

# Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause

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## I. Introduction

As a candidate in the 2008 presidential election race, Barack Obama vigorously denounced the Bush Administration for what he argued were extreme and indefensible assertions of executive power.<sup>1</sup> As President, however, he has frequently taken action by claiming broad executive power.<sup>2</sup>

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1. See Ross Douthat, *All the President’s Privileges*, N.Y. TIMES, June 23, 2012, [http://www.nytimes.com/2012/06/24/opinion/sunday/douthat-all-the-presidents-privileges.html?\\_r=3&.&](http://www.nytimes.com/2012/06/24/opinion/sunday/douthat-all-the-presidents-privileges.html?_r=3&.&) (“Obama campaigned as a consistent critic of the Bush administration’s understanding of executive power . . .”); Charlie Savage, *Barack Obama’s Q&A*, BOS. GLOBE, Dec. 20, 2007, <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/> (criticizing the Bush Administration’s claim of plenary authority for the President).

2. See Melanie M. Marlowe, *President Obama and Executive Independence*, in THE OBAMA PRESIDENCY IN THE CONSTITUTIONAL ORDER 47, 48 (Carol McNamara & Melanie M. Marlowe

In the area of national security, foreign policy, and military affairs (where the Executive has long held sway),<sup>3</sup> the Administration has conducted an undeclared cyber-war against Iran, used military force to bring about regime change in Libya, pursued a proxy war in Somalia, and prepared for more extensive shadow warfare in Africa.<sup>4</sup>

The Obama Administration has been equally assertive in domestic matters. Especially since the Republican congressional victories in the 2010 midterm elections, the Obama Administration has taken measures based on claims of sole executive authority, even after Congress has considered but rejected such proposals.<sup>5</sup> To be sure, earlier Administrations also deployed executive powers before a hostile Congress. In early January 2007, not long after his party had been defeated in the 2006 congressional elections, President George W. Bush announced plans for a “surge” of U.S. military

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eds., 2011) (asserting that President Obama has been a “champion of the unitary executive” in areas such as “access to information, signing statements, control of administration, and national security”); David K. Nichols, *Professor Obama and the Constitution*, in *THE OBAMA PRESIDENCY IN THE CONSTITUTIONAL ORDER*, *supra*, at 25, 34–39 (surveying Obama’s actions in a number of areas of national security and domestic policy and finding them to demonstrate a retrenchment from his campaign criticisms of the scope of executive power under President Bush); Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST. J., Mar. 30, 2012, <http://online.wsj.com/article/SB10001424052702303812904577292273665694712.html> (focusing on Obama’s use of executive power to “press his domestic agenda”); James Oliphant, *The Presidency Will Only Grow More Powerful (No Matter Who Wins)*, NAT’L J., Oct. 11, 2012, <http://www.nationaljournal.com/issues/the-presidency-will-only-grow-more-powerful-no-matter-who-wins--20121011> (surveying President Obama’s most aggressive executive actions).

3. For a study of the President’s constitutional powers in those areas, see generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005). *But see* PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 54 (2009) (arguing that the “presidentialist case for a near-monarchical President in foreign and military affairs fails” and is not “based on a sound reading of constitutional text or history”).

4. See Robert J. Delahunty, *War Powers Irresolution: The Obama Administration and the Libyan Intervention*, ENGAGE, Sept. 2011, at 122, 123, <http://www.fed-soc.org/publications/detail/engage-volume-12-issue-2-september-2011> (“As President Obama and other NATO leaders have repeatedly insisted, the Allies’ overriding war aim is regime change . . .”); Siobhan Gorman & Julian E. Barnes, *Cyber Combat: Act of War*, WALL ST. J., May 30, 2011, <http://online.wsj.com/article/SB20001424052702304563104576355623135782718.html> (explaining that the “sabotaging of Iran’s nuclear program via the Stuxnet computer worm” was an important aspect of the larger global shift toward cyber warfare); Nick Turse, *Washington Puts Its Money on Proxy War: The Election Year Outsourcing that No One’s Talking About*, LE MONDE DIPLOMATIQUE, Aug. 10, 2012, <http://mondediplo.com/openpage/washington-puts-its-money-on-proxy-war> (“Washington is currently pursuing plans for proxy warfare across the globe, perhaps nowhere more aggressively than in Africa.”); Craig Whitlock, *At Pentagon, ‘Pivot to Asia’ Becomes ‘Shift to Africa,’* WASH. POST, Feb. 14, 2013, [http://www.washingtonpost.com/world/national-security/at-pentagon-pivot-to-asia-becomes-shift-to-africa/2013/02/14/649988e0-76d4-11e2-9357-7a107e548ef5\\_story.html](http://www.washingtonpost.com/world/national-security/at-pentagon-pivot-to-asia-becomes-shift-to-africa/2013/02/14/649988e0-76d4-11e2-9357-7a107e548ef5_story.html) (noting that over past two years, the Pentagon has become embroiled in conflicts in Libya, Somalia, Mali, and elsewhere in Africa).

5. See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 22, 2012, <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?pagewanted=all&r=0> (noting that “[t]he Obama administration started down [the] path” of unilateral executive action “soon after Republicans took over the House of Representatives”).

forces in Iraq.<sup>6</sup> President Ronald Reagan, in a similar situation after the congressional elections of 1986, began to issue Executive Orders far more frequently.<sup>7</sup>

The Obama Administration's preferred tool for domestic policy, however, is new: using "prosecutorial discretion" *not* to enforce statutes with which the President disagrees.<sup>8</sup> In 2009, the Department of Justice stopped enforcing federal drug laws against individuals whose actions comply with "existing state laws providing for the medical use of marijuana."<sup>9</sup> In 2011, the Department of Justice decided that it would not defend a provision of the Defense of Marriage Act in the federal courts.<sup>10</sup> The Administration has also relied on "prosecutorial discretion" to shield Attorney General Eric Holder from prosecution for contempt of Congress.<sup>11</sup>

The Obama Administration has claimed "prosecutorial discretion" most aggressively in the area of immigration. The most notable example of this trend was its June 15, 2012 decision not to enforce the removal provisions of the Immigration and Nationality Act (INA) against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States.<sup>12</sup>

6. See generally THOMAS E. RICKS, *THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2006–2008* (2009).

7. See JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 391–93 (2009) (explaining that because the Reagan Administration entered office with a Democrat-controlled House and was faced with a Democrat-controlled Senate after the 1986 election, it had an easier time changing policy "through a combination of executive orders, rule-making, and judicial appointments rather than new legislation").

8. The Administration has also made broad use of its discretionary powers under (its interpretations of) statutory laws. For example, it has "exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate" of the Affordable Care Act. *Newland v. Sebelius*, No. 1:12-cv-01123-JLK, slip op. at 14–15 (D. Colo. July 27, 2012).

9. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys (Oct. 19, 2009), available at <http://blogs.justice.gov/main/archives/192>.

10. Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. For a recent defense of the Obama Administration's decision, see generally Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012). A decision not to defend the constitutionality of an act of Congress is cognate in some respects to a decision not to enforce it. See Michael T. Brady, Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 977 n.27 (1983) (arguing the criticism of executive discretion not to defend federal statutes is often combined with the problem of executive discretion to enforce statutes).

11. Letter from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (June 28, 2012), available at <http://abcnews.go.com/images/Politics/062812%20letter.pdf>. The Department's decision seems likely to have been based on a 1984 memorandum of law to the Attorney General from the Justice Department's Office of Legal Counsel. Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 102 (1984).

12. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2006). The Pew Hispanic Center reported that as many as 1.4 million persons would be covered. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html>

By taking this step, the Obama Administration effectively wrote into law “the DREAM Act,”<sup>13</sup> whose passage had failed numerous times.<sup>14</sup>

The President’s claim of prosecutorial discretion in immigration matters threatens to vest the Executive Branch with broad domestic policy authority that the Constitution does not grant it. For if a President can refuse to enforce a federal law against a class of 800,000 to 1.76 million individuals, what discernible limits are there to prosecutorial discretion? Can a President decline to enforce federal laws barring that class from voting in federal elections? Can a President decline to enforce the deportation statute against *all* illegal immigrants because of a belief in an “open borders” policy? Can a President who wants tax cuts that a recalcitrant Congress will not enact decline to enforce the income tax laws? Can a President effectively repeal the environmental laws by refusing to sue polluters, or workplace and labor laws by refusing to fine violators?

In this Article, we use the Administration’s June 15 nonenforcement decision as a lens through which to examine the Executive’s law enforcement powers and responsibilities. We do not address the merits as a matter of immigration policy, although both of us favor a speedier path to citizenship for illegal aliens who were brought here as children and are enrolled in school or serve in the United States Armed Forces. We argue that the Constitution’s Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases. In other words, we shall argue that there is simply no general presidential nonenforcement power. It is true that enforcement cannot occur in all circumstances. The ordinary, efficient administration of the law requires discretionary decision making on the part of enforcers. But that does not mean that all breaches of the duty are tolerable. On the contrary, the

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pagewanted=all. The Migration Policy Institute currently estimates as many as 1.76 million. JEANNE BATALOVA & MICHELLE MITTELSTADT, MIGRATION POLICY INST., RELIEF FROM DEPORTATION: DEMOGRAPHIC PROFILE OF THE DREAMERS POTENTIALLY ELIGIBLE UNDER THE DEFERRED ACTION POLICY 1 (2012), available at [http://www.migrationpolicy.org/pubs/FS24\\_deferredaction.pdf](http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf).

13. The name comes from a bill originally introduced into Congress in 2001, entitled the Development, Relief, and Education for Alien Minors Act, or the “DREAM Act,” S. 1291, 107th Cong. (2001). The most recent form of the DREAM Act was S. 952, 112th Cong. (2011).

14. Even the President had previously gone on record to say that such action would be outside his constitutional powers. In a March 2011 Univision Town Hall in Washington, D.C., the President responded to a question whether he would grant “temporary protected status” to undocumented students. President Barack Obama, Remarks by the President at Univision Town Hall (Mar. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>. He said that he could not “waive away the laws that Congress put in place” and that “the president doesn’t have the authority to simply ignore Congress and say, ‘We’re not going to enforce the laws that you’ve passed.’” Lamar Smith, *Obama’s Amnesty for Illegal Immigrants Is Against the Law*, CHRISTIAN SCI. MONITOR, June 15, 2012, <http://www.csmonitor.com/Commentary/Opinion/2012/0615/Lamar-Smith-Obama-s-amnesty-for-illegal-immigrants-is-against-the-law>.

deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty.

The Take Care Clause sets the baseline; any deliberate deviation from it is presumptively forbidden. But as with legal duties generally, the duty is “defeasible,” and its nonperformance can be excused or justified in appropriate circumstances.<sup>15</sup> In the immigration area, nonenforcement of the INA’s removal provisions, even in a very large and important class of cases, might arguably be excused or justified if the execution of the law in those cases would undercut the President’s constitutional powers and responsibilities. The immigration laws, for example, might be read to require the President to treat enemy combatants captured in wartime as illegal aliens, who would be due deportation, rather than detention and trial by military authorities. In such cases, we believe, the President could refuse to enforce the immigration laws because they conflict with his authority under the higher law of the Constitution to manage the conduct of war.

We argue, however, that the Obama Administration has provided no adequate excuse or justification for its nonenforcement decision. Rather, it has laid claim to a power to make significant domestic policy on its own, even when that policy effectively amends existing acts of Congress.<sup>16</sup> In the terms of an earlier period of Anglo-American constitutional history, the Obama Administration seeks a “dispensing” power to waive the law. Congress, however, must shoulder some of the blame for enacting stringent immigration rules and then chronically underfunding their administration, which delegates to the President a sweeping de facto discretion over enforcement.

We introduce our discussion in Part II by describing the circumstances of the Administration’s June 15 nonenforcement decision and by identifying the central legal issues. In Part III, we examine the meaning and scope of the President’s duty to “take care” that the laws be faithfully executed. We explore the original understanding of the Take Care Clause by examining the constitutional text, the seventeenth- and eighteenth-century English constitutional background, political theory of the day, and American colonial and early national understandings of the executive power. We devote significant attention to the differences between Thomas Jefferson and

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15. For analysis of the meaning of “defeasibility,” the place of the concept in legal reasoning, and the tension between it and the rule of law, see generally Frederick Schauer, *Is Defeasibility an Essential Property of Law?* (Oct. 12, 2008) (unpublished manuscript), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1403284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403284).

16. The “amendment” was of course functional, not formal. *Compare* *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (striking down the Line Item Veto Act as an impermissible violation of the Presentment Clause), *with* *INS v. Chadha*, 462 U.S. 919, 954–55 (1983) (rejecting the single congressional house veto of presidential action as an infringement of the Presentment Clause). In this case, the President’s displeasure with a “restriction on benefits imposed by Congress” led to executive action that had “the practical force of law, in violation of the Constitution.” *OPM v. Richmond*, 496 U.S. 414, 428 (1990).

Abraham Lincoln over whether the President retains a “prerogative” power enabling the suspension of the law for the common good. In Part IV, we catalogue and review the most commonly offered and generally accepted excuses or justifications for the breach of the duty to execute the laws, such as unconstitutionality of the law, equity in individual cases, and resource limitations. We find that the June 15 decision does not fall within any of them.

There is no obvious “remedy,” either judicial or political, for this constitutional wrong. It is doubtful whether any individual litigant could show the particularized harm necessary for Article III standing,<sup>17</sup> and after *Raines v. Byrd*,<sup>18</sup> it is unlikely that the Senate, the House of Representatives, or individual members of Congress would have standing either.<sup>19</sup> Moreover, even if a plaintiff with standing could be found, the prevailing standard of review for challenges to executive nonenforcement decisions is extraordinarily lenient.<sup>20</sup> Political “remedies” *do* seem possible (assuming Congress decides again not to pass the DREAM Act). These could include legislation to defund the implementation of the program to provide immigration-related benefits to the DREAMers, or Senate rejection of the Obama Administration’s nominees for ranking positions in the immigration area. More ambitiously, Congress could enact legislation (or the President could issue an Executive Order) requiring a detailed justification for any major Executive Branch decision not to enforce federal statutory law.<sup>21</sup> We shall not, however, explore such remedies here.

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17. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 754 (1984) (“This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (holding that the interest in Executive Branch conformity to the requirements of the Incompatibility Clause creates speculative harm shared by all citizens, making it not justiciable).

18. 521 U.S. 811 (1997).

19. We note that the Supreme Court seemingly intends to consider further aspects of “congressional standing” next Term. *See United States v. Windsor*, 133 S. Ct. 787 (2012) (mem.) (granting certiorari on *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) and ordering briefing on the question of whether the Bipartisan Legal Advisory Group of the U.S. House of Representatives has Article III standing).

20. *See infra* notes 70–71.

21. In particular, a new federal statute or Executive Order might provide that if a major nonenforcement decision is allegedly based in whole or in part on inadequate congressional funding—*see infra* subpart IV(C)—then the Executive must provide and publish a detailed account of how great the budgetary shortfall is, what cost savings it expects to achieve from the nonenforcement measure at issue, what additional costs its alternative policy may incur, what alternative forms of nonenforcement it has considered, and why it concluded that the particular option it chose created greater net efficiencies than any of the alternatives. In other words, Congress or the Executive itself could require that the Executive bear and discharge a burden of persuasion on major nonenforcement decisions. Congress might also make at least some major nonenforcement decisions judicially reviewable. *See Fed. Election Comm’n v. Akins*, 524 U.S. 11, 19–25 (1998) (explaining that Congress may create standing to receive information even when the grievance is a general one).

In order to keep a steady focus throughout this Article, we limit our inquiry in two important ways. First, we give no specific consideration to executive nonenforcement decisions in the criminal area (“prosecutorial discretion” in the strict sense), since immigration laws are primarily enforced civilly. Second, “prosecutorial discretion” in immigration law cuts a very broad swath. It “extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.”<sup>22</sup> In this Article, we shall concentrate on decisions, based on broad-gauged policies or resource constraints, to decline (or to suspend) charging members of a large class of persons subject to removal proceedings or orders. We also dispense with phrases like “amnesty” or “illegals,” which are not only inaccurate, but tend to obscure with rhetorical invective the important constitutional substance at issue.

## II. The Administration’s Nonenforcement of the Immigration Laws

### A. *Enacting the DREAM Act Through Deferred Action*

The Government has estimated that as of January 2011, there were about 11.5 million illegal immigrants inside the United States.<sup>23</sup> Illegal immigrants comprise about 30% of the country’s estimated population of 40 million immigrants.<sup>24</sup> Illegal immigrants present in the United States are, broadly, of two kinds: those who have entered the country illegally; and those who, having entered legally (such as with a tourist or student visa), are nonetheless now present illegally (visa “overstayers”).<sup>25</sup> The Immigration and Nationality Act (INA) provides for the removal (in older language,

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22. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010); *see also* *Arizona v. United States*, 132 S. Ct. 2492, 2499, 2505–06, 2527 (2012) (discussing the U.S. Immigration and Customs Enforcement’s prosecutorial discretion). *See generally* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006) (reviewing the discretionary nature of deportation and its interaction with the plenary power doctrine).

23. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRATION POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 4 (2012), *available at* <http://www.dhs.gov/estimates-unauthorized-immigrant-population-residing-united-states-january-2011>. An “illegal immigrant” (or “unauthorized resident”) is defined as a foreign-born noncitizen who is not a legal resident. *Id.* at 2. A legal resident immigrant is defined to include “all persons who were granted lawful permanent residence; granted asylum; admitted as refugees; or admitted as nonimmigrants for a temporary stay in the United States and not required to leave by January 1, 2011.” *Id.*

24. *See id.* at 4 (deducing that there are approximately 33.6 million foreign-born individuals in the United States); MICHAEL JONES-CORREA, MIGRATION POLICY INST., CONTESTED GROUND: IMMIGRATION IN THE UNITED STATES 13 (2012), *available at* <http://www.migrationpolicy.org/pubs/TCM-UScasesstudy.pdf> (noting that there are approximately 11.5 million illegal immigrants and slightly under 40 million total immigrants).

25. HOEFER ET AL., *supra* note 23, at 2.

deportation) of aliens not lawfully present in the United States.<sup>26</sup> Aliens may be removed if they were “inadmissible” at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law.<sup>27</sup>

Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS), has the responsibility of removing illegal immigrants within the United States.<sup>28</sup> ICE is one of the successor agencies to the Immigration and Naturalization Service (INS).<sup>29</sup> Realistically, ICE cannot remove much of the illegal immigrant population unless Congress increased funds more than twentyfold.<sup>30</sup> Removals of illegal immigrants run at just under 400,000 per year, only about 3%–4% of the nation’s current illegal population.<sup>31</sup> Chiefly because of its massive caseload and chronic underfunding, ICE must develop enforcement priorities. These may vary from one administration to the next. DHS Secretary Janet Napolitano explained in an August 2011 letter to the Senate that ICE’s priorities focus on “identifying and removing criminal aliens, those who pose a threat to public safety and national security, repeat immigration law violators and other individuals prioritized for removal.”<sup>32</sup>

As a direct consequence of structuring its enforcement priorities, ICE must regard some categories of cases as low priority. One category now includes the 800,000 to 1.76 million who would have benefited from the passage of the DREAM Act and who were also covered by the June 15 nonenforcement decision.<sup>33</sup> In the words of several of its leading supporters in the Senate, the DREAM Act:

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26. 8 U.S.C. § 1227 (2006).

27. *Id.*

28. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, A DAY IN THE LIFE OF ICE ENFORCEMENT AND REMOVAL OPERATIONS, *available at* <http://www.ice.gov/about/offices/enforcement-removal-operations/>.

29. *Overview*, ICE, <http://www.ice.gov/about/overview/>.

30. Apprehending, detaining, and removing all illegal aliens in the nation would require an ICE budget of \$135 billion. Letter from Nelson Peacock, Assistant Sec’y for Legislative Affairs, U.S. Dep’t of Homeland Sec., to Senator John Cornyn (Dec. 3, 2010). In 2012, ICE’s appropriations ran under \$6 billion. WILLIAM L. PAINTER, CONG. RESEARCH SERV., R42557, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS: A SUMMARY OF THE HOUSE-PASSED AND SENATE-REPORTED BILLS FOR FY2013, at 6 (2012).

31. *See* JONES-CORREA, *supra* note 24, at 10 (illustrating that 387,000 noncitizens out of the total population of 11.5 million noncitizens were removed in 2010).

32. Letter from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to Senator Dick Durbin (Aug. 18, 2011), *available at* [http://durbin.senate.gov/public/index.cfm/files/serve?File\\_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226](http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226).

33. *See* Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (setting forth guidelines for exercising prosecutorial discretion and stating that “young people who were brought to this country as children and know only this country as home” are a low enforcement priority); *see also* Guillermo I. Martínez, *1.76 Million Dreamers Could Emerge from the Shadows*, SUNSENTINEL, Aug. 8, 2012, [http://articles.sun-sentinel.com/2012-08-09/news/sfl-gmcol-dreamers-8912\\_1\\_dreamers-shadows-](http://articles.sun-sentinel.com/2012-08-09/news/sfl-gmcol-dreamers-8912_1_dreamers-shadows-)



would give a select group of students the chance to earn legal status if they arrived in the United States when they were 15 or younger, have lived in this country for at least five years, have good moral character, are not inadmissible or removable under a number of specified grounds, have graduated from high school or obtained a GED, and attend college or serve in the military for two years.<sup>34</sup>

The DREAM Act, in one form or other, has been before Congress since 2001.<sup>35</sup> The Act has commanded widespread bipartisan support and has received the Obama Administration's blessing; indeed, the President called for its enactment in his 2011 State of the Union Address.<sup>36</sup> Nonetheless, the DREAM Act has repeatedly failed to receive Congress's approval. Congress took up the proposal in 2006, 2007, 2009, 2010, and 2011, but never passed it. Congress rejected the legislation in a recorded vote most recently in December 2010, when forty-one Senators (including six members of the President's party) voted against cloture in the debate over the bill.<sup>37</sup>

The Senate's rejection of the DREAM Act in December 2010, followed by the seating of a Republican-controlled House in January 2011,<sup>38</sup> led the Administration to pursue major immigration goals by administrative means alone. An internal DHS policy document entitled *Administrative Alternatives to Comprehensive Immigration Reform*, prepared for the Director of U.S. Citizenship and Immigration Services (USCIS), a component of DHS, reveals this new strategic thinking.<sup>39</sup> The memorandum

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application (reporting that while the government originally estimated that 800,000 DREAMers would be entitled to Deferred Action for Childhood Arrivals, the Migration Policy Institute estimates that there are as many as 1.76 million DREAMers).

34. Letter from Senator Harry Reid et al., to President Barack Obama (Apr. 13, 2011), *available at* <http://tucsoncitizen.com/arizona-hispanic-republicans/files/2011/04/ReidDreamLetter.pdf>. The Senators wrote to the President to urge him to exercise "prosecutorial discretion" on behalf of the DREAMers by granting "deferred action" to them, arguing that they "are not an enforcement priority for DHS" and that such action would "conserve limited enforcement resources." *Id.* Rather perfunctorily, the Senators acknowledged to the President that as "the nation's chief law enforcement officer [you] are, of course, obligated to enforce the law." *Id.*

35. Heidi Timmerman, *Dare to DREAM: Generation 1.5 Access to Affordable Postsecondary Education*, 39 W. ST. U. L. REV. 67, 76 (2011).

36. *See* President Barack Obama, The State of the Union (Jan. 25, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> (proclaiming the need to stop deporting talented young people that have been educated in the United States).

37. *See* Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 632-37 (2011) (summarizing the failed attempts to enact various versions of the DREAM Act from 2001 to 2011); Alexander Bolton, *Senate Rejects DREAM Act, Closing Door to Immigration Reform*, HILL, Dec. 18, 2010, <http://thehill.com/homenews/senate/134351-dream-act-defeated-in-senate> (describing how the DREAM Act failed to overcome a GOP-led filibuster with a vote of 55 to 41).

