

The DACA Case: Agencies’ “Square Corners” and Reliance Interests in Immigration Law

*Peter Margulies**

Stewardship has long been a trope in U.S. law and governance. The Framers spoke of the “trust” that the people reposed in their government.¹ In immigration cases, the Supreme Court has on occasion curbed state enforcement, viewing states as too prone to “sudden irritation” to adequately steward abiding national interests.² Holding in *Department of Homeland Security v. Regents of the Univ. of California* that the U.S. Department of Homeland Security (DHS) under President Trump had failed to engage in “reasoned decisionmaking” when it rescinded the Deferred Action for Childhood Arrivals (DACA) program, the Court refined this stewardship paradigm.³

Chief Justice John Roberts, writing for the Court in *Regents*, noted that in announcing DACA, President Barack Obama’s then–DHS secretary, Janet Napolitano, had provided two things of value to foreign nationals who came to the United States as children with no lawful immigration status: (1) a reprieve from deportation, called “removal” under the Immigration and Nationality Act (INA); and (2) eligibility for various benefits, including work permits.⁴ According to Roberts,

*Professor of Law, Roger Williams University School of Law; B.A., Colgate University; J.D., Columbia Law School.

¹ See The Federalist No. 23 at 153–54 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Andrew Kent, Ethan J. Leib & Jed H. Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2119 (2019) (discussing the Constitution’s Take Care Clause as forging a system of laws as a trust that the president must protect).

² See *Arizona v. United States*, 567 U.S. 387, 395 (2012) (citing The Federalist No. 3 at 44 (John Jay) (Clinton Rossiter ed., 1961) (cited by Supreme Court in later edition)).

³ 140 S. Ct. 1891 (2020).

⁴ Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar et al., Acting Comm’r, U.S. Cust. & Border Prot., et al. (June 15, 2012), <https://bit.ly/30wLkPh> [hereinafter Napolitano Memorandum].

DHS had failed to consider whether DACA recipients' participation in employment, education, medical treatment, military service, or family life formed expectations—"reliance interests" in legal parlance—that the agency had to accommodate. Moreover, DHS had failed to consider alternatives to DACA's total rescission, such as allowing a longer wind-down of the program or keeping the reprieve from removal but ending eligibility for benefits.

The stewardship outlined in Roberts's opinion is deliberative, not substantive: it is about process, not outcomes. Roberts conceded that DHS had the power to end DACA, which DHS, based on the conclusion of Attorney General Jeff Sessions, had in September 2017 found to be unlawful.⁵ DHS could have justified the rescission by stating in writing that enforcing the INA outweighed recipients' reliance interests. However, in ending the program, Roberts explained, an agency had to at least address the interests of stakeholders as part of "the agency's job" and its "responsibility."⁶ Roberts did not mention stewardship per se in his opinion. Nevertheless, framing deliberation as a core component of "responsibility" for a "job" casts DHS's failure in stewardship terms. A sound steward may safeguard a trust by choosing any one of several paths. But stewardship cannot be random or heedless. It requires appropriate consideration of the risks and benefits of each choice.

The model of stewardship reflected in Roberts's opinion in *Regents* has two prongs. The first is consistency: a good steward will deliberate carefully before taking action and stick with the reasons that drove her initial decision rather than dangle a string of shifting justifications before befuddled stakeholders. In addition, a good steward will balance the equities of all parties and of the public.⁷

⁵ Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament et al., Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), <https://bit.ly/2DJJpDy> [hereinafter Duke Memorandum]; Letter from Jefferson B. Sessions III, Att'y General of the United States, to Elaine Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017), <https://bit.ly/3kl3zz1> [hereinafter Sessions Letter].

⁶ 140 S. Ct. at 1908–09.

⁷ See *Nken v. Holder*, 556 U.S. 418, 426, 434 (2009) (noting that stay of removal pending appeal hinges not merely on merits of case, but also on hardship to the applicant, the countervailing factor of hardship to other parties, and consideration of the public interest); see also *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (noting factors for preliminary injunction); see generally Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*,

To promote consistency in *Regents*, Roberts invoked an administrative law standby, the *Chenery* doctrine, which holds that an agency explaining a decision gets only one bite at the apple.⁸ Courts look at how the agency explained its action when the action was taken, not how the agency explains it later, once litigation about the action is underway. Reading *Chenery* broadly, Roberts was able to force DHS off its most favored turf. DHS had to stand or fall with Acting Secretary Duke's stark conclusion in 2017 that DACA was unlawful. Because of Roberts's broad reading of *Chenery* and its "one bite at the apple" rule, Roberts simply refused to consider the more comprehensive 2018 justification by Duke's successor as acting secretary, Kirstjen Nielsen, that DACA was flawed from both a legal and a policy perspective.⁹ But, as Justice Brett Kavanaugh noted in his dissent, Roberts's broad reading of *Chenery* may be a stretch. The *Chenery* doctrine is most effective in stopping agency lawyers in litigation who would otherwise invent new rationales from scratch.¹⁰ Acting Secretary Nielsen's 2018 justification came from a responsible agency official—one asked to create that filing by a district judge, no less—not a desperate lawyer in the throes of litigation.

Complementing Justice Kavanaugh's critique of the consistency prong in Roberts's opinion, Justice Clarence Thomas argued that Roberts's stress on recipients' reliance interests ignored the INA's structure. According to Justice Thomas, the INA is a "carefully crafted scheme" that specifically enumerates classes of people entitled legally to enter the country, including close relatives of citizens and current lawful permanent residents (LPRs), skilled employees, and refugees,

94 B.U. L. Rev. 105 (2014) (discussing stewardship and discretion in immigration law administration); Peter Margulies, Rescinding Inclusion in the Administrative State: Adjudicating DACA, the Census, and the Military's Transgender Policy, 71 Fla. L. Rev. 1429, 1467–74 (2019) (discussing DACA rescission).

⁸ 140 S. Ct. at 1909 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

⁹ Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (June 22, 2018), <https://bit.ly/33vMMDC> [hereinafter Nielsen Memorandum]. After the Supreme Court's decision in *Regents*, current DHS Acting Secretary Chad Wolf rescinded both the Duke Memorandum and the Nielsen Memorandum, and informed the public that he was considering rescinding the Napolitano Memorandum that had announced DACA. Acting Secretary Wolf took a number of interim steps, including barring new DACA applications. See Chad F. Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec., Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (July 28, 2020), <https://bit.ly/3a3cG2P>.

¹⁰ 140 S. Ct. at 1934–35 (Kavanaugh, J., dissenting).

as well as nonimmigrants such as students and tourists.¹¹ Other foreign nationals seeking to enter or remain in the United States often lack either a visa that confers a lawful status or any reasonable path for gaining a lawful status. Taking the INA's structure seriously, immigration officials should not second-guess Congress's methodical distinction between foreign nationals who can receive a lawful status and those without a reasonable chance for that status. Nor should immigration officials grant crucial components of lawful status, such as a reprieve from removal or eligibility for a work permit, to a large group of otherwise removable foreign nationals. As a "sweeping nonenforcement program," DACA undermined the INA's structural integrity, in much the same way as the Obama administration's Deferred Action for Parents of Americans (DAPA) program, which had never gone into operation because courts had enjoined it as exceeding the power that Congress had delegated to immigration officials.¹²

While the question is a close one, ultimately Chief Justice Roberts's vision of deliberative stewardship best fits history and practice regarding prospective Americans. Roberts's emphasis on consistency echoes his rejection in *Department of Commerce v. New York* of the Commerce Department's "pretextual" justification for adding a citizenship question to the census.¹³ Moreover, Roberts's analysis is compatible with Thomas's structural approach. According to Roberts, DHS could readily have reached its desired outcome of ending DACA. To do so, DHS merely had to expressly balance DACA recipients' reliance interests, the public interest, and enforcement of the INA. Given the interests at stake, that balancing is a reasonable expectation that leaves the INA's structure intact.

