

The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action

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INTRODUCTION

On November 19, 2014, the Department of Justice’s Office of Legal Counsel issued an opinion entitled “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.”¹ The opinion justified two new initiatives by the Department of Homeland Security. First it dealt with the prioritization of removal of certain categories of aliens unlawfully present in the United States. The second initiative established a deferred action program for the parents of U.S. citizen or lawful permanent resident children.² OLC’s opinion is of great practical importance for both general and specific reasons.

As a general matter, the framework it instituted for gauging whether a particular exercise of enforcement discretion is consistent with relevant constitutional principles is likely to have continuing importance in all areas where administrative agencies exercise discretion.³ As a specific matter, it seeks to place the Obama Administration’s immigration initiatives on firm legal footing by justifying those broad programs as valid exercises of enforcement discretion.

The opinion founders, however, on the complexities of immigration law, and thus its specific application of the opinion’s framework to the Executive’s initiatives is ultimately unconvincing.⁴ The opinion overstates the degree to which the Immigration and Nationality Act (INA) is concerned with family unification, misapprehends the extraordinarily narrow scope of relief provided to the parents of U.S. citizen and lawful permanent resident (LPR) children under existing law, and misstates the limited scope of prior congressional acquiescence to deferred action programs. These flaws undermine the opinion’s key conclusion that DHS’s deferred action programs are consistent with congressional policy, and thus also place into question the ultimate judgment that these initiatives are permissible exercises of enforcement discretion.

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¹ Available at <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (last accessed Dec. 20, 2014) (hereinafter “OLC Opinion”).

² The statutory term “alien” will be used in this article, and is defined to include “any person not a citizen or national of the United States.” 8 U.S.C. 1101(a)(3).

³ U.S. CONST. art. II, sec. 3.

⁴ Cf. Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1310 (2006) (“OLC is staffed with legal generalists, not individual-rights experts, and they typically lack particular familiarity with the institutional conditions that foster or, alternatively, help to prevent rights violations.”).

This article's scope is narrow and means to address only the question of whether or to what extent deferred action for the parents of U.S. citizen and lawful permanent resident children is consistent with congressional policy as currently embodied by the INA.⁵

Part I reviews the two most recent discretionary initiatives, the so-called Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) programs. Part II turns to OLC's opinion on the legality of DAPA, analyzing its conclusion that DAPA is consistent with congressional policy. First, OLC contends that DAPA is an extension of congressional policy towards family unity. Second, OLC explains that Congress's past acquiescence in or extension of administrative deferred action initiatives supports DAPA.⁶ Both propositions are premised on misleadingly superficial readings of congressional policy in this realm, and fail to justify DAPA.

Part III critiques OLC's conclusion on these points, while placing the all-important flesh on the skeletal version of immigration law contained in that opinion. Previous instances of deferred action exhibit two currents: (1) the alien *had* an *existing* lawful presence, or (2) the alien *has* the *immediate* prospect of lawful residence or presence. For each, deferred action acted as a *temporary bridge* from one status to another, where benefits were construed as arising *immediately* post-deferred action. These threads bring the deferred action within the ambit of congressional policy embodied inside the INA. However, neither limitation holds true for DAPA. With DAPA, deferred action serves not as a bridge for beneficiaries between two approved statuses, but as a tunnel to dig under and through the INA.

DAPA represents a fundamental rewrite of the immigration laws that is inconsistent with the congressional policy currently embodied in the INA. To the extent that DAPA's constitutionality rests on congressional acquiescence, OLC has failed to make its case.

I. DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY

On November 20, 2014, the Department of Homeland Security, through memos by Secretary Jeh Johnson, announced two related prosecutorial discretion initiatives. The first, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," sets out a system of enforcement prioritization and explains how Immigration and Customs Enforcement officials should exercise their discretion in the pursuit of these priorities.⁷ The memo established a three-tier priority system. Aliens who

⁵ Part II of this series will address the constitutionality of DAPA with respect to the Take Care clause. See Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEX. REV. OF LAW & POL. __ (Forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545558.

⁶ Adam Cox & Cristina Rodriguez, *Executive Discretion and Congressional Priorities*, Balkinization (Nov. 21, 2014), available at <http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html> ("The appeal of this approach is that Congress, not the President, appears to make the tough value judgments. The President simply extracts those underlying value judgments out of the statute through sophisticated legal analysis.").

⁷ Memorandum from Jeh Johnson, Sec'y of Homeland Sec., U.S. Dep't of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), available at

constitute threats to national security, border security, and public safety—including aggravated felons, gang members, and aliens attempting to illegally enter the United States—were placed in the first priority category.⁸ Certain misdemeanants, serial immigration violators, and a narrow class of others with immigration violations were placed in the second priority category.⁹ In the last priority category, DHS placed those whose final orders of removal were issued on or after January 1, 2014.¹⁰ Despite the prioritization, the memo also indicated that discretion may be exercised to deprioritize the alien’s removal based on the conclusion that he or she, considering the totality of relevant factors, should not be deemed an enforcement priority.¹¹ This discrete prioritization policy is outside the scope of the present article, but is important because falling *outside* of DHS’s stated enforcement priorities constitutes one of the eligibility factors for relief under the second initiative, Deferred Action for Parental Accountability (“DAPA”).

Through this memo, DHS attempted to place deferred action in its historical and legal context based on its 2012 deferred action program, Deferred Action for Childhood Arrivals (“DACA”).¹² Like DACA before it, the DAPA memo asserts that “[a]s an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency’s discretion.”¹³ The memo stresses that “[d]eferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specific period of time, an individual is permitted to be lawfully present in the United States.”¹⁴

The DAPA memo first expanded operation of DACA, removing the prior age ceiling (thirty years of age under the 2012 memo), extending the authorized period of a DACA grant from two to three years, and moving the date-of-entry requirement forward from June 2007 to January 1, 2010.¹⁵ Second, DAPA established a new class of eligible beneficiaries for deferred action. DACA was limited to the so-called “Dreamers”—certain minors who entered the country without authorization, regardless of whether the

http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (last accessed Dec. 20, 2014).

⁸ *Id.* at 3.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4.

¹¹ *See id.* at 3-4 (noting considerations that should govern an exercise of discretion to deprioritize removal in each of the three priority categories).

¹² DAPA Memo at 2; for legal criticism of the earlier policy, *see, e.g.*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759-61 (2014) (“However attractive it might be as a matter of policy, the DACA program appears to violate the proper respect for congressional primacy in lawmaking that should guide executive action, even when substantial exercises of prosecutorial discretion are inevitable.”); Robert Delahunty & John Delahunty, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (arguing that DACA ran afoul of the Constitution’s “Take Care” Clause, regarding faithful execution of the laws).

¹³ DAPA Memo at 2.

¹⁴ *Id.*

¹⁵ *See id.* at 3-4.

child was related to a citizen. DAPA now covered the parents of minor children¹⁶ who are U.S. citizens or lawful permanent residents. Such individuals will be eligible for deferred action, if they “have continuously resided in the United States since before January 1, 2010, are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with [United States Citizenship and Immigration Services], have no lawful status on the date of this memorandum, are not an enforcement priority as reflected in the November 20, 2014 [prosecutorial discretion memorandum], and present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”¹⁷ The memorandum also indicated that discretion inheres in DHS officers to grant deferred action upon consideration of all relevant factors, including the eligibility criteria: “Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.”¹⁸

II. THE OFFICE OF LEGAL COUNSEL’S OPINION ON THE LEGALITY OF DAPA

In advance of its announcement of the two new initiatives, the Obama Administration made public a legal opinion from the Office of Legal Counsel. The opinion concluded, “DHS’s proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS’s discretion to enforce the immigration laws.”¹⁹ Extrapolating from Supreme Court and courts of appeals precedent regarding the scope of enforcement discretion countenanced by the Take Care Clause, the opinion established a four-factor inquiry to ascertain whether any particular discretionary initiative comports with relevant constitutional and legal principles. “First, enforcement decisions should reflect ‘factors which are peculiarly within [the enforcing agency’s] expertise.’”²⁰ Second, the exercise of discretion cannot constitute an effective rewrite of the law so as to “match [the Executive’s] policy preferences.”²¹ Practically, this means that “an agency’s enforcement decisions should be *consonant with, rather than contrary to*, the congressional policy

¹⁶ “Child” is a term of art under the Immigration and Nationality Act, and is narrower than its biological definition. With certain qualifications that are irrelevant to the scope of this article, “[t]he term ‘child’ [as used in the family-based immigration system] means an unmarried person under twenty-one years of age[.]” 8 U.S.C. 1101(b)(1). Biological children over the age of 21 are termed “sons” or “daughters” for the purposes of the family-based immigration system. *See, e.g.*, 8 U.S.C. 1153(a)(1) (visa preference category for the “[u]nmarried sons and daughters of citizens”).

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 5.

¹⁹ OLC Opinion at 2. The opinion also concluded that the Administration’s proposed extension of deferred action to the parents of those granted deferred action under DACA “would not be a permissible exercise of enforcement discretion.” *Id.*

²⁰ *Id.* at 6 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

²¹ *Id.* at 6.

underlying the statutes the agency is charged with administering.”²² Third, and as an effective corollary to the second factor, the Executive “cannot . . . ‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an *abdication of its statutory responsibilities*.”²³ Fourth, non-enforcement decisions are most comfortably characterized as proper “exercises of enforcement discretion when they are made on a case-by-case basis.”²⁴ The first factor is not in dispute. Part II of this series analyzes the third and fourth elements with respect to the Take Care Clause.²⁵ This article will focus primarily on the second factor.

After reviewing the history of deferred action, including its extra-statutory genesis and incidences of congressional acquiescence in or extension of deferred action initiatives, the OLC opinion attempted to strike a middle course in its review of such programs. First, the opinion stated, deferred action programs could not be deemed per se impermissible, as congressional authorization and recognition of such programs indicate *some* level of consistency with extant congressional immigration policy.²⁶ Second, despite the permissibility of such programs at a certain level of generality, the Executive does not possess a blank check in its promulgation of deferred action initiatives.²⁷ The OLC opinion acknowledged that “deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion.”²⁸ Acknowledging the tenuous ground on which these policies rest, the opinion stressed that “particularly careful examination is needed to ensure that any proposed expansion of deferred action” beyond that which was done by previous executive actions “complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it.”²⁹

DHS offered two justifications for DAPA: (1) that “severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States”;³⁰ and (2) “that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country.”³¹ DHS’s first proffered justification, “the need

²² *Id.* (emphasis added).

²³ *Id.* at 7 (citing *Chaney*, 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc))) (emphasis added).

²⁴ *Id.* at 7.

²⁵ See Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEX. REV. OF LAW & POL. ___ (Forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545558.

²⁶ *Id.* at 23.

²⁷ *Id.* at 24 (“Congress’s apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented.”).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 25.

³¹ *Id.*

to efficiently allocate scarce enforcement resources,” was deemed “a quintessential basis for an agency’s exercise of enforcement discretion.”³²

The OLC opinion also found the second justification compelling. First, it concluded that “determining how to address such ‘human concerns’ in the immigration context is a consideration that is generally understood to fall within DHS’s expertise.”³³ Second, and more fundamentally, OLC found that the “second justification . . . also appears *consonant* with congressional policy embodied in the INA.”³⁴ The opinion referenced numerous provisions concerned with family unity. Through (1) the family-based immigrant visa system and (2) cancellation of removal (a form of relief available to certain non-lawful permanent residents), Congress in certain cases permitted aliens to remain in the United States where they can establish a qualifying family relationship with a U.S. citizen or lawful permanent resident.³⁵

Additionally, OLC reasoned that “because the temporary relief DHS’s proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS’s proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits.”³⁶ Regardless, the opinion also put great weight on the fact that the INA *does* offer avenues to residency and citizenship through (1) the visa-preference system and (2) cancellation of removal. The opinion stressed that those covered by DHS’s proposed program would have the possibility of pursuing avenues expressly authorized by the INA at a future date. In other words, there would be a *prospective possibility* of legalizing the status of the class covered by DAPA if an applicant received a family-based visa, or had her removal cancelled.³⁷ (As discussed *infra*, OLC *grossly* overstates the probability of these unlikely extraordinary remedies.)

Last, and most importantly, OLC looked to consistency with congressional policy as a significant touchstone of the program’s legality. “The proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has *implicitly approved* in the past.”³⁸ OLC thus recognizes that there has not been explicit approval, so it must look to “implicit approval.” This acquiescence, the opinion continued, “provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action.”³⁹ In effect, OLC argued,

³² *Id.* at 25-26.

³³ *Id.* at 26.

³⁴ *Id.* (emphasis added).

³⁵ *Id.* at 26-27. There is also a form of cancellation of removal for lawful permanent residents, but this relief has no relevance to the questions posed by DAPA and its eligibility criteria are, in any event, materially different from those governing cancellation of removal for non-lawful permanent residents. Compare 8 U.S.C. 1229b(a) (cancellation of removal for “certain permanent residents”), with 8 U.S.C. 1229b(b) (cancellation of removal “for certain nonpermanent residents”).

³⁶ OLC Opinion at 27.

³⁷ See *id.* at 27-28.

³⁸ *Id.* at 29.