38. Carl Hulse, *Taking Control, G.O.P. Overhauls Rules in House*, N.Y. TIMES, Jan. 5, 2011, [http://www.nytimes.com/2011/01/06/us/politics/06cong.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/06/us/politics/06cong.html?pagewanted=all&_r=0).

39. *See* Memorandum from Denise A. Vanison, Policy & Strategy, U.S. Citizenship & Immigration Servs. et al., to Alejandro N. Mayorkas, Dir., U.S. Citizenship & Immigration Servs., *available at* <http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive>

advised that “[i]n the absence of Comprehensive Immigration Reform, USCIS can extend benefits and/or protections to many individuals and groups by . . . exercising discretion with regard to . . . deferred action.”<sup>40</sup> The memorandum defined “deferred action” as “an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time.”<sup>41</sup> It offered the thought that “[r]ather than making deferred action widely available to hundreds of thousands and as a non-legislative version of ‘amnesty,’ USCIS could tailor the use of this discretionary option for particular groups such as individuals who would be eligible for relief under the DREAM Act (an estimated 50,000).”<sup>42</sup> It also noted that “[w]hile it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, *not to mention expensive*.”<sup>43</sup>

Other components of DHS began taking administrative steps in 2011 towards the DREAM Act’s goals. On June 17, 2011, ICE Director John Morton issued a memorandum instructing subordinates on the exercise of “prosecutorial discretion.” Morton’s memorandum characterized “prosecutorial discretion” as “the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual.”<sup>44</sup> Morton detailed an extensive list of factors to be considered in evaluating whether an exercise of prosecutorial discretion on

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immigration-reform.pdf (outlining administrative relief options designed to “promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain individuals present in the United States without authorization”). The Memo is marked “DRAFT” and is undated, but from internal evidence was provided in 2011.

40. *Id.* at 1.

41. *Id.* at 10. This definition was first published in the USCIS Adjudicator’s Field Manual. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL § 40.9.2(b)(3)(J).

42. *Id.* at 11.

43. *Id.* at 10 (emphasis added).

44. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 2 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. We note that ICE has defended its exercise of “prosecutorial discretion” in both the Obama and Bush Administrations. See Memorandum from William J. Howard, Principal Legal Adviser, U.S. Immigration & Customs Enforcement, to All OPLA Chief Counsel (Oct. 24, 2005), available at <http://shusterman.com/pdf/prosecutorialdiscretionimmigration2005.pdf> (outlining ICE’s use of prosecutorial discretion in removal cases). In the latter memorandum, however, the argument rested wholly on the agency’s stretched resources, not on a claim to positive authority. See *id.* at 1–3 (highlighting ICE’s limited resources and overwhelming caseload as a justification for the use of prosecutorial discretion). In a still earlier INS memorandum from the Clinton Administration, prosecutorial discretion is characterized as a positive “authority.” See Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Servs., to Regional Dirs., District Dirs., Chief Patrol Agents & Regional & District Counsel 2 (Nov. 17, 2000), available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00> (“‘Prosecutorial discretion’ is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day.”).

behalf of an individual alien was warranted.<sup>45</sup> He then specifically identified “positive factors” that “should prompt particular care and consideration,” among them being “present in the United States since childhood.”<sup>46</sup>

On June 15, 2012, Secretary Napolitano instructed officials in ICE and two other agencies to “defer action” against “certain young people who were brought to this country as children and know only this country as home.”<sup>47</sup> The criteria for inclusion in this class mapped closely onto those specified in the DREAM Act: aliens who came to the United States under the age of sixteen; have continuously resided here for at least five years and are currently present; are a student, high school graduate, GED certificate holder, or veteran; have not had a significant criminal record or otherwise pose a threat to national security or public safety; and are thirty years old or younger.<sup>48</sup> Among the beneficiaries of Secretary Napolitano’s order were aliens “already in removal proceedings or subject to a final order of removal.”<sup>49</sup> Individuals receiving benefits under the order were first to undergo “a background check.”<sup>50</sup> Napolitano characterized and justified her action as an “exercise of prosecutorial discretion.”<sup>51</sup> Not mentioned in Secretary Napolitano’s memorandum, but included in a list of “Frequently Asked Questions” published by DHS, is that individuals who have been granted “deferred action” status are eligible to receive employment authorization for the period they remain in that status.<sup>52</sup> It should be observed that this use of prosecutorial discretion cannot convey a work permit, and the Administration has not identified any source of legal authority for this aspect of its policy. Deferred action status is to be granted for a period of two years, subject to repeated renewal in two-year increments.<sup>53</sup>

The President personally wrote an op-ed defending the legality of the decision based largely on the grounds that ICE’s enforcement resources were

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45. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, *supra* note 44, at 4.

46. *Id.* at 5.

47. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., *supra* note 33, at 1.

48. Compare *id.* at 1, with DREAM Act of 2011, S. 952, 112th Cong. § 3(b) (2011) (listing the requirements for obtaining permanent residency under the DREAM Act).

49. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., *supra* note 33, at 2.

50. *Id.*

51. *Id.* at 1.

52. *Deferred Action for Childhood Arrivals*, ICE, <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/deferred-action-process.htm>.

53. Press Release, U.S. Dep’t of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), available at <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

limited.<sup>54</sup> Otherwise, the Administration did little to defend its legal view publicly. It may, however, have relied on a letter that some 100 law professors had sent to the President on May 28, 2012.<sup>55</sup> The law professors argued that the President had the legal authority to grant “deferred action” in his discretion:

Though no statutes or regulations delineate deferred action in specific terms, the U.S. Supreme Court has made clear that decisions to initiate or terminate enforcement proceedings fall squarely within the authority of the Executive. In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since at least 1971.<sup>56</sup>

*B. The Tension Between Prosecutorial Discretion and the Presumption that Laws Will Be Enforced*

For students of executive power, the Obama Administration’s June 15 nonenforcement decision creates what might seem to be an acute, indeed insoluble, dilemma. On the one hand, the President seems undeniably to have the power to decide on the proper allocation of the limited personnel and resources available to him for enforcing the laws and to establish enforcement priorities for the agencies under him. Indeed, one can argue that the President’s ability to moderate legislative purposes through enforcement is a necessary and desirable consequence of a constitutional system that seeks to protect individual liberties by separating the power to legislate from the power to enforce.<sup>57</sup> Separating the power to execute the law from the power to enact it creates a space in which liberty can be protected by discretionary executive decisions not to implement laws that are vicious, oppressive, or disproportionately harsh.<sup>58</sup> In our constitutional scheme, the “class of

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54. See Barack Obama, *A Nation of Laws and a Nation of Immigrants*, TIME, June 17, 2012, <http://ideas.time.com/2012/06/17/A-NATION-OF-LAWS-AND-A-NATION-OF-IMMIGRANTS/> (“We prioritized our resources and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education.”).

55. Letter from Professor Hiroshi Motomura et al., to President Barack Obama (May 28, 2012), available at [www.nilc.org/document.html?id=754](http://www.nilc.org/document.html?id=754).

56. *Id.* at 2 (footnote omitted).

57. Moreover, it can be argued that Congress implicitly encourages, and perhaps desires, broad enforcement discretionary authority as an antidote to its own overregulation or overcriminalization. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514, 546–47 (2001) (noting the proliferation of state and federal criminal statutes and explaining that enforcement discretion substantially alters the trade-offs that legislatures confront when defining crimes). We shall consider the application of Stuntz’s insight by Adam B. Cox & Cristina M. Rodríguez to the immigration area in subpart IV(D).

58. Indeed, a constitutional system that separates lawmaking from law interpretation and law enforcement seems to argue against clear *ex ante* rules of any kind, and thus to promote some degree of discretionary decision making. See Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1004 (1995) (discussing how the separation of legislative and executive power produces some pressures militating against *ex ante* rules, which may result in executive discretion).

legitimate official revisions” of statutory law by executive officials “is large.”<sup>59</sup>

This seems particularly obvious in the area of criminal law enforcement. Even if sufficient resources are available to enforce valid, unrepealed but obsolete laws against, say, the sale of contraceptives, many would argue that the Executive had not failed in its constitutional duties if it left those laws unenforced.<sup>60</sup> Likewise, the Executive can arguably take account of changing social attitudes regarding illegal drugs by choosing not to prosecute dying cancer patients who purchase marijuana as a painkiller. Or to take another case: the Executive might be considered to be acting properly if it declined to exact lawful but grossly exorbitant fines for failing to report the transport of money outside the country.<sup>61</sup> And given that no federal prosecution has been brought under the Logan Act in the more than 200 years of its existence, are United States Attorneys at fault if they decline to bring cases under it—even though Congress has resisted efforts to repeal it?<sup>62</sup>

Even in the area of civil enforcement, the need for substantial enforcement discretion seems apparent. The many-sided responsibilities of the modern administrative state appear to dictate nothing less.<sup>63</sup> The courts seem implicitly to have acknowledged this: judicial review of executive nonenforcement decisions in the civil context is, for most practical purposes, nonexistent. In *Lincoln v. Vigil*,<sup>64</sup> the Supreme Court reviewed its precedents and affirmed that judicial review of agency nonenforcement decisions under

59. *Id.* at 1008. Sunstein argues that:

[T]here will often be a gap between law on the books and law in the world, and for good democratic reasons. We might conclude that officials in certain social roles—jurors, prosecutors, police—should believe that rules are generally binding, but that they have authority to depart from the rules in compelling circumstances. This authority has democratic foundations; it might promote liberty as well.

*Id.* at 1009.

60. *Cf.* *Poe v. Ullman*, 367 U.S. 497, 498, 507–08 (1961) (holding that, without a showing of a real enforcement threat, there is insufficient grounds to adjudicate the constitutionality of a uniformly unenforced statute that prohibited the use of contraceptive devices).

61. *See* *United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (holding that it violates the Excessive Fines Clause of the Eighth Amendment to fine the respondent for the entire amount of money that he failed to declare upon leaving the country).

62. 18 U.S.C. § 953 (2006) (subjecting to fine or imprisonment any U.S. citizen who “without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government . . . or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States”); *see generally* MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33265, CONDUCTING FOREIGN RELATIONS WITHOUT AUTHORITY: THE LOGAN ACT (2006) (exploring the history of the Logan Act).

63. For that very reason, critics of the modern administrative state consider it to be inherently lawless. *See* Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 495 (2008) (“[T]he administrative state gives rise to a peculiar blend of bureaucratic rule and discretion that does not comport with the historical conception of a rule of law, and its central concern with the control of arbitrary power.”); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233, 1248–49 (1994) (arguing that the administrative state violates separation of powers principles).

64. 508 U.S. 182 (1993).

the Administrative Procedure Act was generally unobtainable.<sup>65</sup> More recently, the Court reaffirmed the same position in a 2007 case, *Massachusetts v. EPA*.<sup>66</sup> Only this Term, in *Arizona v. United States*,<sup>67</sup> the Court stated that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”<sup>68</sup>

On the other hand, the Constitution seems to presuppose that the laws will be enforced in a nonarbitrary manner. It imposes on the President a duty to enforce existing statutes,<sup>69</sup> regardless of any policy differences with the Congresses that enacted them or the presidents who signed them. As President George Washington said, “[I]t is the particular duty of the Executive ‘to take care that the laws be faithfully executed.’”<sup>70</sup> Our constitutional scheme of separated powers was consciously designed to prevent “governmental tyranny which . . . is closely related to [the] arbitrary and capricious government.”<sup>71</sup> Unlimited discretion in enforcement policy can become a greater threat to personal liberty and security than the mechanical enforcement of the law. Thus, even while marginalizing the role of the judiciary in monitoring the Executive’s nonenforcement decisions, the Supreme Court warned that judicial review might indeed be available in “a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>72</sup>

Several reasons support a robust conception of the Executive’s enforcement duty. The passage of legislation is an arduous and slow-moving process, requiring proponents of a new law to assemble majorities on repeated occasions to overcome Congress’s built-in tendency towards inertia. The Framers created multiple veto points such as bicameralism and presentment to impede the passage of all but well-considered legislation.<sup>73</sup>

65. *Id.* at 191.

66. 549 U.S. 497, 527 (2007).

67. 132 S. Ct. 2492 (2012).

68. *Id.* at 2499.

69. See U.S. CONST. art. II, § 3, cl. 5 (stating that the president “shall take [c]are that the [l]aws be faithfully executed”).

70. President George Washington, Proclamation Regarding the Cessation of Violence and Obstruction of Justice in Protest of Liquor Laws (Sept. 15, 1792), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=65427&st=st1>.

71. George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. REV. 151, 156 (1978).

72. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). In raising that possibility, the *Heckler* Court referred approvingly to the D.C. Circuit’s decision in *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc). *Id.* In the latter case, the plaintiff had successfully contended that the defendant agency had “consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty.” *Adams*, 480 F.2d at 1162.

73. See *Loving v. United States*, 517 U.S. 748, 757–58 (1996) (“Article I’s precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.”); John O. McGinnis & Michael B.

By its own internal procedural rules (including the filibuster) and complex committee structure, Congress itself has substantially added to the bias in favor of legislative inaction.<sup>74</sup> For legislation of any real significance to be enacted, there must first be “buy in” from many interested players representing many different perspectives, interests, and constituencies. This entire complicated process is intended to encourage legislation that reflects what Madison called “the cool and deliberate sense of the community.”<sup>75</sup> Given the difficulty of achieving a consensus in favor of the legislation, the Constitution appears to give the President no discretion to set Congress’s policies aside.<sup>76</sup>

Consider the ways in which “prosecutorial discretion,” if carried to an extreme, can distort the lawmaking process that the Constitution established. First, it can encourage Congress to overregulate certain areas with the expectation that the Executive will counterbalance with forgiving enforcement policies. The Controlled Substances Act or the tax laws may have this feature. Second, the threat of nonenforcement gives the President improper leverage over Congress by providing a second, postenactment veto. Much as a line item veto would,<sup>77</sup> that second “veto” gives him a bargaining edge in negotiating with Congress for which the Constitution did not provide. Third, the possibility of class-wide nonenforcement creates an incentive for members of Congress to bypass each other in fashioning legislation and to deal directly with the Executive instead. By inviting the President to unilaterally enforce the laws along the DREAM Act’s terms, some senators short-circuited the legislative process.<sup>78</sup> Rather than redoubling their bargaining efforts with their fellow senators, they opened bargaining with the Executive instead.

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Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 488 (1995) (noting that Constitution itself imposes supermajority requirements in seven places and permits Congress to introduce additional veto points).

74. See McGinnis & Rappaport, *supra* note 73, at 484 (highlighting “the unbroken tradition, stretching from the early Republic to the present day, of rules, such as those sustaining the filibuster and the committee system, whose objective has been . . . to frustrate legislative majorities and promote other values”); see also Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 184–85, 213–17 (1997) (arguing that the Senate filibuster in its present form imposes a supermajority requirement on legislation but does not promote deliberation).

75. THE FEDERALIST NO. 63, at 425 (James Madison) (Jacob E. Cooke ed., 1961).

76. On the public interest in upholding legislative compromises, see Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983). On the dangers that discretionary decision making poses for democratic accountability and the likelihood that it will lead to “governmental overreaching or governmental favoritism,” see Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 12 (2003).

77. See *Raines v. Byrd*, 521 U.S. 811, 817 (1997) (explicating the argument against the Line Item Veto Act that lawmakers’ decision making is adversely impacted by the President’s ultimate cancellation power).

78. See *supra* note 34 (illustrating the Senators’ intent that the President has unilateral enforcement power under the DREAM Act by offering guidance to him regarding how the Act should be enforced).

All of this goes to confirm Hamilton's claim in *Federalist No. 70* that "a government ill executed, whatever it may be in theory, must be in practice a bad government."<sup>79</sup> Our scheme of separated powers, even the very conception of "executive" power in itself, supports a stringent view of the President's duty to enforce an act of Congress.<sup>80</sup> The constitutional text also speaks emphatically in several places—notably, in the Take Care Clause—in favor of that view and against a more permissive understanding of "prosecutorial discretion."<sup>81</sup> But it is also widely accepted that the executive power includes the discretion to decline enforcement of federal laws at any time, place, or case. If the idea of executive power can seem to imply an authority, in proper cases, to deviate from the law, the idea of the liberal state arguably requires that the executive power remain subordinate to the law.

### III. The Historical Background of the Executive Prerogative

The antinomy at work here has recurred over much of American constitutional history, and indeed has its roots in early modern political thought. Executive power has long presented a conundrum: how to make the Executive strong enough to promote the common good, but not so strong as to risk despotism. Identification of the tension between executive power and republican government can be credited to Machiavelli, who invented the modern idea of an arm of government to execute the laws and protect the public welfare.<sup>82</sup> Breaking with Aristotelian and Christian theories of political science, Harvey C. Mansfield, Jr. argues, Machiavelli "liberated" the executive from both natural law and religion.<sup>83</sup> Instead, the executive became the servant of necessity, bound to defend the republic in extraordinary emergencies—even if contrary to regularly constituted law.<sup>84</sup> Machiavelli praised executive decisiveness and secrecy: princes were "quick" to execute and acted "at a stroke," unlike fractious senates.<sup>85</sup> Acting "*uno solo*," the successful executive's ambition will be turned to the common good, or else he will be held accountable for his failures.<sup>86</sup>

The problematic nature of executive power remained vivid in the minds of the Framers.<sup>87</sup> During the ratification of the Constitution, Anti-Federalists

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79. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 75, at 472.

80. Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 110, 116–17 (2000).

81. See *infra* notes 104–08 and accompanying text.

82. HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 121–49 (1989).

83. *Id.* at 134–35.

84. *Id.* at 135.

85. *Id.* at 142, 144.

86. *Id.* at 146.

87. For the Framers' awareness of republican political theory, see BERNARD BAILYN, INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 31 (1967) (observing the impression made by Enlightenment rationalism on the Framers); FORREST MCDONALD, THE AMERICAN



feared that “a vigorous executive is inconsistent with the genius of republican government.”<sup>88</sup> In *Federalist No. 70*, Alexander Hamilton responded that “[e]nergy in the executive is a leading character in the definition of good government.”<sup>89</sup> But “energy in the executive” had somehow to be reconciled with the regularity of law: lessons of constitutional history that were well-known to the Framers had taught them to be conscious of the danger of an uncontrolled Executive that regularly “dispensed with” or “suspended” the law.<sup>90</sup> As both the Supreme Court and individual Justices have often observed in varied contexts,<sup>91</sup> the great seventeenth-century constitutional struggles in England against the Stuart dynasty that culminated in the “Glorious Revolution” of 1688 left an indelible imprint on the minds of our own Revolutionary generation.<sup>92</sup> By the mid-eighteenth century, Sir William

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PRESIDENCY: AN INTELLECTUAL HISTORY 4–5 (1994) (acknowledging that the Framers’ understanding of political philosophy and the history of the Roman Republic and English constitutionalism molded their ideas about the Executive’s power); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1789*, at 10–18 (1969) (discussing the impact of Enlightenment political theory and the history of the English constitution on the Framers’ ideology).

88. *THE FEDERALIST NO. 70* (Alexander Hamilton), *supra* note 75, at 471.

89. *Id.*

90. The power to “dispense with” the laws was originally claimed on behalf of the papacy. The Pope’s power to “dispense” with ordinary laws was sometimes likened to God’s power to set aside the ordinary course of nature by working miracles. *See, e.g.*, Elsa Marmursztejn, *Penser la Dispense: Éclairages Théologiques sur le Pouvoir Pontifical (XIIIe-XIVe siècles)*, 78 *LEGAL HIST. REV.* 63, 85–86 (2010) (equating the Pope’s full power with the idea of omnipotence and discussing how it allows the Pope to grant dispensation from ecclesiastical law); Francis Oakley, *Jacobean Political Theology: The Absolute and Ordinary Powers of the King*, 29 *J. HIST. IDEAS* 323, 332–33 (1968) (comparing the Pope’s ability to act outside the laws of the Church and thus perform papal miracles to God’s power to act outside of the laws of nature to perform miracles). For example, it was thought to include the power to dispense with the law so as to permit King Henry VIII of England to remarry. *Id.* at 335. An early and authoritative statement of the papal claim to the dispensing power is set forth by Pope Innocent III (1160–1216) in the decretal *Proposuit* (1198), in which the Pope laid claim to the power, *de jure*, to dispense with the canon law even when not demanded by necessity. KENNETH PENNINGTON, *THE PRINCE AND THE LAW 1200–1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION* 56–57 (1993). Monarchs were not slow to claim for themselves a dispensing power modeled on the Pope’s.

91. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797–98 (2008) (Second Amendment); *Boumediene v. Bush*, 128 S. Ct. 2229, 2244–46 (2008) (Suspension Clause); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266–67 (1989) (excessive fines); *id.* at 290–91 (O’Connor, J., concurring in part and dissenting in part); *Furman v. Georgia*, 408 U.S. 238, 242–43 (1972) (Douglas, J., concurring) (Eighth Amendment); *United States v. Brewster*, 408 U.S. 501, 545–50 (1972) (Brennan, J., dissenting) (Speech and Debate Clause); *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (Speech and Debate Clause); *O’Callahan v. Parker*, 395 U.S. 258, 268–70 (1969) (courts martial); *id.* at 276–77 (Harlan, J., dissenting); *United States v. Johnson*, 383 U.S. 169, 177–78 (1966) (Speech and Debate Clause); *Am. Comm’n Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 447–48 (1950) (Black, J., dissenting) (First Amendment).

92. *See, e.g.*, *THE FEDERALIST NO. 26* (Alexander Hamilton), *supra* note 75, at 165–66 (describing the English Bill of Rights as arising to challenge the almost unlimited authority of the monarch to keep standing armies, and explaining that Americans derived an hereditary impression of the danger to liberty of standing armies from the experience).

Blackstone, himself the teacher of some of the Framers and a major influence on all American lawyers of their generation,<sup>93</sup> could confidently write:

The principal duty of the king is to govern his people according to law. . . . And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when [the royal] prerogative was at the highest. “The king,” says Bracton, who wrote under Henry III, “ought not to be subject to man, but to God, and to the law; for the law maketh the king.”<sup>94</sup>

As we shall show below, American readers of the Framers’ period were unquestionably aware of the English constitutional record.<sup>95</sup> They would not have understood the executive power to include the right to leave laws unenforced because of policy disagreements with the legislature.

#### A. *The President’s Duty to Enforce the Law*

The President’s constitutional duty to enforce the laws stands as the main textual obstacle to claims of a broad power of prosecutorial discretion. Article II, Section Three of the Constitution states that the President “shall

93. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 7–8 (noting that American lawyers of the Founding period relied “heavily and preeminently” on Blackstone); Lord Phillips, *Foreword* to ERIC STOCKDALE & RANDY J. HOLLAND, *MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION* xii (2007) (reporting that two signers of the Declaration of Independence dined with William Blackstone as students in 1769); STOCKDALE & HOLLAND, *supra*, 15–17 (explaining that Blackstone’s *Commentaries* were heavily studied and influential in the American colonies both before and after the Revolution). The British statesman Edmund Burke remarked that nearly as many copies of Blackstone’s *Commentaries* had been sold in America as in England. See EDMUND BURKE, *Speech on Moving His Resolutions for Conciliation with the Colonies* (Mar. 22, 1775), in 2 *THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE* 101, 125 (6th ed. 1880). Thomas Jefferson acknowledged (though he also deplored) Blackstone’s immense influence on American legal culture. Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), in 16 *THE WRITINGS OF THOMAS JEFFERSON* 155, 156 (Albert Ellery Bergh ed., 1907). Commentators have long noted Blackstone’s direct influence on the American Constitution, including its treatment of executive power. See C. ELLIS STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY* chs. V–VI (2d rev. ed. 1894).

94. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*233–34 (citations omitted).