This article, like Gaul, is divided into three parts. Part I provides background on DACA and DAPA, including the courts' reliance on a structural argument in their rejection of DAPA, before discussing the Trump administration's effort to rescind DACA. Part II outlines the history of an alternative to the structural argument—a stewardship model that this article traces back to the Founding era. Part III examines Chief Justice Roberts's majority opinion in *Regents* in light of the stewardship model and contrasts Roberts's analysis with the insightful arguments made in dissent by Justices Thomas and Kavanaugh.

¹¹ *Id.* at 1930 (Thomas, J., dissenting).

¹² *Id.* at 1923–26, 1930.

¹³ 139 S. Ct. 2551 (2019).

I. President Obama’s Immigration Initiatives and President Trump’s Response: DACA, DAPA, and the Structure of the INA

DACA was a presidential response to a legislative logjam. As a U.S. senator, Barack Obama wrote about meeting a third-grade student, Cristina, with an uncertain immigration status. That encounter, at which Cristina asked for then-Senator Obama’s autograph, prompted Obama to reflect that the most urgent risk was not being “overrun by those who do not look like us,” but failing to “recognize the humanity of Cristina and her family.”¹⁴ As president, Obama failed to persuade Congress to act on this sentiment by passing the DREAM Act, which would have provided legal immigration status to noncitizens who arrived in the United States as children.¹⁵ Since the overwhelming majority of noncitizens in this category did not have a lawful immigration status, Congress’s failure to act meant that noncitizens in this group faced removal. Pondering the human predicament that Congress had not resolved, Obama took executive action through DHS. President Obama later announced a larger immigration initiative: DAPA. Finally, in 2017, DHS under the Trump administration announced that it was rescinding DACA.

A. DACA’s Criteria

Following President Obama’s lead, then–DHS Secretary Janet Napolitano issued a memorandum announcing DACA on June 15, 2012. DACA did not confer a lawful immigration status on the “Dreamers” who were children when they entered the United States; only Congress can establish specific categories that lead to lawful permanent resident (LPR) status or various temporary nonimmigrant forms of status, such as students, tourists, or temporary workers. Rather, DACA granted eligible foreign nationals a renewable reprieve from deportation (called “removal” under current immigration laws) and permission to apply for a work permit.¹⁶

¹⁴ Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 318 (2006).

¹⁵ See *Development, Relief, and Education for Alien Minors Act*, S. 1291, 107th Cong. (2001) (as reintroduced 2011).

¹⁶ See Napolitano Memorandum, *supra* note 4. Compare Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 *Tex. L. Rev.* 781, 856 (2013) (asserting that DACA went beyond the scope of delegation), with Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* 54–59 (2015) (arguing that the ambit of discretion under INA included large-scale programs such as DACA).

To be eligible, an applicant had to have come to the United States before reaching the age of 16. In addition, to ensure that applicants had sustained ties to this country, the applicant had to have resided continuously in the United States for at least five years before June 15, 2012, and be a resident of the United States on that date. Targeting DACA's benefits to those who had pursued an education or service, an applicant had to be currently enrolled in school, have received a high school diploma or general education development (GED) certificate, or be an honorably discharged veteran of the U.S. Armed Forces. To winnow out foreign nationals who had engaged in crime, Napolitano also ruled out any applicant who had a felony or "significant misdemeanor" conviction on her record or multiple misdemeanor convictions, or in any other way might threaten national security or public safety. Finally, to keep the program manageable and focused on young people who had not yet had a chance to build their lives, applicants could be no more than 30 years old.¹⁷

B. An Attempt to Build on DACA: DAPA's Introduction and Chilly Reception in the Courts

Following up on DACA and responding to continued inaction by Congress, President Obama sought additional programs to aid undocumented foreign nationals. In November 2014, DHS Secretary Jeh Johnson, Napolitano's successor, announced the Deferred Action for Parents of Americans (DAPA) program. DAPA extended DACA-style treatment—a two-year renewable reprieve from removal and eligibility for a work permit—to a much larger group: parents of U.S. citizens.¹⁸

¹⁷ DHS also classified DACA recipients as "lawfully present" and thus eligible for driver's licenses.

¹⁸ See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs, Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., 3, 5 (Nov. 20, 2014); Memorandum from Karl R. Thompson, Prip'l Dep'y Asst. Att'y Gen., Off. of Legal Couns., The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others (Nov. 19, 2014), <https://bit.ly/3gu7F5L> [hereinafter Thompson Memorandum]. The Fifth Circuit ultimately held that DAPA went beyond Congress's delegation of power to the executive branch under the INA. See *Texas v. United States*, 809 F.3d 134, 180 (5th Cir. 2015), *aff'd* by an equally divided Court, 136 S. Ct. 2271 (2016); cf. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 *Tex. Rev. L. & Pol.* 213, 284 (2015)

The Justice Department's Office of Legal Counsel (OLC) estimated that over four million undocumented foreign nationals—roughly 40 percent of the United States's undocumented population—would be eligible. Although some DAPA-eligible persons had a theoretical path to acquiring LPR status because their children were U.S. citizens, in most cases that path would have been very difficult.¹⁹

In challenges to DAPA brought by states, including Texas, the Fifth Circuit held that deferred action of DAPA's size and scope conflicted with the INA's framework.²⁰ Its analysis applied most clearly to DAPA's grant of eligibility for work permits and other benefits. While the government had some discretion in merely deciding not to remove foreign nationals, its decision to grant the "benefits of lawful presence" to a large group of undocumented noncitizens clashed

(arguing that DAPA exceeded presidential power). The author of this article served as cocounsel for amici curiae at all phases of the *Texas* litigation, including proceedings before the Supreme Court, arguing that DAPA clashed with the structure and logic of the INA. See Brief for Former Homeland Security, Justice, and State Department Officials as Amici Curiae Supporting Respondents at 2, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674). In lower courts, the author served as cocounsel with Ilya Shapiro of the Cato Institute and Josh Blackman of South Texas College of Law, along with Leif Olson of the Olson Law Firm. Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute and Law Professors, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 14-254), <https://bit.ly/3a1FRmG>.

¹⁹ See 8 U.S.C. § 1151(b)(2)(A)(i) (requiring that a U.S. citizen be at least 21 years old to sponsor a parent for an immigrant visa); see also Thompson Memorandum, *supra* note 18, at 29 n.14 (conceding that many DAPA recipients would "need to leave the country to obtain a visa at a U.S. consulate abroad"; because of some period of unlawful presence in the United States, a DAPA recipient would then "in most instances" be subject to either a 3- or 10-year statutory bar on reentry into the United States, requiring her to wait outside the United States "for the duration of the bar").

²⁰ *Texas*, 809 F.3d at 180. For commentary on DAPA, compare Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *Yale L.J.* 104, 144–51 (2015) (discussing rationale for DAPA based on consistency with the INA, while also suggesting that a better rationale would look to Congress and the president as coprincipals in crafting immigration law), and Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 *Geo. L.J.* 1, 57–61 (2019) (suggesting that the Take Care Clause provided authority for DAPA), with Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 *Am. U. L. Rev.* 1183, 1244–52 (2015) (arguing that DAPA exceeded power Congress had delegated to the executive branch), and Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 *Vand. L. Rev.* 671, 674–75 (2014) (asserting that the Constitution curbs president's power to decline to enforce the law).

with the INA.²¹ In an earlier decision denying a stay of the district court's preliminary injunction against DAPA's operation, the Fifth Circuit explained that the INA included precise categories of foreign nationals allowed to enter or remain in the United States.²² According to the Fifth Circuit, Congress's enumeration of "narrow classes" of foreign nationals allowed to enter and remain and a large residual group subject to removal served an important purpose in Congress's plan: it protected the jobs of U.S. citizen and LPR workers.²³ The court reasoned that, from Congress's perspective, dramatically expanding the pool of foreign nationals eligible for employment could cloud the jobs outlook for citizens and LPRs.