³⁹ *Id.* at 29.

DAPA would comport with other forms of deferred action to which Congress has acquiesced.

Based on these considerations, the opinion concluded that DAPA “is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process.”⁴⁰ This conclusion, coupled with the expertise DHS possesses in relation to resource allocation, led OLC to opine that DAPA represents “a permissible exercise of DHS’s enforcement discretion under the INA.”⁴¹

III. DAPA IS INCONSISTENT WITH CONGRESSIONAL INTENT AND POLICY EMBODIED IN THE INA

OLC’s conclusion that DAPA is consistent with congressional policy embodied in the INA is premised on two fundamental errors. First, its review of existing statutory law regarding the relief available to the parents of U.S. citizen and lawful permanent residents is superficial and ignores the *very limited* nature of any “family unity” policy present in the INA. Congress has not treated all family relationships as equally important for purposes of unification. Specifically, the parents of U.S. citizens and lawful permanent residents historically have not been beneficiaries of congressional largesse in the allocation of visas or the granting of relief under the INA.

Second, OLC’s conclusion that Congress has acquiesced in similar deferred action programs in the past is demonstrably false. The programs cited all countenanced some form of immediate relief, with the deferred action serving as a temporary bridge to permanent residence or lawful presence. In contrast, any permanent relief that a DAPA-eligible alien might receive will be, under existing law, based on contingencies and the mere passage of time. In other words, many will never become eligible for relief, while others will be no more eligible at the expiration of DAPA than they were on the day they applied. Unless Congress changes the law, there is no pot of gold waiting at the end of the rainbow.

A. THE INA’S POLICY TOWARD FAMILY UNIFICATION FOR PARENTS OF CITIZENS AND LAWFUL PERMANENT RESIDENTS

1. CONGRESSIONAL TEXT AND HISTORY REGARDING FAMILY UNITY

There is no question that a policy of family unification runs throughout many provisions of the INA. Family-based immigration is perhaps the primary route to legal residency for intending-immigrants. Under this system, a finite number of visas are allocated annually to four preference categories: (1) the unmarried sons and daughters of

⁴⁰ OLC Opinion at 31.

⁴¹ *Id.*

citizens; (2) the spouses and children of lawful permanent residents and the unmarried sons and daughters of permanent residents; (3) the married sons and daughter of citizens; and (4) the brothers and sisters of citizens.⁴² The immediate relatives of citizens, defined as the “children, spouses, and parents of a citizen”—the traditional nuclear family—are treated even more favorably, as these individuals are not subject to the yearly numerical limitation on the number of visas issued.⁴³

Beyond family-based immigrant visas, the INA also contemplates many forms of relief from removal, or waivers of removability, based on the alien having a qualifying family relationship. For instance, cancellation of removal is available to certain non-lawful permanent residents who have a spouse, parent, or child who is a citizen or lawful permanent resident.⁴⁴ Inadmissibility under 8 U.S.C. 1182(a)(6)(C)(i) for seeking to procure or procuring a visa or immigrant admission “by fraud or willfully misrepresenting a material fact” may be waived by the Attorney General if the alien is “the *spouse, son or daughter* of a United States citizen or of an alien lawfully admitted for permanent residence[.]”⁴⁵ An alien’s inadmissibility based on membership in or affiliation with a totalitarian party or having “a communicable disease of public health significance” can also be waived by the Attorney General if, *inter alia*, a qualifying family relationship is established.⁴⁶ Congress even vested the Attorney General with the discretion to waive some criminal grounds of removability “in the case of an immigrant who is the *spouse, parent, son, or daughter* of a citizen of the United States[.]”⁴⁷

The policy of family unity even extends to individuals who would not otherwise be eligible for any immigrant status or admission on their own. A *spouse* or *child* who is not in his or her own right entitled to issuance of a visa is nonetheless entitled to the same status as the primary visa beneficiary spouse or parent, “if accompanying or following to join, the spouse or parent.”⁴⁸ Similar derivative beneficiary status is provided to the spouses and children of aliens who are granted asylum, even if they would not be eligible for any relief under the INA.⁴⁹ Neither of these provisions, however, provides derivative

⁴² See 8 U.S.C. 1153(a)(1)–(4).

⁴³ See 8 U.S.C. 1151(b) & (b)(2)(A)(i).

⁴⁴ See 8 U.S.C. 1229b(b)(1)(D) (removal can be cancelled where “removal would result in *exceptional and extremely unusual hardship* to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”) (emphasis added).

⁴⁵ 8 U.S.C. 1182(i)(1).

⁴⁶ See 8 U.S.C. 1182(a)(3)(D)(iv) (providing “The Attorney General may, in the Attorney General’s discretion, waive the application” of 8 U.S.C. 1182(a)(3)(D)(i), if the alien “is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States . . . for *humanitarian purposes, to assure family unity*, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.”) (emphasis added); 8 U.S.C. 1182(g)(1)(B) (providing for a waiver of the ground of inadmissibility at 8 U.S.C. 1182(a)(1)(A)(i), “in the case of an alien who . . . has a *son or daughter* who is a United States citizen”) (emphasis added).

⁴⁷ See 8 U.S.C. 1182(h)(1)(B).

⁴⁸ See 8 U.S.C. 1153(d).

⁴⁹ See 8 U.S.C. 1158(b)(3) (“A spouse or child [] of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join such alien.”).

beneficiary status to the *parent* of an alien, where the child has qualified as the primary beneficiary of relief or obtained a visa.⁵⁰

Generally speaking, the INA does contemplate many avenues of relief for those with qualifying family relationships. However, the law does not extend *nearly* as far as OLC stated, in resting its decision so heavily on this purported congressional policy. Consider the family-based immigrant visa system. It is true that the spouses and children of citizens are treated preferentially, as no limits are placed on the allocation of visas to this class of intending-immigrant. However, Congress has imposed strict limits on the allocation of visas to the *parents* of U.S. citizens—the very people that fall within the ambit of DAPA. Specifically, the INA prevents a citizen child from petitioning for a visa on the parent’s behalf until the child turns 21.⁵¹ This is a significant statutory bar that severely undercuts OLC’s assertion that the statute takes an unbounded view of family unity as a policy. This gap period of 21 years means that the parents of U.S. citizen children may be, and often are, removed from the United States. In addition, aliens unlawfully present for more than a year are subject to a ten-year bar before applying for the adjustment of status. Further, they may need to leave the country in order to obtain consular visa processing abroad. These all-too-common outcomes are at odds with OLC’s all-too-rosy and overbroad vision of family unity.

Similar restrictions exist for the family-based visa preference categories. Family unity is reflected to a degree in these categories, but to a relatively narrow degree. First, as noted earlier, only *certain* qualifying relationships are countenanced.⁵² Those that fall outside the statutory categories, including the parents of lawful permanent residents—also DAPA beneficiaries—have *no right* to obtain a visa based on the asserted family relationship—ever. The Supreme Court recently reaffirmed this conclusion.⁵³

Second, even when an alien can establish that he falls within the bounds of the preference category, only a limited number of visas are available each year. Further, wait times for specific nationalities in certain of the four preference categories can stretch for decades.⁵⁴ DAPA, in contrast, operates equally without regard for the nationality of the

⁵⁰ Cox, *supra* note __ at 523 (“As a matter of law, the immigration agencies are not authorized to grant a visa to a person who does not satisfy the admissions criteria or who is subject to one of the grounds of inadmissibility.”).

⁵¹ 8 U.S.C. 1151(b)(2)(A)(i) (“the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.”).

⁵² 8 U.S.C. 1153(a)(1)—(4) (listing qualifying family relationships for purposes of the family-based immigration system, as well as the annual allocation of visas available to each category).

⁵³ *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014) (rejecting expansive construction of 8 U.S.C. 1153(h) because it would include relationships that Congress has never recognized “as warranting a family preference”).

⁵⁴ *See, e.g., U.S. Dep’t of State, Visa Bulletin*, Vol. 9, No. 75 (December 2014), <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-december-2014.html> (last visited Dec. 20, 2014). For example, visas are immediately available for the unmarried sons and daughters of Mexican LPR parents only for those with a priority date (the date a petition was filed with USCIS) of October 1, 1994, or earlier, whereas for most other nationalities the priority date that will entail immediate visa availability is February 22, 2008. In other words, immigrants from certain countries will have to wait significantly longer for a visa than immigrants from other countries.

alien. These twin limitations mean that family unity through the immigrant visa system will be an impossibility for most, a dream for some, and likely a potentially prolonged slog for the remainder.

A broad conception of family unity is even less consistent with the relief provisions of the INA. Cancellation of removal requires that the non-lawful permanent resident establish that his removal “would result in the *exceptional and extremely unusual hardship* to the alien’s” qualifying citizen or permanent resident relative. This is an onerous burden that is rarely met in practice.⁵⁵ As a point of comparison, DACA and DAPA require *no* showing of any hardship.⁵⁶ Moreover, Congress has explicitly capped annual grants of cancellation of removal at 4,000, meaning that many aliens may not obtain relief even if otherwise statutorily eligible.⁵⁷ Millions of potential DAPA beneficiaries could *never* realistically seek relief within these strict statutory caps.

Other waivers of removability require a showing of “extreme hardship” to the qualifying relative.⁵⁸ This standard, a significant statutory stumbling block, carries a burden nearly as onerous as that an alien must discharge in order to establish statutory eligibility for cancellation of removal. And even if the statutory eligibility criteria can be met, these forms of relief also require a favorable exercise of the agency’s discretion. This waiver could be denied for any number of reasons, including past immigration violations, non-disqualifying criminal convictions, or poor moral character.

This is, again, not to say that the INA does not embody a certain policy of family unity. The provisions reviewed here all indicate congressional intent to extend benefits to aliens with certain qualifying family relationships, while withholding those benefits from other aliens who lack such relationships. But this policy is quite limited in scope, and places several statutory hurdles in front of aliens who seek to obtain benefits pursuant to these provisions. These include a statutory cap on the allocation of visas under the

⁵⁵ See 8 U.S.C. 1229b(b)(1)(D) (“removal would result in *exceptional and extremely unusual hardship* to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”) (emphasis added).

⁵⁶ David A. Martin, Concerns about a Troubling Presidential Precedent and OLC’s Review of Its Validity, Balkinization (Nov. 25, 2014), available at <http://balkin.blogspot.com/2014/11/concerns-about-troubling-presidential.html> (“The opinion also finds justification in a form of relief from deportation called cancellation of removal, which OLC says “offers the prospect of receiving [LPR] status immediately” (pp. 27-28). This is *remarkably misleading*. In 1996 Congress greatly tightened the standards for cancellation, which, with minor exceptions, is available only from an immigration judge in removal proceedings. Mere relationship to a US citizen or LPR family member is not enough. The applicant has to prove that removal would cause “exceptional and extremely unusual hardship” to the family member (OLC even misstates and softens this test, p. 27). Congress also capped grants of cancellation at 4,000 a year. A large backlog has developed. By congressional design, there is nothing immediate about cancellation relief.”) (emphasis added).

⁵⁷ 8 U.S.C. 1229b(e)(1) (“the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year.”).

⁵⁸ See, e.g., 8 U.S.C. 1182(i)(1) (requiring a showing of “*extreme hardship to the citizen or lawfully resident spouse or parent*” of the alien) (emphasis added); 8 U.S.C. 1182(h)(1)(B) (providing waiver “if it is established to the satisfaction of the Attorney General that the alien’s denial of admission would result in extreme hardship to the United States citizen . . . spouse, parent, son, or daughter.”).

preference categories and the statutorily imposed high burden of establishing exceptional and extremely unusual hardship to a qualifying relative before removal will be cancelled. The bottom line is that congressional policy regarding family unity is narrow and circumscribed by onerous eligibility criteria. The reality of congressional policy on this point is not consistent with OLC's appeal to a broad conception of family unity.⁵⁹ DAPA's policy of immediate relief for parents of citizens or LPRs, without *any* showing of hardship cannot be squared with the labyrinth Congress designed for other attempts to unify families.

2. DEFERRED ACTION FOR PARENTS OF U.S. CITIZENS

Despite Congress's decision to create this distinct scheme for parents of citizens seeking to immigrate based on the citizenship of their child, DAPA facilely grants deferred action to this disfavored class of aliens. In this sense, DAPA vitiates Congress's stated preference for parents of citizens to wait for their relief. To be sure, the parent will not receive any technical legal status until the point contemplated by the statute. Yet DAPA acts to circumvent the consequences of this statutory provision. Ensuring that citizen children cannot petition for their parents until they reach the age of majority serves Congress's end. But DAPA frustrates this purpose.

Perversely, OLC specifically referenced the desire to evade operation of this statutory provision as a point *in favor* of the program: "The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period"—that is, the period until the citizen child turns 21 years of age.⁶⁰ While keeping families together appeals to humanitarian concerns, it is the exact opposite of the policy Congress designed.⁶¹ The statute not only contemplates possible

⁵⁹ Peter Margulies, President Obama's Immigration Plan: Rewriting the Law, Lawfare Blog (Nov. 23, 2014), available at <http://www.lawfareblog.com/2014/11/president-obamas-immigration-plan-rewriting-the-law/> ("Effective legal guidance would have acknowledged Congress's painstaking efforts to deter undocumented folks from leveraging post-entry US citizen children. Instead, OLC breezily justifies the award of precious benefits like work authorization by touting undocumented parents' 'prospective entitlement to lawful immigration status.'").