95. They could have learned it from David Hume’s *The History of England*, which includes a full account of the legal history leading up to the Glorious Revolution and the constitutional settlement after it, and was widely read in America at the time. DAVID HUME, *THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE ABDICATION OF JAMES THE SECOND, 1688* (1849–51); Forrest McDonald, *A Founding Father’s Library*, 1 *LITERATURE OF LIBERTY* 4, 7–10 (1978) (describing Hume as among the most popular British historians in America and reporting that Jefferson and Hamilton disagreed in their opinions of his *History*). In his Revolutionary Era writings on judicial independence, John Adams cites to and follows the account in Hume’s *History* of the legal and constitutional controversies over the dispensing power that arose in the reign of James II. See John Adams, *The Independence of the Judiciary: A Controversy Between William Brattle and John Adams, Essay of 18 Jan. 1773*, in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 79, 83–84 (C. Bradley Thompson ed., 2000) (quoting multiple sections of Hume’s *History* in his discussion of the judiciary).

take Care that the Laws be faithfully executed.”<sup>96</sup> Early American courts and commentators on the Constitution understood the Take Care Clause to impose a duty on the President to enforce the law, regardless of his own administration’s view of its wisdom or policy.<sup>97</sup>

In grammatical form, the Take Care Clause is an imperative: it instructs or admonishes the President to “take Care.” The 1828 edition of Noah Webster’s *American Dictionary of the English Language* explains the meaning of the noun “care” as including “[c]aution; a looking to; regard, attention, or heed, with a view to safety or protection, as in the phrase, ‘take care of yourself.’”<sup>98</sup> In illustrating the various uses of the verb “take,” he mentions “[t]o take care, to be careful; to be solicitous for” and “[t]o take care of, to superintend or oversee; to have the charge of keeping or securing.”<sup>99</sup> Thus, the Take Care Clause appears to charge the President with the duty or responsibility of executing the laws, or at least of supervising the performance of those who do execute them.

What does it mean, then, to “execute” the laws “faithfully”? According to the 1755 edition of Dr. Samuel Johnson’s *Dictionary of the English Language*, it means “[t]o put in act; to do what is planned or determined.”<sup>100</sup> Johnson cites Richard Hooker’s *Laws of the Ecclesiastical Polity* for the illustration: “Men may not devise laws, but are bound for ever to use and execute those which God hath delivered.”<sup>101</sup> The adjective “executive,” according to Johnson, derives from the verb and means “[a]ctive; not deliberative; not legislative; having the power to put in act the laws.”<sup>102</sup> And Johnson defines the meanings of the adverb “faithfully” to include both “[w]ith strict adherence to duty and allegiance” and “[w]ithout failure of performance; honestly; exactly.”<sup>103</sup>

The Take Care Clause is thus naturally read as an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, “without failure” and “exactly.” It would be implausible and unnatural to read the Clause as creating a power in the President to deviate from the strict enforcement of the laws.<sup>104</sup> The

96. U.S. CONST. art. II, § 3.

97. See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147–50 (2d ed. 1829) (“Every individual is bound to obey the law, however objectionable it may appear to him: the executive power is bound not only to obey, but to execute it.”).

98. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 32 (1828).

99. 2 *id.* at 88.

100. 1 SAMUEL JOHNSON, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE 736 (1755), available at [http://johnsonsdictionaryonline.com/?page\\_id=7070&i=736](http://johnsonsdictionaryonline.com/?page_id=7070&i=736).

101. *Id.* (citing to 3 RICHARD HOOKER, LAWS OF THE ECCLESIASTICAL POLITY 187 (1888)).

102. *Id.* at 737.

103. *Id.* at 763.

104. See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 722 (“The Faithful Execution Clause imposes a duty of faithful law execution on the only officer who enjoys the executive power. Whether the chief executive executes the law himself or whether he executes through his executive subordinates, the president must faithfully execute the

President's responsibility is primarily supervisory: he is not charged with executing the laws himself. Not only would this obviously have been impossible (how could the President collect customs in both Charleston and Boston at once?<sup>105</sup>), but it is reflected in the phrasing of the Clause. It does not say that the President "shall take Care to execute the laws faithfully," but rather that he take care that they "be faithfully executed."<sup>106</sup> Others will "execute" the laws; the President's role is to see to it that they do so "faithfully." Furthermore, the next clause charges him to "Commission all the Officers of the United States,"<sup>107</sup> underscoring that he will be provided with subordinates who will assist him in the tasks of executing the laws, and for whose performance he will be accountable.

That the Take Care Clause prescribes a duty is clear, not only because it is the more natural reading of the Clause, but also because of its position in relation to the Vesting Clause. The Vesting Clause is, indeed, a broad grant of power, comparable to those for Congress and the federal judiciary. But if the Vesting Clause confers the entirety of the "executive power" on the President, what additional power would the Take Care Clause confer? It seems more likely that the Vesting Clause confers a power that could, at least initially, be understood to subsume a power to decline to execute the laws, but that the Take Care Clause dispels that suggestion by requiring the President to ensure that the laws are executed.<sup>108</sup>

Finally, what does the Take Care Clause mean by "the laws"? We join those legal scholars who conclude that the President has no duty to enforce statutory law or treaty provisions that he reasonably and in good faith considers to be unconstitutional.<sup>109</sup> Indeed, we would go further and

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law."). This is not to deny that in other respects the Take Care Clause is a conveyance of power. Like the general grant of the executive power, the duty to "take Care that the Laws be faithfully executed" both restricts and empowers the President. They make clear that the President cannot suspend the law of the land at his whim, as British kings had, but they also give the President authority both to enforce the law and to interpret it. Enforcing the law gives the President the right to compel the obedience of private individuals, and even states, to the Constitution, treaties, and acts of Congress. Enforcement also implies interpretation. In order to carry out the laws, an Executive must determine their meaning. Sometimes those laws will be clear, as when the Constitution sets the minimum age for a President, but more often than not, the laws are ambiguous or delegate decision making to the Executive.

105. As President George Washington noted, it would be an "impossibility" for "one man" to perform "all the great business of the State." 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939); David M. Driesen, *Toward A Duty-Bound Theory of Executive Power*, 78 FORDHAM L. REV. 71, 83 (2009).

106. U.S. CONST. art. II, § 3.

107. *Id.*

108. See Prakash, *supra* note 104, at 726 n.114 ("[T]he [Faithful Execution] clause is best viewed as imposing a duty rather than as ceding a separate presidential power . . .").

109. See, e.g., J. Randy Beck, Book Review, 16 CONST. COMMENT. 419, 426 (1999) (arguing the President owes a "higher allegiance" to the Constitution than to statutes passed by Congress); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 505 (1989) (summarizing the debate and adopting the view that the Supreme Court need not police constitutional conflicts between the Legislative and Executive Branches);

maintain that the President has a duty *not* to enforce statutes that he reasonably and in good faith considers unconstitutional. The obligation to faithfully execute the laws requires the President to obey the Constitution first above any statute to the contrary. As the Supreme Court recognized in *Marbury v. Madison*,<sup>110</sup> judicial review flows from the principle that a court cannot enforce a law that conflicts with the Constitution itself.<sup>111</sup> James Wilson, for one, explicitly compared the President's duty to obey the Constitution first to judicial review: "[T]he legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that *violates* the Constitution."<sup>112</sup> As Akhil Amar has written, "In America, the bedrock principle was not legislative supremacy but popular sovereignty. The higher law of the Constitution might sometimes allow, and in very clear cases of congressional usurpation might even oblige, a president to stand firm against a congressional statute in order to defend the Constitution itself."<sup>113</sup>

Two other constitutional clauses—the Presidential Oath Clause<sup>114</sup> and the Suspension Clause<sup>115</sup>—shed light, albeit indirectly, on the meaning of the Take Care Clause. The Presidential Oath Clause prescribes the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."<sup>116</sup> The language of "faithful execution" obviously echoes the Take Care Clause. Of special note, the phrase "to the best of my Ability" qualifies only the duty to preserve, protect, and defend the Constitution; the duty to "faithfully execute" the Presidential Office, like the duty to take care that the laws are faithfully executed, is unqualified. By contrast, the New York State Constitution of 1777 charged the Governor "to take care that the laws are faithfully executed to the best of his ability."<sup>117</sup>

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Saikrishna B. Prakash, *The Executive's Duty to Disregard Unconstitutional Law*, 96 GEO. L.J. 1613, 1616 (2008) (arguing that the Constitution "requires the President to disregard unconstitutional statutes").

110. 5 U.S. (1 Cranch) 137 (1803).

111. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 914 (2003).

112. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445–46 (Jonathan Elliot ed., 1907).

113. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 179 (2005).

114. U.S. CONST. art. II, § 1, cl. 8.

115. *Id.* art. I, § 9, cl. 2.

116. *Id.* art. II, § 1, cl. 8.

117. N.Y. CONST. art. XIX, available at [http://avalon.law.yale.edu/18th\\_century/ny01.asp](http://avalon.law.yale.edu/18th_century/ny01.asp). New York's provision is relevant in understanding both the Presidential Oath and Take Care Clauses: as Alexander Hamilton argued in *The Federalist* No. 69, the powers and duties of the President are closer to those of the Governor of New York than to the King of England. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 75, at 463.

The Suspension Clause states that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>118</sup> This Clause is the only reference in the constitutional text to the power, asserted by the English monarchy before 1689, to “suspend” the laws.<sup>119</sup> The location of the Clause in Article I suggests that the power to suspend the habeas writ was considered to be a legislative, not an executive, power. Moreover, the Clause tracks English constitutional practice, which vested the power to suspend the writ in Parliament alone.<sup>120</sup> The Suspension Clause subtly underscores that by 1787 the executive power did not include a suspending power.

The drafting history of the Take Care Clause at the Philadelphia Convention supports the natural reading that the text imposes a duty and a constraint. James Wilson, later an Associate Justice of the Supreme Court, introduced a draft dealing with the Executive that read in part: “It shall be his duty to provide for the due & faithful exec—of the laws.”<sup>121</sup> The Committee of Detail altered this draft to read: “he shall take care that the laws of the United States be duly and faithfully executed.”<sup>122</sup> The Committee on Style simplified that version, drafting the final form of the Clause: “he shall take care that the laws be faithfully executed.”<sup>123</sup> Years after the Convention, Wilson explained that the Clause meant that the President has “authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established.”<sup>124</sup>

Wilson, a Pennsylvanian, may have been thinking of his own state constitution. Similar provisions had existed in that colony’s and state’s charters and constitutions between 1682 and 1776.<sup>125</sup> The 1776 Pennsylvania Constitution provided that the state’s executive was “to take care that the

118. U.S. CONST. art. 1, § 9, cl. 2.

119. The Pardon Clause implicitly refers to a facet of the dispensing power. *See* U.S. CONST. art. II, § 2, cl. 1. (“[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

120. *See* Saikrishna Bangalore Prakash, *The Great Suspender’s Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV’T L. REV. 575, 592–602 (2010) (reviewing the legal and constitutional background of the Suspension Clause and concluding that the power is exclusively congressional). Parliament had repeatedly suspended the writ from 1689 onwards, although normally for fixed, brief periods. *See* Clarence C. Crawford, *The Suspension of the Habeas Corpus Act and the Revolution of 1689*, 30 ENG. HIST. REV. 613, 620–21 (1915) (quoting a substantial portion of a 1689 statute). Americans in the Founding period were well aware of the English practice: the habeas cases of two Americans, Stephen Sayre and Ebenezer Platt, had attracted much attention in the 1770s. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 250–51 (2010).

121. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 171 (Max Farrand ed., 1911).

122. *Id.* at 185.

123. *Id.* at 597, 600.

124. 2 JAMES WILSON, *Lectures on Law Part 2*, in COLLECTED WORKS OF JAMES WILSON 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007).

125. CHARTER OF LIBERTIES AND FRAME OF GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA IN AMERICA (1682), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 271, 277 (Donald S. Lutz ed., 1998) (“[T]he Governor . . . shall take care, that all laws, statutes and ordinances . . . be duly and diligently executed.”).

laws be faithfully executed.”<sup>126</sup> Other state constitutions contained similar provisions. The New York State Constitution of 1777 charged the Governor “to take care that the laws are faithfully executed to the best of his ability.”<sup>127</sup> Likewise, the Virginia Constitution of 1776 roundly declared that the executive was to “exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute or custom of England.”<sup>128</sup>

### B. *The English Constitutional Background*

The federal Constitution, unlike some state constitutions of the Founding period, contains no express provision precluding the President from “dispensing with” or “suspending” the laws.<sup>129</sup> Moreover, there is apparently no evidence explicitly linking the Take Care Clause to the elimination of those powers.<sup>130</sup> Nonetheless, scholars have argued that the Take Care Clause has that purpose.<sup>131</sup> They claim that it is closely related to the English Bill of Rights of 1689,<sup>132</sup> which formed an essential part of the great constitutional settlement that wrote the victory of the Glorious Revolution into law<sup>133</sup> and included in its first two sections prohibitions on the suspending and dispensing powers.<sup>134</sup> We join that view. The

126. PA. CONST. of 1776, § 20, available at [http://avalon.law.yale.edu/18th\\_century/pa08.asp](http://avalon.law.yale.edu/18th_century/pa08.asp).

127. N.Y. CONST. of 1777, art. XIX, available at [http://avalon.law.yale.edu/18th\\_century/ny01.asp](http://avalon.law.yale.edu/18th_century/ny01.asp).

128. VA. CONST. of 1776, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1910, 1910–11 (Ben Perley Poore ed., 2d ed. 1878).

129. Compare the Vermont Constitution of 1786, which stated: “The power of suspending laws, or the execution of laws ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for.” VT. CONST. of 1786, ch. 1, art. XVII, available at [http://avalon.law.yale.edu/18th\\_century/vt02.asp](http://avalon.law.yale.edu/18th_century/vt02.asp). Similarly, the Maryland Constitution of 1776, Section VII, declared that “no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.” MD. CONST. of 1776, sec. VII, available at [http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp).

130. Prakash, *supra* note 104, at 726 n.113.

131. See CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS 160 n.58 (1998) (cataloguing authorities on the Take Care Clause and its link to the elimination of certain executive powers).

132. 1 W. & M., 2d sess., c. 2 (Eng.); MAY, *supra* note 131, at 16.

133. For important scholarly accounts of the constitutional and political history of the Glorious Revolution, see generally CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 229–59 (1981); Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUD. 434 (1977) [hereinafter Edie, *End of the Dispensing Power*]; Carolyn A. Edie, *Tactics and Strategies: Parliament’s Attack Upon the Royal Dispensing Power 1597–1689*, 29 AM. J. LEGAL HIST. 197 (1985) [hereinafter Edie, *Tactics and Strategies*].

134. 1 W. & M., 2d sess., c. 2 (Eng.) (“That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall. That the

connection between the executive duty to enforce the law and the absence of any power to dispense with the law is conceptual and analytical, not merely historical. And it is scarcely conceivable that a federal Executive modeled on the Governor of New York should have been vested with a power that had long since been denied to the English King.

English monarchs had long claimed an extraordinary power to “dispense with” the law, along with a related but less significant power to “suspend” the law.<sup>135</sup> In *The Case of Monopolies*,<sup>136</sup> Lord Coke had explained the royal dispensing power in this way: Because an Act of Parliament “may be inconvenient to divers particular persons, in respect of person, place, time, &c. . . . the Law hath given power to the King, to dispense with particular persons.”<sup>137</sup> Sir Matthew Hale,<sup>138</sup> writing before the Glorious Revolution, distinguished two kinds of royal dispensation with laws: “that which dispenseth with the penalty, not the obligation, as a pardon, . . . and that which dispenseth both with the penalty and obligation of a law and is precedent . . . .”<sup>139</sup> In connection with the latter category, Hale reports that “[t]he king may dispense with such an act of parliament” when “he is immediately trusted in the managing thereof,” giving, among other cases, that of the appointment of a sheriff to office for longer than the statutorily prescribed period of one year “because he is the king’s immediate officer.”<sup>140</sup>

There were some limits to the dispensing power. For example, the King could “dispense with” many kinds of statutes, but not with common law.<sup>141</sup>

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pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath bene assumed and exercised of late is illegall.”). Likewise, the preamble to the Bill of Rights condemned James II for “Assumeing and Exerciseing a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament.” *Id.* Note that Section Two refers only to the illegality of the dispensing power “as it hath been assumed and exercised of late,” i.e., during the reign of James II. The Bill of Rights did not eradicate the royal dispensing power as such. That was, however, accomplished by a later act of Parliament that can also be regarded as part of the great post-revolutionary constitutional settlement, and which prohibited dispensing with the laws except insofar as authorized by Parliament. See Edie, *End of the Dispensing Power*, *supra* note 133, at 449 (discussing the act of Parliament that eradicated the royal dispensing power).

135. The “suspending power abrogated a statute across the board, whereas the dispensing power nullified it only as to those specifically granted exemptions.” MAY, *supra* note 131, at 4. In both thought and practice, however, the distinction between the two powers was often blurred. JACQUELINE ROSE, *GODLY KINGSHIP IN RESTORATION ENGLAND: THE POLITICS OF THE ROYAL SUPREMACY, 1660–1688*, at 91 (2011).

136. 1 SIR EDWARD COKE, *The Case of Monopolies*, in *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 394 (Steve Sheppard ed., 2003).

137. *Id.* at 403.

138. On Hale, see Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1702–21 (1994).

139. SIR MATTHEW HALE, *THE PREROGATIVES OF THE KING* 177 (D.E.C. Yale ed., 1976). For an illuminating guide to Hale’s views on the dispensing power, see *id.* at xlvi–lvi.

140. *Id.* at 177.

141. For a fuller analysis of the traditional legal limitations on the royal dispensing power, see GLENN BURGESS, *ABSOLUTE MONARCHY AND THE STUART CONSTITUTION 197–98* (1996) and ROSE, *supra* note 135, at 91–92.



In the leading case of *Godden v. Hales*,<sup>142</sup> Sir Edward Herbert summarized the justification for the dispensing power:

[T]he law of man may be dispensed with by the legislator, for a law may either be too wide or too narrow, and there may be many cases which may be out of the conveniences which did induce the law to be made; for it is impossible for the wisest lawmakers to foresee all the cases that may be, or are to be remedied, and therefore there must be a power somewhere, able to dispense with these laws.<sup>143</sup>

By and large, England had no principled difficulty with the dispensing power before the reign of James II, and in fact found it convenient.<sup>144</sup> Since Parliaments met rarely and were inexpert at drafting, the power enabled the monarch to keep the legal system both more attuned to emerging conditions and more equitable in practice.<sup>145</sup> True, there had been intermittent criticisms of particular exercises of the dispensing power, but there was no demand for its abolition.<sup>146</sup> Even after James's fall in 1688, English lawyers found themselves unable to say that the dispensing power was *illegal*, even if that monarch had abused it.<sup>147</sup>

James II and, occasionally, his predecessors did land in serious trouble when they used the dispensing power to accomplish important policy objectives of their own that cut against the clear preferences of Parliament, as expressed in statutory law.<sup>148</sup> When the subject matter of a royal dispensation was a comparatively minor matter, its use was generally unquestioned.<sup>149</sup> But “[t]he use of the power made by James was of an altogether different order: he used it to systematically dispense with a vast array of religious legislation and rules governing the universities. There was no ‘emerging inconvenience’ to justify the use of the power. . . .”<sup>150</sup> His broad use of the dispensing power was a major cause of the Glorious Revolution. To the scandal and consternation of his Protestant subjects, the King repeatedly “dispensed” his fellow Roman Catholics from their obligations under the Test Acts of 1673 and 1678.<sup>151</sup> The First Test Act was designed to ensure that anyone holding public office, whether civil or military, would denounce the Roman Catholic doctrine of transubstantiation

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142. *The Trial of Sir Edward Hales*, in 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 1166 (T.B. Howell ed., 1816).

143. *Id.* at 1196.

144. Dennis Dixon, *Godden v Hales Revisited—James II and the Dispensing Power*, 27 J. LEGAL HIST. 129, 134–36 (2006).

145. *Id.* at 135.

146. *Id.*

147. *See id.* (noting that many notable Whig lawyers spoke out against the abolition of the dispensing power after James's fall).

148. *See id.* at 136 (citing episodes from Elizabeth I and Charles II).

149. *Id.* at 135–36.

150. *Id.* at 136.

151. *Id.* at 129–30.

and receive the Anglican sacrament.<sup>152</sup> Parliament's intention was to exclude Roman Catholics, who could not conscientiously take these tests, from holding public office more than temporarily.<sup>153</sup> The Second Test Act made certain exceptions (including one for the King himself), but essentially continued this exclusionary policy.<sup>154</sup> Parliament was determined to ensure that Roman Catholics could not make public policy or threaten the Protestant ascendancy by serving as public ministers, advisers, officials, or military personnel.<sup>155</sup>

James began using his dispensing power extensively to override the Test Acts, filling offices with his fellow Roman Catholics.<sup>156</sup> These included military officers, not only in England, but also in Ireland, whose population was largely Roman Catholic.<sup>157</sup> Protestants in both England and Ireland become uneasy at the prospect of a military that was largely in Catholic hands.<sup>158</sup> In January 1686, James appointed Sir Edward Hales, a Catholic and a close associate, to a colonelcy in the infantry, under a royal warrant dispensing him from the Test Acts.<sup>159</sup> Hales's appointment provided the King with the opportunity to seek judicial validation of his dispensing power. Hales's footman, a Mr. Godden, brought a collusive suit against his employer for the 500 pounds that the Test Act allowed to informers.<sup>160</sup> *Godden v. Hales* thus became the vehicle by which the King's power could be tried. To ensure a successful outcome, the King dismissed six of the twelve royal judges before the case was heard because they would not promise to sustain the validity of his use of the dispensing power.<sup>161</sup> In the end, eleven of twelve judges (some newly appointed for the occasion) upheld the King's dispensing power:

The most provocative aspect of *Godden v. Hales* was the proposition now explicitly advanced in a court of law that the king as the only law-maker in parliament might rightfully and legally exercise the dispensing power to set aside statutes . . . . The [Court's] statement that the laws of England were the king's laws could be interpreted to mean that the king alone made law in parliament; and

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152. *Id.* at 136.

153. *See id.* at 137 (observing that, unlike comparatively flexible nonconformists, Catholics could not comply with the Act's religious requirements and therefore could remain in office only until the next rounds of tests were administered).

154. *Id.*

155. *See id.* at 137 (explicating Parliament's belief that by excluding Catholics from various government posts, Catholicism could never be in the political ascendancy).

156. *Id.* at 130.

157. JOHN MILLER, *JAMES II* 212 (2000).

158. *See* Edie, *End of the Dispensing Power*, *supra* note 133, at 439–40 (remarking that English subjects feared James II's use of the dispensing power to bring Catholics into the army).

159. Dixon, *supra* note 144, at 137.

160. ERNEST C. THOMAS, *Godden v. Hales*, in *LEADING CASES IN CONSTITUTIONAL LAW BRIEFLY STATED* 17 (Charles L. Attenborough, 3d ed. 1901); *see supra* note 41.

