 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

370. See generally *Salazar v. Buono*, 559 U.S. 700 (2010).

371. Chief Justice Roberts and Justice Alito joined Justice Kennedy's opinion; Justices Scalia and Thomas concurred based on finding that the challenger of the measure lacked standing. *Id.* at 705, 729.

372. *Id.* at 720.

373. *Id.* at 721.

374. *Id.*

375. *Id.*

376. Establishment Clause cases hinging on official intent have a far narrower focus on the religious observance or the sustenance of a religious organization: For example, in *McCreary County v. ACLU*, 545 U.S. 844, 848, 852

In this regard, consider Congress's passage of the Lautenberg Amendment, which requires that immigration officials presume that Jews and Evangelical Christians from the former Soviet Union and related states qualify for asylum.<sup>377</sup> Under the Lautenberg Amendment, the groups covered did not have to go through the demanding asylum adjudication process required of other asylum claimants alleging a well-founded fear of persecution based on religion.<sup>378</sup> In that sense, the Lautenberg Amendment gave an edge to particular religious groups. Nevertheless, the distinctive treatment authorized in this provision, along with subsequent amendments that covered other groups such as religious minorities from Iran,<sup>379</sup> allowed the political branches to craft a tailored response to changing international political dynamics.<sup>380</sup> Application of a rigid Establishment Clause standard would have denied the political branches this needed flexibility.

In addition, consider a significant event in post-World War II U.S. foreign policy: President Truman's recognition of Israel.<sup>381</sup>

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(2005), the Supreme Court invalidated a courthouse display of the Ten Commandments that the legislature had endorsed "in remembrance and honor of Jesus Christ." In *Larson v. Valente*, 456 U.S. 228, 254-55 (1982), the Court struck down a state law that limited religious congregations' ability to fundraise outside of church services. Members of the legislature stated that the law targeted groups that relied on public in-person solicitation of contributors; one legislator described his colleagues as "hot to regulate the Moonies." Candidate and President Trump's comments, while they are deplorable, do not address religious observance or fundraising in this way.

377. See 8 U.S.C. § 1157 n.(b)(2)(A) (2017) (providing that "[a]llies who are (or were) nationals and residents of an independent state of the former Soviet Union or of Estonia, Latvia, or Lithuania and who are Jews or Evangelical Christians shall be deemed" to be presumptive refugees).

378. Cf. Michael J. Churgin, *Is Religion Different? Is There a Thumb on the Scale in Refugee Convention Appellate Court Adjudication in the United States? Some Preliminary Thoughts*, 51 TEX. INT'L L.J. 213, 215 (2016) (asserting that "presumption of refugee eligibility" in the Lautenberg Amendment amounts to a "thumb on the scale for certain religious groups" that mandates a less onerous process than the one that typically applies in refugee adjudication).

379. See § 1157 n.(b)(1)(C).

380. Today, many of the beneficiaries of the Lautenberg Amendment and subsequent provisions are Evangelical Christians from Ukraine fleeing violence in that country. See Miriam Jordan, *Soviet-Era Program Gives Even Unoppressed Immigrants an Edge*, N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/26/us/ukrainian-christian-refugees.html> [<https://perma.cc/8V23-GNWM>] (citing refugee advocates' acknowledgment that this group is "still vulnerable to persecution in pro-Russian areas" of Ukraine).

381. See Richard Holbrooke, *President Truman's Decision to Recognize Israel*, JERUSALEM CTR. FOR PUB. AFF. (May 1, 2008),

Truman expressly recognized the creation of a “Jewish state” within Israel’s borders.<sup>382</sup> Clark Clifford, Truman’s close advisor and a future Secretary of Defense under President Lyndon Johnson, recalled that Truman was fond of citing Deuteronomy 1:8, in which God decreed that the Israelites “go in and take possession of the land [of] . . . Abraham, . . . Isaac, and . . . Jacob.”<sup>383</sup> One of Truman’s motivations was the intent to help Judaism survive and prosper. According to Clifford, Truman also articulated “moral and ethical” factors supporting “the foundation of a Jewish state.”<sup>384</sup>