⁶⁰ OLC Opinion at 29.

⁶¹ OLC's view of DAPA's operation resembles the operation of the classic property topic, the Rule Against Perpetuities. As canonically expressed by Professor John Chipman Gray, the Rule provides that "No interest is good unless it *must* vest, if at all, not later than twenty-one years after the death of some life in being at the creation of the interest." John Chipman Gray, *The Rule Against Perpetuities* § 201 p. 174 (3rd Ed. 1915). In short, the Rule prevents the transfer of property interests to people too far into the future. Between the grant of the property in the present, and the vesting of the interest in the future, a lot of things can happen in between. Many of the problems inherent with the Rule Against Perpetuities exist for DAPA with respect to the parents of citizens. First, the parent needs to wait until the child ages till 21, which is no guarantee. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) citing Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789) ("Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes."). Second, the child needs to petition for a visa for the parent. There can be many unpredictable factors that counsel against granting such a visa. Third, the parent will likely need to leave the United States, and apply at the consulate in his or her home country for re-entry. Finally, there is no guarantee that even after all of these steps happen, the parent will receive a visa—and if she does it will take many years, potentially apart from the child. A lot of things can happen to

separation during the minority of the citizen child, it may even require it before a visa is granted, as most parents would likely have to depart and proceed through consular visa processing abroad. Accordingly, the operation of the statute is in tension with DAPA's intent to eliminate *any* possible separation in the interim between the birth of a citizen child and the point at which that child may file an immediate relative petition on behalf of the parent.

On this point, DAPA is also contrary to congressional intent. In 1965, parents of citizens were added to the category of "immediate relatives."⁶² Prior to the 1965 Act,⁶³ parents were subject to strict numerical limitations regarding visa availability, just like the current preference categories,⁶⁴ providing some indication of the lower priority parents have traditionally enjoyed under the INA. Nonetheless, in shifting parents into the immediate relative category, Congress explicitly *rejected* a draft that would have permitted a petition to be filed *regardless* of the age of the citizen child.⁶⁵ Instead, Congress enacted the current provision that disallows petitioning by a minor child.⁶⁶ In fact, both the House and Senate reports indicate an intent to permit only *adult* citizen children to petition on behalf of the citizen parent.⁶⁷

prevent the interest from vesting. A similar rule could be stated to assess the validity of OLC's reasoning: "The Deferred action is not valid, unless a visa must vest, if at all, not later than 21 years after a citizen in being at the creation of the deferred action." Under this Rule, DAPA fails, as there is hardly any guarantee that the parent of a citizen will eventually be able to receive a visa.

⁶² See S. Rep. 89-748 at 3329 (noting one purpose of the 1965 Act as providing for the immigration of the parents of adult U.S. citizens without numerical limitation).

⁶³ The Immigration and Nationality Act of 1965 (Pub.L. 89-236, 79 Stat. 911), 8 U.S.C. § 1101, et seq.

⁶⁴ See S. Rep. 89-748 at 3332 ("It is to be noted that parents of U.S. citizens are presently eligible for second preference status under the quotas, but will hereafter be permitted to enter without numerical limitation.").

⁶⁵ *Faustino v. INS*, 302 F.Supp. 212, 215-16 (S.D.N.Y. 1969) (reviewing hearing colloquy between Senators Ervin (NC) and Kennedy (NY) rejecting a draft provision that would have included parents of U.S. citizens as "immediate relatives" regardless of the age of the citizen child). *Id.* at 216 ("Senator ERVIN. I agree with you, because I think that this provision is unwise. Foreigners can come as visitors and then have child born here, and they would become immediately eligible for admission would they not, as parents of this child as now worded? Senator KENNEDY of New York. That is right. I think it should go back as it was."); *id.* at 215 ("Absent this classification, wholesale avoidance of the established limitations would be possible by means of the very device employed in this case (whether unwittingly or not), i.e., an alien expectant mother arrives in this country as a visitor, during her stay the 'citizen' is born, and shortly thereafter, a petition by the new citizen for permanent resident status of the mother and other 'immediate relatives'. To grant * * * this form of relief upon the accident of birth in the United States of their son would be to deprive others, who are patiently awaiting visas under their already oversubscribed quotas.") citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 74-75 (1957). Senator Robert Kennedy would become the Attorney General. Senator Sam Ervin would later chair the Senate Watergate Committee. Assistant Attorney General Norbert Schlei suggested an amendment that restored the language, pronouncing the change necessary "to preclude an inadvertent grant of ... immigrant status to aliens to whom a child is born while in the United States." Hearings on S. 500 before the U.S. Senate Cmte. on the Judiciary, Subcmte. on Immig. & Naturalization, 89th Cong., 1st Sess. 270 (Feb. 10, 1965).

⁶⁶ See 8 U.S.C. 1151(a)(2)(B)(i) (permitting only citizen children over the age of 21 to petition on behalf of their parents).

⁶⁷ See S. Rep. 89-748 at 3332 ("In order that the family unity may be preserved as much as possible, parents of *adult U.S. citizens*, as well as spouses and children, may enter the United States without numerical limitation.").

Congress could have permitted the filing of a visa petition on behalf of a parent regardless of the age of the child. Such a statute would have avoided the possibility that a citizen child would be separated from his or her parents or forced to return with the parent to the parent's country of nationality. It did not do so, as the text of the statute indicates. But further, Congress also *rejected* a provision that would permit a petition to be filed by a minor child on behalf of an alien parent.⁶⁸ The operation of DAPA is thus contrary not only to the text of the statute, which contemplates only a limited petitioning mechanism for the parents of citizen children, but also to congressional intent, as evidenced by Congress's *explicit rejection* of the exact type of expansive family unity principle that DAPA enacts administratively.

3. DEFERRED ACTION FOR PARENTS OF LAWFUL PERMANENT RESIDENTS

The same inconsistency in DAPA is implicated even more strongly by permitting broad deferred action for the parents of *lawful permanent resident* children. Unlike the parents of citizens, however, the parents of LPRs are a class of alien Congress has *never* contemplated providing special preference under the INA. They have *not* been included as one of the visa preference categories under the family-based immigration system, and thus they are *not* eligible to obtain visas as primary beneficiaries under that system.⁶⁹

These omissions are important, as the Supreme Court has placed significant weight on the fact that a relationship that has not been recognized by Congress does not warrant preferential treatment under the INA.⁷⁰ Congress's non-recognition of parents of LPR children reveals a chasm between the avenues of relief Congress has provided and the deferred action program the Executive has promulgated. Even if the parents of *citizens* can eventually be the beneficiary of a visa petition when the child reaches 21 years of age, the parents of *LPRs* can never be the primary beneficiary of a visa petition based on that relationship, unless the status of their child changes.

OLC attempts to sidestep these concerns in two unconvincing ways. First, it notes the possibility that the permanent resident child *could* eventually obtain citizenship and then petition for their parent as an immediate relative, assuming the citizen child had reached the age of 21.⁷¹ But the contingent possibility that at some future point an alien in this class *might* be eligible to obtain an immigrant visa is a weak reed on which to rest a claim of consistency.⁷² This eventuality is too far attenuated from Congress's policy embodied in the INA. Moreover, it is hard to see what the logical stopping point of this argument is. There are countless other classes of alien that are only one or two steps removed from *possible* eligibility to obtain a visa. Anything could happen; but it cannot be the case that

⁶⁸ See *Faustino*, 302 F.Supp. at 215-16.

⁶⁹ See 8 U.S.C. 1153(a)(1)-(4) (visa preference categories, which include no category for the parents of LPRs).

⁷⁰ See *Cuellar de Osorio*, 134 S. Ct. at 2207.

⁷¹ See OLC Opinion at 27.

⁷² Under the adapted Rule Against Perpetuities, this deferral is void, as the interest will *never* vest—parents of LPR's will never be eligible for a visa, unless the LPR first becomes a citizen.

a simple contingent future possibility of relief is enough to engage deferred action until that contingency occurs.

As an alternate rationale, OLC notes the provision of cancellation of removal and argues that this also indicates a viable avenue to relief and legalization.⁷³ Yet this argument is remarkably disingenuous for two important reasons. First, statutory eligibility criteria are onerous and rarely met in practice. In 2013, the last full year for which statistics are currently available, *only* 3,625 applications for cancellation of removal were granted for those non-lawful permanent residents subject to the annual cap.⁷⁴ Only the *most compelling* cases of aliens will be able to even establish *statutory* eligibility for this form of relief. This must be contrasted with a virtually-automatic relief based on *executive* eligibility factors. The replacement of these statutory stumbling blocks with an executive rubber stamp is inconsistent with Congressional design. Even those who meet the statutory stumbling blocks still must receive leniency from the Executive Branch in the form of an exercise of the Attorney General's discretion.

Second, even assuming an alien manages to vault over the statutory stumbling blocks, and warrants discretion from the executive branch, Congress has capped the number of cancellations of removal annually at 4,000.⁷⁵ Statutory eligibility alone might not be sufficient for an alien to obtain relief. The alien will also have to be one of 4,000 grants each year, while also establishing that he or she warrants a favorable exercise of discretion. Again, as noted in the preceding section, the limited form of cancellation of removal simply does not indicate any broad Congressional policy or intent to provide relief to the parents of lawful permanent residents. It cuts in just the opposite direction. Congress makes the exercise of discretion with respect to cancellation of removal very, very narrow. Here, the Attorney General's discretion is severely limited by a cap of 4,000. This is several orders of magnitude smaller than the 4,000,000+ covered by DAPA. With these limits, virtually none of the parents of LPR could ever obtain cancellation of removal.

OLC's justification ultimately boils down to this: "Removing the parents of U.S. citizens and LPRs would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided."⁷⁶ This harsh reality is a feature, not a bug of our immigration system. Congress has provided only limited avenues for visa availability and relief, and that for the most part the classes of alien contemplated by DAPA fall outside the bounds of these provisions. DAPA is meant to mitigate operation of the statute by effectively nullifying provisions the Executive does not agree with, thereby rewriting the statute in a manner that more readily comports with this Administration's policy preferences.⁷⁷ This action is not a faithful execution of the law.⁷⁸

⁷³ See OLC Opinion at 27.

⁷⁴ U.S. Department of Justice, Executive Office for Immigration Review, FY 2013 Statistics Yearbook at N1 (2014), available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf> (last visited Jan. 1, 2015).

⁷⁵ 8 U.S.C. 1229b(e)(1) ("the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year.").

⁷⁶ OLC Opinion at at 30.

⁷⁷ Josh Blackman, Gridlock and Executive Power, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466707.

⁷⁸ Blackman, *supra* note __ at .

Absent future immigration legislation, which the author supports, the aliens covered by DAPA will only obtain permanent legal relief, if at all in the future, consistent with the terms of the statute. But until that day comes, DAPA acts to override the Congressional intent that the parents of citizen and LPR children should receive no more special treatment than the limited forms that Congress has sought fit to enact.

In the case of family-based immigrant visas, the parents of U.S. citizens do not have *any* immediate prospect of relief or a visa available to them. They will have to wait until the child turns 21, and can only then petition for a visa. This process will likely entail leaving the country, applying at a consulate in their home country, and then re-entering, if they are not otherwise barred from doing so. This process is hardly consistent with deferred action to maintain family unity. Further, the parents of lawful permanent residents cannot pursue a visa through this system. Although there are other forms of relief available, including cancellation of removal, the prospects of obtaining that relief and thereby being able to pursue adjustment of status are slim.

B. CONGRESS'S ACQUIESCENCE TO DEFERRED ACTION HAS BEEN NARROWLY CIRCUMSCRIBED

OLC's second justification for finding DAPA consistent with congressional policy is the assertion that Congress has acquiesced to the existence of deferred action. Specifically, OLC argues, this round of deferred action is substantially similar to prior instances where Congress has sanctioned or extended deferred action.

The origin of deferred action is nebulous. Deferred action was conceived as an administrative measure without explicit congressional authorization. Although Congress has not specifically granted the Secretary the power to defer deportations, it has been understood to stem from two provisions: 6 U.S.C. § 202(5)⁸⁸ and 8 U.S.C § 1103(a).⁸⁹

⁸⁸ 6 U.S.C. § 202(5) (“The Secretary, acting through the Under Secretary for Border and Transportation Security, shall be responsible for . . . Establishing national *immigration enforcement policies and priorities.*”) (emphasis added).