161. Dixon, *supra* note 144, at 138.

this proposition led in turn to the conclusion that the king, as the sole law-maker in parliament, possessed the inseparable prerogative of dispensing with laws in particular cases and upon particular necessary reasons. He was the sole judge of those reasons and necessities.<sup>162</sup>

James's actions and the Court's results in *Godden v. Hales* set in motion the events that led to his fall later in the same year. His son-in-law and eventual successor, the Dutch Prince William of Orange, worked to turn English public opinion against James. William published a series of *Declarations of Reasons* for his armed intervention in England's affairs.<sup>163</sup> This propaganda effort was successful in discrediting James and helped bring William (and his wife, Mary) to the throne in James's stead.<sup>164</sup> William's propaganda made the King's dispensing power the central target of its attacks.<sup>165</sup>

William's military and political victory over James led to fundamental constitutional changes in English law, most of which have entered into the broad stream of our own constitutional history. Of particular relevance here, that victory enabled Parliament to abolish the royal dispensing power altogether. On December 16, 1689, Parliament formally did so.<sup>166</sup> Thenceforward, English law has acknowledged no dispensing power unless specifically provided for by Act of Parliament.<sup>167</sup>

By the time of the Founding, it had become entirely obvious that the King's dispensing power was gone. Lord Mansfield, a leading eighteenth-century English jurist who, like Blackstone, exercised substantial influence on the Framers, stated that by 1766, the King's prerogative power no longer included either a dispensing or a suspending power:

I can never conceive the prerogative to include a power of any sort to suspend or dispense with laws, for a reason so plain that it cannot be

162. WESTON & GREENBERG, *supra* note 133, at 235–36 (footnotes omitted).

163. Tony Claydon, *William III's Declaration of Reasons and the Glorious Revolution*, 39 HIST. J. 87, 87–88 (1996).

164. For accounts of the contents and distribution of William's Declarations, see *id.* at 89–97; Lois G. Schworer, *Propaganda in the Revolution of 1688–89*, 82 AM. HIST. REV. 843, 851–60 (1977).

165. For example, in his *Prince of Orange's Declaration, 19 December 1688*, William noted: [The King's advisers] did invent and set on foot the King's dispensing Power; by virtue of which they pretend, that, according to Law, he can suspend and dispence with the Execution of the Laws, that have been enacted by the Authority of the King and Parliament, for the Security and Happiness of the Subject; and so have rendered those Laws of no Effect: Though there is nothing more certain, than that, as no Laws can be made but by the joint Concurrence of King and Parliament, so likewise Laws so enacted, which secure the publick Peace and Safety of the Nation, and the Lives and Liberties of every Subject in it, cannot be repealed or suspended but by the same Authority.

10 H.C. JOUR. (1688) 1 (Eng.), available at <http://www.british-history.ac.uk/report.aspx?compid=28773>.

166. Edie, *End of the Dispensing Power*, *supra* note 133, at 449.

167. Dixon, *supra* note 144, at 135.

overlooked, unless because it is plain; and that is, that the great branch of the prerogative is the executive power of government, the duty of which is to see to the execution of the laws, which can never be done by dispensing with or suspending them.<sup>168</sup>

Versed in England's constitutional history, the Framers surely understood that the Constitution's grant of the executive power did not include dispensation, and that to charge the President with the "faithful execution" of the laws underscored that fact.<sup>169</sup> England's constitutional moment in 1689 was to become, nearly a century later, very much our own. "The president of the United States cannot control [an act of Congress], nor dispense with its execution . . ."<sup>170</sup> "The Executive Branch does not have the have the dispensing power on its own . . ."<sup>171</sup>

### C. *The Presidential "Prerogative"*

Our argument that the President has a duty to execute the law, and no power not to execute it, is still incomplete. It has not so far addressed the question whether there is a presidential prerogative that would authorize deviation from, or even outright violation of, the law. By the "prerogative," we mean the authority to violate statutory law on the grounds of compelling public necessity.<sup>172</sup> To conclude that the Constitution encapsulates a grant of prerogative power would be to contradict our claim that the Constitution recognizes *no* general power in the President not to execute the law.

In order to analyze the question of the prerogative, we must turn to the political theory of John Locke. His *Second Treatise of Civil Government*, distinguished between the executive and legislative powers: the legislature held the "Supream [sic] Power" to set private rules of conduct, while the

168. Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 335 (1952) (quoting Lord Mansfield, *A Speech in Behalf of the Constitution Against the Suspending and Dispensing Prerogative, &c.*, in 16 PARL. HIST. ENG. (1766) 267 (Eng.)).

169. The omission of any explicit reference in the Constitution to the nonexistence of a dispensing power is fully intelligible in this light. First, as of 1787, the Vesting Clause could not be understood to confer a dispensing power; second, any lingering suggestion that the President had a dispensing power was erased by the Take Care Clause. Not given to superfluities, the drafters of the Constitution did not refer to dispensations.

170. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806). *Smith* was decided by Justice William Paterson, who had previously been a New Jersey delegate to the Philadelphia Convention. See JOHN E. O'CONNOR, WILLIAM PATERSON: LAWYER AND STATESMAN 1745–1806, at 131 (1979) (describing Paterson's participation in the convention).

171. *OPM v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring) (asserting as such in an opinion joined by Justice Blackmun).

172. "Prerogative" is also sometimes used to designate particular presidential authorities, such as the pardon power or the power to conduct the Nation's foreign affairs. That the President has "prerogative powers" in that sense is, of course, undeniable. See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . and he shall have Power to grant Reprieves and Pardons for Offenses against the United States . . ."). Reliance on a claim of prerogative is different from the claim that execution of the law would, in a particular application, unconstitutionally interfere with or undermine the legitimate exercise of an Article II power.

executive's primary duty was to implement the laws.<sup>173</sup> Because legislatures could not always remain in session, society needs "a power always in being which should see to the execution of the laws that are made and remain in force."<sup>174</sup> But Locke also described other dimensions to the executive power. The executive possessed key lawmaking powers such as the right to call or dissolve Parliament, the veto, and the "federative" power over "war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."<sup>175</sup> Locke discerned that the federative and the executive "are always almost united" because the federative "is much less capable to be directed by antecedent, standing, positive laws."<sup>176</sup> These functions were to be performed by the executive—the part of government that is always operative and able to swiftly adapt to new circumstances or dangers.<sup>177</sup> Locke did not recommend separating the functions, which he predicted would lead to "disorder and ruin," by dividing "the force of the public" into "different commands."<sup>178</sup>

Locke's analysis of the federative power also identified the roots of the prerogative. Unanticipated threats and emergencies were to be dealt with by the executive, because legislatures could not sit continuously, could not write laws to encompass every contingency, and were badly designed to take immediate action. By contrast, the executive was always in being and could act swiftly and decisively to events. As Locke noted, the prerogative operated where general laws could not, and that area "must necessarily be left to the discretion of him that has the executive power in his hands."<sup>179</sup> The use of the prerogative was necessary because the legislature could not move quickly enough "for the dispatch requisite to execution."<sup>180</sup> Sometimes, Locke observed, the executive's resort to prerogative in an emergency could conflict with standing legislation, written before and without anticipation of the current circumstances. The prerogative allows the executive "to act according to discretion for the public good, without the prescription of the law, and sometimes even against it."<sup>181</sup>

Locke provided no definitive resolution to the conflict between Parliament's supreme power of legislation and the prerogative. To be sure, the executive's authority had to be exercised in the public interest and for the

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173. JOHN LOCKE, *The Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT § 143–44, at 194–95 (Thomas I. Cook ed., Hafner Publ'g Co. 1965) (1690).

174. *Id.* § 144, at 195.

175. *Id.* § 146, at 195.

176. *Id.* § 147, at 195–96.

177. *See id.* ("[W]hat is to be done with foreigners . . . must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.")

178. *Id.* § 148, at 196.

179. *Id.* § 159, at 203.

180. *Id.* § 160, at 204.

181. *Id.*

common good—unlike the royal prerogative. But the “old question” remained of how to resolve conflicts between emergency power and the standing laws.<sup>182</sup> There were no pre-existing answers to this problem for Locke, and there was “no judge on earth” who could resolve it.<sup>183</sup> Attempting to define the executive prerogative’s full scope ahead of time would be self-defeating.

Although Locke’s influence on the Founding generation is undoubted, its extent is arguable.<sup>184</sup> Legal scholars and historians have long debated whether the Framers understood the “Executive power” to exclude Locke’s conception of the prerogative.<sup>185</sup> The question is complicated by the fact that Locke’s conception of “the prerogative” includes at least two different aspects, one of which might reasonably be thought to be encompassed in the grant of executive power. Locke includes within the prerogative both: (1) the power to take discretionary actions for the sake of the public good in unprovided-for cases, i.e., matters that the law simply does not address, and (2) the power to act in an emergency or other extreme situation, for the sake of preserving the society, in a manner contrary to law.<sup>186</sup> We can call these the “law-supplementing” and the “law-violative” forms of the prerogative. Locke writes:

Many things there are which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good

182. *Id.* § 166–68, at 206–07.

183. *Id.* § 168, at 207.

184. Some scholars have asserted that “Locke was the preeminent influence on the American Founding.” George Thomas, *As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government*, 30 *PRESIDENTIAL STUD. Q.* 534, 537 (2000). But that is exaggerated. See Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 860 (1978) (cautioning against attributing too much influence to Locke). One quantitative study ranked Locke third among political thinkers most frequently cited by Americans of the Founding period—roughly as often as Hume, but well below both Montesquieu and Blackstone. DONALD S. LUTZ, *A PREFACE TO AMERICAN POLITICAL THEORY* 136 tbl.5.2 (1992).

185. Thus, Clinton Rossiter wrote that “[t]he Lockian theory of prerogative has found a notable instrument in the President of the United States, and executive initiative has come to be the basic technique of constitutional dictatorship in this country.” CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 218 (1948). For various viewpoints, contrast the views expressed in EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 14–15 (4th rev. ed. 1957) [hereinafter CORWIN, *OFFICE AND POWERS*] (arguing the presidency was designed to reproduce the English monarchy without the corruption) and Edward S. Corwin, *War, The Constitutional Moulder*, *NEW REPUBLIC*, June 9, 1917, reprinted in *PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS* 23 (Richard Loss ed., 1976) (defending the claim that the Framers incorporated Lockean prerogative into Presidential power), with David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 *PRESIDENTIAL STUD. Q.* 376, 388 (2012) (asserting that the Framers “delivered a robust historical and constitutional rebuke” to the prerogative power) and Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 *PRESIDENTIAL STUD. Q.* 85, 91, 95 (2007) (noting that the Framers circumscribed but did not entirely eliminate prerogative power).

186. LOCKE, *supra* note 173, § 159, at 203.

and advantage shall require; nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, viz., that, as much as may be, all the members of the society are to be preserved . . . .<sup>187</sup>

Although the two facets of Locke's prerogative are not always easy to separate, the law-supplementing form of the prerogative seems less controversial in American practice. An early example is President John Adams's arrest of Jonathan Robbins under an extradition treaty with Great Britain.<sup>188</sup> In the absence of an act of Congress, Congressman John Marshall argued, the Executive had the power to give effect to the treaty by choosing his own means.<sup>189</sup> In 1807, Thomas Jefferson claimed that the Executive had some power to fill in, or even vary, the details by which a law was to be executed. He wrote, "if means specified by an act are impracticable, the constitutional [executive] power remains, and supplies them. . . . This aptitude of means to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one, would really be verified."<sup>190</sup> Another classic example in this line is the Supreme Court's decision, *In re Neagle*,<sup>191</sup> which held that in the absence of an act of Congress the President could assign a United States Marshall to protect a Supreme Court Justice.<sup>192</sup> And in *Loving v. United States*,<sup>193</sup> the Supreme Court suggested that the President could prescribe rules and regulations for the military, such as aggravating factors for capital military crimes.<sup>194</sup> Interstitial lawmaking of this kind offends no act of Congress and seems well recognized in American constitutional practice.

The law-violative form of Locke's prerogative, however, has been highly controversial. Locke argues that "a strict and rigid observation of the laws may do harm—as not to pull down an innocent man's house to stop the fire when the next to it is burning."<sup>195</sup> A private person who performed such an act, Locke argues, should merit a royal pardon.<sup>196</sup> His analogy further

187. *Id.*

188. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 684 (1952) (Vinson, C.J., dissenting).

189. *Id.*; see also Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 339–51 (1990) (discussing Marshall's argument in the House of Representatives in which Marshall supported the use of executive power in the Robbins affair).

190. Letter from Thomas Jefferson to Governor William H. Cabell (Aug. 11, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 318, 320.

191. 135 U.S. 1 (1890).

192. *Id.* at 66–68, 76.

193. 517 U.S. 748 (1996).

194. *Id.* at 773–74. Writing for the majority, Justice Kennedy noted that Congress may delegate authority to the executive power. *Id.* at 767 ("Under Clause 14 [of Article I], Congress, like Parliament, exercises a power of precedence over, not exclusion of, Executive authority. *Cf.* *United States v. Eliason*, 16 Pet. 291, 301 (1842) ('The power of the executive to establish rules and regulations for the government of the army, is undoubted').").

195. LOCKE, *supra* note 173, § 159, at 203.

196. *Id.*

suggests that the executive itself is empowered to destroy private property when such destruction is necessary to prevent a greater harm.

An argument based on such prerogative may be thought to have particular appeal to those who, like us, have defended a robust conception of presidential authority over national security and foreign affairs, especially in time of crisis.<sup>197</sup> But even if a presidential prerogative exists in that form, we do not believe that it would encompass an action like President Obama's recent immigration decision. To explain why it does not, we must review both critical episodes in American constitutional practice, such as the Louisiana Purchase and the Civil War, and key cases in the nation's jurisprudence, such as the Steel Seizure crisis.

Any prerogative would not extend to the immigration decision because the President's constitutional authority should only extend to national security and foreign affairs. Republican government suffers from an inherent difficulty. Representative, deliberative legislatures have institutional difficulty in anticipating and providing for unforeseen events. The Executive is the only branch constantly in being that can respond swiftly and decisively to emergency. The challenge is investing the Executive with sufficient discretion to handle crisis without veering into a dictatorship. The record of American constitutional practice shows that the Executive possesses adequate powers under the Constitution to cope with extreme national emergencies. Ever since Abraham Lincoln's presidency, the nation's emergency powers have rested within the President's Article II powers, not outside it.<sup>198</sup>

The controversy over the placement of the prerogative can be illustrated through the differences between Presidents Thomas Jefferson and Abraham Lincoln. President Jefferson had a strict view of the separation of powers including the equal right of each branch of government to interpret the Constitution for itself. Take, for example, his handling of those charged under the Alien and Sedition Acts of 1798.<sup>199</sup> Jefferson pardoned the ten individuals convicted under the law and ordered all pending prosecutions dropped. Even though Congress had passed the law and the courts had upheld it, Jefferson argued that he had a duty to review its consistency with the Constitution:

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197. See, e.g., Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 167 (2007). (“[W]e find that the Declare War Clause was *not* understood to vest Congress with the exclusive power to wage war or, even more broadly, to control any governmental activity that might even *signal* war.”). See generally YOO, *supra* note 3.

198. See YOO, *supra* note 7, at 209 (“Lincoln's greatness in preserving the Union depended crucially on his discovery of the broad executive powers inherent in Article II for use during war or emergency.”).

199. See John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 426–27 (2008) (articulating the argument for presidential equality and asserting the Executive Branch could independently and equally interpret the Constitution).



On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering without the authority of law, or, which was equivalent, under a law unauthorized by the Constitution, and therefore null.<sup>200</sup>

Jefferson used the unique powers of the Presidency to refuse executing a law.

Jefferson rejected the notion that the courts have the last word on constitutional meaning. As he explained in a letter to Abigail Adams, the Executive and Judiciary are “equally independent” in reviewing the constitutionality of the laws.<sup>201</sup> “You seem to think it devolved on the judges to decide on the validity of the sedition law,” he wrote, “But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them.”<sup>202</sup> While the courts have the right to interpret the Constitution and uphold a law, the President can hold a different view and refuse to bring prosecutions against those who violate the law or pardon those already convicted.

Jefferson believed that the President’s understanding of the Constitution should guide him in his use of the Executive Branch’s unique powers. He thought that Presidents ought to veto laws that he judged unconstitutional, but at the same time, he believed that the President should not veto laws simply because of policy disagreements.<sup>203</sup> Similarly, as the Alien and Sedition Acts episode shows, he believed a President should decline to prosecute unconstitutional laws.<sup>204</sup> As with the veto, Jefferson nowhere appears to have believed that Presidents could decline to enforce a law purely out of disagreement with its policy; that would have been hard to square with his view that Presidents could not even veto laws on that ground.

Rather, Jefferson’s claim of an extraordinary presidential authority had to reach outside the Constitution altogether. This was made clear in the 1803 Louisiana Purchase—perhaps Jefferson’s greatest act as chief executive. But an act that raised constitutional issues about the acquisition of new territory by the United States and whether it could evolve into a full-fledged member of the Union. Even though the Louisiana Purchase avoided war with France and Spain, and doubled the size of the nation, Jefferson believed it had no constitutional authorization.<sup>205</sup> The Constitution does not clearly provide for the addition of new territory to the Union. Article IV, Section Three

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200. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 212, 214.

201. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 49, 50.

202. *Id.*

203. YOO, *supra* note 7, at 107.

204. *Id.*

205. Yoo, *supra* note 199, at 435, 437.

recognizes Congress's power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>206</sup> But the Property Clause seems to describe Congress's power over land and property that is already in the possession of the United States; it does not address the process of acquiring the new territory in the first place.<sup>207</sup> But Article IV, Section Three also sets out a process for the admission of new states to the Union: "New States may be admitted by the Congress into this Union," but the formation of a new state from within the territory of an existing state would require the existing state's permission.<sup>208</sup> If the Constitution provided no process for adding new territory, but still set out a procedure for the entry of new states, where would these new states come from?

Jefferson, for one, reconciled these conflicting provisions by concluding that the admissions process for new states could only apply to territory held by the United States in 1789. The territory governed by the Northwest Ordinance, which gave rise to Midwestern states such as Ohio, could still become states. But Jefferson doubted whether the territory of the Louisiana Purchase could ever become states. The Constitution prohibits the formation of new states out of the borders of existing states without their consent as well as the consent of Congress.<sup>209</sup> Jefferson's Attorney General agreed with the President, but proposed a solution to the problem by urging that the boundaries of existing states be enlarged to include the Louisiana Purchase.<sup>210</sup> Treasury Secretary Albert Gallatin, on the other hand, argued that the federal government has powers that extended beyond those explicitly set out in the Constitution to include the sovereign powers held by all other nations.<sup>211</sup> The United States, under Gallatin's view, could acquire new territory and add states even if the Constitution did not provide for it.

Jefferson quietly approved Gallatin's reasoning. But in order to maintain fidelity to his vision of the Constitution as granting only narrow powers, he had to confess that the new territory would enter the Union as a matter of "expediency."<sup>212</sup> In an 1803 letter, he wrote that "[o]ur confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, [and] still less of incorporating it into the Union."<sup>213</sup> For the Louisiana Purchase to

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206. U.S. CONST. art. IV, § 3, cl. 2.

207. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 27–30 (2004).

208. U.S. CONST. art. IV, § 3, cl. 1.

209. YOO, *supra* note 7, at 118.

210. *Id.*

211. 4 DUMAS MALONE, *JEFFERSON AND HIS TIME* 312 (1970).

212. *Id.*

213. Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 261, 262 (Paul L. Ford ed., 1897).

eventually give birth to states, Jefferson admitted, “[a]n amendment to the Constitution seems necessary.”<sup>214</sup> Writing in a similar vein to John Breckinridge, a leading Jeffersonian in the Senate, the President more explicitly relied upon Locke’s theory of the prerogative. “The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution,” Jefferson wrote.<sup>215</sup> It was now up to Congress to support the unconstitutional act. “The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it.”<sup>216</sup> Although he did not ultimately follow this course in public, Jefferson concluded that the President should seek atonement before the public for violating the Constitution due to necessity. “[W]e shall not be disavowed by the nation,” he predicted, “and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines.”<sup>217</sup>

Jefferson believed the Louisiana Purchase to be sufficiently unconstitutional that he drafted at least two constitutional amendments to specifically allow the territory’s addition to the Union.<sup>218</sup> But necessity even forced him from that route of escape from his constitutional dilemma. Shortly after American envoys reached an agreement in Paris, further word reached Jefferson that Napoleon was considering reneging on the deal.<sup>219</sup> The time needed for a constitutional amendment might give Napoleon the time to change his mind.<sup>220</sup> Jefferson sent letters to Congress advising members to drop any constitutional objections to the treaty: “nothing must be said on that subject which may give a pretext for retracting; but that we should do sub silentio what shall be found necessary.”<sup>221</sup> With Senator William C. Nicholas, for example, Jefferson agreed that “[w]hatever Congress shall think it necessary to do, should be done with as little debate as possible, and particularly so far as respects the constitutional difficulty.”<sup>222</sup> Nevertheless, Jefferson still believed the President and Congress were

214. *Id.*

215. Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 407, 411.

216. *Id.*

217. *Id.*

218. Drafts of an Amendment to the Constitution (July 1803), in 8 THE WRITING OF THOMAS JEFFERSON, *supra* note 213, at 241, 241–49.

219. YOO, *supra* note 7, at 120.

220. *Id.*

221. Letter from Thomas Jefferson to John Breckinridge (Aug. 18, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 213, at 244 n.1; *see also* Letter from Thomas Jefferson to Thomas Paine (Aug. 18, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 213, at 245 n.1 (requesting the same).

222. Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 417, 418.

violating the Constitution. Adding the Louisiana Purchase, he admitted would create a precedent that would allow the United States to add “England, Ireland, Holland, etc. into it.”<sup>223</sup> Such methods of interpretation, Jefferson warned, would “make our powers boundless” and would render the Constitution “a blank paper by construction.”<sup>224</sup> Jefferson claimed that it would be better to stick with a narrow interpretation of Congress’s powers, and then “ask an enlargement of power from the nation, where it is found necessary.”<sup>225</sup>

Jefferson claimed that circumstances could justify presidential action beyond the Constitution. If he had limited the Presidency to his narrow interpretation of the government’s powers, he could not have carried out the Louisiana Purchase as a simple treaty. Jefferson’s dilemma, however, was of his own creation. Article IV, Section Three, for example, requires that states must approve the admission of new states created from within the former’s existing borders.<sup>226</sup> If Jefferson were correct, and no territory could be added to the Union, then all new states would fall into this category. There would be no class of states that would fall under Section Three’s simple approval by Congress alone.<sup>227</sup> Congress’s sole approval must extend, therefore, to the creation of states out of new territory.

Jefferson’s cramped reading of Section Three, and his broader allegiance to a strict construction of the Constitution, ironically forced him into the arms of the prerogative. In his letter to Breckinridge, Jefferson compared himself to a guardian acting in the best interests of his ward.<sup>228</sup> He had to seize the opportunity “which so much advances the good of the[] country.”<sup>229</sup> Unforeseen circumstances required him to exceed his legal powers to protect the greater good.<sup>230</sup> Jefferson looked for ultimate approval not from the Constitution, but from the people through their representatives in Congress.<sup>231</sup>

Two years after he left office, Jefferson provided a more complete defense of the prerogative. In an 1810 letter, he asked whether “circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law.”<sup>232</sup> Jefferson found the question “easy” in principle, though “embarrassing in practice”:

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223. *Id.*

224. *Id.* at 419.

225. *Id.* at 418–19.

226. U.S. CONST. art. IV, § 3, cl. 1.

227. *Id.*

228. Letter from Thomas Jefferson to John Breckinridge, *supra* note 215, at 411.

229. *Id.*

230. *Id.*

231. *Id.*

232. Letter from Thomas Jefferson to J. B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 418, 418.

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.<sup>233</sup>

Jefferson illustrated with examples from the Revolution: Washington had destroyed private property for tactical reasons, while Jefferson as Governor of Virginia had seized men and confiscated material needed for the fight.<sup>234</sup> He also raised the possibility during his presidency of acquiring the Floridas without any congressional appropriation.<sup>235</sup> “Ought the Executive, in that case . . . to have secured the good to his country, and to have trusted to their justice for their transgression of the law?”<sup>236</sup> Jefferson’s answer was yes.<sup>237</sup> Jefferson argued that “a law of necessity and self-preservation” was at stake, and that law “rendered the *salus populi* supreme over the written law.”<sup>238</sup>

Prerogative, Jefferson believed, could only be invoked by the nation’s highest officers, and only in moments of real crisis. But when “consequences are trifling, and time allowed for a legal course,” he maintained, “overleaping the law” was worse than “a strict adherence to its imperfect provisions.”<sup>239</sup> If an executive misjudged the circumstances, he deserved to be judged harshly. “It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake.”<sup>240</sup> Jefferson trusted that his fellow Americans would “put themselves into his situation” and judge his decisions based on what he knew at the time.<sup>241</sup>

Jefferson, however, left many of the most important details unfilled. He did not define when the national security was sufficiently threatened to trigger the prerogative. A good officer would somehow know when to disregard his orders that did not suit new circumstances.<sup>242</sup> Jefferson does not limit the Executive’s prerogative to self-defense; he also approves of taking advantage of favorable circumstances to advance the nation’s interests.<sup>243</sup> Jefferson believed that a President could act decisively, even without congressional approval, to seize a golden opportunity such as the

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233. *Id.*

234. *Id.* at 418–19.