Under the Establishment Clause theory propounded by the EO’s challengers, courts would also entertain challenges to decisions such as Truman’s. If courts agreed that the *Lemon* test was the proper vehicle for this challenge, plaintiffs would be allowed to conduct discovery on whether Truman had an appropriate secular purpose that outweighed his religious sentiments and whether the “primary effect” of the recognition decision was to help or hinder religion. Madison, who in Federalist No. 41 counseled vigilance regarding the hostile “exertions” of foreign powers, would have expressed alarm at using litigation to second-guess such fundamental foreign policy decisions.<sup>385</sup>

In addition to inhibiting U.S. foreign relations, the Establishment Clause challenge to the revised refugee EO also lacks intelligible limits. That absence of limits is clearest on the standard for using the statements of a political candidate or public official. While the government’s argument that those statements are never

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<http://jcpa.org/article/president-truman%E2%80%99s-decision-to-recognize-israel/> [<https://perma.cc/6ALU-922V>].

382. *Id.*

383. *See id.* (quoting *Deuteronomy* 1:8).

384. *Id.*

385. THE FEDERALIST NO. 41, *supra* note 15, at 257. *Cf.* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (cautioning that allowing suits for damages could chill official decision-making in sensitive areas). While *Abbasi*’s analysis may have overshot the mark in that case, its relevance to a lawsuit and discovery regarding recognition decisions is manifest; one could argue that recognition decisions are so wrapped up in the President’s power to conduct foreign relations under Article II of the Constitution that special rules should limit Establishment Clause challenges in that arena. *Cf.* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (holding that President had exclusive power to decide how questions involving the status of Jerusalem affected the listing of place of birth on a U.S. citizen’s passport, despite legislation to the contrary). However, a rule distinguishing recognition decisions from other foreign policy matters for Establishment Clause purposes would cause significant line-drawing problems that courts generally seek to avoid. *See Chesney, supra* note 7, at 1396.



relevant would provide no check at all, the challengers' approach, largely adopted by the Fourth Circuit, fails to address the core problem with using politicians' campaign statements: Campaigns are fluid processes in which a candidate's statements can vary depending on his or her opponents, the audience, or different paragraphs in a single speech.

As an illustration, consider the words of a President rightly recognized as among the best: Franklin D. Roosevelt. Historians often remember Roosevelt as the patron saint of deficit spending, who pioneered scores of social programs to get people back to work during the Great Depression.<sup>386</sup> However, as the Princeton historian Julian Zelizer has argued, in the 1932 election, Roosevelt's commitment to social programs did not deter him from campaigning against then President Herbert Hoover's supposed fiscal extravagance—although Hoover's spending was nowhere near the levels Roosevelt would reach after he moved into the White House.<sup>387</sup> A complete picture of Roosevelt's approach would have to examine each strand of his statements—but that picture was incomplete until Zelizer's work more than fifty years after Roosevelt's passing. It is doubtful that contemporary courts could have done full justice to Roosevelt's subtly shifting remarks.

Similarly, Roosevelt was a moving target on the next great crisis he faced: America's role in World War II. In 1940, World War II was already raging, but the United States was on the sidelines, kept there by a Congress and public that was wary of foreign entanglements. Just before the 1940 election, Roosevelt appeared at a Boston campaign rally to speak on the subject of America's military capabilities.<sup>388</sup> Roosevelt told the crowd to recognize the "obvious" fact that the war posed "dangers to all forms of democracy throughout the world."<sup>389</sup> Nevertheless, lest the crowd think Roosevelt was issuing this warning to signal an intent to enter the

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386. See Mariano-Florentino Cuellar, "Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939-1953, 76 U. Chi. L. Rev. 587, 687 (2009) (discussing contemporary opposition to Roosevelt's "social welfare programs").

387. See Julian E. Zelizer, *The Forgotten Legacy of the New Deal: Fiscal Conservatism and the Roosevelt Administration, 1933-1938*, 30 PRESIDENTIAL STUD. Q. 331, 335 (2000).