⁸⁹ 8 U.S.C. § 1103(a)(3) (“The Secretary of Homeland Security shall . . . establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for *carrying out his authority under the provisions of this chapter.*”) (emphasis added). I emphasize the last portion, because the Secretary's discretion exists only so long as this “authority [is] under the provisions of” the INA. Authority beyond the scope of the INA would not fall under § 1103. Allowing this provision to confer such significant residuals of power to confer benefits on millions Congress deemed unworthy of such benefits, would render much of the INA superfluous. Further, such a reading of § 1103 that gives the Secretary the authority, by itself, to implement DAPA, would raise serious constitutional concerns. If a single provision that affords the Secretary the authority to do “what he deems necessary” provides the authority to bypass congressional policy embodied in the INA, it would almost certainly lack an “intelligible principle.” *Whitman v. American Trucking Association*, 531 U.S. 457, 474-76 (2001). Delahunty, *supra* note __ at 853 (“Even by the extremely permissive standards of the nondelegation doctrine, 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.”). With the voluminous INA providing specific limits and caps on the Secretary’s discretion, Congress did not “hide elephants in mouseholes.” *Whitman*, 531 U.S. at 468. To avoid these constitutional doubts, the

Over the last four decades, Congress has given its implied and express approval of deferred action by including provisions related to the practice in the INA, and by statutorily extending deferred action programs. There is little question today that deferred action is a permissible manifestation of immigration enforcement discretion.⁹⁰

As OLC correctly noted, one of the best measures for the lawfulness of DAPA is its consistency with prior incidences of congressional acquiescence in deferred action programs. OLC identified five prior exercises of deferred action “to certain *classes* of aliens”⁹¹ supported by Congress: deferred action for (1) VAWA self-petitioners, (2) T and U visa applicants, (3) foreign students affected by Hurricane Katrina, (4) widows and widowers of U.S. Citizens, and (5) Deferred Action for Childhood Arrivals (DACA). Based on this history, OLC opined that DAPA is consistent with the scope and intent of these prior programs.

The facts do not support this conclusion. The scope of Congress’s acquiescence in the Executive’s use of deferred action is *far* more constrained than the OLC opinion suggests. Deferred action only exists within a circumscribed realm designed by Congress.

The first four incidences of deferred action were all sanctioned in one way or another by Congress. In these cases, one of two conditions existed: (1) the alien had an *existing* lawful presence, or (2) the alien had the *immediate* prospect of lawful residence or presence. For each, deferred action acted as a *temporary bridge* from one status to another, where benefits were construed as *immediately* arising post-deferred action. These currents bring the deferred action within the tides of congressional policy.

provision should be read as it is written—to only permit authority within the “provisions of this chapter.” *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *N.W. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). Accordingly, OLC adopted this refined understanding of § 1103(a), even though a purely textual argument could vest the Secretary with far more power. OLC Opinion at 3-4. However, the Justice Department changed its tact during the course of litigation, and cited § 1103 as the basis for DAPA. *Sur-Reply of United States, Texas v. United States*, 1:1-cv-00254 (Jan. 30, 2015) at 21 (“Specifically, Congress has afforded the Secretary broad discretion to take necessary actions to carry out his authority, see 8 U.S.C. § 1103(a), and directed him to ‘[e]stablish[] national immigration enforcement policies and priorities,’ 6 U.S.C. § 202(5). That is *precisely* what the Secretary has done with the 2014 Deferred Action Guidance, which is part of a series of interrelated memoranda that set Department-wide enforcement priorities and allow resources to be deployed most effectively in support of those priorities.”) (emphasis added), <https://www.scribd.com/doc/254323502/Texas-v-United-States-Government-Surreply>.

⁹⁰ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (noting a “regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience” citing 6 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure* § 72.03 [2][h] (1998) (“This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action.”). Cox, *supra* note __ at 510 (“In immigration law, there exists a broader basis than in many other areas of law for defending inherent authority as a matter of constitutional design. This possibility stems from many sources: from the immigration power’s ephemeral origins; from the nexus between immigration law and foreign affairs; from the uneasy relationship between the immigration power and administrative law over the last century; and from the ambiguity regarding legal authority that often arises during times of perceived crisis.”).

⁹¹ See OLC Opinion at 15-20.

However, neither limiting principle exists for the fifth instance of deferred action, DACA, or its close cousin, DAPA.

1. DEFERRED ACTION FOR VAWA SELF-PETITIONERS

To justify congressional acquiescence to DAPA, the OLC memo first reviewed the “class-based deferred action” program for abused aliens under the Violence Against Women Act (VAWA). This program granted deferred action⁹² for VAWA self-petitioners⁹³ where the visa petition had been approved but a visa was not immediately available.⁹⁴

This deferred action flows with the second, as applicants had an immediate prospect of lawful presence. The VAWA self-petitioners who benefitted from deferred action had already had their visa petitions approved and were simply waiting for visas to become available. In other words, their lawful permanent residency was simply a matter of visa allocation, not some eligibility contingency. In this sense, deferred action was employed within the framework of discretion vested by Congress pursuant to the Violence Against Women Act. As the OLC memo noted, “In 2000, INS reported to Congress that, because of this program, *no* approved VAWA self-petitioner had been removed from the country.”⁹⁵ Here, the deferred action served as a temporary bridge for those who would soon receive permanent status according to the laws of Congress.

2. DEFERRED ACTION FOR T AND U VISA APPLICANTS

Second, the OLC memo relied on the deferred action program⁹⁶ for T and U visa applicants.⁹⁷ This policy directed the former Immigration and Naturalization Service to actively seek out possible beneficiaries and to use existing administrative tools, including deferred action, to forestall removal of those whose applications were already deemed to be *bona fide*.⁹⁸ Through the Victims of Trafficking and Violence Protection Act

⁹² Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues at 3 (May 6, 1997), available at <https://www.scribd.com/doc/251876850/Memorandum-for-Regional-Directors-et-al-INS-from-Paul-W-Virtue-Acting-Executive-Associate-Commissioner-INS-Re-Supplemental-Guidance-on-Battere>.

⁹³ Under VAWA, battered women were allowed to petition for a visa on their own, without having to rely on abusive family members to petition for them. *See, e.g.*, 8 U.S.C. 1154(a)(1)(iii) (an alien can file his or her own petition if “during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien’s spouse”).

⁹⁴ OLC Opinion at 15; *See* 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii).

⁹⁵ OLC Opinion at 15.

⁹⁶ Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—“T” and “U” Nonimmigrant Visas at 2 (Aug. 30, 2001), available at <https://www.scribd.com/doc/251877266/Memo-INS-VTVPA>.

⁹⁷ These visas are intended for victims of human trafficking, named after their section in the U.S. code. *See* 8 U.S.C. 1101(a)(15)(T), (U).

⁹⁸ OLC Opinion at 15-16.

(“VTVPA”), Congress imposed specific limits on the number of visas that could be granted.⁹⁹ The INS regulations provided that an applicant should receive deferred action if she presents “prima facie evidence” of eligibility under the provisions Congress specified.¹⁰⁰ In the case of T and U visa applicants, deferred action was granted following a determination that the application was *bona fide* and the visa petition was likely to be approved based on the statute. The situation presented by T and U visa applicants is thus also consistent with the second current, as the deferred action served as a bridge—lawful admission was immediately available on the other side of the deferral. The proverbial pot of gold awaited on the other side of the rainbow.

Noteworthy of OLC’s analysis,¹⁰¹ with respect to VAWA and VTPVA, is the symbiotic relationship between Congress and the Executive, as they favorably reacted to specific grants of deferred action based on statutes they enacted. This is in stark contrast with the straws OLC must grasp at in order to justify DAPA, coupled with the present-day contentious relationship between the elected branches. The argument for acquiescence cannot be stretched from the healthy working relationship between Congress and the Executive under VAWA and VTPVA, where specific instances of deferred action were affirmed, and the dysfunctional situation today where Congress has specifically rejected the DREAM Act and further comprehensive immigration reform.¹⁰³ Gridlock does not license the unlawful expansion of executive power.¹⁰⁴

3. DEFERRED ACTION FOR FOREIGN STUDENTS AFFECTED BY HURRICANE KATRINA

The third example cited by OLC concerned one of the worst natural disasters of the 21st century. Following the tragedy inflicted by Hurricane Katrina, the executive branch granted deferred action for foreign students who attended schools in the Gulf Coast.¹⁰⁵ This action provided temporary relief—from November 2005 through February 2006—to those unable to fulfill the educational requirements of their nonimmigrant admission.¹⁰⁶ Students affected by Katrina who benefitted from this deferred action program were previously in the country *lawfully* and had a valid status. They would have continued to be in compliance with the conditions of their non-immigrant status, had the hurricane not wreaked havoc on the Gulf Coast and its schools.

⁹⁹ Victims of Trafficking and Violence Protection Act (VTVPA) Pub. L. No. 106-386, 114 Stat. 1464. See 8 U.S.C. 1184(o)(2) (imposing an annual cap of 5,000 T visas); 8 U.S.C. 1184(p)(2)(A) (imposing an annual cap of 10,000 U visas).

¹⁰⁰ OLC Opinion at 15.

¹⁰¹ OLC Opinion at 18-19.

¹⁰³ Press Release, The White House, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> (“Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it.”).

¹⁰⁴ Josh Blackman, Gridlock and Executive Power, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466707

¹⁰⁵ See Press Release, USCIS, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), available at http://www.uscis.gov/sites/default/files/files/pressrelease/F1_Student_11_25_05_PR.pdf (“”).

¹⁰⁶ *Id.* OLC Opinion at 16-17.

Deferred action simply provided a mechanism to permit sufficient time for the students to get back into compliance with the conditions of their initial admission. This was as simple as enrolling at another school to pursue a “full course of study,” which could be done within a single semester. No action of Congress was necessary. Further, the relief was limited to “several thousand foreign students,”¹⁰⁷ whose present stay in the United States would be limited by the duration of their “full course of study.” This deferral of any immigration action is consistent with the first thread, as the applicants already possessed a lawful status.

4. DEFERRED ACTION FOR WIDOWS AND WIDOWERS OF U.S. CITIZENS

Fourth, OLC justifies DAPA by looking to a deferred action policy for widows and widowers of U.S. citizens who were on the precipice of receiving a visa. Under the INA, an alien who marries a citizen is entitled to be the primary beneficiary on a visa petition filed by the citizen spouse. Because the spouse is an “immediate relative,” a visa is *immediately* available. However, a problem arose under a prior version of the statute, which seemed to provide immediate relative status to widows and widowers only “[i]n the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen’s death.”¹⁰⁸ In cases where the alien had not been married at least 2 years prior to the passing of the citizen-spouse, the alien was construed to fall outside the category of “spouse.”¹⁰⁹

This circumstance specifically affected the widows and widowers of U.S. citizens who were beneficiaries of visa petitions that had been filed, but not completely adjudicated because of administrative delays, as well as those where no visa petition had been filed at the time of the citizen’s passing. Under USCIS’s interpretation at the time of the then-existing statute, these aliens were no longer eligible for visas as immediate relatives—although they would have been had the process been completed more quickly.¹¹⁰ As a result, the aliens were here without lawful status, and were subject to removal.

To remedy this gap, the Executive provided deferred action to those spouses married less than two years at the time of the passing of the U.S. citizen spouse.¹¹¹ This deferral followed the first current. Prior to the death of the citizen spouse, the alien spouse had lawful status. However, this status was vitiated by the untimely death of the citizen spouse. Further, under the statute, they would have been entitled to a visa *without regard to any numerical limitation* had the petition been completely and timely adjudicated. In several respects, this deferred action was consonant with congressional policy embodied in the INA.

¹⁰⁷ *Id.* at 16.

¹⁰⁸ *See* 8 U.S.C. 1151(a)(2)(B)(i) (2000).

¹⁰⁹ *See, e.g.,* Lockhart v. Napolitano, 573 F.3d 251, 255-62 (6th Cir. 2009) (interpreting the relevant statutory language and reviewing the government’s defense of the narrow interpretation).

¹¹⁰ OLC Opinion at 17.

¹¹¹ Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (Sept. 4, 2009)

Further, this deferral could also be seen flowing along the second current, as the action partially bridged two different statuses. Deferred action seems to have been employed as a temporary adjustment as the agency determined how to proceed while conditions were in flux. It represents an attempt at uniformity, since aliens in at least two circuits were eligible for a visa and thus not in need of deferred action at all.¹¹² The agency interpretation might already have shifted prior to the deletion of the problematic language in the INA. In this light, deferred action ensured the ability of a small, afflicted class of aliens to remain in the United States as the government and Congress worked on enacting a definitive statutory fix to the issue. And a few months after the deferred action program was announced, Congress ratified this understanding,¹¹³ placing the President and the legislature in agreement. This species of deferred action is perhaps at its constitutional zenith, as the courts, and ultimately Congress, ratified the Executive's interpretation.¹¹⁴ In light of subsequent events, the significance of this program as a basis for an expansive interpretation of executive authority in this domain is not great.

In contrast to the widows and widowers of citizens, DAPA beneficiaries are not lawfully present, and Congress does not support the President's reading of the law.¹¹⁵ There is no immediate prospect of a visa for DAPA beneficiaries. Rather, Congress has specifically *rejected* the type of comprehensive immigration reform that would be necessary to provide these people a quick and sure pathway to citizenship. DAPA is a bridge to nowhere.

In short, the four programs OLC cites do not demonstrate that Congress has acquiesced to the scope of deferred action at play in DAPA.