235. *Id.* at 419.

236. *Id.* at 419–20.

237. *Id.* at 420.

238. *Id.* at 421.

239. *Id.*

240. *Id.* at 421–22.

241. *Id.* at 421.

242. *Id.* at 422.

243. *Id.* at 421–22.

purchase of Louisiana.<sup>244</sup> Afterwards, he could remedy the constitutional breach by seeking congressional ratification.<sup>245</sup>

There are two constitutional possibilities for the prerogative. First, Article II's grant of the executive power to the President to respond to unforeseen emergencies, even to the point of violating statutory law. Presidents might seek approval from Congress after the crisis ends, but as a matter of political harmony rather than constitutional requirement. A second approach would refuse to recognize the existence of an emergency power within the Constitution. A President may violate the law out of national necessity, but he acts unconstitutionally. Viewing the prerogative in this way, Jefferson thought, would prevent the President from permanently ratcheting up executive power after every emergency. As Jeremy Bailey and Gary Schmitt have each argued, Jefferson's appeal to the prerogative allowed him to purchase Louisiana but keep true to his vision of a Constitution of narrow federal powers.<sup>246</sup>

It was for Lincoln to resolve this question by firmly planting emergency powers within the Constitution. Some prominent scholars have compared Lincoln to a "despot," in the words of Arthur M. Schlesinger, and his presidency to a "dictatorship" in the words of both Edward Corwin and Clinton Rossiter.<sup>247</sup> Lincoln considered the possibility that preserving the Union could justify the exercise of extraconstitutional powers. In 1864, he asked in a letter: "Was it possible to lose the nation, and yet preserve the constitution?"<sup>248</sup> Preserving the nation had to come first, for without the nation there could be no Constitution. "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."<sup>249</sup> To Lincoln, the law of necessity applied equally to the nation as to the individual. "By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb."<sup>250</sup>

While Lincoln exercised his powers broadly, however, he did not seek them beyond the Constitution. Responding to a dire threat to the nation's security, he relied on his power as Commander in Chief to give him control

244. *Cf. id.* at 419–20 (hypothesizing about performing a similar act to purchase the Floridas).

245. *Cf. id.* at 420 (discussing the retroactive congressional sanctioning of supplying those involved in the "Chesapeake affair").

246. JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 15–22 (2007); Gary J. Schmitt, *Jefferson and Executive Power: Revisionism and the "Revolution of 1800,"* PUBLIUS, Spring 1987, at 7, 22–25.

247. CORWIN, OFFICE AND POWERS, *supra* note 185, at 20; ROSSITER, *supra* note 185, at 224; ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 59 (1973).

248. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 585, 585 (Don E. Fehrenbacher ed., 1989).

249. *Id.*

250. *Id.*

over decisions ranging from tactics and strategy to Reconstruction policy. Lincoln believed his constitutional duty to execute the laws, his role as chief executive, and his presidential oath gave him the authority to wage war against those who sought to secede. “[M]y oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law.”<sup>251</sup> While Lincoln entertained the question of the prerogative, he refused to believe that the Constitution was so defective as to lack the means for its own self-preservation.<sup>252</sup>

Lincoln found the source of the nation’s right of self-preservation in the Executive Power Clause.<sup>253</sup> It allowed Lincoln to respond to secession with military force: without Congress, he raised an army, invaded and blockaded the South, imposed an occupation government of recaptured territory, and suspended the writ of habeas corpus.<sup>254</sup> Lincoln consistently maintained that the power to handle this most dire threat to the nation’s security rested within the Constitution’s war powers.<sup>255</sup>

Lincoln’s first exercised this authority to decide that secession was unconstitutional and could be stopped by military force. Today, we assume that Lincoln was correct, but the question of constitutional exit goes unanswered in the constitutional text and would not be resolved by the Supreme Court until after the Civil War.<sup>256</sup> His predecessor, James Buchanan, had announced that secession was illegal but that he lacked the constitutional authority to stop it.<sup>257</sup> Lincoln, however, immediately concluded that the Confederate States were effectively blocking the proper operation of the constitutional system and refusing to accept the results of the ballot box. They had seceded before Lincoln had even taken the oath of office, not to mention before the new Republican Congress had passed any new restrictions on slavery. In his First Inaugural Address, Lincoln restated his campaign promise to leave slavery untouched in the Southern states,

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251. *Id.*

252. *Id.*

253. YOO, *supra* note 7, at 202.

254. *Id.*

255. *Id.*

256. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) (“The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”).

257. In his December 1860 annual message to Congress, Buchanan concluded that even though the South could not secede, he could not “make war against a State,” leaving the federal government powerless. President James Buchanan Fourth Annual Message (Dec. 3, 1860), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3157, 3166 (James D. Richardson ed., 1897). After the Confederate States of America formed, Buchanan again declared that the executive power did not include the use of force against a state, and humbly requested that Congress, “the only human tribunal under Providence possessing the power to meet the existing emergency,” do something. H. JOURNAL, 36th Cong., 2d Sess. 158 (1861); *see also* DANIEL A. FARBER, LINCOLN’S CONSTITUTION 76 (2003).

which he considered a matter of their own “domestic institutions.”<sup>258</sup> He promised to execute the laws passed to enforce the Fugitive Slave Clause, even if he disagreed with them, and to continue to recognize “the institution of slavery in the States where it exists.”<sup>259</sup> But the South had to accept that the Union was perpetual.<sup>260</sup> It preexisted the Constitution and the Articles of Confederation.<sup>261</sup> According to Lincoln, no state could ever secede; therefore, the Southern states remained part of the nation, and “the Union [was] unbroken.”<sup>262</sup>

The President’s duty to enforce federal law became one of Lincoln’s central constitutional powers to stop secession. Lincoln relied on something of a fiction: he maintained that secession justified a swift presidential response because the southern states impeded his execution of the laws. He consistently claimed that it was a conspiracy of individuals, not the states themselves, that prevented the execution of the laws. The Constitution required the use of force, if necessary, to see “that the laws of the Union be faithfully executed in all the States.”<sup>263</sup> The Constitution gave Lincoln no choice but to put down the rebellion. “*You* have no oath registered in Heaven to destroy the government,” Lincoln told the South, “while *I* shall have the most solemn one to ‘preserve, protect and defend’ it.”<sup>264</sup>

Lincoln called Congress into special session but, significantly, not until July 4, well after he had called up an army and deployed the navy against the South.<sup>265</sup> Lincoln responded to growing criticism of his actions as executive dictatorship, led in part by Chief Justice Taney’s decision in *Ex parte Merryman*,<sup>266</sup> in his message to the special session. Lincoln stressed that the Confederacy had fired the first shot at Fort Sumter in order to preempt the process of “time, discussion, and the ballot-box.”<sup>267</sup> In response, “no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.”<sup>268</sup> Although Congress had not yet authorized his initial military responses, Lincoln claimed that he had sufficient public support. “These measures, whether strictly legal or not, were ventured upon, under what appeared to be

258. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 215, 215.

259. *Id.* at 215–17.

260. *Id.* at 217.

261. *Id.* at 217–18.

262. *Id.* at 218.

263. *Id.* at 218–19, 223–24.

264. *Id.* at 224; *see also* Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 706–07 (2004) (reviewing DANIEL FARBER, LINCOLN’S CONSTITUTION (2003)) (explaining Lincoln’s belief in a duty to defeat secession).

265. President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 246, 248–50.

266. 17 Fed. Cas. 144 (C.C.D. Md. 1861).

267. Lincoln, *supra* note 265, at 247.

268. *Id.* at 250.



a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them.”<sup>269</sup>

Lincoln asked Congress to provide retroactive approval for his actions. “It is believed that nothing has been done beyond the constitutional competency of Congress.”<sup>270</sup> Congress enacted a statute that did not explicitly authorize war against the South, but supported Lincoln’s actions.<sup>271</sup> In *The Prize Cases*,<sup>272</sup> a 5–4 majority of the Court upheld Lincoln’s actions before Congress’s authorization passed in July.<sup>273</sup> Lincoln did not need Congress’s approval to immediately react to Fort Sumter. “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”<sup>274</sup> It did not matter whether the attacker was a foreign nation or a seceding state. The firing on Fort Sumter constituted an act of war against which the President automatically had authority to use force. “And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ‘*unilateral*.’”<sup>275</sup> The Court expressly declared that the scope and nature of the military response rested within the hands of the Executive. “Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him* . . . .”<sup>276</sup> Judicial review would not extend to the President’s decisions on whether to consider the Civil War a war, and what type of military response to undertake. The Justices only entertained the need for legislative approval as a hypothetical to buttress their conclusion, and never held that Congress’s approval was necessary as a constitutional matter.<sup>277</sup>

No decision better illustrates Lincoln’s view of the Presidency than Emancipation. Lincoln freed the slaves not under a claim of prerogative—even though it ran squarely against *Dred Scott v. Sandford*<sup>278</sup>—but under his

269. *Id.* at 252.

270. *Id.*

271. Act of Aug. 6, 1861, Sess. I, ch. 63, § 3, 12 Stat. 326, 326.

272. 67 U.S. (2 Black) 635 (1863).

273. *Id.* at 665–66.

274. *Id.* at 668.

275. *Id.*

276. *Id.* at 670.

277. As the Justices noted:

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency.

*Id.* at 670.

278. 60 U.S. (19 How.) 393 (1857).

authority as Commander in Chief.<sup>279</sup> Whether the federal government could abolish slavery remained unanswered at the time. Lincoln had even campaigned on the plank that slavery was a matter of state law and could not be touched where it already existed. It was unclear whether the United States had the right as a belligerent, under the laws of war, to free slaves. A nation at war generally had the right to seize enemy property when necessary to achieve its military goals, but it also could not, as an occupying power, simply take all property held by private citizens.<sup>280</sup>

As the cost of the war rose higher, Northern demands for an end to slavery grew louder.<sup>281</sup> By July 1862, Lincoln decided to free the slaves, drafted an order, and notified his cabinet.<sup>282</sup> Antietam provided Lincoln with the military victory he needed to provide cover for the proclamation.<sup>283</sup> On September 22, 1862, five days after the battle, Lincoln issued the Emancipation Proclamation under his sole constitutional powers. Lincoln remained clear that the war was not about slavery, but “for the object of practically restoring the constitutional relation between” the United States and the rebel states.<sup>284</sup> Nevertheless, his proclamation freed 2.9 million slaves, 74% of all slaves in the United States and 82% of the slaves in the Confederacy.<sup>285</sup> On January 1, 1863, Lincoln issued the final version of the proclamation, “by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States.”<sup>286</sup> The President justified the Emancipation Proclamation “as a fit and necessary war measure for suppressing said rebellion.”<sup>287</sup>

Lincoln’s invocation of presidential power to justify the Emancipation Proclamation also carried built-in limits. As a war measure, he believed, the proclamation could not free any slaves in the loyal states, nor remake the Southern economic and political order. Lincoln even believed that the Emancipation Proclamation could not permanently free the slaves, but could only remain in effect while necessary to defeat the enemy. Shortly before issuing the preliminary proclamation, Lincoln wrote to Republican

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279. For general discussion, see DAVID HERBERT DONALD, *LINCOLN* 375 (1995).

280. For general discussion, see JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 371–85 (1926).

281. YOO, *supra* note 7, at 218.

282. DONALD, *supra* note 279, at 365.

283. *Id.* at 369, 374.

284. *Id.* at 375.

285. PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN* 155 (1994).

286. President Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865*, *supra* note 248, at 424, 424.

287. *Id.* Some of Lincoln’s contemporaries, including former Supreme Court Justice Benjamin Curtis, criticized the legality of the Proclamation. See BENJAMIN R. CURTIS, *EXECUTIVE POWER* 21 (1862) (“The necessary result of [Lincoln’s] interpretation of the Constitution is, that, in time of war, the President has any and all power, which he may deem it necessary to exercise, to subdue the enemy . . .”).

newspaper editor Horace Greeley, and through him to a broad readership, that his goal was to restore “the Union as it was.”<sup>288</sup> Emancipation would stay in effect only as long as necessary to achieve victory. “My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery,” Lincoln wrote.<sup>289</sup> “If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.”<sup>290</sup>

Lincoln made clear that the Commander in Chief Clause allows measures based on military necessity that would not be legal in peacetime. “I think the constitution invests its commander-in-chief, with the law of war, in time of war,” he wrote.<sup>291</sup> Freeing the slaves was a form of preventing the enemy from using property to conduct its war effort. “Armies, the world over, destroy enemies’ property when they can not use it; and even destroy their own to keep it from the enemy.”<sup>292</sup> “Civilized belligerents do all in their power to help themselves, or hurt the enemy, except a few things regarded as barbarous or cruel,” such as the massacre of prisoners or noncombatants.<sup>293</sup>

Emancipation both denied the South a vital resource and brought black soldiers into the Union war effort. Lincoln claimed that Union generals “believe the emancipation policy, and the use of colored troops, constitute the heaviest blow yet dealt to the rebellion.”<sup>294</sup> Lincoln understood that as a war measure, emancipation would end with the war’s end.<sup>295</sup> In 1864, Lincoln pressed for an end to slavery that would survive the war with the Thirteenth Amendment.

Lincoln domesticated Jefferson’s prerogative. Rather than claim an extraconstitutional power, Lincoln located the President’s ability to respond to the greatest threat to the nation’s existence in his executive and Commander in Chief powers and his duty to execute the laws. But regardless of whether the prerogative rests within the Constitution or outside of it, American constitutional practice shows that it has been reserved to national security and foreign affairs. Constitutional text and structure confirms this, in part, by the open-ended nature of its distribution of the foreign affairs power. Many significant foreign affairs powers, such as the authority to develop foreign policy, to communicate with foreign nations, to

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288. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 357, 358.

289. *Id.*

290. *Id.*

291. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 495, 497.

292. *Id.*

293. *Id.*

294. *Id.*

295. YOO, *supra* note 7, at 220–22.

make nontreaty international agreements, and to break international agreements, are not specifically enumerated in the constitutional text. The Constitution “seems a strange, laconic document,” Professor Louis Henkin wrote, characterized by troubling lacunae that leave many powers of government not mentioned.<sup>296</sup> The Constitution’s silence has led some commentators to fall back on extraconstitutional sources, practice, or inferences from the Constitution’s structure to support their preferred system for managing foreign affairs.<sup>297</sup>

The Constitution generally does not establish a fixed process for foreign relations decision making. Rather, it allocates different powers to the President, Senate, and Congress, which allows them to shape different processes depending on the contemporary demands of the international system at the time and the relative political position of the different branches.<sup>298</sup> The basic questions of war and peace remain open even today because the demands of foreign relations are unpredictable and ever changing, while the costs of mistake are so dear. There has been no definitive settlement of the power to make war or the place of treaties in our constitutional system. In essence, previous scholars have sought to articulate a legal order of fixed rules to rectify the disorder of foreign affairs, usually by adopting the template set by our domestic lawmaking system—that is, Congress legislating, the President executing, and the Judiciary adjudicating.<sup>299</sup> The unsettled nature of foreign affairs, however, does not arise from a systematic defect in the constitutional regime. The conflict among the branches of government over foreign affairs is not a flaw in the constitutional design, but is instead its conscious product. The Constitution does not establish a strict, legalized process for decision making. Instead, it establishes a flexible system permitting a variety of procedures. This not only gives the nation more flexibility in reaching foreign affairs decisions, it gives each of the three branches of government the ability to check the initiatives of the others in foreign affairs. The deepest questions of American foreign relations law remain open because the Constitution wants it that way.

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296. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 13–14 (2d ed. 1996).

297. *See id.* at 15 (arguing that attempts to define the foreign affairs power requires extrapolating from the Constitution, “reading between lines,” and “stretching of language”).

298. *See* U.S. Const. art. I, § 8, cl. 3 (granting Congress the general power to regulate international commerce); *id.* art. II § 2, cl. 2 (granting the President the power to make foreign treaties with two-thirds consent by the Senate).

299. *See* Harold Hongju Koh, *Setting the World Right*, 115 *YALE L.J.* 2350, 2364–65 (2006) (praising the Supreme Court in *Hamdan* for reinstating checks and balances to protect against abuse of executive authority); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 *N.Y.U. L. REV.* 1338, 1340 & n.7 (1993) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)) (placing the author within the “prominent chorus of legal academics advocating a more formalist approach to war powers disputes generally, through heightened participation by the courts and enhanced statutory responsibilities for Congress,” and citing examples).

This approach helps explain practice better than competing theories, which have generally criticized practice as inconsistent with the Constitution.<sup>300</sup> Our approach explains variations in the different institutional arrangements over time, or between issues, by the wide discretion provided to the political branches to shape decision making in foreign affairs as they wish. Take war powers, for example. World Wars I and II might have led to the assumption that a congressional declaration of war is needed to trigger the President's powers as Commander in Chief. Formal declarations of war, however, have constituted the exception rather than the rule. The United States has declared war only 5 times, but has committed military forces into hostilities abroad more than 215 times in its history.<sup>301</sup> In some cases, such as the Quasi-War with France in 1798, the Vietnam War, the Persian Gulf War, and most recently the conflicts in Afghanistan and Iraq, Congress has "authorized" the President to engage in military operations, but more often it has not.<sup>302</sup> When President Truman sent American troops into Korea in 1950, he did not seek congressional approval, relying instead on his inherent executive and Commander in Chief powers.<sup>303</sup> In the Vietnam conflict, President Johnson never obtained a declaration of war nor unambiguous congressional authorization, although the Gulf of Tonkin Resolution expressed some level of congressional support for military intervention.<sup>304</sup> American actions in Grenada, Panama, Somalia,

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300. *See, e.g.*, BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4–5 (2010) (maintaining that executive power is the greatest potential threat to the Constitution and citing the war on terror as an example of illegality); SCHLESINGER, *supra* note 247, at viii–ix (asserting that expansion of executive powers, especially in the military realm, threatens the Constitution); Koh, *supra* note 299, at 2358–59 (positing an executive tendency to assume inherent authority beyond legitimate bounds).

301. CONG. RESEARCH SERV., *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1789–1989* (1989), *reprinted in* THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 650, 650 (2d ed. 1993).

302. Memorandum from the Office of the Legal Adviser, U.S. Dep't of State, on *The Legality of United States Participation in the Defense of Viet-Nam* (Mar. 4, 1966), *reprinted in* 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 583, 597 (Richard A. Falk ed., 1968) (stating that presidents have utilized military forces at least 125 times to date without some form of congressional authorization).

303. Memorandum from Dep't of State, *Authority of the President to Repel the Attack in Korea* (July 3, 1950), *in* *DEP'T OF STATE BULLETIN*, JULY 3, 1950, at 173, 173–78. In the Korean War, the vast majority of congressmen approved of President Truman's military response to the North Korean invasion, but Congress recessed soon after the initiation of the war and President Truman chose not to ask for formal congressional approval when Congress returned. DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 414–15 (1969).

304. While presidential critics such as Ely and Henkin generally attack unilateral executive war making in the postwar period, they find the Gulf of Tonkin Resolution to amount to acceptable congressional authorization for war, even though it was not a declaration of war. *See* JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 16 (1993) (maintaining that the Gulf of Tonkin Resolution was broad enough to authorize Johnson's later actions in Vietnam); HENKIN, *supra* note 296, at 101 (claiming that the President only needed congressional approval, which he had in the form of the Gulf of Tonkin Resolution). Other critics, however, believe the Vietnam War was unconstitutional. *See, e.g.*, SCHLESINGER, *supra* note 247, at 177–207 (arguing that the Resolution was not a declaration of war, but a vague statement of

and Kosovo received no express congressional authorization.<sup>305</sup> Statutory efforts to control presidential war making, such as the 1973 War Powers Resolution,<sup>306</sup> have met with little success.<sup>307</sup>

Thus, if broad executive powers were to exist anywhere, they would exist in foreign affairs, where the limitations of republican government are most pronounced. Furthermore, it is here where the Constitution is most vague, hence giving the President the opportunity to act with the most discretion. In contrast, the domestic powers of the government are strictly defined and limited. Article I makes clear that it limits the power of Congress to the powers “herein” enumerated, the most prominent of which are the Commerce Clause and the Taxing and Spending powers.<sup>308</sup> Unlike the “invitation to struggle” that is the foreign affairs Constitution,<sup>309</sup> the process for enacting legislation is strict and defined. Both Houses of Congress must approve legislation, which must then be signed by the President as required by Article I, Section Seven of the Constitution.<sup>310</sup>

Domestic affairs permit a constitutional design framed to slow down, rather than speed up, federal action. Challenges at home do not tend toward the unforeseen and unprecedented. Domestic issues involve systematic social and economic problems, rather than divining the intentions and countering the actions of international competitors. Sometimes the most difficult problems, such as balancing the federal budget or fixing entitlement programs, can build for decades before they reach a point of crisis. Even sporadic events, such as natural disasters and economic fluctuations, might be predicted and provided for, just as with private insurance.

Furthermore, domestic and foreign affairs differ in their costs of inaction. With the latter, passivity may allow a sudden attack or a serious foreign setback to occur. With the former, however, passivity may allow for better policy. Inaction provides for more time to collect information, consider alternatives, and deliberate on the best policy. As the analysis of rules versus standards suggests, errors decrease under a more flexible

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opinion that the Founding Fathers would have opposed); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 62–63 (1991) (agreeing that the Constitution does not permit Congress to grant—without a declaration of war—the President authority to order military engagements similar in scale to the Vietnam Conflict and Operation Desert Storm); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 690–92 (1972) (contending that the Gulf of Tonkin Resolution did not give the President authority to send ground troops to Vietnam).

305. See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, *THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS* 49–69 (2010) (indicating that presidents cite inherent executive and Commander in Chief powers as a source of authority when disclosing military actions to Congress as required by the War Powers Act).

306. 50 U.S.C. §§ 1541–48 (2006).

307. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 86 (2010) (reporting that the Resolution is in effect “a dead letter” because of Congress’s inability to enforce it).

308. U.S. CONST. art. I, § 8, cl. 1, 3.

309. CORWIN, *OFFICE AND POWERS*, *supra* note 185, at 201.

310. U.S. CONST. art. I, § 7, cl. 2.

approach that considers the totality of the circumstances.<sup>311</sup> The trade-off is that gathering more information and considering more alternatives drives decision costs up.<sup>312</sup> Domestic matters can tolerate longer decision processes and higher costs because the government has more time to act. Foreign affairs, however, impose greater costs on slower decisions because of the harms that can occur to the nation from a sudden attack or foreign setback.

In addition, the Constitution can treat presidential prerogative differently in foreign affairs than in domestic affairs because of federalism. In foreign affairs, the President is the only branch that can respond to a looming threat or emergency. If the Executive fails to act, the United States has failed to act. There is no backup system. In fact, Article I, Section Ten of the Constitution does its best to prohibit states from acting in national security affairs.<sup>313</sup> Even when Section Ten permits states to respond where the federal government cannot, such as in cases of imminent danger, the forces available to decentralized states may well prove inadequate to a nation-state level threat.