388. See Franklin D. Roosevelt, President of the United States 1933-1945, Campaign Address at Boston, Massachusetts (Oct. 30, 1940), <http://www.presidency.ucsb.edu/ws/?pid=15887> [<https://perma.cc/6M75-CCXS>].

389. *Id.*

conflict, Roosevelt also assured the crowd that, “Your boys are not going to be sent into any foreign wars.”<sup>390</sup>

Less than two months before the speech, Roosevelt had agreed in the so-called “Destroyer Deal” to send Britain fifty outmoded U.S. Navy destroyers in exchange for the ability to maintain bases in British possessions such as Antigua and Bermuda.<sup>391</sup> To keep the political running room he needed, Roosevelt had to accompany all such initiatives with the disclaimer he issued in Boston about avoiding a U.S. combat role.<sup>392</sup> A contemporary court may have found this single speech in Boston as difficult to parse as Roosevelt’s conflicting statements about government spending. However, that ambiguity was a feature, not a bug, in Roosevelt’s efforts to prepare the public for a larger U.S. role in the conflict, which came slightly over a year later with the Japanese attack on Pearl Harbor. Contemporaneous judicial efforts to discern Roosevelt’s authentic meaning could only have frustrated Roosevelt’s canny strategy.

While few would confuse President Trump with Franklin Roosevelt, the Fourth Circuit did not consider the full range of candidate Trump’s remarks on matters related to the revised refugee EO. Judge Gregory, writing for the court, cited the “numerous occasions” on which candidate Trump urged a “total and complete shutdown” of Muslim immigration.<sup>393</sup> However, newspaper accounts readily available to the court, but omitted from its opinion, showed twists and turns in Trump’s position. In May 2016, Trump said the proposed complete ban was “just a suggestion” and he was open to other ideas.<sup>394</sup> In June and July 2016, Trump called for immigration measures tied to particular nations and “territory” where terrorism and armed conflict were prevalent.<sup>395</sup>

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390. *Id.*

391. See Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 *FORDHAM INT’L L.J.* 642, 666 (2007).

392. See *id.* at 667-68.

393. See *IRAP v. Trump*, 857 F.3d 554, 594 (4th Cir. 2017).

394. See Jenna Johnson, *Donald Trump Is Expanding His Muslim Ban, Not Rolling It Back*, *WASH. POST* (July 24, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/?utm\\_term=.6944cce18cdc](https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/?utm_term=.6944cce18cdc) [<https://perma.cc/W5PH-LR3S>].

395. See *id.* This rationale was an early variant of the rationale in the revised EO, stressing information deficits in dealing with countries that were embroiled in domestic armed conflicts or were state sponsors of terrorism. See EO-2, § 1(d), 82 Fed. Reg. 13,209, 13,210 (Mar. 6, 2017). Assuming an absence of *uniform* statements showing religious animus, the Revised EO’s rationale would be consistent with the “facially legitimate and bona fide” standard affirmed by Justice

Then-candidate Trump may well have been deceptive or insincere. However, as the Franklin Roosevelt example illustrates, sincerity in statecraft is a relative term, and even deception sometimes yields benefits for the public interest. Before embarking on electoral hermeneutics, courts should determine if their approach will usefully address Rooseveltian ambiguity, as well as Trumpian bluster. At the very least, the Fourth Circuit should have conducted a comprehensive inventory of Trump's campaign statements and distinguished those that didn't fully fit the attribution to Trump of anti-Muslim animus.<sup>396</sup> The court failed to undertake this task, despite the availability of press accounts supplying such information. This gap proves that dissenting Judge Niemeyer was right to call out the majority's "unbounded"<sup>397</sup> negative implications for judicial methodology.