5. DEFERRED ACTION FOR CHILDHOOD ARRIVALS

In addition to the four previously mentioned programs, the OLC opinion also referenced DACA as a comparable initiative. This program granted deferred action to approximately 1 million "certain young people who were brought to this country as

¹¹² Taing v. Napolitano, 567 F.3d 19 (1st Cir. 2009); Lockhart v. Napolitano, 573 F.3d 251, 255-62 (6th Cir. 2009) ("we conclude that a 'surviving alien-spouse' is a 'spouse' within the meaning of the 'immediate relative' provision of the INA"); Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) (same). Other courts agreed with USCIS's interpretation, and found that alien was not "immediate relative" upon spouse's death. See Robinson v. Napolitano, 554 F.3d 358 (3d Cir. 2009), cert. denied 130 S.Ct. 826 (2009).

¹¹³ See Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009) ("The second sentence of section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)) is amended by striking 'for at least 2 years at the time of the citizen's death'").

¹¹⁴ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

¹¹⁵ In November 2014, the House passed a measure to stop DAPA. Seung Min Kim, *House Sends Obama message with immigration vote*, Politico (Dec. 4, 2014), available at <http://www.politico.com/story/2014/12/house-immigration-vote-obama-113327.html>. In August 2014, the House passed a measure that would defund DACA. Susan Ferrechio, *House votes to end Obama's deferred deportation program*, Washington Examiner, August 1, 2014, available at <http://washingtonexaminer.com/house-votes-to-end-obamas-deferred-deportation-program/article/2551601>.

children” unlawfully.¹¹⁶ However, DACA stands on an *even shakier* footing than DAPA, and serves as a very weak precedent for this expansion of deferred action.

In a cryptic footnote, the opinion explains that OLC “orally advised” DHS that granting deferred action on a “class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action.”¹¹⁷ Specifically, the memo recognized that DACA “was predicated on humanitarian concerns that appeared *less particularized and acute* than those underlying certain prior class-wide deferred action programs.”¹¹⁸ Yet, the action was lawful because “the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.” This is simply not correct—reading the opinion closely suggests that even OLC was not comfortable with this conclusion. The humanitarian concerns at issue with the four previous deferred action programs were consistent with congressional policy. In contrast, Congress has explicitly and repeatedly rejected providing a path to citizenship for the so-called Dreamers.¹¹⁹ On March 28, 2011—eight months before DACA was announced—President Obama accurately explained this dynamic in response to a question about whether he could stop deportation of undocumented students with an executive order:

“Well, first of all, temporary protective status historically has been used for special circumstances where you have immigrants to this country who are fleeing persecution in their countries, or there is some *emergency situation* in their native land that required them to come to the United States. So it would not be appropriate to use that just for a particular group that came here primarily . . . for *economic opportunity*. With respect to the notion that I can just suspend deportations through executive order, that’s just not the case, because there are laws on the books that Congress has passed. . . . There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those

¹¹⁶ OLC Opinion at 17.

¹¹⁷ *Id.* at 18 n.8.

¹¹⁸ *Id.* Further, unlike past deferred actions for residents of specific countries, DACA, as well as DAPA are “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.” Delahunty, *supra* note __, at 840. As well, past humanitarian exercises of deferred act may implicate the President’s foreign affairs powers. *Arizona v. United States* (2012) (“Some discretionary decisions involve policy choices that bear on this Nation’s international relations”); Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242 (1981) (invoking the “invoked the “President’s inherent constitutional power to protect the Nation and to conduct foreign relations”). Cox, *supra* note __ at 497-499. None of these concerns are present here.

¹¹⁹ See Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 632–37 (2011) (describing failed attempts to enact various versions of the DREAM Act in 2006, 2007, 2009, and 2010).

congressional mandates would not conform with my appropriate role as President.”¹²⁰

The President as correct in 2011. The “concerns animating DACA” were not consistent with previous class-wide deferred action programs.

While this footnote casts serious doubt on DAPA’s legitimacy—as Congress arguably has not looked favorably on the status of parents of citizens and LPRs—it is devastating for the legality of DACA. First, DAPA beneficiaries at least have a close kinship with a citizen or lawful resident child. In contrast, DACA beneficiaries need not have *any* familial relationship with *any* citizen or lawful resident.¹²¹ Second, there have been active congressional attempts to defeat DACA, and the program remains controversial over two years after its institution, making it a weak basis for a claim of congressional acquiescence in deferred action.¹²² This is especially true where DACA was based largely on a bill that was defeated in Congress and never became law.¹²³

Remarkably, the OLC memo would not “draw any inference regarding congressional policy from these unenacted bills,”¹²⁴ even though DACA, like the mythical phoenix, arose from the ashes of the failed Dream Act.¹²⁵ DAPA was occasioned on the failure of

¹²⁰ Remarks by the President at Univision Town Hall, March 28, 2011, <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>.

¹²¹ Steve Legomsky, *Why Can't Deferred Action Be Given to Parents of the Dreamers?*, Balkinization (Nov. 25, 2014), available at <http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html>.

“First, OLC approved DACA itself, a program that doesn’t require any family ties at all, much less ties to family with LPR paths. How can it be that it’s legal to grant deferred action to those with no family ties, but illegal to grant it to those with family ties to people who live in the U.S., are now lawfully present, and for all practical purposes are likely to remain for the long haul, but who have no path to LPR status? One can certainly make a convincing policy argument that the DACA recipients – brought here as children – have a stronger case for discretionary relief than their parents do. *But if OLC truly means to suggest that a family relationship to an LPR-path family member is a legal prerequisite to deferred action, then how does it explain its recent approval of DACA itself?* And if such a relationship is not a prerequisite, then what, exactly, is the problem? Is it simply OLC’s policy view that keeping parents and children together is not a strong enough humanitarian concern to justify deferred action when the children lack an LPR path? Is that really their call?” (emphasis added).

¹²² 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 was blocked by GOP-led filibuster with a vote of 55 to 41).

¹²³ Press Release, The White House, *Remarks by the President on Immigration* (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> (“Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it.”).

¹²⁴ OLC Opinion at 18.

¹²⁵ The President explained that “In the absence of any immigration action from Congress to fix our broken immigration system . . . we’re improving” the immigration policy on our own.” <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> Frank James, *With DREAM Order, Obama Did What Presidents Do: Act Without Congress*, NPR (Jun. 15, 2012, 3:52 PM), <http://www.npr.org/blogs/itsallpolitics/2012/06/15/155106744/with-dream-order-obama-did-what-presidents-do-act-without-congress> (“And like the other actions the president has increasingly taken as part of his “We Can’t Wait” initiative, the decision announced Friday was characterized by Obama’s political opponents as an abuse of power and violation of congressional prerogatives.”).

comprehensive immigration reform.¹²⁶ The President cited the failure of both bills in justifying his executive action.¹²⁷ Rather than justifying DAPA based on DACA, OLC should have attempted to justify DACA. It did so only feebly, in a cryptic footnote, without the benefit of a written opinion, suggesting the legality of that program is in serious doubt.

C. PREVIOUS INCIDENCES OF DEFERRED ACTION WERE BRIDGES, NOT TUNNELS

Deferred action in the first three cases cited by OLC acted as a *temporary bridge* from one status to another, where benefits were construed as *immediately* arising post-deferred action. For VAWA self-petitioners, deferred action was the bridge between the approval of the visa petition and the availability of the visa. For students impacted by Hurricane Katrina, deferred action was the bridge between two periods of lawful presence as a student, where classes had been temporarily interrupted on account of the natural disaster. For the T and U visa beneficiaries, deferred action was a bridge from likely unlawful presence to lawful admission pursuant to these visa categories as victims of human trafficking. For widows and widowers, the case is more complicated, as noted earlier, but as immediate relatives of U.S. citizens, such aliens were presumptively entitled to a visa and on a short pathway to a visa.

For DAPA, deferred action serves not as a bridge for beneficiaries to a visa, but as a tunnel to dig under and through the INA. There is no relief necessarily waiting on the other side of deferred action, as there was in the cases OLC cited.¹²⁸ Although aliens might accrue factors that create greater equities—such as working lawfully and paying taxes—and thus more easily meet the hardship standards for relief, or have a child who turns 21 during the period of deferral, these occurrences are fundamentally different from those that led to eligibility for relief in prior instances of deferred action. VAWA self-petitioners *had* approved visa petitions, but were subject to caps. The visa petitions of T and U applicants were deemed *bona fide*, but were not yet approved. Foreign students were in lawful status and were again seeking to comply with the conditions of that status post-Katrina. The widows and widowers were immediate relatives under the family-based immigration system, and had not received a visa because of administrative delays, or the failure to file the petition that would have entitled them to a visa. DAPA is not a

¹²⁶ Following the announcement that the House would not consider an immigration bill in 2014, the President said “I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing.” He said, I will “fix the immigration system on my own, without Congress.” *Transcript: President Obama’s June 30 remarks on immigration*, WASH. POST (Jun. 30 2014), http://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html.

¹²⁷ Josh Blackman, *Gridlock and Executive Power*.

¹²⁸ The relief for beneficiaries of DAPA cannot be described as “inevitabl[e].” Ahilan Arulanantham, *Two Rationales for Administrative Relief, Balkinization* (Nov. 21, 2014), available at <http://balkin.blogspot.com/2014/11/two-rationales-for-administrative-relief.html>.

bridge in this sense, but merely a detour that seeks to bypass the normal operation of the provisions Congress has enacted.

OLC is correct to note that “Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.”¹²⁹ But it is wrong to rely on DAPA’s superficial resemblance to these past programs of categorical deferred action. There is, again, no question that Congress has acquiesced in the existence of deferred action and in several categorical programs of deferred action. That acquiescence, however, should be deemed *narrowly circumscribed* by the nature of those prior programs.

Those programs were either for the benefit of individuals with *existing lawful* status in the U.S. or those who had an *immediate* prospect of such status. The deferred action was meant to act as a temporary bridge to the availability of relief, for which the aliens had already established eligibility. DAPA, encompassing individuals with *no* lawful status in the U.S., and *no* prospect for such status in the near future, falls outside the scope of prior congressional acquiescence. Given this, as well as congressional reaction to both DACA and DAPA, it is false to opine that these programs are “consonant . . . with congressional understandings about the permissible uses of deferred action.”¹³⁰ It is certainly true that “widespread nonenforcement in many areas of federal law is so inevitable that Congress must be understood to have acquiesced in it.”¹³¹ However, DAPA does not fit into that mold. Congress has *not* acquiesced. To the extent that the constitutionality of DAPA hinges on congressional acquiescence, OLC has failed to carry its burden.¹³²

Professors Cox and Rodriguez have written that, although Congress still retains “a monopoly over the[] formal legal criteria” for “admission and deportation of noncitizens,” the President has a “de facto delegation of power that serves as the functional equivalent to standard-setting authority.”¹³³ Through this power, the executive branch has the authority to “play[] a major role in shaping screening policy.”¹³⁴ Specifically, this delegation “gives the President vast discretion to shape immigration policy by deciding how (and over which types of immigrants) to exercise the option to deport.”¹³⁵ While it very well may be true that the President has acquired some broad de

¹²⁹ OLC Opinion at 18.

¹³⁰ *Id.* at 29.

¹³¹ Price, *supra* note __ at 745-46.

¹³² The first federal district court to uphold DAPA cited the OLC memo’s superficial analysis almost verbatim, without any discussion of what they actually entailed, and how they differ from DAPA. *Arpaio v. Obama*, 2014 WL 7278815 *3 (Dec. 23 2014) (“The executive branch has previously implemented deferred action programs for certain limited categories of aliens, including: certain victims of domestic abuse committed by United States citizens and Lawful Permanent Residents; victims of human trafficking and certain other crimes; students affected by Hurricane Katrina; widows and widowers of U.S. citizens; and certain aliens brought to the United States as children.”) (citations omitted).

¹³³ Adam B. Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 *Yale L.J.* 458, 511 (2009).

¹³⁴ *Id.*

¹³⁵ *Id.* at 511, 485 “485 (“We show that the intricate rule-like provisions of the immigration code, which on their face appear to limit executive discretion, actually have had the effect of delegating tremendous

facto power beyond that delegated by Congress, OLC has not adopted such an expansive notion.¹³⁶ Nor has the President attempted to rely on some form of inherent executive power.¹³⁷ Rather, the Administration has looked to whether DAPA is “consonant” with previous deferred action policies. This is an appropriate framework, but the factual predicates of how these four policies operated defeats claims of both “formal mechanisms of congressional delegation” as well as “de facto delegation.”¹³⁸ Congress has not expressly, or tacitly, approved of the requisite authority needed to implement a program of the size and scale of DAPA.

D. THE 1990 “FAMILY FAIRNESS” POLICY DOES NOT SUPPORT DAPA

There is a sixth instance of deferred action that OLC puts surprisingly little weight on—the 1990 “Family Fairness” program instituted under President George H.W. Bush.¹³⁹ A brief history will explain why. In 1986, President Reagan signed into law the Immigration Reform and Control Act (IRCA).¹⁴⁰ This bipartisan act provided a path to citizenship for up to 3 million immigrants who had been continuously present in the United States since 1982. However, the law did not cover eligible immigrants’ spouses and children who did not themselves meet the residency requirement. This gap created so-called “split-eligibility” families. Generally, once a beneficiary of IRCA received LPR status, he or she could petition for a visa for a spouse or child.¹⁴¹ Under the IRCA, however, during this potentially lengthy and cumbersome process to obtain a visa—

authority to the President to set the screening rules for immigrants—that is, to decide on the composition of the immigrant community.”).