To address this concern, the Fifth Circuit explained, Congress and immigration officials had limited the scale and scope of deferred action. Grants of deferred action have typically served as "bridges" to a lawful status or have entailed "country-specific" responses to war, political turmoil, or natural disasters such as hurricanes and earthquakes. Deferred action is also available in a small number of cases involving hardships, such as extreme youth, sickness, or old age. In light of the INA's detailed framework, it was unlikely that Congress, without saying so in the law, had *also* given immigration officials sweeping power to grant deferred action to millions of otherwise removable noncitizens. As Justice Antonin Scalia said, Congress does not "hide elephants in mouseholes."²⁴ Based on this analysis, the Fifth Circuit found that DAPA exceeded executive power under the immigration laws, and the Supreme Court affirmed that decision by an equally divided 4-4 vote after Justice Scalia's passing.

C. DACA's Rescission under the Trump Administration

Although DAPA never went into effect, DACA was in full swing through the remainder of the Obama administration and the first months of the Trump presidency. In the summer of 2017, however,

²¹ Texas, 809 F.3d at 180 (noting tension with statutory scheme).

²² Texas v. United States, 787 F.3d 733, 759–61 (5th Cir. 2015).

²³ Texas, 809 F.3d at 181 (remarking that "a primary purpose in restricting immigration is to preserve jobs" for U.S. citizens) (citation omitted). But see Ilya Somin, *Free to Move: Foot Voting, Migration, and Political Freedom* (2020) (arguing that immigration enhances employment prospects for citizens and lawful residents).

²⁴ Texas, 787 F.3d at 760 n.86 (citing *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)).

a number of states that had sued to stop DAPA, led by Texas, wrote a letter to the Trump administration arguing that DACA was illegal for the same structural reasons that the Fifth Circuit had cited in affirming the preliminary injunction against DAPA. The states threatened a lawsuit against DACA. In September 2017, Attorney General Jeff Sessions wrote a letter asserting that DACA also lacked “proper statutory authority” and thus was an “unconstitutional” exercise of executive power, citing the Fifth Circuit’s DAPA decision.²⁵ Acting DHS Secretary Elaine Duke followed up with a memorandum that announced DHS’s intention to rescind the program, referring to the stark legal conclusion in Sessions’s letter and finding, without further explanation, that DACA was illegal.

Secretary Duke did not summarily revoke DACA’s terms for recipients. In a nod to the “complexities . . . [of] winding down the program,” DHS agreed to process all initial applications then in the pipeline and all renewal requests from recipients whose two-year term would expire by March 5, 2018.²⁶ Since Chief Justice Roberts highlighted the choices that DHS’s wind-down entailed and the lack of explanation for those choices, further detail is useful.

Under Duke’s rescission plan, DHS would not accept new DACA applications after the issuance of her memorandum and the group of some 700,000 DACA recipients would lose benefits on a staggered basis, starting on March 6, 2018, with *all* benefits terminating by March 6, 2020. As an illustration, consider a DACA recipient whose two-year period of participation in the program was due to terminate on March 6, 2018. The recipient hoped to renew her participation for an additional two-year period. Renewal was crucial, because the recipient had started a four-year undergraduate college program in September 2016, planning to major in computer science. If all went according to plan, the recipient would graduate from college in May 2020. Duke’s wind-down would have changed those plans, because it barred renewals for periods of participation that expired after March 5, 2018. Under Duke’s wind-down, the recipient would lose DACA almost two years into her undergraduate program, with slightly over two years remaining before she was due to obtain her degree.

²⁵ Sessions Letter, *supra* note 5. The Fifth Circuit did not discuss DAPA’s constitutionality, since the court held that DAPA was invalid on statutory grounds, making resolution of the constitutional issue unnecessary.

²⁶ Duke Memorandum, *supra* note 5.

A number of courts enjoined the DACA rescission within months of its issuance, holding that Secretary Duke's explanation for the rescission was insufficient.²⁷ One court required DHS to submit a more detailed explanation.²⁸ In June 2018, new Acting Secretary Kirstjen Nielsen did so, including both legal and policy arguments. In her legal discussion, Nielsen affirmed Attorney General Sessions's conclusion that DACA was unlawful in light of the Fifth Circuit's DAPA ruling. Citing the logic and structure of the INA discussed earlier, Nielsen explained that the Fifth Circuit had held that granting deferred action to a large group of otherwise removable foreign nationals was "contrary to the statutory scheme" of specific forms of legal status and a residual category of foreign nationals subject to removal.

In her policy discussion, Nielsen again cited the structural account of the INA to pinpoint what she termed "serious doubts" about DACA's lawfulness. According to Nielsen, it was reasonable to rescind a policy in the face of such doubts, rather than maintain it in the face of legal challenges from states. Nielsen added a related policy concern that in her view Congress, not the executive, should authorize programs as extensive as DACA, thereby providing more certainty and predictability than the executive branch could offer. Nielsen also articulated a general preference in administrative trade-craft for case-by-case determinations about deferred action, not the sweeping criteria that DACA entailed. In addition, Nielsen contended that a program such as DACA would send confusing signals about the government's commitment to enforcing Congress's scheme, especially given what Nielsen called "unacceptably high levels" of unlawful immigration.

Finally, Nielsen discounted the expectations of DACA recipients that they would be able to stay in the United States or at least complete projects here, such as courses of study or medical treatment. She observed that DACA was always intended to be temporary. Reinforcing her denigration of recipients' reliance interests, Nielsen stressed that Obama administration officials, when implementing DACA,

²⁷ See *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 505–10 (9th Cir. 2018), *aff'd*, 140 S. Ct. 1891 (2020); *Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); *NAACP v. Trump*, 298 F. Supp. 3d 209, 237–43 (D.D.C. 2018) (NAACP I); see also *NAACP v. Trump*, 315 F. Supp. 3d 457, 467–73 (D.D.C. 2018) (NAACP II) (finding new explanation by then-Acting DHS Secretary Nielsen inadequate).

²⁸ See NAACP I, 298 F. Supp. 3d at 245.

had expressly refused to grant recipients any enforceable legal rights in DACA's continuation. In any case, Nielsen concluded, in the absence of congressional approval for DACA, the erosion of the INA's structure caused by enabling the "continued presence" of a large group of foreign nationals without a lawful status outweighed any reliance interests that the program may have instilled.²⁹

While lower courts gave the DACA rescission an unfavorable reception, their rationales were unpersuasive. In an illustrative example, the Ninth Circuit minimized both the structural concerns that had driven the Fifth Circuit to hold that DAPA was unlawful and the relevance of those concerns to DACA.³⁰ The Ninth Circuit analogized DACA to earlier uses of deferred action, failing to acknowledge that those earlier occasions encompassed either a bridge to a legal status or a response to hardship such as extreme youth, age, or infirmity. DACA failed to fit the "bridge" category; the program was beneficial to recipients precisely because they had no reasonably available path to a legal status. Taking the broadest possible view of the "hardship" category, DACA barely fit. DACA recipients came to the United States as children, and thus had something in common with past deferred action recipients who received benefits because of their youth. DACA recipients are a varied group, however, including some people as old as 29 who can still qualify for the program. If DACA's dimensions failed to fit either the "bridge" or "hardship" categories, the program conflicted with the INA's framework.

The Ninth Circuit and other courts failed to acknowledge the scope of this structural problem, let alone resolve it. As of June 2020, the key question was whether the Supreme Court would find a more satisfying approach to the difficult issues posed by the Trump administration's attempt to rescind DACA.

II. Stewardship and Prospective Americans

As an alternative to the structural analysis outlined above and in Justice Thomas's *Regents* dissent, consider an approach based on stewardship. As I conceive it, stewardship is not a license for the free-floating exercise of presidential power; instead it resides in the second category of Justice Robert Jackson's *Youngstown* concurrence,

²⁹ See Nielsen Memorandum, *supra* note 9, at 2–3.

³⁰ See *Regents*, 908 F.3d at 505–10.

as a gap-filler in cases of statutory silence.³¹ From the Founding era, Congress and the public have expected that presidents will assume responsibility for the welfare of refugees and other prospective Americans imperiled by hostile nonfederal sovereigns. In that sense, deferred action is part of the foreign affairs toolkit. As described by the Supreme Court in previous decisions, immigration officials' "deferred action" in lieu of removal can spring from this stewardship rationale.³² Indeed, President Obama's rationale for DACA entailed similar reasoning. Chief Justice Roberts's opinion in *Regents* suggests that once the executive branch has chosen to offer such protection, officials must deliberate soundly about the reasons for ending it.