A shared stewardship approach would steer clear of the Fourth Circuit's unbounded venture into campaign semiotics while retaining the ability to consider a uniform pattern of statements over time.<sup>398</sup> Suppose that campaign and post-election statements indicated a uniform, longstanding purpose to either help or hinder a religious group. Having examined the *complete* record and made that determination, a court could then insist that the government show a closer means-end fit for the challenged measure.<sup>399</sup>

This approach would preserve sovereign interests over foreign affairs and offer an intelligible limiting principle for judicial forays into campaign hermeneutics. It would recognize that all officials who appear in public occasionally make statements that are ambiguous, hasty, or tailored to a particular audience. Finding a uniform and comprehensive pattern of statements reflecting the intent to help or hurt a religion indicates that the official in question has failed the test of stewardship, warranting heightened judicial scrutiny. Subjected to

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Kennedy in *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (quoting Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)).

396. Compare *IRAP*, 857 F.3d at 594, with *Johnson*, *supra* note 394.

397. See *IRAP*, 857 F.3d at 650; see also *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc) (noting that "[c]andidates say many things on the campaign trail; they are often contradictory or inflammatory").

398. See *supra* notes 24-40 and accompanying text.

399. This test is narrower than the broader standard urged by some commentators. See generally Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (arguing that courts can consider presidential speech when inquiring into purpose, without proposing limits on that consideration).

the full pressure of the *Lemon* test and failing the secular purpose prong, the revised EO would then fall by the wayside.<sup>400</sup>

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400. President Obama's initiatives would encounter a mixed reception under the shared stewardship model. Pursuing the commendable policy goal of compensating for Congress's failure to enact comprehensive immigration reform, the Obama administration authored two important programs: Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA). See Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. 3 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/2TUG-TBUG>] (announcing DAPA); *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/N6WZ-WLGP>] (last updated Jan. 13, 2018).

DAPA was the larger program by a substantial margin; it entailed granting work authorization and a renewable reprieve from removal to over four million of the roughly 11 million undocumented noncitizens in the United States. Primarily because of its scale, DAPA would not have fared well under any of the shared stewardship criteria. Its most glaring flaw was its lack of intelligible limits. As with any administrative measure, DAPA had to fit into the "harmonious whole" of the INA. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Congress has regularly sought to *curb* executive discretion on reprieves from removal. See 8 U.S.C. § 1229c(a)(2)(A) (2012) (curbing executive practice of granting "extended voluntary departure" (EVD) to noncitizens without a legal status). Congress's effort to cabin executive discretion on reprieves from removal would make little sense if immigration officials could circumvent these limits by announcing a sweeping new program. See *Texas v. United States*, 809 F.3d 134, 178-82 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 WASHBURN L.J. 143, 159 (2015) (observing that, "[h]aving balked at the relatively modest discretionary benefits provided by EVD . . . Congress would surely bridle at the cornucopia of benefits provided by DAPA"); see also Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 216 (2015) (arguing that DAPA overstepped presidential authority).

DACA presents a different case with clearer limits. It granted relief from removal and work authorization to a substantially smaller group: undocumented children whose parents brought them to the United States. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra*. Noncitizens in this group had no control over their parents' decision to enter the country without a legal status. *Id.* In addition, DACA recipients have developed close ties to the United States and often have virtually no connection to their nominal countries of origin. *Id.* Relief for this group is thus closer to the narrowly tailored relief from a range of hardships, including serious illness, disability, and extreme youth or old age, that has long been a mainstay of the immigration system. See SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF

#### D. Retroactive Application of Removal Grounds: Against Playing “Gotcha!”

Since our discussion of shared stewardship thus far has centered on persons located abroad, it is appropriate in this final Section to address the rights of noncitizens *already here*. A perennial issue alluded to earlier has been the retroactive effect of changes in immigration law. For over a century, the Supreme Court has agreed that Congress can make immigration laws retroactive if it states its intent clearly.<sup>401</sup> The shared stewardship model departs from this longstanding default, precluding Congress from retroactively applying new criteria for the removal of noncitizens.<sup>402</sup>