¹³⁶ Cox and Rodriguez have faulted DAPA for not going far enough with respect to exercises of executive authority. Adam Cox & Cristina Rodriguez, *Executive Discretion and Congressional Priorities*, Balkinization (Nov. 21, 2014), available at <http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html> (“But for now we’ll just emphasize that the history of the inter-branch interaction in immigration law consists not of the Executive attempting to mold its discretion to fit Congress’s objectives, but rather of the Executive testing the limits of legislation in ways that have prompted Congress to react, either to validate the Executive’s actions or to create a framework to channel executive action through a set of legislatively defined standards and structures of adjudication. This is the story of the rise of our asylum system and many other aspects of modern immigration law that we have told in other work.”).

¹³⁷ Cox, *supra* note __ at 540. (“Though the question of inherent authority has never been definitely resolved, we are fairly confident that this option would not be viable in the contemporary political environment. The assertion of inherent authority would be too disruptive to the conventions that have evolved over time regarding Congress’s leadership in this arena (and in administrative law generally).”).

¹³⁸ Cox, *supra* note __ at 462.

¹³⁹ It is only mentioned twice in the Opinion. OLC Opinion at 14-15, 30-31. However, it is cited extensively in the government’s defense of DAPA in federal court. *Sur-Reply of United States, Texas v. United States*, 1:1-cv-00254 (Jan. 30, 2015) at 29 (“Although Plaintiffs contend that prior deferred action programs were limited to providing a “temporary bridge” to lawful status for which recipients were already eligible by statute, that was true of neither the 1990 Family Fairness Program nor 2012 DACA (which Plaintiffs are not challenging here).”).

<http://joshblackman.com/blog/2015/02/04/government-sur-reply-part-6-how-big-was-president-bushs-family-fairness-program-of-1990/>

¹⁴⁰ Immigration Reform and Control Act of 1986, Pub. L. No. 99- 603, 100 Stat. 3359 (“IRCA”).

¹⁴¹ 8 U.S.C. § 1153(a)(2) (authorizing immigrant visas for “spouses or children” of LPRs).

roughly three-and-a-half years after status was approved¹⁴²—these immediate family members without legal status would be subject to deportation.¹⁴³

In 1987, the INS put on hold deportations of children under the age of 18 that were living with a parent covered by IRCA.¹⁴⁴ In effect, this temporary deferral of deportations was meant to give the parent the appropriate time to complete the process, and then allow the parent to petition for a visa for the child. At this point, it made little sense to deport children whose parents would, in due time, receive lawful status, and by extension petition for a visa for their children.¹⁴⁵ Attorney General Edwin Meese’s policy focused on circumstances where there were “compelling or humanitarian factors” that counseled against deportations.¹⁴⁶ On the other side of this deferral, a legal status awaited the child. In this sense, the deferral of deportations served as a bridge. The pot of gold was glistening, awaiting the alien on the other side of the rainbow.

In July of 1989, the Senate passed what would become the Immigration Act of 1990. This bill, among other provisions, provided relief for the children and spouses of IRCA beneficiaries. The Senate bill was not brought up for a vote in the House until October 1990,¹⁴⁷ though, as the *New York Times* reported at the time, “passage of the new legislation seemed almost certain.”¹⁴⁸ It ultimately passed by a vote of 231-192, with 45 Republicans voting yea and 65 Democrats voting nay.¹⁴⁹ Despite disagreements about the economics of the bill, the *Times* reported, “few dispute the humanitarian aim of uniting families.”¹⁵⁰

In the interim, between the Senate vote in July of 1989, and the House vote in October of 1990, spouses and children of IRCA beneficiaries, who would soon be provided with a process to obtain lawful status, were still subject to deportation. In response, in February of 1990, INS Commissioner Gene McNary announced a new policy¹⁵¹ to expand the deferral of deportations of roughly 100,000—not 1.5 million (as

¹⁴² Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, *Am. Univ. L. Rev.* at 23 (Forthcoming 2015), <http://ssrn.com/abstract=2559836>.

¹⁴³ The Senate Judiciary Committee Report had declared that “families of legalized aliens . . . will be required to ‘wait in line’ in the same manner as immediate family members of other new resident aliens.” See 1985 U.S. Senate Committee on the Judiciary, *Report on S. 1200, 99th Cong., 1st Sess.*, at 16 (Aug. 28, 1985).

¹⁴⁴ INS, *Control of Employment of Aliens: Final Rule*, 52 Fed. Reg. 16216 (May 1, 1987).

¹⁴⁵ See U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law, *Immig. Reform & Control Act of 1986 Oversight 459* (May 10 & 17, 1989) (hereinafter *IRCA Oversight Hearing*) (testimony of INS Commissioner Alan C. Nelson) (providing relief for “young children” of IRCA beneficiaries.”).

¹⁴⁶ <http://edsources.org/wp-content/uploads/Deferred-Action-Congressional-Research-Service-Report.pdf> p. 10

¹⁴⁷ <http://clerk.house.gov/evs/1990/roll406.xml>

¹⁴⁸ <http://www.nytimes.com/1990/10/03/us/immigration-bill-debated-in-house.html>

¹⁴⁹ <http://clerk.house.gov/evs/1990/roll406.xml>

¹⁵⁰ <http://www.nytimes.com/1990/10/04/us/immigration-bill-approved-in-house.html?module=Search&mabReward=relbias%3As>

¹⁵¹ Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990) (“Family Fairness Memorandum”).

reported in the OLC opinion)¹⁵²—spouses and children of IRCA beneficiaries. This was a temporary stopgap measure to protect those who would soon receive a lawful status after the legislation was enacted.

On November 29, 1990, President George H.W. Bush signed into law the Immigration Act of 1990. On signing the law, the President said it “accomplishes what this Administration sought from the outset of the immigration reform process: a complementary blending of our tradition of family reunification with increased immigration of skilled individuals to meet our economic needs.”¹⁵³ With the signing of the law, the Family Fairness policy become immediately moot—exactly what the President had in mind by temporarily putting on hold deportations until Congress could finish passing the bipartisan legislation.

Both Presidents Reagan and Bush used prosecutorial discretion to keep together families. For the 40th President, the deferrals were used to afford time so that parents could petition for a visa for their children. For the 41st President, the deferrals were a temporary stopgap measure in the several months between votes in the Senate and the House. In both cases, it made little sense to rip apart families, when in due course, the spouse and children could receive a visa, ancillary to statutory authorizations. As a 1990 article in the *New York Times* explained, a legal resident under the 1986 amnesty with lawful status, “would [soon] be able to file a petition for his wife to be granted legal status, a process expected to take about two years.”¹⁵⁴ Protection was extended based on someone who already benefited from Congress’s naturalization laws.

While the American Immigration Council calls President George H.W. Bush’s policy a “striking parallel to today’s immigration challenge,”¹⁵⁵ it teaches just the opposite lesson. Presidents Reagan and Bush deferred deportations for family members who

¹⁵² The OLC Opinion repeated an oft-cited, but incorrect statistic that President George H.W. Bush’s “Family Fairness” deferred the deportation of 1.5 million. *See* OLC Opinion at 14. This statistic has been repeated by the President. *This Week* (Nov. 23, 2014) <http://abcnews.go.com/ThisWeek/week-transcript-president-obama/story?id=27080731> (“If you look, every president—Democrat and Republican—over decades has done the same thing. George H W Bush—about 40 percent of the undocumented persons, at the time, were provided a similar kind of relief as a consequence of executive action.”). The actual estimate was roughly 100,000. Glenn Kessler, *Fact Checker: Obama’s Claim that George H.W. Bush Gave Relief to ‘40 percent’ of Undocumented Immigrants*, *Wash. Post* (Nov. 24, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/24/did-george-h-w-bush-really-shield-1-5-million-illegal-immigrants-nope>. The origin of this false number is subject to some dispute, and seems to be based on an error in congressional testimony. INS Commissioner Gene McNary himself told the *Washington Post*, “I was surprised it was 1.5 million when I read that. I would take issue with that. I don’t think that’s factual.” Ultimately, by October 1 of 1990, INS had received *only 46,821 applications*. *Id.* The next month, President Bush signed the Immigration Act of 1990, which ended the temporary family fairness program. *See* Josh Blackman, *Government Sur-Reply Part 6: How Big was President Bush’s Family Fairness Program of 1990?*, *Josh Blackman’s Blog* (Feb. 4, 2015), <http://joshblackman.com/blog/2015/02/04/government-sur-reply-part-6-how-big-was-president-bushs-family-fairness-program-of-1990/>.

¹⁵³ <http://www.presidency.ucsb.edu/ws/index.php?pid=19117>

¹⁵⁴ <http://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html>

¹⁵⁵

http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_4.pdf

would shortly be able to receive a lawful status by virtue of the status of their spouse or child. In sharp contrast, DAPA defers deportations for parents of citizen children—who need to wait at least 21 years to petition for a visa—and parents of LPRs, who will *never* be able to petition for a parental visa.

Perhaps recognizing this difference, the OLC opinion draws a distinction between the five previously discussed programs, and the Family Fairness policy. OLC characterizes the “Family Fairness” policy not as a deferred action program, but a “voluntary departure program.”¹⁵⁶ Specifically under the policy, aliens were “potentially eligible for discretionary extended voluntary departure relief,” *not* deferred action. Voluntary departure allowed “allowing an otherwise removable alien to depart the United States at his or her own personal expense and return to his or her home country.”¹⁵⁷ In this case, the aliens were not required to actually depart during this interim period. Further, while OLC contended that Family Fairness and DAPA were on a similar scale, the opinion acknowledged that DAPA will “likely differ in size from these prior deferred action programs.”¹⁵⁸ OLC did not consider Family Fairness a precedent with respect to deferred action.

Perhaps unwittingly, the OLC opinion makes clear that the Family Fairness program fits within the “bridge” construct: “INS implemented a ‘Family Fairness’ program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status *under the Immigration Reform and Control Act of 1986*.”¹⁵⁹ Precisely! The temporary relief afforded to the beneficiaries of Family Fairness was connected to the 1986 IRCA.¹⁶⁰ The OLC opinion even makes clear that “Congress later implicitly approved” of the Family Fairness policy.¹⁶¹ Such acquiescence is lacking for DAPA.

In short, Family Fairness served as a bridge—a very temporary one—until Congress could finish acting. President George H.W. Bush’s short-lived voluntary departure program was connected to the IRCA, and sandwiched between the Senate and House voting on a bipartisan bill. As Professor Margulies explains, “All of the relief provided under both Family Fairness and the 1990 Act was ancillary to legal status that would be available within a discrete and reasonably short period to recipients of that relief.”¹⁶²

¹⁵⁶ *Id.* at 30.

¹⁵⁷ <http://www.justice.gov/eoir/press/04/ReliefFromRemoval.htm>

¹⁵⁸ *Id.* at 30.

¹⁵⁹ *Id.* at 14. (emphasis added).

¹⁶⁰ Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, *Am. Univ. L. Rev.* at 22 (Forthcoming 2015), <http://ssrn.com/abstract=2559836>. (“While proponents of DAPA sometimes cite the Family Fairness program implemented by immigration officials under Presidents Ronald Reagan and George H.W. Bush as precedent for DAPA, this analogy is inapposite. Family Fairness was ancillary to enumerated grants of status and far smaller than DAPA. Moreover, Family Fairness was within a short period ratified by Congress in the Immigration Act of 1990 – a prospect that is almost certain to elude DAPA, which has already generated substantial congressional opposition.”).

¹⁶¹ *Id.* at 31.

¹⁶² Margulies, *supra* note __ at 24.

DAPA, in contrast, is not meant as a temporary stopgap measure while Congress finishes a bill in the works. It imposes a not-too-veiled quasi-permanent status. Though it is not binding on the winner of the 2016 election, as a practical matter, those given deferred prosecution and work permits will be effectively untouchable. The President has admitted as much, explaining that future presidents may “theoretically” remove DAPA beneficiaries, but “it’s not likely.”¹⁶³ Call it lawful status by estoppel.

CONCLUSION

Upon a full consideration of the relevant provisions of the INA, DAPA is inconsistent with congressional policy. Congress has instituted a complex scheme for the conferral of benefits on aliens, including the unlawfully present parents of U.S. citizen and lawful permanent resident children. Although this scheme indicates congressional intent to favor family unification, it represents a narrow policy in furtherance of this goal. The family unification scheme is limited in terms of (1) who can obtain relief, (2) what must be demonstrated in order to establish statutory eligibility, and (3) the potentially lengthy wait one must endure before a visa or other relief may be available.

DAPA undercuts all three goals. Specifically, it effectively negates Congress’s considered judgment to *disallow relief* to the parents of minor citizen children, while extending relief to the parents of lawful permanent residents, a class that has *never* been entitled to preferential treatment under the immigration laws. DAPA is an executive rewrite of immigration policy. Its intent is to effectuate the Executive’s conception of what the best policy is, as against that actually enacted by the body entrusted with developing immigration law: the Congress.

DAPA’s inconsistency with congressional policy is a strong indication that the policy is not lawful. As OLC explained, “an agency’s enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering.”¹⁶⁴ DAPA is contrary to, rather than consonant with, the congressional policies underlying the INA. It is in palpable tension with the statute and the intent Congress evinced in enacting the relevant provisions.