A. The Framers, Historical Practice, and Stewardship's Central Values

The Framers were familiar with stewardship and similar concepts such as the role of the fiduciary in assuming responsibility for others. In Federalist No. 23, Alexander Hamilton analogized government to a private fiduciary, urging that "government ought to be clothed with all the powers requisite to complete execution of its trust."³³ Consistency is a watchword of the stewardship envisioned by the Framers, while volatility is its antithesis.

For Hamilton, consistency was built into the virtues of the presidency, including decisiveness. The Framers sought a Constitution with a strong federal government in part to ensure that the nation spoke with "one voice" in world affairs, instead of shifting between

³¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *id.* at 610–11 (Frankfurter, J., concurring) (asserting that legislative acquiescence should prompt judicial deference); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding presidential claims settlement as reflecting longstanding practice in which Congress has acquiesced); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv. L. Rev.* 689 (2008) (analyzing *Youngstown's* implications); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 411, 415 (2012); Brett M. Kavanaugh, *Congress and the President in Wartime*, *Lawfare* (blog), Nov. 29, 2017, reviewing David Barron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (2016), <https://bit.ly/2XzFMLv>.

³² See *Arizona*, 567 U.S. at 408–09 (2012) (warning that overzealous immigration enforcement by the several states could undermine federal decisions to extend consideration to undocumented foreign nationals in the United States who were "college student[s]" or had some other functional tie to the country).

³³ See *The Federalist* No. 23, *supra* note 1, at 153–54; see also Kent et al., *supra* note 1, at 2130 (discussing the president's oath of office and the Constitution's Take Care Clause, which both commit the president to faithful execution of the laws of the United States).

the multiplicity of agendas that might drive individual states within the new republic.³⁴ Indeed, in *Rutgers v. Waddington*, a celebrated case prior to the Constitution's enactment, Hamilton persuaded a New York court to look to the law of nations as a guide in a property dispute in which New York law appeared to conflict with the treaty between the United States and Britain that concluded the Revolutionary War.³⁵ Judged from a stewardship perspective, consistency over time yields the same virtues as decisiveness in the executive branch or a single voice in a nation's foreign relations.

Equitable balancing is also central to deliberative stewardship. A fiduciary exercising sound stewardship will rarely if ever consider just one factor. Instead, the steward will discern how various factors interact. For example, in the law of remedies, courts address the "balance of hardships" among the parties, as well as the public interest. In some cases, equity will require a "fine adjustment" among competing interests, which the judge should analyze in crafting remedies.³⁶

Consider Chief Justice Roberts's analysis in *Nken v. Holder*. There, Roberts outlined the test for a stay pending appeal of a removal

³⁴ *Arizona*, 567 U.S. at 409.

³⁵ N.Y. Mayor's Ct. 1784, reprinted in 1 *The Law Practice of Hamilton: Documents and Commentary* 393, 405 (Julius Goebel Jr. ed., 1964) (explaining that, because of logic of federal system established by Articles of Confederation, each of the several states must be bound by international law when conflicts arise between any one state's law and international law, and warning of the "confusion" that would arise "if each separate state should arrogate to itself a right of changing at pleasure" precepts of the law of nations). On the importance of the *Rutgers* decision to U.S. foreign relations law and the evolving institution of judicial review, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, 193–99 (2005); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 963–66 (2010). Along these lines, provisions in the Constitution and the Judiciary Act of 1789 stemmed from the Framers' concerns that individual states were failing to punish violations of international law, including violations of the principle of diplomatic immunity. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–18 (2004).

³⁶ See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (noting that "the qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs"); see also *Winter v. NRDC*, 555 U.S. 7, 24–26 (2008) (holding that in issuing and affirming injunction against navy training exercises, lower courts had failed to adequately take into account public interest served by the exercises); but see Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 Va. L. Rev. 485, 513–20 (2010) (criticizing *Winter's* reading of equitable balancing as not giving sufficient weight to Congress's plan).

order—a judicial variant of the reprieve prong of DACA.³⁷ Roberts wrote that a judge can consider whether removal would result in irreparable harm and whether the “balance of hardships” and the public interest favored the applicant for a stay. A court must determine whether a noncitizen’s removal prior to full adjudication of her appeal would unduly impede her ability to appeal and thus relegate appellate review to an “idle ceremony.”³⁸ Impeding a court’s chance to consider a colorable claim for relief on appeal injures the applicant for a stay, but also adversely affects the public interest in a properly functioning means of appellate review. Conversely, an appellate court should also determine whether a stay would injure the public interest served by efficient enforcement of immigration law.

Weighing of the public interest has also figured in executive branch decisions to provide assistance to prospective Americans. Before DACA, examples of practice in this vein started with a cautionary counter example during the John Adams administration and proceeded through President Theodore Roosevelt’s intervention in the San Francisco school crisis of 1906–1907. In each case, a president either earned scorn for failing to help or acted decisively to intervene.

In the first example—a cautionary tale of stewardship’s absence—President John Adams infuriated both Congress and the public by his delivery to British custody of Thomas Nash, who claimed to be a U.S. citizen named Jonathan Robbins. Britain then tried and executed Nash on charges of mutiny.³⁹ Americans at the time viewed mutiny as a valid response to brutal British navy discipline and impressment of foreign seamen, including those from U.S. vessels. In addition, Jefferson and others argued that mutiny was a political

³⁷ *Nken*, 556 U.S. 418. A stay pending appeal differs from DACA-style relief since an applicant for a stay first must receive a removal order from DHS, while a DACA recipient could participate in the program without ever being in removal proceedings. Moreover, a stay pending appeal lasts only so long as the court needs to resolve the appeal, while DACA is renewable indefinitely. But both a stay and DACA enable a reprieve from removal.

³⁸ *Id.* at 427 (citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942)).

³⁹ See Margulies, *Taking Care of Immigration Law*, *supra* note 7, at 134–36; see also John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. Rev. 1973, 1975 n.10 (2010) (describing episode as a “cautionary tale . . . for decades to come”); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229 (1990) (providing comprehensive analysis of this episode).

crime that targeted an oppressive system and was therefore not an appropriate subject for extradition. Indeed, Jefferson was skeptical about extradition because of the difficulty of distinguishing ordinary from political crimes.⁴⁰ The intervention on Nash's behalf that Adams rejected would have provided a clear, consistent signal of the president's dedication to rescuing prospective Americans. Meshing with the public interest, intervention would also have dovetailed with evolving U.S. conceptions of human rights and more mundane U.S. interests in a growing merchant fleet.

The response to Adams's failure to save Nash underlined the importance of stewardship to safeguarding prospective Americans. Adams was almost impeached. He lost the election of 1800, the Federalists ceased to be a significant political force, and extradition became a dead letter for decades. Adams's default in Nash's case was not the only cause of the first two events, but it was a primary factor in the third development and crystallized sentiment that led to Adams's loss and the Federalists' precipitous decline.

In the second example, President Franklin Pierce lived up to the stewardship model's expectations. Pierce intervened to rescue Hungarian dissident Martin Koszta, who had lived in New York before being kidnaped by Austrian agents while in Turkey.⁴¹ Secretary of State William Marcy articulated a consistent test, announcing that the United States would use its power to protect individuals anywhere around the world who had established a domicile in the United States. Marcy linked the United States's intervention with the public interest in compliance with the "laws of humanity . . . [that] protect the weak from being oppressed by the strong, and . . . relieve the distressed."⁴² This rationale suggests that for Marcy and President Pierce, positioning the United States in the vanguard of that humane effort would also enhance the nation's global reputation and

⁴⁰ See Thomas Jefferson, Secretary of State, to George Washington, President (Nov. 7, 1791), <https://bit.ly/33qSXJ8> (advising Washington that it was often "difficult to draw the line between [ordinary crimes] . . . and acts rendered criminal by tyrannical laws only").

⁴¹ Margulies, *Taking Care of Immigration Law*, *supra* note 7, at 138–41; *In re Neagle*, 135 U.S. 1, 64 (1890).