Domestic affairs give rise to opposite demands. The Constitution's structure recognizes that states provide the default system for addressing social and economic problems. Indeed, the common law of the states provides a universal, background level of regulation in the absence of any federal action. The Constitution's enumeration of Congress's powers in Article I, Section Eight means that federal intervention in any subject is interstitial, specialized, and limited, while state common law is general and universal. This contrast between federal and state law remains the core principle of *Erie Railroad Co. v. Tompkins*'s<sup>314</sup> holding that "[t]here is no federal general common law."<sup>315</sup> Unlike foreign affairs, if the President fails to act to solve a domestic problem, the states can act instead. The states are not constitutionally disabled; rather, the Constitution is biased in favor of state initiative. And the decentralized nature of the federal government may in fact lead to superior policy outcomes when facing the type of systematic, persistent problems that characterize domestic affairs.

Prerogative in foreign affairs may also have posed less trouble for the Framers not just because the potential benefits were so great, but because the expected costs would have been lower. The danger of the prerogative is the possibility that a President might convert emergency measures into a permanent authoritarian government. This threat is less likely with foreign rather than domestic challenges. Threats from abroad may be more harmful

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311. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 403 (1985) (explaining that flexible standards can help avoid unnecessary punishment).

312. See Charles R. Adrian & Charles Press, *Decision Costs in Coalition Formation*, 62 AM. POL. SCI. REV. 556, 557 (1968) (concluding that decision costs are, in part, a function of information gathering).

313. U.S. CONST. art. I, § 10.

314. 304 U.S. 64 (1938).

315. *Id.* at 78.

but of shorter duration than those at home. A military danger, even war, could inflict destruction on the nation, but it will be of limited duration—with a beginning and end point—that is dictated by the foreign actor, the nature of the attack, and the conclusion of the war. America's longest and most destructive wars, such as the Civil War, World Wars I and II, or even Vietnam and Iraq, have all ended. Although usually not involving large-scale hostilities, the long Cold War also came to an end. Even if a President exercises a prerogative to handle such threats to national security, he will still need Congress's support for any long-term military action because of the legislature's sole control of the power of the purse and the raising of the military—powers which we do not think the prerogative can overcome.<sup>316</sup>

A prerogative in domestic affairs would raise the risk of the kind of authoritarianism that worried the Framers much more. Domestic challenges tend toward persistent society-wide problems that do not have set beginnings or endings nor come at the hand of a single opponent. Poverty and crime have been permanent features of the human condition; no single person or institution is responsible for their existence. Invoking a prerogative to combat such decentralized problems would produce an extraordinary executive power of long duration. To be sure, some claim that the war on terrorism has a similar feature to it—it is a national security threat but one with no foreseeable end.<sup>317</sup> We think that this mistakes a persistent problem (terrorism) for a war against a discrete enemy (the al Qaeda terrorist network).

#### D. Supreme Court “Prerogative” Cases

Supreme Court cases that are most closely on point confirm our conclusion here that if the President has any prerogative power to violate the law, it must be limited to national security and foreign affairs.

In several major cases, the Executive has claimed (in substance, albeit not in terms) the prerogative power to injure an innocent third party's interest or expectations, and so override the law, for the sake of avoiding a far greater

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316. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 296 (1996) (arguing that the practical requirement of congressional funding for modern military intervention provides Congress with a powerful check on the President's war powers and providing historical examples); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH*, 92 MICH. L. REV. 1364, 1390 (1994) (“As a structural matter, Congress has the first and last word. It must provide forces before the President can commence hostilities, and it can remove those forces, by decommissioning them or forbidding their use in pursuit of a particular policy at any time.”).

317. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (O'Connor, J.) (observing with concern the prospect that the “broad and malleable” underpinnings of the “war on terror” raise the prospect that the conflict may not formally end and could lead to indefinite detention); Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV. 1309, 1309–10 (2006) (characterizing the war on terror as a “war without end” and lamenting the threats to civil liberties posed by such an indefinite conflict).



harm to the society at large. We may call the most important of these the “prerogative cases.” They are *United States v. Caltex, Inc.*,<sup>318</sup> *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>319</sup> and *United States v. Midwest Oil Co.*<sup>320</sup>

In *Caltex*, the Court denied an American corporation’s request for “just compensation” under the Fifth Amendment for the U.S. Army’s destruction of its refinery and petroleum products near Manila in the Philippine Islands (then a U.S. territory) in order to prevent the facilities and products from falling into the hands of the Japanese Army, which was then entering Manila.<sup>321</sup> Although the Court referred to the “sovereign’s” common law power in such exigent circumstances to destroy private property without incurring an obligation to pay compensation for it,<sup>322</sup> it nowhere identified an affirmative grant of authority to the President in the constitutional text. Not even the Commander in Chief Clause was cited. If one had to find a constitutional footing for the outcome, it would be natural to identify it as a Lockean “prerogative” that was vested in the Executive. And indeed, in *Bowditch v. Boston*,<sup>323</sup> one of the precedents on which *Caltex* relied, the Court had spoken explicitly of “the Prerogative.”<sup>324</sup>

By contrast, *Youngstown* might be read as the definitive rejection of the idea that the President has any “prerogative” power—or at least, a rejection of the idea that national emergencies allow the President to act in ways that would otherwise be illegal.<sup>325</sup> The question before the Court was whether President Truman had the authority to seize and manage the Nation’s steel mills in the middle of the Korean War.<sup>326</sup> Justice Hugo Black, a dissenter in *Caltex*,<sup>327</sup> wrote the opinion for the Court. Black reasoned that if the President had the authority to seize the mills, that authority would have to

318. 344 U.S. 149 (1952).

319. 343 U.S. 579 (1952).

320. 236 U.S. 459 (1915). For a somewhat different account of *Midwest Oil*, though also one that denies that the Court there sustained a law-violative form of the prerogative, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 44–47 (1993).

321. *Caltex*, 344 U.S. at 151–52, 156.

322. *Id.* at 154 (“[T]he common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.”).

323. 101 U.S. 16 (1879).

324. *Id.* at 18–19.

325. This is far from clear, however. On a different analysis, a majority of the *Youngstown* Justices in fact recognized a presidential prerogative:

[T]hat the President does possess, in the absence of restrictive legislation, a residual or resultant power above or in consequence of his granted powers, to deal with emergencies that he regards as threatening the national security, is explicitly asserted by Justice Clark, and the same view is evidently shared, with certain vague qualifications, by Justices Frankfurter and Jackson; and the [three] dissenting Justices would apparently go further.

EDWARD S. CORWIN & LOUIS W. KOENIG, *THE PRESIDENCY TODAY* 43 (1956).

326. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

327. *Caltex*, 344 U.S. at 156.

derive either from an act of Congress or from the President's Article II powers.<sup>328</sup> But neither Congress nor the Constitution supplied the requisite authority: the President had been acting legislatively. But "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."<sup>329</sup>

Black's opinion, though spare and elegant,<sup>330</sup> left many corners dark. For one thing, Black's reasoning seems to cast the *Caltex* holding in doubt. If the Executive may destroy an oil refinery in a military emergency, why may it not seize a steel mill? The Lockean prerogative seems to cover both situations, and, as Chief Justice Vinson argued in dissent, the wartime circumstances in which Truman acted were exigent.<sup>331</sup> To be sure, the destruction of the oil refinery occurred *flagrante bello*, while the seizure of the mills took place on the home front.<sup>332</sup> More importantly, the Government was putting the mills to *use* in its war effort, while the oil refinery had intentionally been rendered useless.<sup>333</sup> Still, Black did not adequately explain why the President lacked the power to *seize* the mills, even if their seizure created an obligation on the Government's part to provide the mills' owners with compensation.

Unquestionably, if the President could finance a war by seizing private assets without authorization from Congress, Congress would lose control of its most powerful tool for checking executive war making. In *Federalist No. 58*, James Madison ascribed "the continual triumph of the British house of commons over the other branches of the government" to the employment of "the engine of a money bill."<sup>334</sup> That Congress retains sole power over the purse remains crucial to our system of government. Though scarcely visible

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328. *Youngstown*, 343 U.S. at 585.

329. *Id.* at 587.

330. See Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 221 (2002) (characterizing Black's opinion as contributing sound principles of law and the proper guidance for the interpretation of constitutional separation of powers issues during wartime).

331. See *Youngstown*, 343 U.S. at 679 (Vinson, C.J., dissenting) (arguing that to view the case as considering "the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant" can "arise only when one ignores the central fact of this case—that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure").

332. See *Youngstown*, 343 U.S. at 583 (showing that the steel mills seized by the President were located in the United States); *Caltex*, 344 U.S. at 150–51 (revealing that the war materiel in the Philippines was destroyed while Japanese troops were breaking through into Manila).

333. See *Youngstown*, 343 U.S. at 583 ("The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running."); *Caltex*, 344 U.S. at 151 ("All unused petroleum products were destroyed, and the facilities were rendered useless to the enemy.").

334. THE FEDERALIST NO. 58 (James Madison), *supra* note 75, at 395. On the attempts by Parliaments under the Tudors and Stuarts to use their leverage over taxing and spending to control Crown policy, see J.E. NEALE, *ELIZABETH I AND HER PARLIAMENTS 1584–1601*, at 169–83 (1958); E.R. Turner, *Parliament and Foreign Affairs, 1603–1760*, 34 ENG. HIST. REV. 172, 172 (1919). For a theory of how Parliaments have been able to control the predatoriness of rulers, see generally MARGARET LEVI, *OF RULE AND REVENUE 127–44* (1988).

in Black's opinion,<sup>335</sup> that principle has been the bedrock of Anglo-American constitutional law for centuries.<sup>336</sup> The principle traces back to yet another phase of the controversies between Parliament and the Stuart dynasty—here, Parliament's struggle against King Charles I in the *Ship Money*<sup>337</sup> case of 1637.<sup>338</sup> Yet neither the lead nor the concurring opinions in *Youngstown* cited that constitutional background.

Furthermore, Black's analysis paid insufficient attention to the fact that the presidential action took place *at home*, rather than in combat abroad.<sup>339</sup> This crucial point was not missed in Justice Jackson's concurrence, however. Jackson found it "sinister and alarming" to think "that a President whose conduct of foreign affairs is so largely uncontrolled . . . can vastly enlarge his mastery over *the internal affairs* of the country by his own commitment of

335. Justice Jackson's concurrence is much more on target when it says: "Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement." *Youngstown*, 343 U.S. at 643 (Jackson, J., concurring).

336. For an American case illustrating this principle, see *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 135 (1851) (stating that it is for the "political department of the government" to indemnify a military officer who "in his zeal for the honor and interest of his country" trespasses on private rights).

337. *Proceedings in the Case of Ship-Money, Between the King and John Hampden*, in 1 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANORS 505 (4th ed. 1776).

338. In the Petition of Right of 1628, Charles I had bound himself (among other things) not to raise money without the consent of Parliament. Pressed for funds for naval operations, however, the King issued writs in 1636 based on an old prerogative—the power to compel the port towns of England to build and outfit ships for the Royal Navy in time of emergency. Charles's writs, however, went beyond the older rule in that he extended the system inland; they required the payment of money; and they were not justified by any apparent emergency. A member of the House of Commons, John Hampden, refused to pay what he regarded as an illegal tax, and was tried in the famous *Ship Money Case* of 1637, in which a closely divided court ruled in the Crown's favor. Hampden became a hero, and the *Ship Money Case* was a contributory cause of the ensuing civil war between the King and Parliament. In 1641, Parliament repealed the *Ship Money Case*. *Act Declaring the Illegality of Ship-Money*, Aug. 7, 1641, 17 Car. I. cap. 14, in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625–1660, at 189, 189–92 (Samuel Rawson Gardiner ed., 3d ed. 1906). The repealing Act went on to find that the Court's opinion was "contrary to and against the laws and statutes of this realm, the right of property, the liberty of subjects, former resolutions in Parliament, and the Petition of Right." *Id.* at 191. Leading Americans of the Founding period were well aware of the *Ship Money Case* and its aftermath: Charles Carroll of Carrollton, a signer of the Declaration of Independence, argued that Robert Eden, the Governor of colonial Maryland, had unilaterally imposed taxes (in the form of fees) in contravention of the constitutional principle vindicated by the repeal of the *Ship Money Case*. H. TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 138–39 (1965). For a study of the English decision, see generally D.L. Keir, *The Case of Ship-Money*, 52 LAW Q. REV. 546 (1936) (describing the historical background behind the *Ship Money* decision and its later overruling).

339. Black does observe, however, that "[e]ven though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." *Youngstown*, 343 U.S. at 587.

the Nation's armed forces to some foreign venture."<sup>340</sup> Jackson pointed to the Third Amendment in support of the "obvious" proposition that "[t]hat military powers of the Commander in Chief were not to supersede representative government of internal affairs."<sup>341</sup> And with his customary flair, he wrote:

I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power . . . is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.<sup>342</sup>

The core of the case, for Justice Black, was not the danger posed by the war-making propensities of a self-financing Executive, nor even the distinction between presidential actions in overseas combat and in domestic affairs. Rather, it lay in what he saw as the President's usurpation of Congress's domestic lawmaking power. But Black did not explain satisfactorily why Truman's action fell on the "legislative" side of the legislative-executive divide.<sup>343</sup> The best explanation for his opinion seems therefore to lie in its latent structure. Black presupposed—without articulation or defense—the "law enforcement" or "dictionary" conception of the Executive, in which "the President simply 'executes' the will of Congress" and has "little independent presidential authority, at least when presidential authority would directly interfere with pre-existing private rights."<sup>344</sup> Whatever the hold of that conception might be, it can hardly support executive action like that upheld in *Caltex*.

Black's opinion is somewhat more persuasive if one takes into account its discussion of the legislative background to Truman's action. According to Black, the Government was not arguing that the President had statutory authorization for the seizure.<sup>345</sup> Rather, he reasoned, the President had deliberately acted as if Congress *had* empowered him to use seizure as a tool for resolving labor-management disputes, when in fact Congress had

340. *Id.* at 642 (Jackson, J., concurring) (emphasis added).

341. *Id.* at 644.

342. *Id.* at 645–46.

343. The difficulty was more fully appreciated by a very nonformalistic Justice Holmes. See *Springer v. Philippine Islands*, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting) ("[H]owever we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments . . .").

344. Monaghan, *supra* note 320, at 3. Monaghan argues that *Youngstown* "provides the classic illustration of this conception." *Id.*

345. See *Youngstown*, 343 U.S. at 588 ("The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.").

considered but *rejected* granting that authority.<sup>346</sup> Focusing on that aspect of the opinion makes it more intelligible why Black characterized Truman's action as "legislative" rather than "executive," and hence unconstitutional. As he saw it, Truman was not acting in a legislative void or with the implied approval of Congress, but instead squarely against the decision that Congress had made to limit the President to other dispute-resolution devices.

*Midwest Oil*, the third case in our trilogy, further reveals the depth of the Court's reluctance to deal with the question of presidential prerogative head-on. There, the Court sought to find a legislative basis for the President's action, however tenuous. An act of Congress had declared federal lands containing petroleum to be "free and open to occupation, exploration, and purchase by citizens . . . under regulations prescribed by law."<sup>347</sup> On the advice of the Interior Department, however, the President issued a proclamation "withdrawing" many of the lands from private claims.<sup>348</sup> The proclamation was intended chiefly to prevent the federal government from having to repurchase oil that it had, in practical terms, given away.<sup>349</sup> This was of particular concern because the Navy had a clear interest in securing large supplies of cheap oil near its stations on the Pacific in the troubled international environment immediately preceding the First World War.<sup>350</sup>

The Government rested its case on two constitutional claims. First, that as Commander in Chief, the President "had power to make the [withdrawal] order for the purpose of retaining and preserving a source of supply of fuel for the Navy."<sup>351</sup> Second, that the President, "charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution . . . and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties."<sup>352</sup> The defendants argued "that there is no dispensing power in the Executive and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens."<sup>353</sup>

The Court's reasoning charted a course midway between the constitutional arguments of the parties. The Court relied chiefly on the long, continuous, and unchallenged executive practice of withdrawing federal lands from private appropriation.<sup>354</sup> Since Congress was well aware of this

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346. *Id.* at 586.

347. *United States v. Midwest Oil Co.*, 236 U.S. 459, 466 (1915) (internal quotation marks omitted).

348. *Id.* at 475, 480.

349. *Id.* at 467.

350. *Id.*

351. *Id.* at 468.

352. *Id.* (citation omitted).

353. *Id.*

354. *Id.* at 471–72.

practice and had acquiesced in it, the Court reasoned that Congress had implicitly delegated it to the Executive.<sup>355</sup> Further, the Executive was acting as the agent of Congress, which had a proprietary interest in the land; and Congress, as principal, had impliedly granted its agent the power to manage the sale of the land—including its withdrawal from sale.<sup>356</sup> By taking recourse to the fiction of an “implied” delegation, the Court was able to sidestep the question of whether the Vesting Clause did, or did not, confer a prerogative power in an exigent case to violate the terms of an act of Congress *pro bono publico*.

Interestingly, the Court at one place *did* advance an argument on behalf of the President’s action that made scant reference to legislative authorization, but seemed instead to be grounded in the Lockean prerogative:

But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For prior to the initiation of some right given by law the citizen had no enforceable interest in the public statute and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people’s lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.<sup>357</sup>

Our review of the Supreme Court’s leading prerogative cases suggests that the Court has been uneasy *both* in recognizing the existence of a naked prerogative power in the President *and* in denying it. Instead the Court has considered whether Congress “impliedly” delegated authority for the presidential action in question.<sup>358</sup> In effect, the Court has posed the counterfactual question of whether Congress *would* have approved the challenged executive action *if* it had addressed the question. The conception of the President as playing the role of “agent” to a congressional “principal” is but another way of framing the question of what Congress would have willed.

Our analysis of the prerogative thus suggests that the June 15 nonenforcement decision was not and cannot be defended as a valid exercise of a prerogative power—even assuming that a presidential prerogative can be

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355. *Id.* at 474–75.

356. *Id.* at 475.

357. *Id.* at 471. It was of course untrue to say that “no private interest was injured,” since the explorers and producers had at least a legally founded expectation of title, and the defendant had actually occupied, claimed, and exploited the property.

358. This tendency was exhibited not only in the *Midwest Oil* case, but also more recently in *Dames & Moore v. Regan*, 453 U.S. 654, 669, 672, 674 (1981), which can also be considered a “prerogative” case.

found in the Constitution. First, the decision was plainly not of the law-supplementing kind. Congress had not failed to speak to the removal of illegal aliens or of the DREAMers in particular. There was no “gap” in the statute to be filled. Second, the law-violative form of the prerogative is asserted in extreme or emergency situations. But no comparable urgency was present here. Third, the decision was plainly not in accord with Congress’s actual or counterfactual wishes. Congress considered and rejected the DREAM Act numerous times over a decade. The June 15 nonenforcement decision was more clearly contrary to Congress’s will than President Truman’s seizure of the steel mills.

#### IV. Defenses to a Breach of the Duty of Enforcement

In ordinary moral argument and in legal reasoning alike, a breach of duty may be defended. One can attempt to justify a breach of duty by showing that doing the act in question was necessary to discharge a more important duty, or was right or permissible, or contributed to achieving a significant good.<sup>359</sup> One can seek to excuse it by admitting that the action was wrong, but to deny responsibility for it.<sup>360</sup> Or one might acknowledge that the act was a breach of duty, seek neither to justify nor excuse it, but seek forgiveness on the grounds that it was only inconsequential.<sup>361</sup> In many ways, the legal system mirrors this structure of reasoning.

Use of this familiar moral and legal structure, we believe, will illuminate the question of breaches of the Executive’s duty to enforce the law. We shall identify what appear to be the most commonly recognized and acceptable defenses that Presidents and federal agencies have raised when charged with breach of duty for a failure to execute the laws. None of them appears to vindicate the June 15 nonenforcement decision.

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359. We take the distinction between “justification” and “excuse” from J.L. Austin, *A Plea for Excuses: The Presidential Address*, 57 PROC. ARISTOTELIAN SOC’Y 1 (1957), a classic paper by a leading “ordinary language” philosopher. See *id.* at 2 (positing that to “justify” a “bad, wrong, inept, unwelcome, or . . . untoward” action is “to admit flatly that [the actor] did do that very thing . . . but to argue that it was a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion”).

360. See *id.* (asserting that to “excuse” a “bad” action is “to admit that it wasn’t a good thing to have done, but to argue that it is not quite fair or correct to say *boldly* ‘X [actor] did A [act],’” and subsequently explaining that “[i]n the one defence [justification], briefly, we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don’t accept full, or even any, responsibility”).

361. Cf. *id.* at 20 (explaining that it is characteristic of “excuses to be ‘unacceptable’ . . . there will be cases of such a kind or of such gravity that ‘we will not accept’ it. . . . We may plead that we trod on the snail inadvertently: but not on a baby—you ought to look where you’re putting your great feet”).

### A. *Unconstitutional Statutes*

Presidents have refused to enforce or defend acts of Congress that they maintain are unconstitutional.<sup>362</sup> The unconstitutionality of an act of Congress can serve as a defense to a charge of nonexecution in two ways. First, the President can argue that his duty is to enforce the “law.” An unconstitutional act of Congress is void, and thus not “law.” There is no duty to enforce it, and no breach of duty in not enforcing it. Alternatively, the President can argue that the Constitution is itself a “law” that he has a duty to enforce. If he is also obligated to enforce an unconstitutional statute, his duties will conflict. In that conflict, he must discharge the higher and more important duty, which is to the Constitution.

We have argued in other work that the President is not duty bound to enforce an unconstitutional law.<sup>363</sup> Of course, legal scholars and practitioners may disagree over whether a particular statute is, or is not, unconstitutional. During the Clinton Administration, there was a controversy over the constitutionality of a statute that would have required the Defense Department to identify military personnel who were HIV-positive and to discharge them if they tested positive.<sup>364</sup> Likewise, during that Administration there was also a controversy over a bill that would have precluded the President from placing U.S. military personnel under the command of foreign military officers.<sup>365</sup> In both cases, the Clinton Administration concluded that these measures would infringe on the

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362. See, e.g., Robert J. Delahunty, *The Obama Administration's Decisions to Enforce, But Not Defend, DOMA § 3*, 106 NW. U. L. REV. COLLOQUY 69, 69–70, 75–76 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/20> (analyzing the Obama Administration's decision not to defend § 3 of the Defense of Marriage Act against constitutional challenges); Prakash, *supra* note 109, at 1617 n.20 (listing several of the “many scholarly treatments discussing whether the President may (or must) disregard unconstitutional laws”); *id.* at 1623 & n.38 (recounting President Clinton's decision not to defend an HIV/AIDS testing program that he deemed unconstitutional); *id.* at 1642 (describing President Andrew Johnson's “supposed exercise of Executive Disregard with respect to the Tenure in Office Act”); *id.* at 1655–72 (surveying the early history of “Executive Disregard” in the United States).

363. See YOO, *supra* note 7, at 45–46 (arguing that “[t]he obligation to faithfully execute the laws requires the President to obey the Constitution first above any statute to the contrary,” and characterizing the President's refusal to enforce unconstitutional laws as “[an] aspect[] of executive control over law enforcement”); Delahunty, *supra* note 362, at 70 (declaring that “the Executive has no duty to enforce an unconstitutional statute” because “[t]he Executive is charged with the faithful execution of ‘the law,’ and an unconstitutional statute is not law”).

364. See Letter from Andrew Fois, Assistant Att'y Gen., U.S. Dep't of Justice, to Senator Orrin Hatch, Chairman, U.S. Senate Comm. on the Judiciary (Mar. 22, 1996), *available at* <http://journaloflaw.us/0%20JoL/1-1/JoL1-1.pdf> (expounding on President Clinton's directive to the Department of Justice to decline to defend the constitutionality of § 567 of the National Defense Authorization Act for Fiscal Year 1996).

365. See Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 183 (1996) (articulating the position of the Department of Justice that the bill “unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief [and] undermines his constitutional role as the United States' representative in foreign relations”).