To justify this policy, the government must advance more than the superficial defenses that have thus far been mounted. The United States bears the burden of justifying this unprecedented expansion of executive power. It has not done so through the OLC memo. If DAPA is lawful, that fact must be established through consideration of

¹⁶³<http://www.washingtontimes.com/news/2014/dec/9/obama-next-president-wont-undo-immigration-reform/> (“It’s true a future administration might try to reverse some of our policies. But I’ll be honest with you — the American people basically have a good heart and want to treat people fairly and every survey shows that if, in fact, somebody has come out and subjected themselves to a background check, registered, paid their taxes, the American people support allowing them to stay. So any future administration that tried to punish people for doing the right thing, I think, would not have the support of the American people,” Mr. Obama told a supportive crowd at a town hall meeting in Nashville. “It’s true, theoretically, a future administration could do something that I think would be very damaging. It’s not likely, politically, that they reverse everything we’ve done.”).

¹⁶⁴ OLC Opinion at 6.

all relevant provisions of the INA, their history, and the congressional intent behind their enactment. While there may indeed be light at the end of this tunnel in the form of comprehensive immigration reform—which the author supports—the Executive cannot simply drill through the constrained framework that Congress has designed.

THE CONSTITUTIONALITY OF DAPA PART II: FAITHFULLY
EXECUTING THE LAW

BY JOSH BLACKMAN*

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I. INTRODUCTION

Article II imposes a duty on the President unlike any other in the Constitution: he “shall take Care that the Laws be faithfully executed.”¹ More precisely, it imposes four distinct but interconnected obligations. First, the imperative “shall” commands the President to execute the laws. Second, in doing so the President must act with “care.” Third, the object of that duty is “the Laws” enacted by Congress. Fourth, in executing the laws with care, the President must act “faithfully.” A careful examination of the four elements of the “Take Care” clause provides a comprehensive framework to determine whether the Executive has complied with his constitutional duty. This article assesses the constitutionality of President Obama’s executive actions on immigration through this lens of the “Take Care” clause.

Part I provides a textual exegesis of the “Take Care” clause. Through constructive references to common law doctrines, as well as background principles of the Supreme Court’s separation of powers jurisprudence, I analyze the text and history of these four critical elements, and the scope of the duty they impose on the President.

Part II introduces President Obama’s two primary executive actions on immigration. First, Deferred Action for Childhood Arrivals (“DACA”) was a 2012 policy that deferred the deportations of roughly 1 million “Dreamers”—those who were brought to this country unlawfully as minors.² Second, Deferred Action for Parental Accountability (“DAPA”) was a 2014 policy that aimed to defer the deportations of roughly 4 million aliens who were the parents of citizen children, or lawfully permanent residents.³ Both policies, occasioned by the defeat of legislation in Congress, were announced through executive memoranda.⁴ The Office of Legal Counsel (“OLC”) issued an opinion justifying the legality of both policies, explaining that deferrals of deportations made on a “case-by-case” basis, based on a policy that is “consonant” with Congressional policy, were

1. U.S. CONST. art. III, § 3.

2. Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children*, U.S. DEP’T. OF HOMELAND SECURITY (June 15, 2012), www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

3. Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children and with Respect to Certain Individuals who Are the Parents of U.S. Citizens or Permanent Residents*, U.S. DEP’T. OF HOMELAND SECURITY (Nov. 20, 2014), www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter, Johnson Memo 1].

4. *Id.*; Napolitano, *supra* note 2.

presumptively lawful.⁵ This article demonstrates why neither of these principles hold true—DAPA does not employ an individualized “case-by-case” analysis, and it is inconsistent with long-standing congressional policy.

Part III turns to the imperative of the “Take Care” clause—the President “shall” execute the laws. While the Supreme Court has not addressed, directly at least, when this command is violated, in the administrative law context it has held that an executive policy would be reviewable if the “agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”⁶ This test, though framed in terms of reviewability, at its core parallels the failure of the executive branch to execute the laws. With respect to DAPA, the government adopted an extremely “broad policy” that restricts the ability of officers to enforce the immigration laws.⁷ DAPA was “consciously and expressly adopted” not as a means to enforce the laws of Congress, or to conserve limited resources, but to exempt nearly 40% of undocumented aliens in the United States—even those who were not previously subject to any previous enforcement action—from the threat of removal, and to provide them with work authorization.⁸ While the policy is based on the selective enforcement of the immigration laws, it is unprecedented to excuse over four million people in a class Congress did not deem worthy of preferential treatment, from the scope of the naturalization power.

Part IV considers whether the implementation of DAPA was done with “care” to the laws. Like the common law of torts, the Constitution imposes a standard of *care*. The President cannot act negligently or recklessly, but must proceed with a caution for the “Laws” of Congress. DAPA was designed with a disregard for the Immigration and Nationality Act in at least three ways. First, the case-by-case discretion at the heart of all aspects of prosecution was

5. Karl R. Thompson, *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*, OFFICE OF LEGAL COUNSEL (Nov. 19, 2014), www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf [hereinafter, Thompson].

6. Heckler v. Chaney, 470 U.S. 821 n. 4 (1985) (citing Adams v. Richardson, 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973) (en banc)).

7. Thompson, *supra* note 5, at 5.

8. See Heckler v. Chaney, 470 U.S. 821 n. 4 (1985); *Most Voters Still Veto Obama’s Immigration Plan*, RASMUSSEN REPORTS (Nov. 18, 2014), www.rasmussenreports.com/public_content/politics/current_events/immigration/november_2014/most_voters_still_veto_obama_s_immigration_plan.

supplanted by the Secretary's blanket policy.⁹ No deviations were allowed for individualized judgment. Second, through the so-called "Lean & Lite" review, the Department of Homeland Security ("DHS") limited the depth of investigation that officers could employ to investigating applications.¹⁰ In this sense, the officers were procedurally constrained from investigating various indicia of fraud that would normally counsel against providing relief.¹¹ Third, DHS weakened the scope of officer discretion, as it limited the grounds for denial to checking boxes on a "template."¹² Substantively, discretion was confined to the preferences of the Secretary, displacing any meaningful case-by-case review. A veteran USCIS officer declared that the administration "has taken several steps to ensure that DACA applications receive *rubber-stamped approvals* rather than thorough investigations."¹³ Due to the limitations on the officer's individual discretion, behind the pretense of conserving resources, DAPA was not designed with "care" for the laws, but as a deliberate means to bypass it.

Part V shines the light of DAPA through Justice Jackson's tripartite prism in *Youngstown Sheet & Tube Co. v. Sawyer*. President Obama's unprecedented action is a perfect storm of executive lawmaking, and deflects to the bottom tier. First, the President is not acting in concert with Congress: Congress rejected or failed to pass immigration reform bills reflecting his policy numerous times.¹⁴ Second, Congress has not acquiesced in a pattern of analogous executive actions. Previous uses were typically ancillary to statutory grants of lawful status or responsive to extraordinary equities on a very limited scale.¹⁵ Third, there is no murky "twilight" about congressional intent; both houses of Congress are proactively seeking to defund DAPA, in the face of a brazen veto threat. In this bottom rung of authority, presidential power is at its "lowest ebb," unentitled to a presumption of constitutionality.

9. For purposes of full disclosure, I joined an amicus brief on behalf of the Cato Institute in support of Texas's constitutional challenge to DAPA. Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute and Law Professors at 12, *Texas v. United States*, No 1:14-CV-254 (S.D. Tex. Filed Jan. 7, 2015) [hereinafter Cato Brief].

10. *Deferred Action on Immigration: Implications and Unanswered Questions: Hearing on DAPA/DACA Before the S. Comm. on Homeland Security and Gov't Affairs*, 114th Cong. 12 (2015) (testimony of Luke Peter Bellochi, Of Counsel, Wasserman, Mancini and Chang, PC).

11. *Id.*

12. Cato Brief, *supra* note 9, at 12.

13. Decl. of Kenneth Palinkas, *Texas v. United States*, no 1:14-cv-254 (S.D. Tex. Filed Jan. 7, 2015). All Exhibits are attached to Texas's motion for a preliminary injunction reply, available at <http://joshblackman.com/blog/2015/01/08/filings-in-texas-v-united-states/>.

14. See Cato Brief, *supra* note 9, at 7.

15. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952); see also Abraham Lincoln, Emancipation Proclamation (Jan. 1, 1863).

Part VI completes the clause. If the President has disregarded the laws without care, the Constitution imposes one final hurdle—was it a good faith mistake of law or a bad faith deliberate deviation.¹⁶ The former is regrettable, but acceptable.¹⁷ The latter is unconstitutional.¹⁸ To assess the motive of the executive in failing to comply with the law, this part first considers how, like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. Taking executive action to achieve several of the key statutory goals of laws Congress voted *against* reflects a deliberate attempt to circumnavigate an uncooperative legislature. Exacerbating this conclusion is the fact that prior to the defeats of DACA and DAPA, the “sole organ” of the Executive Branch consistently stated that he lacked the power to defer the deportations of millions by himself. However, once the bills were voted down, the President conveniently discovered new fonts of authority. While flip-flops are par for the course in politics, and usually warrant no mention in constitutional discourse, they are salient for the “Take Care” clause. They establish a prima facie case that the change in constitutional analysis was not done in good faith. The revised rationales speak directly to the motives of the Executive, and whether he mistakenly failed to comply with his constitutional duty, or deliberately bypassed disfavored legislation. All signs point towards the latter.

While no single factor renders DAPA unconstitutional, when viewed in its entirety, against the backdrop of defeats for antecedent legislation, in light of the deliberate policy aimed at transforming discretion into a rubber stamp, and in the face of Congressional opposition, as the President previously disclaimed the authority to act unilaterally, DAPA flouts the duties imposed by the “Take Care” clause. This pattern of behavior amounts to a deliberate effort to act not in good faith, but in an effort to undermine the Laws of Congress. The duty under Article II has been violated. Here, the President has dislodged Article II’s fulcrum, knocking out of orbit this fixed star in our constitutional constellation.

II. FAITHFULLY EXECUTING THE LAW

Article II, Section III of the Constitution provides that the President “shall take Care that the Laws be faithfully executed.”¹⁹ A textual

16. See Thompson, *supra* note 5, at 5.

17. See *id.*

18. See *id.*

19. Art II, Sec. 3. For an excellent analysis of the text, history, and structure of the “Take

examination of the clause reveals that this constitutional duty entails four distinct but interconnected components. First, has the President declined to execute the law, in conflict with the command of “shall”? If the President abdicates the duty in its entirety, there is a clear case of a constitutional violation—but typically the failure to execute the law falls along a spectrum. Second, is the president acting with “care,” or “regard” for his duty? The more flagrant the lack of regard—evidenced by the size and scope of the deviation from the “Laws” of Congress—the stronger the case is for unconstitutional actions. Here, recourse must be had to the statutes enacted by Congress to determine the disjunction between the policy of Congress and that of the Executive. Third, do the “Laws” of Congress vest the Executive with discretion to decline to enforce the statute, or has the Legislature given an unambiguous directive to the Executive? If the President violated an unambiguous directive, the action should not be entitled to a presumption of deference. Fourth, and most importantly, the clause requires an investigation into whether the President has executed in good “faith.” Only when the other three factors point towards a constitutional violation should the President’s motivations be brought into question—but at this stage, it is the cornerstone of the “take care” clause’s duty.

A. *“Shall” Imposes an Imperitive on the Executive*

Our Constitution strikes a stark asymmetry with respect to the duties and obligations of Congress and the President. In Article I, Congress bears *no* affirmative duties. “Congress shall have the power” to make a number of laws,²⁰ but need not do so. The only duties Congress owes to the other branches concern compensation for the President and federal judges. These commands appear in Article II²¹ and Article III,²² respectively, not Article I.²³ This structure reflects the framer’s design that the Congress need not, and indeed cannot act, unless majorities of the body agree.

Care” clause, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 760 (2014). For a detailed analysis of the constitutionality of DACA, see Robert J. Delahunty & John C. Delahunty, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–84 (2013).

20. U.S. CONST., art. I, § 8.

21. U.S. CONST. art. II, § 1.

22. U.S. CONST. art. III, § 1.

23. The Guarantee Clause imposes some duty on Congress. Art IV, Sec. 4. See *Luther v. Borden*, 48 U.S. 1 (1849) (“Under this article of the Constitution it rests with Congress to decide what government is the established one in a State.”).

Article II operates in a diametrically opposite manner on the unitary executive. This philosophy is crystalized in the constitutional duty to “take care that the laws [are] faithfully executed.”²⁴ Section I vests the office of the Presidency, and determines how he is elected. Section II grants the President a number of authorities. Virtually all of these duties are prefaced by *shall*: “shall be Commander in Chief,” and “shall have Power to grant Reprieves and Pardons.” Several of the key “shall” duties can only be exercised “by and with the Advice and Consent of the Senate,” such as the power to “make treaties,” and “nominate” Ambassadors, Ministers, Judges, and Officers of the United States. This consent need not be given at all.