⁴² See Hon. William M. Marcy, Secretary of State, to Baron von Hulsemann, Austrian Charge D'Affaires, Sept. 26, 1853, in *Correspondence Between the Secretary of State and the Charge D'Affaires of Austria Relative to the Case of Martin Koszta* 16 (1853), <https://bit.ly/30u3qlc>.

thus further U.S. interests. In *In re Neagle*, the Court cited the Koszta episode for the proposition that presidential stewardship includes not merely the “express terms” of treaties and statutes, but also U.S. “international relations and all the protection [of federal officials, U.S. nationals, and intending Americans like Koszta] implied by the nature of the government under the Constitution.”⁴³

B. Stewardship and Federalism

In an early 20th-century episode, President Theodore Roosevelt and his secretary of state, Elihu Root, practiced stewardship in their resolution of the San Francisco segregation dispute of 1906–1907. Acting under California law, San Francisco had sought to establish segregated schools for Japanese children domiciled in the United States with their families. A treaty between Japan and the United States gave those children rights to the same education as other foreign national children, including those from Europe. Roosevelt ordered federal troops into position to stop any violence against San Francisco’s Japanese community and sued to enjoin the city’s policy.⁴⁴ Elaborating on the rationale for Roosevelt’s handling of the segregation dispute, Root echoed the concern with consistency and the public interest that drove Hamilton’s arguments in *Rutgers v. Waddington*. Root faulted local passions, which could impede the consistency required for foreign affairs and erode “rules . . . essential to the maintenance of peace . . . between nations.”⁴⁵

In the last 40 years, stewardship has figured in federal responses to overly aggressive state immigration enforcement that could derail U.S. foreign policy. In *Plyler v. Doe*, the Supreme Court struck down a Texas law that excluded undocumented children from public school.⁴⁶ While Justice William Brennan, writing for the Court, analyzed the

⁴³ 135 U.S. 1, 64 (1890); see also John Harrison, *The Story of In re Neagle: Sex, Money, Politics, Perjury, Homicide, Federalism, and Executive Power*, in *Presidential Power Stories* 133, 153–54 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (discussing role of Koszta episode in *Neagle*); cf. Henry Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 70–71 (1993) (arguing against unduly broad reading of *Neagle* that might result in presidential overreaching).

⁴⁴ See Elihu Root, *The Real Questions under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int’l L. 273, 276 (1907).

⁴⁵ *Id.* at 273–74.

⁴⁶ 457 U.S. 202 (1982).

case in equal-protection terms, Brennan's opinion framed undocumented children as recipients of a kind of tacit de facto deferred action in which federal officials expressly conceded that they could not deport each undocumented child. The likelihood that many undocumented children would grow up knowing only the United States as their home highlighted the need for stewardship's virtues of consistency and equitable balancing. Justice Brennan remarked on Congress's power, which the Court has repeatedly recognized, to set consistent national policy regarding immigration, contrasting that with states' patchwork of immigration measures. Moreover, he wrote, Texas's law impinged on the broader public interest in educating children. State laws impeding undocumented children's access to public education would "foreclose any realistic possibility that . . . [undocumented children] will contribute in even the smallest way to the progress of our Nation."⁴⁷

In *Arizona v. United States*, the Supreme Court again addressed the conflict between restrictive state measures and federal stewardship.⁴⁸ Finding that Congress had preempted some of Arizona's laws on immigration enforcement, the Court cited Federalist No. 3, in which John Jay had warned of border states' habit of "sudden irritation" and resulting skirmishes with foreign states.⁴⁹ For Jay, easing the country back from the brink of war required the more "temperate and cool" perspective of the federal government, which could cultivate that longer-term outlook because it was physically further from the fraught border.⁵⁰

Applying Jay's insights, Justice Anthony Kennedy noted that states could undermine U.S. foreign policy and the overall public interest through "harassment" of foreign nationals who were students pursuing higher education, veterans of the armed forces, or witnesses in criminal cases.⁵¹ In a nod to consistency, Justice Kennedy warned that the Framers crafted the Constitution in part to spare a foreign country from dealing with "50 separate states," instead of a single

⁴⁷ *Id.* at 230.

⁴⁸ 567 U.S. 387 (2012); Margulies, Taking Care of Immigration Law, *supra* note 7, at 162–65.

⁴⁹ *Arizona*, 567 U.S. at 395 (citing The Federalist No. 3 (John Jay)).

⁵⁰ The Federalist No. 3 (John Jay).

⁵¹ *Arizona*, 567 U.S. at 408.

central government that could efficiently address foreign concerns. For Kennedy, deferred action allowed the federal government to practice that consistency and speak with “one voice” in the volatile realm of foreign relations.⁵²

President Obama’s initiation of DACA fit within this stewardship model. As foreign nationals who arrived in the United States as children and had often known no other country as home, DACA recipients were a fit subject for interstitial executive protection. DACA also shielded these hardship cases from overzealous state enforcement efforts of the kind the Court had curtailed in *Plyler* and *Arizona*. Recipients aided the public interest, since they were able to contribute their time, effort, and talent to the American project, as Justice Brennan had envisioned in *Plyler*. The program’s categorical approach provided consistency and certainty that a more piecemeal approach to immigration relief would have lacked.

The Trump administration had a different approach, which prompted judicial skepticism even before *Regents*. In a 2019 case encompassing the public interest and undocumented immigrants, the Court in *Department of Commerce v. New York* required consistency in the Trump administration’s rationale for adding a citizenship question to the census.⁵³ Adding a citizenship question would have been a departure from recent practice: although the government had included a citizenship question in the past as part of its constitutional duty to conduct a census, officials for 60 years had not included this query. Pre-Trump officials had resisted reintroducing a citizenship question, explaining that this move would deter participation since undocumented individuals and their families would fear that an accurate response would prompt immigration enforcement action. Reduced participation would skew the population count and with it calculations on congressional representation, the composition of state legislatures, and federal funding.⁵⁴

Against this backdrop of a high-stakes decision affecting the public interest that pivoted from decades-long agency practice,

⁵² *Id.* at 409.

⁵³ 139 S. Ct. 2551 (2019). For commentary on the census decision, see Jennifer Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 Sup. Ct. Rev. 231 (2019); Margulies, *Rescinding Inclusion*, *supra* note 7, at 1461–67; Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 Sup. Ct. Rev. 1 (2019).

⁵⁴ *Dep’t of Commerce*, 139 S. Ct. at 2562, 2565.

the Court held that the Commerce Department's rationale for seeking to reintroduce a citizenship question was "pretextual."⁵⁵ Writing for the Court, Chief Justice Roberts agreed that the secretary of commerce had the power to decide to add a citizenship question. But he also indicated that, under accepted principles of administrative law, the government when making such "important decisions" had to offer "genuine justifications" that will survive judicial and public scrutiny.⁵⁶ In the census case, the Court found that Commerce Secretary Wilbur Ross had failed in his duty to provide such a sincere justification. Instead, Ross had "contrived" a pretextual rationale by persuading reluctant Department of Justice officials to assert that a citizenship question would provide information necessary for compliance with the Voting Rights Act.⁵⁷

That "disconnect" in the census case between a high-stakes decision and the "contrived" official reason for the agency's choice would, if accepted by the Court, have made judicial review into an "empty ritual."⁵⁸ Here, Chief Justice Roberts's description echoed his concern in *Nken v. Holder* that a stay of removal pending appeal was necessary to avoid making appellate review an "idle ceremony."⁵⁹ Sound stewards do not have the time for either empty rituals or idle ceremonies. Moreover, they do not impose such futile exercises on others. Secretary Ross's "pretextual" rationale thus compromised the Administrative Procedure Act's requirement of "[r]easoned decisionmaking."⁶⁰ While Chief Justice Roberts did not find that Acting DHS Secretary Duke's reasons for ending DACA were similarly contrived, he did identify flaws in her justification that also violated the APA's "reasoned decisionmaking" goal.

III. The Court's DACA Decision: Stewardship Over Structure

This preliminary discussion of stewardship sets the stage for analysis of Chief Justice Roberts's discussion in *Regents*. In his opinion finding DHS's rationale for rescission inadequate, Roberts sounded

⁵⁵ *Id.* at 2574.