The Supreme Court’s decision in *Harisiades v. Shaughnessy*<sup>403</sup> is perhaps the most extensive modern statement of the reasons for permitting retroactive removal criteria. Writing for the Court, Justice Jackson asserted that the United States’ sovereign interest in the effective “conduct of foreign” policy<sup>404</sup> justified retroactive application of a removal provision based on the noncitizens’ past membership in the Communist Party. The longtime LPRs ordered removed in *Harisiades* had each terminated their membership in the Communist Party years *prior* to Congress’s expressly designating past membership as a basis for removal.<sup>405</sup> Application of the ground to the noncitizens who challenged their removal in *Harisiades* upset reliance interests that the Court has generally sought to honor, at least in the statutory context. However, faced with a clear statement from Congress, the *Harisiades* Court held that due process did not require limiting Congress to prospective application.<sup>406</sup>

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PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 2, 55, 63 (2015). *But see* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783-84 (2013) (arguing that DACA exceeded presidential authority).

401. Justice Holmes stated this in typically blunt fashion. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (citing *Johannessen v. United States*, 225 U.S. 227, 242 (1912)) (noting that deportation was not punishment and therefore was not included within the constraints of the Ex Post Facto Clause; deportation is “simply a refusal by the Government to harbor persons whom it does not want”).

402. The Court has long read ambiguous immigration *statutes* as only applying prospectively. *See* *Vartelas v. Holder*, 566 U.S. 257, 261 (2012); *Morawetz*, *supra* note 181, at 140; *Motomura*, *supra* note 181, at 568.

403. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

404. *See id.*

405. *See id.* at 593.

406. *See id.* at 591.

To justify this stark holding, Justice Jackson resorted to what Professor Hiroshi Motomura has called the “contract theory” of immigration.<sup>407</sup> Under this theory, legal immigrants know that the United States has admitted them under certain conditions and with certain background understandings.<sup>408</sup> One such understanding is that immigrants are merely probationary members of U.S. society. As such, they are subject to both the removal grounds in place at the time of their admission and those grounds that Congress has seen fit to add later, including removal grounds that based deportation on conduct the noncitizen engaged in before the legislation became effective. For Jackson, the immigrant consented to these conditions, harsh though they might be in particular settings like those that prevailed in *Harisiades* itself.<sup>409</sup> That consent made retroactive application fair.

Arguing that the bargain here was not one-sided, Justice Jackson claimed that the noncitizen gained from his or her probationary status prior to naturalization. According to Jackson, the noncitizen, unlike a U.S. citizen, could marshal the diplomatic efforts of a foreign power on his or her behalf.<sup>410</sup> Moreover, Jackson noted, the noncitizen did not incur certain risks of citizenship, such as exposure to conscription into the armed forces of the United States. These benefits, Jackson asserted, made the “contract” entered into by the arriving noncitizen a fair one, despite what in other contexts the Court would view as the unfairness of retroactive legislation.<sup>411</sup>

Justice Jackson’s account both exaggerated the benefits of noncitizens’ probationary status and muted the adverse consequences of that status. Let us consider the latter first, through shared stewardship’s focus on collateral impacts. Permitting retroactive laws undermines the legislative process and diminishes the productivity of noncitizens. In each respect, Justice Stevens’ opinion for the Court in *INS v. St. Cyr*<sup>412</sup> is a valuable guide. Justice Stevens was troubled by the prospect that Congress could legislate retroactively “as a means of retribution against unpopular groups or

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407. See *id.* at 585; MOTOMURA, *supra* note 8, at 9-11 (describing the contract theory of immigration).

408. See MOTOMURA, *supra* note 8, at 9-11.

409. See *Harisiades*, 342 U.S. at 587.

410. See *id.* at 585-86.

411. *Id.*

412. See generally *INS v. St. Cyr*, 533 U.S. 289 (2001) (providing guidance on legislative processes and productivity of noncitizens).

individuals.<sup>413</sup> According to Justice Stevens, retroactive legislation also deprives people of “confidence about the legal consequences of their actions.”<sup>414</sup> Just as Hamilton predicted that unfair laws would “sap the foundations of public and private confidence,”<sup>415</sup> Justice Stevens expressed concern that retroactive application would undermine our “free, dynamic society”<sup>416</sup> and suppress “creativity in both commercial and artistic endeavors.”<sup>417</sup>