President's prerogatives as Commander in Chief.<sup>366</sup> We ourselves have argued that congressional efforts to control the initiation of hostilities through the War Powers Resolution would violate the President's Chief Executive and Commander in Chief powers.<sup>367</sup> Such constitutional objections could serve as a valid defense to the charge that nonenforcement was a breach of constitutional duty.

The Obama Administration has made no claim, however, that the immigration statutes as applied are unconstitutional. Although the Supreme Court has indicated on several occasions that the President has some measure of "inherent" power over immigration,<sup>368</sup> the Court seems to have settled finally on the view that the formation of immigration policy "is entrusted exclusively to Congress,"<sup>369</sup> and that "[t]he plenary authority of Congress over aliens . . . is not open to question."<sup>370</sup> Furthermore, even assuming that the Court recognizes the President as having some measure of "inherent" power over immigration, that seems only to mean that the President may set immigration policy in the absence of a congressional directive. It does not seem to mean that the President's constitutional powers in the area trump those of Congress.<sup>371</sup> Thus, the Obama Administration did not and, in the

366. 142 CONG. REC. H12 (daily ed. Jan. 3, 1996) (statement of President William J. Clinton).

367. See Delahunty & Yoo, *supra* note 197, at 128–29, 166 n.233 (arguing that the Commander in Chief Clause gives the President any war powers not conveyed to Congress in Section Eight of Article I, and the Declare War Clause does not give Congress the power to block him otherwise, as is the case with the War Powers Resolution).

368. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (explaining that the right to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation").

369. *Fiallo v. Bell*, 430 U.S. 787, 792 n.4 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766–67 (1972); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

370. *INS v. Chadha*, 462 U.S. 919, 940 (1983) (citation omitted). The constitutional text does not explicitly allocate authority over immigration between the political branches, nor even between the federal government and the states. As a result, the source of federal power to regulate immigration thus remains in dispute. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (suggesting that the enumerated powers in the Constitution possibly imply a federal power to regulate immigration); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 274 (same); Gerald N. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1842–43 (1993) (describing a period in early American history when several states passed laws governing immigration). In the *Head Money Cases*, 112 U.S. 580, 595–96 (1884), the Court ruled that Congress held the power to enact such immigration controls, based on its authority to regulate foreign commerce. Later, in *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) and in *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893), the Court rested federal authority over immigration, not on the constitutional text, but on the (international law) conception of sovereignty. Scholars have long faulted the Court's reasoning, but it now appears to be settled doctrine that Congress, not the President, has the lead regulatory role in immigration. See *Fiallo*, 430 U.S. at 792 (holding that the legislative power of Congress over the admission of aliens is complete); *Mahler v. Eby*, 264 U.S. 32, 40 (1924) (explaining that the Executive cannot exercise the power to expel aliens absent congressional authority).

371. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 546–47 (2009) (concluding that the President may not act in opposition to Congress

current state of the law, could not seek to defend the June 15 nonenforcement decision on that constitutional ground.

A variation of this defense arises when the enforcement of a particular law would materially interfere with the President's discharge of a constitutional responsibility in another area, such as foreign policy or national security.<sup>372</sup> In last Term's *Arizona v. United States*,<sup>373</sup> the Supreme Court emphasized that the Executive may rightfully make discretionary nonenforcement decisions in the immigration area on the basis of its constitutional responsibilities with regard to foreign policy:

Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.<sup>374</sup>

Likewise, the *Arizona* Court indicated that nonenforcement of the immigration laws may be defended in light of the Executive's constitutional responsibility to protect American nationals and interests overseas:

Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national

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and decide whom to admit, though he may decide whom to deport under the authority delegated to the Executive by Congress).

372. We should not be interpreted as saying that the President's constitutional responsibilities with respect to foreign policy enable him to make domestic law. That is not the case, even where the President has "plainly compelling" reasons for attempting to enforce a (non-self-executing) Article II treaty against a recalcitrant state. See *Medellin v. Texas*, 552 U.S. 491, 524–27 (2008) (holding that the terms of a non-self-executing treaty can only become domestic law through the passage of legislation by Congress). Nor are we saying that the Constitution requires that any conflict between a federal statutory mandate and a presidential foreign policy goal must always be resolved in favor of the latter. What we are saying (and what we take the Supreme Court in *Arizona* to have said) is that when the President's obligation to enforce the law is balanced against his obligation to protect the nation's security and vital national interests, the President may reasonably conclude that the latter is weightier, and defend his nonenforcement decision on that basis. Congress and the President's critics may, of course, reasonably disagree, instigating a political contest over the decision.

373. 132 S. Ct. 2492 (2012).

374. *Id.* at 2499.

sovereign, not the 50 separate States. This Court has reaffirmed that “[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.”<sup>375</sup>

In a similar vein, the Court in *Reno v. American-Arab Anti-Discrimination Committee*<sup>376</sup> argued that foreign policy and national security needs warranted skepticism about the desirability of judicial review of prosecutorial decisions to bring or not to bring removal proceedings:

What will be involved in deportation cases is not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques. The Executive should not have to disclose its “real” reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.<sup>377</sup>

Nothing in the Obama Administration’s nonenforcement policy indicates that it was based on foreign policy or national security considerations. The Administration did not allege that the deportation of the DREAMers would cause serious detriment to our relationship with Mexico or any other foreign nation; nor did it refer in defense of its action to any negotiations with foreign nations in which the latter had expressed concern over the deportation of the DREAMers; nor was the nonenforcement policy embodied in any international agreement. Indeed, the Administration carefully placed responsibility for the policy on DHS, rather than on the

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375. *Id.* at 2498–99 (citations omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)); *see also id.* at 2506–07 (explaining that maintaining a consistent foreign policy requires discretion by the Executive with respect to enforcing immigration laws). The Court has affirmed the connection between the Executive’s foreign affairs powers and its enforcement of the immigration laws in others cases as well. *See, e.g., Jama v. ICE*, 543 U.S. 335, 348 (2005) (“Removal decisions, including the selection of a removed alien’s destination, ‘may implicate our relations with foreign powers’ and require consideration of ‘changing political and economic circumstances.’” (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))). Note, however, that the connection the Court sees between immigration enforcement and the need for a unitary national foreign policy is probably overstated. *See Arizona*, 132 S. Ct. at 2514–15 (Scalia, J., concurring in part and dissenting in part) (asserting that the states “have their own sovereign powers” which are not to be abridged for the sake of foreign policy); Legomsky, *supra* note 370, at 261–62, 268 (explaining that immigration issues affect foreign policy only in a few special cases); Neuman, *supra* note 370, at 1898 (suggesting that there is a weak correlation between the substance of immigration policy and relationships with foreign nations); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT’L L. 121, 122 (1994) (arguing that foreign nations understand that the United States is not an undifferentiated unit and that the nation as a whole is not responsible for an individual state’s actions).

376. 525 U.S. 471 (1999).

377. *Id.* at 490–91.

President or the State Department, whose foreign-relations roles are much more evident. Furthermore, the Administration's policy is not nation-specific or even region-specific: it applies to all removable aliens in the DREAM Act category, regardless of national origin. It is hardly credible, therefore, to argue that the policy is designed to defuse some diplomatic tension or win other nations' good will. In these respects, the Administration's nonenforcement decision contrasts sharply with other cases in which an executive decision with respect to large-scale immigration was triggered by foreign policy issues. Consider, for example, the efforts of President Theodore Roosevelt to overcome the serious friction that U.S. immigration policy was creating with Japan. Restrictions on Japanese immigration and the treatment of ethnic Japanese on the West Coast caused acute tensions between the United States and Japan, leading to a war scare in 1907.<sup>378</sup> The Roosevelt Administration sought to resolve the issue through the so-called "Gentlemen's Agreement" of 1907 with Japan.<sup>379</sup> That agreement can be seen as part of a more extensive, near-contemporaneous settlement of the foreign policy differences between the United States and Japan, with the aim of accommodating Japan's rising power and bringing about the balance of forces that Roosevelt's Administration desired in east Asia.<sup>380</sup> Nothing at all comparable appears to be true of the DREAMers situation.

In summary, then, the nonenforcement of an immigration law may be justified when enforcement interferes with the President's discharge of another constitutional responsibility, such as the conduct of foreign affairs or the protection of national security. Given the extent of the President's constitutional functions, it is unsurprising that the exercise of one function may bear directly on the exercise of another. In such situations, the President will often be entitled to decide which function matters more. But these facts do nothing to justify a nonenforcement decision based on "prosecutorial discretion" alone.

An analogy may be helpful here. Consider the longstanding constitutional debate over the question whether the President had the constitutional authority to "impound" appropriated funds. Presidential impoundments (or refusals to spend, in part or whole, funds that Congress had appropriated for designated purposes) had a long, if contentious, history before Nixon's abuses of the claimed authority led an exasperated Congress

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378. GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 355–57 (2008).

379. See generally Kiyoo Sue Inui, *The Gentlemen's Agreement: How It Has Functioned*, 122 ANNALS AM. ACAD. POL. & SOC. SCI. 188 (1925).

380. See Thomas A. Bailey, *The Root-Takahira Agreement of 1908*, 9 PAC. HIST. REV. 19 (1940); see generally Greg Russell, *Theodore Roosevelt's Diplomacy and the Quest for Great Power Equilibrium in Asia*, 38 PRESIDENTIAL STUD. Q. 433 (2008) (analyzing Roosevelt's strategic objectives in Asia).

to nullify it.<sup>381</sup> Nixon triggered a strong congressional reaction by using impoundments aggressively, not only to make significantly deeper spending cuts than were usual, but also for the express purpose of thwarting statutory mandates and policies.<sup>382</sup> Congress brought the controversy to an end by enacting the Congressional Budget and Impoundment Control Act of 1974.<sup>383</sup>

Presidential impoundments (which, when not authorized by Congress, resemble other nonenforcement decisions), were generally predicated on one of two constitutional bases. First, under the Commander in Chief authority, presidents going back to Thomas Jefferson had impounded funds that Congress had appropriated for national defense purposes.<sup>384</sup> Alternatively, claiming to act under the Vesting Clause, presidents have impounded appropriated funds whose expenditure they considered wasteful or inefficient.<sup>385</sup> Critics of the latter position made telling points against it. In effect, they argued that the President had no authority to decline to enforce a statute that mandated spending for a designated purpose and that was itself constitutional, at least in the absence of a plausible claim that the expenditure would disable the President from discharging his constitutional responsibilities in another area, such as national defense.<sup>386</sup> Whatever traction the first defense of impoundments might have had, the second had none.

The Obama Administration made no defense of the June 15 nonenforcement decision in terms of a presidential power or responsibility separate from its asserted power of prosecutorial discretion. There was no claim that by continuing to deport DREAMers, the United States would encounter serious diplomatic difficulties for its foreign policy, endanger American citizens or investments abroad, compromise important national security interests, or anything of the kind.

### B. *Equity in Individual Cases*

Breach of the Executive's enforcement duty might also be excused based on equitable considerations in an individual case or a small set of

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381. Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 14, 16–17.

382. *See id.* at 14–15 (discussing Nixon's withholding of a substantially larger amount of funds than any previous president in order to weaken or destroy programs he disagreed with).

383. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297; *see Train v. City of New York*, 420 U.S. 35, 41–42 n. 8 (1975) (summarizing the provisions of the Act).

384. In 1803, Jefferson informed Congress that he had decided not to expend some \$50,000 that it had appropriated for gunboats, finding the expenditure unnecessary. Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1508 n.7 (1973). Jefferson was careful to say, however, that his action was a delay rather than a refusal to spend; and he expended the funds on gunboats in the following year. *Id.*

385. *See id.* at 1508 (“[F]unds were impounded solely because they were no longer necessary for or appropriate to the achievement of the ends for which they had been made available . . .”).

386. *Id.* at 1513–14.

cases. Again, the *Arizona* Court spoke to the point in the immigration context:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return.<sup>387</sup>

To be sure, statutory law provides authorization for many equitable exceptions. Section 240A of the INA provides for cancellation of removal at the Attorney General's discretion in certain classes of cases, or under treaty law such as the Refugee Convention<sup>388</sup> and the Convention Against Torture.<sup>389</sup> The Court seems to have had in mind these statutory and treaty grounds for exercising "equity," rather than "equitable" exceptions based on the Executive's sole Article II authority. Certainly the Constitution itself seems to envisage no kind of presidential "equity" power, other than in the Pardon Clause (which concerns crimes, not civil violations).<sup>390</sup>

Under our analysis, equitable exceptions from statutory law that were not themselves based on another statute or on treaty law would be "dispensations," and hence not valid exercises of Article II authority.<sup>391</sup> Without more, therefore, they are breaches of duty. To be sure, one might consider the equitable exceptions to which the Court referred to be tolerable, even allowing that they were breaches of duty. They might be regarded as wrong but venial.<sup>392</sup> However, it is essential to bear in mind—as the Court

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

388. *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137; *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267.

389. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85.

390. U.S. CONST. art. II, § 2, cl. 1.

391. *See supra* notes 122–70 and accompanying text (discussing dispensation).

392. In their cumulative effect, however, even venial breaches can be damaging. As Todd Zywicki has argued, following rules uniformly:

advance[s] the rule of law by distancing rule makers from the merits of individual cases, thereby leading to an abstractness and even-handedness in the operation of rules. . . . At the same time, it protects individual actors from the arbitrariness inherent in such decisions, increasing the predictability of their interaction with rules of the state.

carefully stressed—that the exceptions it described all concerned “an individual case.”<sup>393</sup> Allowing an individual removable alien to remain in the United States when there are equitable considerations to be made on his or her behalf will ordinarily have a minimal adverse effect on congressional policy. Indeed, such a decision in an individual case might be defended on the grounds that it furthers congressional policy (perhaps by improving ICE’s reputation for fairness in the immigrant community) or that it represents what Congress itself would have decided in that case, if it had been able to give the case its attention. The situation with regard to a class of as many as 1.76 million people is altogether different. This is not a matter of granting equity at all, as that concept has historically been understood, but of making law.<sup>394</sup>

The connection between equity and particularity is a longstanding and even, it seems, a necessary or conceptual one.<sup>395</sup> In our legal culture, the dominant understanding of equity derives from Aristotle.<sup>396</sup> In his consideration of justice in Book Five of the *Nicomachean Ethics*, Aristotle argues that “equity” is neither “absolutely the same” as justice nor yet “generically different” from it.<sup>397</sup> Equity, Aristotle says, is better than one kind of justice, but it is also justice itself.<sup>398</sup> What creates the problem of specifying the true relationship between equity and justice “is that all law is universal but about some things it is not possible to make a universal statement which shall be correct.”<sup>399</sup> Law is designed to deal with the general or typical case, and therefore consists for the most part in general statements or rules. But particular cases arise to which the law, in its generality, cannot or should not be applied. Lawmakers, Aristotle says, know that general rules may fail in this way, but they cannot anticipate the future in complete detail.<sup>400</sup> The problem caused by generality need not arise from careless lawmaking, but from the nature of things.

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Zywicki, *supra* note 76, at 12.

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

394. See Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2090 (2008) (outlining “moral arguments” for legalizing the status of DREAMers, but suggesting a solution through legislative action).

395. This is not to say that no “law” can deal with an individual case. An act of Congress (posthumously) made the Marquis de Lafayette a U.S. citizen. See Act of Aug. 6, 2002 Pub. L. No. 107-209, 116 Stat. 931 (conferring honorary citizenship on Lafayette). But as a general matter, “laws” consist of rules, and hence may be applied to more cases than one.

396. See Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 92–95 (1993) (observing that it was Aristotle who made the major contribution to incorporating equity into concepts of justice); Roger A. Shiner, *Aristotle’s Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1251–53 (1994) (suggesting that Aristotle’s account of equity provides us a way to understand equity beyond linking it to gaps in the law to acting as a rectification of law’s misleading universality).

397. ARISTOTLE, *THE NICOMACHEAN ETHICS* 98 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (350 B.C.E.).

398. *Id.*

399. *Id.* at 99.

400. *Id.*

A general law may fail to provide for an unforeseen case either because the conditions for its application have not been met or because, although those conditions have been met, the application of the rule to the particular facts of the case would have an unjust result. Equity steps in “to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality.”<sup>401</sup> Simply following the general legal rule may be just, but “correcting” the legal rule to suit the particular features of a case may be more just still.

Aristotle is describing a dynamic within the idea of justice that drives lawmakers to make legal rules that classify with ever increasing specificity and precision. Lawmakers can shift from rules that impose strict liability for certain conduct to rules that take account of intent, motive, means, or circumstances.<sup>402</sup> The list of mitigating or aggravating factors can be extended indefinitely. At the outermost limit, rules could apply to all conceivably relevant facets of every particular case. But the limit is unattainable, and the drive for justice cannot end in the complete abandonment of general laws.

Furthermore, decisions made solely on a case-by-case basis and without reference to general laws are also liable to be unjust. They are inordinately prone to bias and arbitrariness—vices that generality in the law aims to suppress. Moreover, a legal system that consisted entirely of discretionary, situational judgments about particular cases would leave ordinary citizens at a loss for how to order their conduct or plan their lives—another evil that the generality of law is designed to prevent. And even if a wholly discretionary system routinely produced “correct” results in individual cases, it would entail prohibitive decision-making costs. Thus, the idea of justice creates a counterdrive away from unlimited discretion in particular cases towards the formation of fixed, general rules. The tension in any developed legal system between the need for generality in its rules and the need to secure justice in particular cases cannot be solved perfectly.

Within the traditional law–equity framework, the June 15 nonenforcement decision has the hallmarks of a statement of law, not those

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401. *Id.* The power to “correct” the law is not, however, the power to overturn it. Thus, a court of equity must accept and enforce an unjust law, if the intent of the legislator is plain. As Justice Joseph Story wrote, if a court of equity had the power of “superseding the law . . . it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised.” 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 21 (14th ed. 1918).

402. To take one of Aristotle’s own examples, someone wearing a finger ring whose hand brushes up against another may be held to be guilty of assault with a “weapon,” unless circumstances and intent are taken into account. See Shiner, *supra* note 396, at 1252 & n.30 (citing ARISTOTLE, ARS RHETORICA 1374a32-b2 (W.D. Ross ed., 1959)).



of a judgment in equity.<sup>403</sup> It is general, applying to every member of a class of perhaps 1.76 million people on the basis of a limited number of common characteristics. It requires no searching, individualized evaluation of the merits of particular applicants. All who possess the designated characteristics will qualify. It can hardly be seen as “correcting” a rule that Congress made in the light of an unforeseen contingency. Nor can it be said to be implementing what Congress would have done, had it been aware of how the existing rules of immigration law would apply to this class. It is the amendment of existing law—and so statute-like itself—not a correction that perfects the law.

### C. *Insufficient Resources*

The final type of defense commonly available when the duty of enforcement has been breached is that the agency simply lacked sufficient resources—funding, staffing, or leadership—to discharge its enforcement duty in full. In such cases, the agency would be pleading an excuse: it would be admitting to having failed in its duty but arguing that the responsibility is really that of Congress.

Justice Brandeis’s explanation of this defense can hardly be improved upon:

Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or, because Congress, having created the office, declines to make the indispensable appropriation. Or, because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.<sup>404</sup>

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403. To be sure, the Executive has in the past asserted an “equitable” power to dispense with the statutory immigration law on behalf of a large class of persons, rather than individuals or small groups. But equally, Congress has protested against such actions and, on occasion, severely narrowed the Executive’s discretion. See Cox & Rodriguez, *supra* note 371, at 501–05 (detailing the executive practice of “paroling” refugees into the United States).

404. Myers v. United States, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting). Compare Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (emphasizing that “[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible”).

There is no doubt that ICE, like its predecessor INS, has faced acute resource constraints.<sup>405</sup> The agency has long sought to cope with these limitations by establishing enforcement priorities. In the present Administration, ICE has focused its enforcement efforts on removing illegal immigrants who have committed nonimmigration crimes while in the United States.<sup>406</sup> Correspondingly, the agency has dedicated fewer resources to other forms of enforcement, such as workplace enforcement (a tool used more often in the Bush Administration<sup>407</sup>) or the prosecution of noncriminal visa overstayers.<sup>408</sup> Given the budgetary constraints on the agency, few if any would argue that these priorities were unreasonable, let alone unconstitutional.

The questions of the unreasonableness as opposed to the unconstitutionality of a nonenforcement decision, though related, are distinct. A decision to seek the deportation only of visa overstayers would be an unreasonable and inefficient use of ICE's scarce resources, but arguably not an unconstitutional one, even if it meant that illegal immigrants who had committed serious crimes while in the United States remained here. On the other hand, whether or not judicial review of the action is possible,<sup>409</sup> an enforcement decision to seek the removal only of Haitians, as distinct from members of any other national origins category, we believe would be unconstitutional.<sup>410</sup> So would a decision to remove deportable aliens because they had not contributed to the President's reelection campaign.<sup>411</sup>

A categorical refusal to enforce the removal statutes against any deportable alien—effectively, the adoption of an “open borders” policy—would also, we think, be unconstitutional. Even if enforcement resources were constrained, it would be an obvious refusal to perform the constitutional duty of faithful execution of the laws. Yet the logic of the June 15

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405. See *supra* note 30 and accompanying text.

406. JONES-CORREA, *supra* note 24, at 9–10.

407. Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES, May 29, 2011, [http://www.nytimes.com/2011/05/30/us/politics/30raid.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/05/30/us/politics/30raid.html?pagewanted=all&_r=0).

408. *System for Tracking Visa Overstays Is Almost Ready*, WASH. TIMES, Mar. 6, 2012, <http://www.washingtontimes.com/news/2012/mar/6/system-for-tracking-visa-overstays-is-almost-ready/>.

409. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 492, 497 (1999) (Ginsburg, J., concurring in part and concurring in the judgment) (leaving open the possibility of judicial review of a claim of selective deportation based on an alien's exercise of First Amendment rights).

410. See *Yick Wo v. Hopkins*, 118 U.S. 356, 368–70 (1886) (establishing that the selective enforcement of ordinances against only Chinese immigrants violates “the nature and the theory of our institutions of government” which “do not mean to leave room for the play and action of purely personal and arbitrary power”).

411. See *Bridges v. Wixon*, 326 U.S. 135, 162 (1945) (Murphy, J. concurring) (asserting that “the First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws,” including freedom of speech). *But see Harisiades v. Shaughnessy*, 342 U.S. 580, 591–92 (1952) (upholding over First Amendment objection the deportation of a noncitizen based on his former affiliation with the Communist Party).

nonenforcement decision points to the conclusion that the President may adopt exactly that policy if he wishes. If the President may constitutionally permit 15% of the nation's illegal immigrant population to remain in the United States without fear of removal, why may he not do the same for 50% of that population, or for all of it? True, as long as some funding was available to ICE for enforcement, the President could not claim that an appropriations shortfall justified the *total* cessation of deportation activities. Still, the President could deliberately allocate ICE's resources in such a way as to achieve essentially that result. But if the President can constitutionally implement an open borders policy on his own initiative and without authorization from Congress, what remains of the immigration law? The rationale supporting the June 15 nonenforcement decision can lead to absurdity. The failure of an agency to perform its ordinary enforcement duties may be so unreasonable that it may be considered unconstitutional, notwithstanding limitations on its resources.

Even though the question of whether resource constraints excuse an agency's nonenforcement decisions is almost always one for Congress, large-scale nonenforcement (such as exists here) nonetheless calls for a reasoned public explanation and defense. One has first to consider whether the excuse is factually true or not. If it is not true, the excuse should likely be rejected. But even if the circumstances were as the party offering the excuse claimed, the excuse may still be rejected as flimsy or insufficient. If I seek to excuse my failure to keep my promise to attend your child's birthday party because I was short of cash and could not pay for the taxi fare, you can rightly reject my excuse if you know that I could easily have withdrawn cash from the bank on my way to the taxi stand, or that I spent all the cash I had on an expensive present for myself. The motivation and intent behind nonperformance may also be relevant to its evaluation. To break a promise deliberately is bad enough; to break it out of a desire to cause hurt or hardship is worse.