⁵⁶ *Id.* at 2575.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2575–76.

⁵⁹ *Nken*, 556 U.S. at 427.

⁶⁰ Dep't of Commerce, 139 S. Ct. at 2576.

three themes in the key of stewardship. First, Roberts focused on the Duke Memorandum, describing the later Nielsen Memorandum as an impermissible “*post hoc* rationalization.”⁶¹ Second, Roberts described DACA recipients’ expectations that the program would continue, and the Duke Memorandum’s failure to acknowledge and address those expectations. Third, Roberts asserted that the Duke Memorandum should have considered other options besides outright termination of the entire program; in particular, Duke should have considered separating out the reprieve and work permit parts of the program and continuing the reprieve component.

The third point is striking because Chief Justice Roberts disagreed with lower-court rulings that viewed DACA as one unified exercise of executive discretion, instead agreeing with the Fifth Circuit’s framing of the reprieve/benefits distinction in the DAPA case. But, compared with the Fifth Circuit’s decision, Roberts’s use of this frame had a very different practical effect. In the DAPA case, the Fifth Circuit had cited the inclusion of eligibility for benefits as a basis for invalidating the program. In contrast, Roberts found fault with DHS’s insufficient consideration of the consequences of rescinding both parts of DACA and sent the agency back to the drawing board. I call his process-based mode of analysis “deliberative stewardship,” to distinguish it from the stronger, substantive brand of stewardship that President Theodore Roosevelt championed.

A. Stewardship as Consistency: Reading Chenery Broadly to Limit DHS to One Bite at the Apple

After determining that courts could review the DACA rescission under the Administrative Procedure Act, Chief Justice Roberts turned to the important task of deciding whether the Supreme Court could only consider the conclusory justifications for the rescission in the 2017 Duke Memorandum, or whether it could also consider the more detailed explanation in Acting Secretary Nielsen’s June 2018 memorandum. In a key move, Roberts read administrative law doctrine as limiting DHS to reliance on Duke’s perfunctory explanation. The following subsections analyze Chief Justice Roberts’s approach to this complex issue and then discuss Justice Kavanaugh’s powerful dissent.

⁶¹ 140 S. Ct. at 1909.

1. Chief Justice Roberts and the perils of agency post hoc rationalizations

Chief Justice Roberts stressed the need for government to “turn square corners in dealing with the American people.” A sound steward deliberates systematically, without “cutting corners.”⁶² In contrast, an agency failing to do its job deliberates in haste and rolls out shifting rationales to suit its short-term interests.

Administrative law enforces the virtue of consistency through the *Chenery* doctrine. That doctrine takes its name from a 1943 Supreme Court decision holding that a court should only consider an agency’s initial justification for a decision, not subsequent justifications that may help the agency in a lawsuit but do not candidly represent the agency’s original rationale. That holding promotes “clarity in . . . [the] exercise” of administrative judgment, the responses of the agency’s stakeholders, and review by courts.⁶³

The *Chenery* doctrine’s virtues dovetail with the uniformity that the Framers praised in the federal government’s constitutional role in foreign affairs. In *Arizona v. United States*, the virtue of consistency inhered in the straightforward negotiating position of a single central government, as compared with the patchwork quilt of 50 different sets of state law enforcement officials. In the DACA case, the issue was consistency *over time*; an agency should deliberate about a position clearly and carefully when it first announces that decision, instead of issuing “post hoc’ [after-the-fact] rationalizations” that confuse the agency’s audience.⁶⁴ As Roberts put it, this relentless procession of “belated justifications” forces litigants and courts to “chase a moving target.”⁶⁵ The confusion that results clashes with the agency’s stewardship role.

Having established the virtue of consistency over time in agency explanations, Chief Justice Roberts then applied it to limit DHS to

⁶² *Id.* (citing *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

⁶³ *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Justice Felix Frankfurter, who prized methodical decisionmaking by agencies, wrote the opinion of the Court in *Chenery* and an earlier decision that he cited in his *Chenery* opinion, *Phelps Dodge Corp. v. NLRB* 313 U.S. 177, 197 (1941). Cf. Ronald M. Levin, “Vacation” at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 *Duke L.J.* 291, 367 (2003) (explaining *Chenery* doctrine).

⁶⁴ 140 S. Ct. at 1909 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971)).

⁶⁵ *Id.*

the Duke Memorandum's reasons for the DACA rescission. Roberts described the Duke Memorandum as the "natural starting point" for the Court's consideration of DHS's reasons.⁶⁶ Duke had merely cited, "without elaboration," Attorney General Sessions's legal conclusion that DACA exceeded the power Congress had delegated to immigration officials under the INA.⁶⁷ Focusing on the Duke Memorandum's stark statement of reasons put DHS at a marked disadvantage in the case, since Duke had not offered a detailed consideration of DACA recipients' expectations that the program would continue. In contrast, the Nielsen Memorandum's explanation offered a more thorough response. However, Roberts's devotion to consistency cast the Nielsen Memorandum's additional detail as a flaw, not a virtue. Citing the importance of consistency, Roberts determined that this more elaborate reasoning was "nowhere to be found" in the Duke Memorandum, and that therefore the Nielsen Memorandum relied on "impermissible *post hoc* rationalizations" that the Court would not address.⁶⁸

2. Justice Kavanaugh's narrower reading of the *Chenery* doctrine

If the *Chenery* doctrine is about agency consistency, it is important that courts apply the doctrine in the same consistent vein. Chief Justice Roberts's expansive view of *Chenery* is not the only way to read administrative law. For Justice Kavanaugh, Roberts's approach misread the doctrine's teaching.

In his dissent, Justice Kavanaugh viewed the Nielsen Memorandum's fuller account of reasons behind the rescission as an entirely permissible "amplified articulation" of points the government had made previously.⁶⁹ For Kavanaugh, *Chenery* excluded a different subset of after-the-fact explanations: the arguments of lawyers in litigation, who have an incentive to cobble together remotely plausible rationales to satisfy reviewing courts. The Nielsen Memorandum was not a lawyer's tactic. As a mere amplification of earlier reasoning by a responsible official, the Nielsen Memorandum had all the consistency administrative law could reasonably require.

⁶⁶ *Id.* at 1907.

⁶⁷ *Id.* at 1910.

⁶⁸ *Id.* at 1908–09.

⁶⁹ 140 S. Ct. at 1934 (Kavanaugh, J., dissenting) (citing *Alpharma v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006)).

But Justice Kavanaugh's more constrained view of the *Chenery* doctrine does not fully answer Chief Justice Roberts's concerns.⁷⁰ Consistency in this case would have cost DHS little. DHS could have deliberated with greater depth in 2017, instead of issuing a more comprehensive explanation only after judicial prompting. Especially given the high stakes of the decision, it was reasonable for Chief Justice Roberts to expect a more detailed explanation of DHS's reasons up front.

B. Regents and Reliance Interests

The equitable balancing dimension of stewardship took center stage for Chief Justice Roberts's analysis of DACA recipients' reliance interests. As noted above, stewardship considers both the "balance of hardships" and the public interest. In finding that the Duke Memorandum had failed to assess the weight of recipients' reliance, Roberts observed that maintaining stability for recipients also benefited the public.

As a matter of administrative law doctrine, Roberts's analysis of the Duke Memorandum's deliberative flaws invoked that staple of robust judicial review, the "hard look" doctrine.⁷¹ Under the "hard look" doctrine, there must be a "satisfactory explanation" of the agency's decision. Moreover, the agency must engage in "consideration of the relevant factors" and address each "important aspect of the problem" at hand.⁷² That commitment to "consideration" is a core tenet of equitable balancing and the duties of stewardship. Because her memorandum did not assess the weight that DHS should accord recipients' reliance interests, Acting Secretary Duke failed this threshold test.