The supposed benefits of immigrant status that Justice Jackson invoked in *Harisiades* do not outweigh these burdens.<sup>418</sup> While in theory a foreign national can call upon his or her government for protection, foreign governments have rarely been effective in halting the removal of noncitizens from the United States.<sup>419</sup> Similarly, international law is of modest help. Even basic rights to be accorded foreign nationals under international law, such as notification of that individual’s consulate in the United States in the event the noncitizen is arrested, have been ignored or minimized by some U.S. jurisdictions.<sup>420</sup> The erratic and unreliable benefits provided by international law hardly outweigh the costs of retroactive application for noncitizens.

Along with adverse collateral impacts, permitting retroactive application of removal grounds has no limiting principle. In *Harisiades*, removal subjected longtime legal residents of the United States to a wrenching shift that the Court itself has described as

413. See *id.* at 315. *Cf. id.* at 315 n.39 (explaining vulnerabilities of noncitizens). As a judge on the Tenth Circuit Court of Appeals, Justice Neil Gorsuch eloquently stated similar views. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1146 (10th Cir. 2016) (noting due process concerns with retroactive application, since “retroactive application of new penalties to past conduct that affected persons cannot now change denies them fair notice of the law and risks endowing a decisionmaker expressly influenced by majoritarian politics with the power to single out disfavored individuals for mistreatment”).

414. See *St. Cyr*, 533 U.S. at 316 (quoting *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265-66 (1994)).

415. See THE FEDERALIST No. 78, *supra* note at 15, at 470.

416. See *St. Cyr*, 533 U.S. at 316 (citing *Landgraf*, 511 U.S. at 265-66).

417. See *id.*

418. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 585-86 (1952).

419. In *Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001), the Court noted that an effective tack for a country was to refuse to accept the repatriation of its own nationals after those individuals had received final orders of removal. However, the impact of this step is limited; it may result in the noncitizen’s release from detention, but it will not modify the underlying removal order.

420. See *Medellin v. Texas*, 552 U.S. 491, 530-32 (2008) (holding that treaty requiring consular notification and establishing safeguards for criminal defendants denied this right was not self-executing and thus not enforceable in federal court).

being “the equivalent of banishment.”<sup>421</sup> Retroactive application of removal grounds may often be harsher in practice than the *ex post facto* criminal laws that the Constitution forbids. Criminal laws may provide only modest penalties, depending on the sentences prescribed. In contrast, removal of longtime residents is in effect a life sentence of exile from relationships and commitments that may have evolved over decades.<sup>422</sup>

Finally, it is far from clear that the power to retroactively apply removal criteria materially aids the United States’ sovereign interests. On the level of design, barring retroactive application would impair the nation’s ability to rethink removal criteria. That consequence is not trivial, as the addition of removal grounds after September 11 demonstrates. However, one should not overstate these costs. Consider one post-9/11 addition to the INA: the addition of terrorism-related offenses such as material support of a terrorist organization.<sup>423</sup> In dealing with this problem, the government has many tools at its disposal if the individual persists in the activity, including criminal prosecution.<sup>424</sup> Moreover, if the individual who may have engaged in material support is still a noncitizen, the government can also resort to *prospective* application of removal grounds if the conduct in question recurs.<sup>425</sup> In other words, the added value of retroactive application does not yield significant gains in addressing exigent situations.

Moreover, on the issue of the *design* of removal grounds, permitting retroactive application sends a discordant message. As the Constitution’s *Ex Post Facto* Clause demonstrates, disdain for retroactive legislation is a foundational commitment of American governance.<sup>426</sup> Ignoring this principle in order to target a politically vulnerable group suggests that our passion for avoiding unfairness is

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421. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

422. *See* Aleinikoff, *supra* note 146, at 244 (noting “actual relationships the individual has developed with a society . . . [including] a family, friends, a job, association memberships, professional acquaintances, opportunities”).