The June 15 nonenforcement decision purported to be based on budgetary constraints.<sup>412</sup> The President himself defended the decision by arguing that "in the absence of any action from Congress to fix our broken immigration system, what DHS has taken steps to do is focus immigration enforcement resources in the right places."<sup>413</sup> But there are obvious reasons to question the truth of this assertion.

First, the Obama Administration provided no evidence to substantiate its claim of inadequate resources. It gave no estimates of what the cost savings from its initiative would be. Given that it had already, in 2011, publicly declared that any enforcement action against the DREAMers was "low

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412. Miriam Jordan, *Immigration-Policy Details Emerge*, WALL ST. J., Aug. 3, 2012, <http://online.wsj.com/article/SB10000872396390443545504577567441019730890.html>.

413. Obama, *supra* note 54.

priority,”<sup>414</sup> it did nothing to show that the savings from this additional nonenforcement measure would be significant. It did not explain how the resources freed up by the nonenforcement decision would be used to improve ICE’s enforcement efforts in other areas. It did not and probably could not show why the grant of work authorization to the DREAMers would result in cost savings for ICE, rather than in extra costs. Indeed, DHS’s own immigration policy advisers and strategists had found that a “deferred action” program for the DREAMers would “likely be controversial, not to mention expensive.”<sup>415</sup>

Justice Scalia, for one, did not credit the administration’s rationalization for its nonenforcement decision. “The husbanding of scarce enforcement resources,” he wrote in *Arizona*, “can hardly be the justification for this [policy], since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be deducted from immigration enforcement.”<sup>416</sup> Justice Scalia is quickly being proven right. As details of the Administration’s policy implementation emerge, it appears that ICE expects to hire over 1,400 full-time workers, in addition to contract labor, to handle applications.<sup>417</sup>

Furthermore, cost savings alone cannot possibly explain the fact that the contours of the nonenforcement decision dovetailed so neatly with those of the DREAM Act.<sup>418</sup> That could hardly have been a pure coincidence; rather, it was proof by a kind of *res ipsa loquitur* that the Administration’s true purpose was not that of economizing or prioritizing. There is no reason to think that the Administration or ICE considered alternative nonenforcement measures that would not have been so overtly antagonistic to Congress’s choice to reject the DREAM Act, or even a nonenforcement measure that would not have applied to DREAMers who were already subject to removal orders.<sup>419</sup>

414. Robert Pear, *Fewer Youths to be Deported in New Policy*, N.Y. TIMES, Aug. 18, 2011, <http://www.nytimes.com/2011/08/19/us/19immig.html?pagewanted=all> (discussing the new Obama Administration policy that would suspend deportation proceedings for low-priority cases).

415. Memorandum from Denise A. Vanison, Policy & Strategy, U.S. Citizenship & Immigration Servs., et al., *supra* note 39, at 10. The memo also discussed ways of funding such a program, which it acknowledged seemed to require either “a separate appropriation or independent funding stream.” *Id.* at 10–11.

416. *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part).

417. Jordan, *supra* note 412.

418. There are certain differences between the DREAM Act and the nonenforcement decision, though not material ones. For example, the DREAM Act would have applied to those of 35 years of age or under, not those of 30 years or under. DREAM Act of 2011, S. 952, 112th Cong. § 2(b)(1)(F); BATALOVA & MITTELSTADT, *supra* note 12, at 1.

419. For example, the nonenforcement measure applies equally to those immigrants already ordered removed and within the 90-day removal period. See 8 U.S.C. § 1231(a)(1)(A) (Supp. II 2009) (“[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).”).

In short, there are valid reasons to question the truth of the Administration's claim that its June 15 nonenforcement decision was driven by the need to conserve scarce enforcement resources and dedicate them to more urgent priorities. Because the Administration has not indicated how much ICE was spending on the removal of DREAMers as of June 15, it has not shown that nonenforcement against the DREAMers would result in significant savings or achieve significant benefits. Moreover, by creating what amounts to a substantial new program, it has subtracted from the resources available for enforcement. Assuming that the nonenforcement decision will result in cost savings to ICE, the Administration has not shown that those savings will be dedicated to higher priority enforcement activities.<sup>420</sup> So far as we are aware, the Administration has not announced that ICE's (alleged) cost savings from the nonenforcement decision will be applied to (say) the removal of greater numbers of deportable violent offenders from the state and federal prisons in which they are being held.<sup>421</sup>

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420. A simple and schematic illustration may be in order. Suppose that the total population of deportable immigrants is 10,000, of whom 5,000 are DREAMers and 5,000 are criminal aliens. Suppose also that ICE's enforcement budget is \$1,000, and that the cost of proceeding against and deporting a single illegal immigrant is \$1. If ICE used the whole of its budget without distinguishing between the two kinds of deportable immigrants, it would spend \$500 on deporting 500 DREAMers and \$500 in deporting 500 criminals. But assume that ICE had reasonably concluded that the deportation of a criminal created 2 units of value, whereas that of a DREAMer created only 1 unit of value. Then it would be rational for ICE to dedicate the whole of its budget to deporting 1,000 criminals, thus creating 2,000 units of value, rather than to deporting 500 of each kind, with a yield of only 1,500 value units. This appears to be how the Administration would have us think about its action.

But the situation is more complicated. First, DREAMers had been a low enforcement priority for about a year before the June 15 nonenforcement decision. So let us assume that instead of spending \$500 on their deportation, ICE had been spending only \$50. Then the nonenforcement decision would shift \$50 to enforcement against the criminal class, creating a net value gain of only 50 ( $(2 \times 50) - 50$ ), not 500 ( $2,000 - 1,500$ ). Second, assume that the cost of background checks and other expenses related to the "deferred action" program amounted to 10 cents per DREAMer, and that all 5,000 DREAMers applied for that relief. The cost of the new program would then be \$50—a sum equal to the amount that ICE had been spending on enforcement against them. In that case, there would be no additional funding available for enforcement against the criminal class, and so no gain in value. Finally, suppose that 5 DREAMers had outstanding deportation orders against them, and that it would cost only 10 cents to complete the removal of each of them. Nonenforcement against these DREAMers would then make an additional 50 cents available for enforcement against the criminals. But the value of deporting the 5 DREAMers would be 5, whereas dedicating 50 cents more to enforcement against criminals would yield only 1 unit of value.

421. Although the Administration has declared that the removal of aliens convicted of serious crimes is a high priority, there is obviously a significant enforcement shortfall in that and related areas. A recent report by the Inspector General of DHS found that more than 800,000 individuals who had been ordered deported, removed, and excluded are still in the United States. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-13-11 (Revised), IMPROVEMENTS NEEDED FOR SAVE TO ACCURATELY DETERMINE IMMIGRATION STATUS OF INDIVIDUALS ORDERED DEPORTED 1 (2012). Further, DHS had erroneously identified about 12% of these cases (including cases of those with criminal records), as having a lawful immigration status. *Id.* Individuals erroneously verified for benefits included some who had committed felonies ranging from citizenship fraud to aggravated assault. *Id.* One person who had been ordered deported in 2000 after multiple criminal convictions including a weapons offense applied in 2009 for a Transportation Security

Nor has the Administration said why, if that is its purpose, ICE did not seek a supplemental appropriation from Congress to cover the cost of removing such convicted offenders (which in the current political climate would presumably be easy to obtain), instead of choosing not to enforce the law in the DREAMers' case.

Even more importantly, the Administration has not explained why, if enforcement priorities and cost savings dictated its nonenforcement decision, it chose to waive enforcement as against the very class of persons that Congress decided should not receive such relief. In other words, it has not dispelled the inference that its breach of duty was improperly motivated, rather than being the most efficient use of available resources.

We cannot *prove* that the Administration's defense of its nonenforcement decision was pretextual. But it appears to be so, and that appearance will linger for as long as the Administration does not provide a more detailed explanation of how it is using ICE's resources. At the very least, respect for the constitutional mandate to enforce the laws implies that the Executive must shoulder the burden of persuading the public and Congress that a major nonenforcement decision such as this are due to spending constraints and considerations of efficiency; and conclusory statements to that effect, without detailed documentation and careful cost-benefit analysis, do not discharge that burden.<sup>422</sup> At this point, the nonenforcement decision remains an unexcused, and perhaps unconstitutional, breach of the Executive's duty to enforce.

Finally, let us consider the argument that even if the June 15 nonenforcement decision did not result in the dedication of ICE's resources to more important priorities, the President nonetheless had the authority to close down enforcement against the DREAMers simply because he considered those enforcement costs to be money wasted. In other words, suppose that although ICE has adequate resources to bring removal proceedings against DREAMers, the President concludes that the costs of such enforcement are simply not worth it, in the sense that those costs exceed whatever value is created by the prosecutions. This scenario is different from the one which we have been considering, in which appropriations that had been dedicated to enforcement against DREAMers are supposed to have been rededicated to higher value enforcement activities. The difference is akin to that between impoundment—in which appropriated funds are simply

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Administration card granting access to secure areas of transportation facilities and was erroneously confirmed to be in lawful status. *Id.* at 6. ICE finally removed this person in 2012. *Id.* So far as we are aware, the Administration has said nothing about dedicating resources allegedly saved from its DREAMers program to improving enforcement in deporting, or disqualifying from benefits, those under removal orders who have criminal records.

422. As noted earlier, the Obama Administration could adopt a policy of this kind as a matter of self-policing and governmental transparency through an Executive Order, or Congress could impose such a policy by statute. *See supra* note 21 and accompanying text.

not spent on a “wasteful” activity—and reprogramming<sup>423</sup>—in which appropriations originally directed to one purpose are spent on another, more desirable one. Does the President have the constitutional authority to shut down enforcement activities that he considers not “worth it” in that sense?

The answer, we think, is no. The Executive is still duty bound to bring those cases for removal. That duty grows directly out of the original meaning of the Take Care Clause. Congress has articulated the activity that it expects to be prosecuted, and has provided sufficient resources for it to be prosecuted. Congress’s judgments, both as to the nature of the proscribed activity and as to the provision of the means to prosecute it, trump the Executive’s judgment. The essential principle at issue here was confirmed in *TVA v. Hill*,<sup>424</sup> where the Court upheld an injunction against the completion of a nearly finished federal dam because the operation of the dam would endanger a protected species.<sup>425</sup> Plausibly, the survival of the snail darter was simply “not worth” the cost of enjoining the dam, which might have brought substantial benefits to consumers of electricity and on whose construction considerable sums had already been expended.<sup>426</sup> But Congress’s judgment that the survival of the snail darter took priority was definitive.<sup>427</sup> If Congress directs that a particular type of civil enforcement action occur and provides the means to do so, the President may not override that judgment by concluding that the expenditure is wasteful.<sup>428</sup>

#### D. *The Illegal Immigration System: De Facto Delegation*

The President’s refusal to enforce the law raises the question whether the modern administrative state, with the vast and unreviewable discretion it allows to the Executive, is intrinsically inconsistent with the Framers’ intention to create a constitutional order that subordinates the Executive to the law in the domestic arena. That question arises with special intensity in the case of immigration law.

Adam Cox and Cristina Rodriguez have argued that the “rise of *de facto* delegation” has created a situation in which the formal allocation of power between Congress and the President with respect to immigration policy has

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423. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 85 (2005) (defining “reprogramming”).

424. 437 U.S. 153 (1978).

425. *Id.* at 156, 172.

426. The Court duly noted this point. *Id.* at 187 (acknowledging the argument that “in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter”).

427. *Id.* at 194.

428. As the Court said in *Hill*,

[It is] the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws . . . .

*Id.*

come to matter less and less.<sup>429</sup> On the one hand, Congress has formally regulated the admission and removal of noncitizens in great detail, especially with regard to the major categories of family and labor migration.<sup>430</sup> In this sense, they say, immigration law resembles tax law or criminal law more closely than other regulatory areas where Congress has explicitly delegated broad standard-setting power to the Executive.<sup>431</sup> On the other hand, Congress has de facto given the Executive vast discretion to decide whether, whom, and when to deport by making a high number of noncitizens deportable.<sup>432</sup> Further, Congress has magnified this delegation by increasingly subjecting even lawful entrants to deportation for post-entry criminal conduct.<sup>433</sup> Finally, by eliminating earlier avenues for relief from deportation that had existed in the past, Congress has increasingly shifted discretion to the charging phase of the removal process.<sup>434</sup>

Given that roughly 11.5 million noncitizens are present in the country illegally, and given also that only a tiny fraction of that illegal population will ever be placed in removal proceedings due to resource constraints, Cox and Rodriguez argue that the scope for “prosecutorial discretion” or deliberate nonremoval will be vastly increased.<sup>435</sup> Counterintuitively but plausibly, as Congress has made the formal immigration law system more stringent, subjected growing numbers of noncitizens to removal, and eliminated statutory forms of relief, it has also made the system more vulnerable to discretionary executive decision making. Cox and Rodriguez speculate:

Congress has intentionally delegated increasing amounts of immigration authority to executive officials for political reasons. Congress might accrue political benefits from making immigration law on the books ever harsher and bear few of the political costs associated with immigration enforcement efforts that portions of the public might see as excessive . . . .<sup>436</sup>

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429. Cox & Rodriguez, *supra* note 371, at 528–29.

430. *Id.* at 511.

431. *Id.*

432. *Id.* at 512–13.

433. *Id.* at 514.

434. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (“[I]mmigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.” (citation omitted)); *id.* at 1480 (“In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996.” (citations omitted)); *id.* at 1481 (“[R]ecent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.”).

435. Cox & Rodriguez, *supra* note 371, at 513–14.

436. *Id.* at 529.



Congress, in other words, might be deliberately writing stringent immigration laws in the confidence that they would be radically underenforced. And to ensure underenforcement, Congress would deliberately fail to appropriate the funds necessary for enforcers to perform their assigned tasks in anything like an adequate manner.<sup>437</sup> This incongruous system could serve to placate two opposed political constituencies: those hostile to illegal immigration (because the formal laws became harsher) and those favorable to it (because those laws were radically underenforced).<sup>438</sup>

If this account of our immigration system were correct, then the Obama Administration's use of its implicit discretion would appear in a different light: if the Administration seemed to be disregarding constitutionally based rule-of-law requirements, that was only because Congress had enabled, and indeed tempted, it to do so. Well before the June 15 nonenforcement decision, Cox and Rodriguez had observed that "Obama has the power to overhaul the immigration screening system even in the absence of congressional action."<sup>439</sup>

That insight provides the best defense that we can see for the Administration's nonenforcement decision. The Administration could argue that its decision rests on the overall structure of our current immigration law, including the appropriations that Congress has made available for its enforcement. On that view, Congress has implicitly—though not formally—delegated to it an essentially unfettered power to decide "who should or should not be admitted into the country."<sup>440</sup>

Even by the extremely permissive standards of the nondelegation doctrine,<sup>441</sup> however, this would be an extraordinary delegation. It has no "intelligible standard" whatsoever to guide and limit administrative discretion. It would allow an administration lawfully to subvert the very laws that it was charged with enforcing. And it would permit an administration to decide unilaterally, and without regard to standing immigration law, what the nation's demography was to be.

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437. See Motomura, *supra* note 394, at 2049 ("[C]hronic and intentional underenforcement of immigration law has been de facto federal policy for over a century . . ."); *id.* at 2037 ("[D]iscretion seems to be unusually important in immigration law, because unlawful immigrant activity enjoys acceptance in many circles, and because rates of investigation, detection, apprehension, and prosecution are extremely low.").

438. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 71 (contrasting the view of constituencies that claim that federal immigration law is overenforced with those claiming it to be underenforced, and concluding that both critiques "are accurate").

439. Cox & Rodriguez, *supra* note 371, at 464.

440. *De Canas v. Bica*, 424 U.S. 351, 355 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1974 (2011).

441. See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001) (acknowledging the wide outer limits of nondelegation precedents and citing cases to that effect).

What would explain such an incoherent and self-defeating pattern of legislation? There are two separate questions here. First, why would Congress delegate so much discretion to the Executive, while also making detailed policy decisions in some immigration areas itself? Second, when Congress delegates to the Executive in the immigration area, why should it do so *informally* through underfunding, rather than *formally*?

Some political scientists have theorized that Congress's decision when to make policy itself and when to delegate policy making away is equivalent to a firm's make-or-buy decision—in other words, a choice whether to produce a product internally or contract out for its supply.<sup>442</sup> On this view, Congress will tend to make policy itself when doing so maximizes legislators' chances of reelection.<sup>443</sup> So the tax code (like immigration law) contains many detailed provisions that work to the advantage of key constituencies—such as corporations or other well-organized groups seeking special tax breaks.<sup>444</sup> But Congress will also tend to delegate policy making away from itself (or “contract out”) when its own decision making is likely to be inefficient, where it is most prone to logrolling, or least likely to have expertise.<sup>445</sup> Thus, Congress will delegate to the Executive policy-making authority over matters like base closing.<sup>446</sup> By such a delegation, Congress can avoid both the difficulties of negotiating a list of bases to be closed and the blame for closing particular bases; for Congress, these gains outweigh the costs of losing control over the base-selection process. Applying this analysis to the immigration area, it is explicable why Congress should make detailed policy in some areas (such as the grant of visas for skilled employees in high-tech industries), but delegate away other matters (such as the deportation of illegal immigrants) to the Executive.

But why would Congress delegate policy-making authority over deportation informally rather than formally? Perhaps the answer is that if it made a formal delegation, Congress would share more of the blame for the nonremoval of particular groups of aliens than if it made an informal delegation. If the President acts only on the basis of an informal delegation, Congress can more successfully evade responsibility for an unpopular exercise of presidential discretion (although it will also not be positioned to claim any credit for a popular one) by claiming it had nothing to do with it.

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442. For discussion and application of the theory of the firm to Congress, see David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947, 960–67 (1999). See also Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 *J.L. ECON. & ORG.* 213, 231–38 (1990); Terry M. Moe, *The New Economics of Organization*, 28 *AM. J. POL. SCI.* 739, 765–72 (1984).

443. Epstein & O'Halloran, *supra* note 442, at 962.

444. See, e.g., 26 U.S.C. § 11 (Supp. I 2009) (containing portions of tax code dealing with corporate income tax and its exceptions).

445. Epstein & O'Halloran, *supra* note 442, at 965.

446. See *Dalton v. Specter*, 511 U.S. 462, 464–65 (1994) (describing the congressional delegation of base closing authority to both a special commission and the President).

True, Congress might be tempted to formalize the President's discretionary power because that would expose him even more to the risk of blame in the highly negative area of illegal immigration. But in exposing the President to heightened risk, it could be doing the same to itself.

Thus, the current structure of our immigration law might not be as incoherent as it seems, at least as a matter of meeting electoral incentives. Indeed, it might also serve our first-order national goals of immigration policy, even if not well designed to do so.<sup>447</sup> But a *de facto* delegation system of immigration law would come with substantial costs. Chief among these costs is the damage that such a system would do to the republican character of our government. As we discussed above, the Framers sought to solve the problem of the Executive by giving it broad but undefined powers to act in emergencies in which the life or security of the nation was at risk, but correspondingly, by subordinating its powers of action in the domestic sphere to the will of Congress as declared in statutory law.<sup>448</sup> The President might behave like a King of England in an international crisis, but in ordinary, domestic matters he was little more than a Governor of New York. That essential balance would be upset if Congress gave the Executive the power to overturn, at will, the statutes that it had enacted. What would the enactment of statutory law *mean* if Congress also consciously enabled and encouraged the Executive *not* to enforce it? The essential purpose of the legislative process created by the Framers—that fundamental policy decisions on matters of vital domestic interest should be made by the nation's elected representatives on the basis of public reason and the reconciliation of different interests—would be defeated. And what would become of public respect for law and government if acts of Congress were perceived as utterly ineffectual, and the Executive were thought to be blatantly disregarding them? In these circumstances, the citizenry's regard for legality and customary law compliance, on which republican government finally depends, would surely wither.<sup>449</sup> From any traditional separation of powers

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447. On the relationship between the first-order goals of immigration policy and the second-order institutional design features used to achieve those goals, see Cox & Rodríguez, *supra* note 371, at 542–43. In practice, our current institutional arrangements might function very much like a system in which the Executive was vested with broad *but formalized* discretionary powers to remove unwanted immigrants while admitting desirable ones, and used those powers in furtherance of national immigration goals.

448. *See supra* Part III.

449. Consider a very simple analogy: Suppose the Legislature sets the speed limit at 60 m.p.h., but does not cover enforcement costs fully. The police might quietly decide to enforce a 70-m.p.h. limit, and disregard drivers traveling between 60 and 70 m.p.h. If knowledge of this policy became widespread, it would likely cause many drivers who previously had been law compliant to drive at up to 70 m.p.h. That effect alone would likely damage the public's respect for the law and weaken its habits of compliance. Imagine next that the police commissioner made a formal, public announcement that motorists driving illegally but below 70 m.p.h. would not be stopped and charged. Not only would that announcement likely encourage more noncompliance, but it could do considerably more harm to the public's regard for the law.

perspective, a legal regime that invites the President to openly refuse to enforce the law in hundreds of thousands of cases is badly in need of repair.

## V. Conclusion

The common idea that the President has a positive constitutional authority to decide not to enforce the civil law is mistaken. The Take Care Clause, coupled with related constitutional provisions, establishes that the President has a duty to enforce the laws. The Constitution confers no express or implied power or authority not to enforce the laws. On the face of it, the Obama Administration breached its constitutional duty by refusing to enforce the immigration law in as many as 1.7 million cases.

The Administration cannot rely on a claim of presidential prerogative to justify a decision not to enforce the law. American constitutional practice, coupled with the Supreme Court's case law, does indeed suggest that there is a presidential prerogative. But if so, that prerogative is one granted *by the Constitution*; it is not *extraconstitutional*. And it is restricted to action for the sake of national security in times of war or sudden crisis. Presidential prerogative does not justify a refusal to enforce the immigration laws in ordinary, noncritical circumstances. Rather, the Constitution tries to solve the problem of reconciling the need for a strong executive with a republican form of government by giving the President broad, undefined powers in the international sphere but circumscribing his power closely in domestic matters.

Just as in common law, a range of defenses can be offered for the Administration's apparent breach of duty here. The main justifications or excuses that can be used to defend a breach of the duty of faithful execution fall into four categories: that the law whose nonenforcement is at issue is unconstitutional; that enforcement in the particular circumstances would interfere materially with the exercise of another constitutional power of the President (such as that over foreign affairs and national security); that equity in individual cases warrants forbearance in enforcement; and most importantly here, that the enforcing agency lacks sufficient resources for complete enforcement and must therefore use its best judgment to allocate the resources it has. Despite its claims to the contrary, the Administration's nonenforcement decision with regard to the DREAMers does not appear to fall within any of these categories, including the last. Thus it stands as an unexcused breach of duty.

The Administration's decision is the almost inevitable outcome of what has been described as a *de facto* delegation system that Congress has established in the immigration area. It can be argued that the combination of a massive illegal immigrant population, extremely stringent laws regarding deportability, and inadequate resourcing for enforcement gives the President virtually unfettered control to decide who remains in the country and who is removed. If this understanding of our immigration law system is correct,

then that system poses a threat to the traditional conception of the rule of law and its attempt to control arbitrary executive action. It invites a President to create operative, functional “law” covering hundreds of thousands of cases that overtly contravenes statutory law.

The conception of executive power that we have defended is fully consistent with the attribution to the President of broad constitutional powers over foreign affairs, national security, and military policy. The Framers intended to give Congress the dominant role in regulating domestic matters, while giving the Presidency, with its distinctive institutional qualities of energy, secrecy, speed, and unity of purpose, the primary responsibility for foreign affairs. Although immigration straddles domestic and foreign policy, Congress, not the President, has the controlling authority in that area.