Roberts noted that the Duke Memorandum would have terminated DACA recipients' participation starting with current terms that ended on March 6, 2018, a mere six months after the rescission's announcement, with all participation ending two years after that, on March 6, 2020. While at first blush this wind-down period might

⁷⁰ In the interest of full disclosure, I should explain that my own view has shifted on this point. In an earlier piece, I also took a narrow view of *Chenery* and the DACA rescission, although my discussion was limited to two sentences in a footnote. See Margulies, *Rescinding Inclusion*, *supra* note 7, at 1473 n.240.

⁷¹ 140 S. Ct. 1912–13 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

⁷² *Id.* at 1905 (citing *Overton Park*, 401 U.S. at 416); *id.* at 1913 (citing *State Farm*, 463 U.S. at 43).

seem reasonable, a closer look revealed that Duke had failed to either accommodate the expectations of recipients or explain why such accommodation was inappropriate. Consider again the hypothetical posed earlier of a DACA recipient who enrolled in a four-year college in September 2016 and whose two-year DACA period of participation was due to end on March 6, 2018. In Chief Justice Roberts's apt phrase, this recipient would be "caught in the middle of a time-bounded commitment," without either sufficient notice of the rescission to avoid embarking on an undergraduate degree or sufficient time to complete her college education.⁷³ Chief Justice Roberts described a similar predicament for persons serving in the armed forces or receiving an extended course of needed medical treatment. According to Roberts, Duke could have considered allowing our hypothetical college student and similar "caught in the middle" recipients to complete their respective periods of study, treatment, or service.⁷⁴ A good steward would have at least deliberated about a wind-down that reflected these concerns.

The dashed expectations that Chief Justice Roberts flagged also affected a large number of U.S. nationals. In our college student hypothetical, consider the interests of the U.S. school that had counted on the recipient's continued enrollment and devoted substantial resources to her education. Chief Justice Roberts suggested that those interests were also an aspect of the case that DHS should have considered.⁷⁵ Roberts did not cite the Supreme Court's decision almost 40 years earlier in *Plyler v. Doe*. Nevertheless, his argument echoed the anxiety in *Plyler* and *Arizona* about negative externalities—impacts on persons and entities beyond the parties. Echoing these risks, Roberts reminded readers that the adverse effects of the rescission would "radiate outward" from recipients to U.S. persons and institutions involved in recipients' lives, including U.S. citizen children, schools where recipients "study and teach," and employers who invested money and effort in preparing recipients to work in their companies and were now facing a loss of their investment.⁷⁶

⁷³ *Id.* at 1914.

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting the rescission's challengers and their amici as asserting that there was "much for DHS to consider," including the expectations of third parties with ties to DACA recipients).

⁷⁶ *Id.* (citing Brief for Respondent Regents of Univ. of Cal. et al. at 41–42, Dep't of Homeland Security v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587)).

As a sound steward, DHS had to deliberate about the relative merits of rescission versus the synergy that rescission would extinguish between DACA and the public interest. Beyond deliberation, Robert disclaimed any duty by DHS to continue the program. Upon deliberation, DHS might have concluded that recipients' reliance interests were not weighty in the scheme of things or did not outweigh legal questions about the program. But the Duke Memorandum suffered from a deliberative deficit. Invoking the responsibilities of stewardship, Roberts asserted that deliberation about reliance interests was a central part of "the agency's job" and "responsibility" that the agency had neglected.⁷⁷

C. Stewardship's Puzzle: The Practical Problems with Separation of Forbearance and Benefits

In the course of discussing DHS's failure to consider recipients' reliance interests, Chief Justice Roberts also separated out two aspects of DACA: its reprieve from deportation, which Roberts called "forbearance," and its provision of eligibility for a work permit, which Roberts referred to as DACA's "benefits" prong.⁷⁸ Roberts asserted that Acting Secretary Duke erred by failing to consider the legality of continuing forbearance under DACA, while terminating benefits. Roberts's separation of these two parts of DACA reinforced his point that DHS failed to consider reliance interests. But Roberts's separation of DACA into forbearance and benefits was artificial, since in practice the two parts are often integrally related.

Roberts clearly viewed as "important" Acting Secretary Duke's failure to separately consider the legality of benefits and forbearance, respectively.⁷⁹ For Roberts, forbearance—detached from benefits—was DACA's "centerpiece."⁸⁰ According to Roberts, the bulk of the DHS memorandum announcing DACA was "devoted entirely" to

⁷⁷ *Id.*

⁷⁸ *Id.* at 1911–13.

⁷⁹ *Id.* at 1913 (citation omitted). Harvard Law professor Benjamin Eidelson was one of the architects of advocates' strategy on this point. See Benjamin Eidelson, "Unbundling DACA and Unpacking Regents: What Chief Justice Roberts Got Right," Balkinization (blog), June 25, 2020, <https://bit.ly/3gwiQpX>; see also Josh Blackman, "Where Did CJ Roberts's Anti-Saving Construction in the DACA Case Come From?," Reason: Volokh Conspiracy, June 20, 2020, <https://bit.ly/2Pp4jVQ> (discussing origins and development of separation idea in the course of litigation over the DACA rescission).

⁸⁰ Regents, 140 S. Ct. at 1913.

forbearance, with a single isolated sentence instructing DHS to consider recipient requests for work permits.⁸¹ However, this view of DACA as centering on forbearance and conferring eligibility for benefits as an afterthought failed to recognize benefits' crucial role.

From the start, the ability to leverage recipients' skills by providing work permits was integral to DACA's plan. In announcing DACA, DHS Secretary Napolitano cited the "productive young people" that the program would help, further noting that "many" prospective recipients had "already contributed to our country in significant ways."⁸² These observations were hardly throwaway lines. Building on her description of prospective recipients' valuable contributions to U.S. society, Napolitano directed DHS to accept applications for work permits from DACA recipients. Picking up on this signal, contemporary media accounts and immigration advocates touted DACA's benefits.⁸³ A policy of forbearance without benefits would not have earned that level of enthusiasm.⁸⁴

That said, separating forbearance from benefits is not entirely artificial. Consider recipients that Roberts mentioned who are enrolled in college or receiving medical treatment. A state such as California allows noncitizens to enroll in higher education programs and pay in-state tuition even if they are not lawfully present.⁸⁵ Some hospitals will provide medical treatment under similar circumstances. For at least the California cohort of recipients, forbearance alone will serve

⁸¹ *Id.* at 1912 n.6.

⁸² See Napolitano Memorandum, *supra* note 4, at 2.

⁸³ See Julia Preston & John H. Cushman, Jr., "Obama to Permit Young Migrants to Remain in U.S.," *N.Y. Times*, June 16, 2012, at A1 (citing eligibility for work permits in lead paragraph, mentioning eligibility throughout story, and quoting "[i]mmigrant student leaders as expecting that the 'majority of [immigrant] students would seize the opportunity to work and come out of the shadows'").

⁸⁴ On the practical problems with separating benefits and forbearance, the proof is in the pudding. DHS's practice under President Obama's second Senate-confirmed Homeland Security Secretary, Jeh Johnson, virtually always resulted in work authorization for successful DACA applicants. See Jie Zong et al., *Migration Pol'y Inst., A Profile of DACA Recipients by Education, Industry, and Occupation 3–8* (Nov. 2017), <https://bit.ly/30yWhjD> (describing details of DACA recipients' work permit status based on DHS statistics, and implying that virtually all recipients who sought a work permit received one).

⁸⁵ *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 861 (Cal. 2010) (citing Cal. Educ. Code § 68130.5(a)(4)); see also Ming Hsu Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 *Syracuse L. Rev.* 87, 129–30 (2016) (describing state laws and policies).

reliance interests. To that extent, Roberts's point that DHS should have considered splitting up benefits and forbearance fits the model of deliberative stewardship.⁸⁶

Viewing DHS's duty as deliberative stewardship connects *Regents* with earlier precedents such as *Plyler v. Doe* and *Arizona v. United States* and historical examples such as President Pierce's intervention in the Martin Koszta episode. *Regents* also echoes the 2019 census decision, *Department of Commerce v. New York*. In *Department of Commerce*, as noted above, Chief Justice Roberts noted the high stakes of adding a citizenship question on the census and required a clear and consistent justification. The Commerce Department's "contrived" justification on needing data for Voting Rights Act compliance failed to pass muster.⁸⁷ Admittedly, Roberts did not refer to Acting Secretary Duke's explanation for the DACA rescission as pretextual, in the way that he had characterized Commerce Secretary Wilbur Ross's reasons in the census case. Nevertheless, each decision focused on flawed and shifting explanations for momentous actions that departed from established practice. In both decisions, Roberts seems to be reminding agencies that stewardship requires sounder deliberation than the agencies saw fit to provide.