423. *See* 8 U.S.C. § 1227(a)(4)(B) (2012).

424. *See* 18 U.S.C. § 2339A (2012) (prohibiting material support of terrorist activity); § 2339B (prohibiting material support of foreign terrorist groups); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) (upholding material support law against First Amendment challenge).

425. *Vartelas v. Holder*, 566 U.S. 257, 273-74 (2012).

426. *See* Fletcher v. Peck, 10 U.S. 87, 138 (1810) (explaining that this provision, the Bill of Attainder Clause, and the Contracts Clause were designed by the Framers to counter legislators’ penchant for “violent acts which might grow out of the feelings of the moment”).



disconcertingly contingent, rather than constitutive. Giving the political branches the power to send that deflating message undermines the abiding sovereign interests of the United States. To safeguard those interests, shared stewardship would rule out retroactive application of removal grounds.

## CONCLUSION

The retroactivity of removable grounds is a case study in the difficulty of deriving clear and coherent rules on judicial review of immigration law. Indeed, in some ways that issue understates the dimensions of the problem. At least in the retroactivity arena, courts have arrived at a consensus: interpret ambiguous statutes to permit only prospective application, while upholding retroactive application when Congress issues a clear statement. As we have just seen, there are persuasive arguments that the consensus is wrong. However, at least in this area, its parameters are clear for courts, policymakers, and the public.

The same cannot be said for other areas of immigration law. The judicial response to President Trump's refugee EOs has thus far highlighted the *lack* of guidance in case law and commentary regarding executive power. Concerns about the "extreme vetting" that will accompany EO-3 exacerbate this problem. The attenuated nature of the Court's rationale for distinguishing the gender-based citizenship statute struck down in *Sessions v. Morales-Santana* from valid gender-based statutes has increased the puzzlement of stakeholders.

The prime candidates for supplying that guidance have problems of their own. The deference that the Court has long invoked does not fit the close means-end scrutiny deployed in *Morales-Santana* or the fine adjustments that the Court made in its stay order in *IRAP v. Trump*.<sup>427</sup> The normalization thesis, which would generally require the same close means-end nexus of immigration measures that courts already require for domestic laws, unduly discounts the nation's concern with the composition of the community and the exigencies of foreign policy. A stable, normative regime will not stem from either mechanical deference or the failure to acknowledge immigration's genuine differences from wholly domestic law.

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427. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017); *Trump v. IRAP*, 137 S. Ct. 2080, 2087-88 (2017).

Shared stewardship seeks to fill the gap. To address whether heightened judicial review is appropriate, shared stewardship considers three factors conjunctively: (1) degree of sovereign interest, (2) number and intensity of collateral impacts, and (3) absence of intelligible limits.<sup>428</sup> Each factor figures in the Framers' thought and the Supreme Court's case law, although the latter sometimes elevates the perceived foreign policy aspects of a challenged measure and downplays concern with collateral impacts and intelligible limits. Balanced attention to all three factors will lead to a clearer and more cohesive model of judicial review.

In at least two important areas—vetting of visa applicants by consular officials and retroactive application of removal grounds—shared stewardship's criteria lead to different results than current case law. Shared stewardship would prohibit vexatious or unduly onerous requests for information from consular officials to visa applicants and bar retroactive application of newly enacted removal provisions. In reaching those different results, shared stewardship is more skeptical than current case law about the foreign affairs implications of certain immigration decisions and more concerned with requiring a floor of fairness that will both discipline the political branches and send a positive signal to the rest of the world. Shared stewardship would also view EO-3 as inconsistent with the INA because of the absence of a limiting principle governing the EO's indefinite restrictions.

Shared stewardship will not eliminate close cases in immigration law. Nor will it end debates about the degree of deference that courts display. However, shared stewardship will ensure a judicial role in key areas where that role has until now been muted. Moreover, shared stewardship will enlist the courts' capacity for judgment without unduly intruding on U.S. sovereign interests. Given immigration law's importance for the near future under President Trump and the longer term flourishing of the American experiment, achieving that balance is worth the effort.

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