D. Justice Thomas's Dissent

On the substance of the DACA rescission, Justice Thomas's dissent stressed the structural concerns raised by the Fifth Circuit about the DAPA program. In interpreting statutes, courts generally hold that Congress does its work mindfully, drafting language to cover issues it considers crucial and specifically describing areas where it has delegated discretion to an agency such as DHS. When courts read Congress's silence as giving vast power to an agency, the courts risk making the text of the law "wholly superfluous."⁸⁸ Treating the

⁸⁶Chief Justice Roberts rejected the claim of the rescission's challengers that the rescission violated the Equal Protection Clause. 140 S. Ct. at 1915–16. Justice Sonia Sotomayor dissented from this part of Chief Justice Roberts's opinion. *Id.* at 1916–18 (Sotomayor, J., dissenting in part).

⁸⁷139 S. Ct. 2551, 2575–76 (2019).

⁸⁸*Id.* at 1925 (Thomas, J., dissenting). Justice Thomas also stated that if the statute permitted a vast program like DACA to be created under executive fiat, the INA would be an unconstitutional delegation of legislative power. *Id.* at 1929 n.13. Cf. Gary Lawson, "I'm Leavin' It (All) Up to You": Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine, 2018–2019 *Cato Sup. Ct. Rev.* 31 (2019) (discussing recent indications that the Supreme Court is ready to revive the nondelegation doctrine).

actual words of the statute as a useless ornament that the executive branch can sweep aside would make Congress a supporting player in the legislative arena, when Congress should have the lead role.

Applying these principles, Justice Thomas asserted that DACA, like DAPA, was far too large a program to fit within the INA's specific framework. Congress's careful drafting would have been a waste of time if DHS could establish a program of DACA's size "at the stroke of a Cabinet secretary's pen."⁸⁹ By invalidating an effort by a subsequent administration to end this clash with the INA's framework, the Court's majority had disregarded a crucial tenet of statutory interpretation.

Furthermore, Thomas reminded the majority that regard for the reliance interests of DACA recipients did not fit past practice on deferred action, which Justice Scalia in an earlier decision had described as rooted in administrative "convenience."⁹⁰ Indeed, when it announced DACA during the Obama administration, DHS had stated that it could "terminate . . . deferred action at any time at the agency's discretion."⁹¹ Thomas warned that while deferred action's ease of implementation had been a virtue, the majority's decision would henceforth make future officials hesitate to grant it, since rescinding such grants will in the future entail "years of litigation."⁹²

While Thomas's critique of the majority's position is cogent, ultimately Roberts's focus on DACA recipients' reliance interest is more convincing from a stewardship perspective. Thomas's dissent insightfully outlined the structural argument against DACA. But Roberts's focus on DHS's deliberative deficit sidestepped this point. Stewardship's equitable balancing strand helps support Roberts's analysis. As mentioned above, under longstanding equitable principles that govern how a court devises a remedy for a particular illegal act, the court must consider a range of factors, including the balance of hardships and the public interest.⁹³ That may mean that a court will not order an immediate end to a practice, but will instead

⁸⁹ 140 S. Ct. at 1925–26 (Thomas, J., dissenting).

⁹⁰ *Id.* at 1931 n.16 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999)).

⁹¹ *Id.* (citation omitted).

⁹² *Id.*; cf. Ilya Shapiro, "DACA Ruling: Bad Judging on Top of Bad Lawyering, Good for Dreamers but Makes Immigration Reform Harder," *Cato at Liberty* (blog), June 18, 2020, <https://bit.ly/2XwReho>.

⁹³ See *Hecht Co.*, 321 U.S. at 329.

order a gradual termination. While a court has discretion to craft a remedy that includes a wind-down or opt for immediate termination of the challenged practice, the court will have to show that it balanced all the necessary factors in reaching its result.⁹⁴ This is exactly what DHS failed to do in rescinding DACA. That failure of due deliberation about remedy was problematic, regardless of DACA's legal merits. In this sense, Roberts's approach fit the stewardship model and deflected much of Thomas's critique.

Conclusion

Like the Court's 2019 census decision, *Department of Commerce*, in which Chief Justice Roberts also authored the majority opinion, *Regents* imposes a higher than usual burden of justification on executive branch officials. In the census case, the Court found the Department of Commerce's "voting rights enforcement" rationale for a census citizenship question to be pretextual. It did so even though that finding involved looking behind the Commerce Department's stated justifications, into its "contrived" interactions with a Justice Department that—truth to tell—seemed largely uninterested in the Commerce Department's ostensible voting rights rationale. *Regents* did not find that DHS's reasons for rescinding DACA were pretextual. But Chief Justice Roberts still looked beyond the structural issue of DACA's fit with the INA and found the agency's deliberative process flawed, especially in its failure to consider DACA recipients' reliance interests and alternatives to the outright termination by March 2020 that DHS had announced.

Although Chief Justice Roberts did not mention stewardship *per se* in his opinion, his analysis of DHS's "job" and "responsibility" in deliberating about reliance interests and alternatives to outright rescission sounded in that key. Starting with the cautionary tale of stewardship's absence in the Jonathan Robbins episode during the John Adams administration, executive practice has contemplated a gap-filling role in protecting prospective Americans against nonfederal sovereigns. The stewardship suggested by this interstitial role has highlighted the virtues of consistency and equitable balancing,

⁹⁴ See *N.Y. State Ass'n for Retarded Citizens v. Carey*, 706 F.2d 956, 969–72 (2d Cir. 1983). In this decision, Judge Henry Friendly discussed the role of factors such as the public interest and effects on persons or entities not before the court in modification of an equitable decree reforming a government institution.

especially synergies between the welfare of prospective Americans and the public interest. Cases like *Plyler v. Doe* and *Arizona v. United States* illustrate these virtues in restraining individual states' efforts at immigration enforcement when that enforcement might affect the national interest and U.S. foreign relations. *Department of Commerce* touched on similar virtues, particularly in its skeptical look at the Commerce Department's stated rationale for departing from decades of practice omitting a citizenship question from the census.

In *Regents*, the dissenters made cogent arguments that the majority's review lacked a clear basis in either administrative law doctrine or the statutory scheme. Justice Kavanaugh's dissent pointed out that Chief Justice Roberts's opinion, which limited DHS to reliance on the stark Duke Memorandum and barred any consideration of the later, more detailed Nielsen Memorandum, rested on an expansive reading of the *Chenery* doctrine. Excluding the Nielsen Memorandum may not serve *Chenery's* premises, which center on the need to limit agency *lawyers'* litigation-driven rationales.

Justice Thomas's dissent argued to great effect that Chief Justice Roberts failed to fully address the large DACA program's poor fit with the INA's carefully crafted framework of enumerated categories of foreign nationals who can enter or legally remain in the United States and its residual category of persons subject to removal. That structural concern drove the courts' halt of the Obama administration's even larger DAPA program. The role of similar structural concerns on DACA raises difficult questions that Roberts did not try to definitively answer.

Nevertheless, the stewardship model supports Chief Justice Roberts's focus on the deliberative virtues of consistency, consideration of synergies between DACA recipients' expectations and the public interest, and assessment of alternatives. Acting Secretary Duke would have lost little by a fuller explanation of reasons in September 2017, when DHS first announced the DACA rescission. Moreover, analogy to the law of equitable remedies shows that DHS could have deliberated with greater care about resolving tensions between DACA and the statutory scheme.

Taking care of the laws of the United States is a key part of the executive branch's constitutional responsibility. The DACA rescission affected the implementation of the INA and the interests of millions of U.S. citizens, LPRs, domiciliaries, and organizations. A duty of deliberative stewardship in a matter with such high stakes is a reasonable requirement to impose on a responsible agency.