The Constitution does not simply vest the President with powers concerning his own office, as Article I does with Congress. Article II imposes a duty on the President to *execute* the laws of Congress with those powers. Specifically, Article II, Section III defines the scope of the President’s affirmative obligations towards Congress. First, the President “shall from time to time give to the Congress Information of the State of the Union.” This is a duty the President cannot shirk—the Congress must be apprised about the “State of the union” to inform its governance.²⁵ Second, the President “shall receive Ambassadors and other public Ministers.” He must engage with this aspect of foreign diplomacy—an important limitation on what is sometimes viewed as an unfettered power over foreign affairs.

Third, the President “shall Commission all the Officers of the United States.”²⁶ Whatever positions the Congress creates, the President has an obligation to commission officers. The President cannot choose to let the offices stay vacant. Fourth, in case of “extraordinary occasions,” the President “*may*”—not must—“adjourn” or “convene” Congress. But this is not a duty the President “shall” execute. Indeed, so as not to unduly infringe on the separation of powers, the Constitution limited that responsibility to circumstances where the President “shall think proper.”²⁷

This background brings us to the all-important “Take Care” clause. First, this is a duty the President “shall” perform. Not “may,” or decline as he “shall think proper.” *Shall*. President George

24. U.S. CONST. art. II, § 3.

25. Arguably, the Constitution also imposes on Congress the duty to receive the President’s State of the Union, as the President could not discharge his duties unless it was accepted. U.S. CONST. art. II, § 3 (“He shall from time to time give to the Congress Information of the State of the Union”).

26. U.S. CONST. art II, § 3.

27. *Id.*

Washington wrote to Alexander Hamilton concerning the enforcement of unpopular tax laws, “It is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it.”²⁸ There is no other such command in the Constitution that mandates that any branch execute a delegated power in a specific manner—for good reason.

As the Framers’ progenitors recognized over three centuries ago, “the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.”²⁹ The Virginia Declaration of Rights, authored by George Mason a month before our independence was declared, prohibited suspension as a “basis and foundation of government”—“[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised.”³⁰ This history contributed to the development of the “Take Care” clause in our Constitution.³¹

During the constitutional convention, on Monday, June 4, Pierce Butler of South Carolina proposed a resolution “that the National Executive have a power to suspend any legislative act. . . .”³² Benjamin Franklin “seconded the motion.”³³ Elbridge Gerry retorted that “a power of suspending might do all the mischief dreaded from the negative [veto] of useful laws; without answering the salutary purpose of checking unjust or unwise ones.”³⁴ On the question of “giving this suspending power all . . . [states voted] *no*.”³⁵ The ability to dispense this power throws a wrench in the interlocking gears that

28. Letter from George Washington to Alexander Hamilton (Sept. 7, 1792) *available at* www.loc.gov/teachers/classroommaterials/lessons/washington/hamilton2.html. The Solicitor General has recently affirmed to the Supreme Court that the Take Care clause imposes a “duty” on the President. Brief for Nat’l Labor Relations Bd. at 63, *NLRB v. Canning*, 134 S. Ct. 2550 (2014), (No. 12-1281). (“That result would directly undermine the President’s *duty* to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3—which necessarily requires the ‘assistance of subordinates.’”) (emphasis added).

29. 1W. & M., 2d sess., c. 2 (Eng.) p. 410 BB. Delahunty, *supra* note 19 at 803 (“scholars have argued that the Take Care Clause. . . . is closely related to the English Bill of Rights of 1689. . . .”).

30. THE VIRGINIA DECLARATION OF RIGHTS, § 7 (1776), *available at* www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html.

31. Delahunty, *supra* note 19, at 797-98. See also Price, *supra* note 19, at 692.

32. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 103 (Max Farrand ed.), *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=llfr&fileName=001/llfr001.db&recNum=132&itemLink=r%3Fammem%2Fhlaw%3A%40field%28DOCID%2B%40lit%28fr0012%29%29%230010003&linkText=1> [hereinafter Farrand’s Records, Volume 1].

33. *Id.*

34. *Id.* at 104.

35. *Id.* See also Price, *supra* note 19, at 693.

power our republic.

Second, the Constitution prescribes the manner in which the execution must be performed—the President shall “take Care.” Professor Natelson explains that the phrase “take care” was employed in colonial-era “power-granting instruments” where an official assigned a task to an agent, as well in the Continental Congress for similar instructions.³⁶ Professors Delahunty and Yoo reach a similar conclusion, finding that the clause “charge[s] the President with the duty or responsibility of executing the laws, or at least of supervising the performance of those who do execute them.”³⁷ The usage of the passive voice supports this conclusion—the President need not execute all the laws personally.³⁸

The word “care,” by itself, bears a similar meaning today, as it did two centuries ago. Dr. Samuel Johnson’s 1755 *Dictionary of the English Language* provides five definitions of “care,” including “concern,” “caution,” “heed in order to protection and preservation,” and “object of care.”³⁹ In several of the examples, the word “care” is prefaced, like in the Constitution, with “take.”⁴⁰ Noah Webster’s 1828 *American Dictionary of the English Language* similarly defines 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.’”⁴¹ Webster, like Johnson explained how the verb “care” could be prefaced by “to”: “[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.”⁴²

Read against this background, like the common law of torts, the Constitution imposes some sort of a standard of *care* of how the President should execute his duties.⁴³ Providing meaning to the text of

36. Robert Natelson, *The Original Meaning of the Constitution’s “Executive Vesting Clause”—Evidence from Eighteenth-Century Drafting Practice*, 31 Whittier L. Rev. 1, 14 n.59 (2009).

37. Delahunty, *supra* note 19, at 799.

38. *Id.* at 800.

39. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 328 (1755), available at <http://johnsonsdictionaryonline.com> [hereinafter, JOHNSON’S DICTIONARY].

40. *Id.* citing Dryden (“Or, if I would *take care*, that care should be, for Wit that scorn’d the world, and liv’d like me.”); Tillotson (“The foolish virgins had taken *no care* for a further supply, after the oil, which was at first put into their lamps, was spent as the wife had done.”); Atterbury (“We take care to flatter ourselves with imaginary scenes and prospects of future happiness.”)

41. 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 32 (1828), available at <http://webstersdictionary1828.com/Home?word=Care> [hereinafter WEBSTER’S DICTIONARY].

42. 2 *id.* at 88.

43. RESTATEMENT (FIRST) OF TORTS § 283 (1934) (“Unless the actor is a child or an insane

the Take Care clause by reference to common law doctrines is consistent with originalist construction,⁴⁴ as well as reflecting the “unwritten practices that shape interbranch struggle more generally.”⁴⁵ Applying this approach yields a requirement for the President to supervise that his subordinates enforce the law with “caution” or “regard to the law.” This is a common feature of the law of agency,⁴⁶ whereby a “principal who authorizes his agent to so act ‘on his behalf’ consensually empowers the agent to exercise certain rights that the principal alone would normally exercise”⁴⁷ The principal officers of the United States, which the President nominates, and the Senate confirms, can complete these tasks. But the President’s supervisory role is to ensure that the laws are executed—and done so with “care.”

B. *The President Executes “The Laws” of Congress*

Third, the President’s duty extends not to his own powers, or preferences, but to the “Laws.” What are these “Laws” to “execute”? Read in the context of Article II, Section III, which reflects the relationship between Congress and the Presidency, this phrase is most naturally read to refer to the “Supreme Law of the Land.”⁴⁸ Among these supreme laws, are the Laws of Congress, which the President must execute.⁴⁹ In this sense, “Congress is the first mover in the mechanism of United States law.”⁵⁰ The President can only “execute” those laws passed by Congress.⁵¹

Johnson’s dictionary defines the verb “execute” with a direct reference principles of agency: “[t]o put in act; to do what is planned

person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”).

44. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 504 (2013) (“But suppose that ‘due process of law’ was a term of art that was understood by the linguistic subcommunity of persons learned in the law to refer to relatively specific features of the system of *procedure provided by common law and equity in the late eighteenth century.*”) (emphasis added).

45. One scholar has suggested that reference to private law can inform our understanding of how the separation of powers have developed. David Pozen, *Self Help and the Separation of Powers*, 124 *YALE L.J.* 2, 7 (2014) (applying doctrines of public international law to understand the separation of powers).

46. Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *STAN. L. REV.* 1005, 1038 (2011).

47. Randy E. Barnett, “Squaring Undisclosed Agency Law with Contract Theory,” 75 *CALIF. L. REV.* 1969, 1981 (1987).

48. U.S. CONST., art. VI, § 3.

49. Natelson, *supra* note 36, at 31. Price, *supra* note 19 at 688.

50. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 *HARV. L. REV.* 1867, 1895 (2005).

51. *Id.*

or determined.”⁵² Planned by whom? Johnson explains with a theologically apt example from Richard Hooker’s *Laws of the Ecclesiastical Polity*: “Men may not devise laws, but are bound for ever to use and execute those which God hath delivered.”⁵³ In other words, the agent (man) puts into effect the laws of the principal (God). In the *Federalist*, Hamilton similarly viewed the relationship between the branches in terms of agency: “every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void . . . To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master.”⁵⁴

In this sense, akin to the law of agency,⁵⁵ the President serves as a “faithful” agent to Congress, and to the people, the ultimate sovereigns, and residual of all legitimate governance.⁵⁶ The people elect Congress to write the laws, and choose the President to enforce the laws on their behalf. The scope of this duty would “depend on an implicit understanding of the principal’s expectations as much as on any explicit directives.”⁵⁷ Specifically—“What exactly would Congress, or the public, consider a faithful performance of the President’s duties?”⁵⁸

Viewed this way, the Take Care clause is the fulcrum that holds together our entire system of governance. The President always has an independent constitutional duty to not obey unconstitutional laws,⁵⁹ as well as the limited prerogative “to violate statutory law on the grounds of compelling public necessity.”⁶⁰ But he must remain a *faithful* steward of the “laws” of Congress, and cannot shirk that duty when he disagrees with them.⁶¹

52 JOHNSON’S DICTIONARY at 736.

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

54. THE FEDERALIST NO. 78 (Alexander Hamilton).

55. RESTATEMENT (FIRST) OF AGENCY § 20 (1933) (“A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person.”).

56. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 189 (2013).

57. Price, *supra* note 19, at 698.

58. *Id.*

59. To continue the analogies to the law of agency, the Constitution, ratified by “We the People,” presents a superior interest of the “Supreme Law of the Land,” to which the agent is bound, above the principal’s (Congress’s) interests. RESTATEMENT (FIRST) OF AGENCY § 383 (1933) (“Except when he is privileged to protect his own or another’s interests, an agent is subject to a duty to the principal not to act in the principal’s affairs except in accordance with the principal’s manifestation of consent.”).

60. Delahunty, *supra* note 19, at 808.

61. RESTATEMENT (FIRST) OF AGENCY § 23 (1933) (“One whose interests are adverse to those of another may be authorized to act on behalf of the other; it is a breach of duty for him so to act without revealing the existence and extent of such adverse interests.”).

C. Executing the Laws In Good “Faith”

Fourth, and most importantly, after imposing the imperative with the appropriate standard of care, and specifying the subject of the action, the Constitution defines how the duty should be complied with: “faithfully executed.” This part provides an in-depth examination of the text and history of the Take Care Clause, and its relationship to long-standing common law notions of good faith.

1. The Faithful History of the Take Care Clause

The Take Care clause draws from a rich pedigree of colonial-era Constitutions limiting state executives from suspending the law. The post-revolutionary Constitutions of New York,⁶² Pennsylvania,⁶³ and Vermont⁶⁴ employed similar standards to define the role of the executive, all requiring some variant of “faithfully executed.” By 1787, six states “had constitutional clauses restricting the power to suspend or dispense with laws to the legislature”⁶⁵—Delaware,⁶⁶ Maryland,⁶⁷ Massachusetts,⁶⁸ North Carolina,⁶⁹ New Hampshire,⁷⁰ and Virginia.⁷¹

During the Constitutional Convention, the President’s duty to execute the laws went through several evolutions. These changes highlight the importance of the duty of faithfulness to the framers. An early version of the Take Care clause appeared in the Virginia Plan on May 29, 1787.⁷² It vested the “National Executive” with the “general authority to execute the National laws.”⁷³ On June 1, James Madison “moved,” and “seconded by” James Wilson, the Convention adopted a revised version of the clause: the Executive was “with power to carry

62. N.Y. CONST. of 1777, art. XIX (“That it shall be the duty of the governor to . . . take care that the laws are faithfully executed to the best of his ability. . .”).

63. PA. CONST. of 1776, § 20 (The state President and council shall “take care that the laws be faithfully executed. . .”).

64. VT. CONST. of 1777, § XVIII (The Governor is to “take care that the laws be faithfully executed.”)

65. Steven G. Calabresi et. al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1534 (2012).

66. DEL. CONST. of 1776, Decl. of Rights, § 7.

67. MD. CONST. of 1776, Decl. of Rights, art. 9.

68. MASS. CONST. of 1780, pt. 1, art. VII, XX.

69. N.C. CONST. of 1776, Decl. of Rights, art. 5.

70. N.H. CONST. of 1784, Bill of Rights, pt 1, art. XXIX.

71. VA. CONST. of 1776, Bill of Rights, § 7.

72. Farrand’s Records, Volume 1 at 21.

73. *Id.* For a detailed analysis of the history of the Take Care clause, see Saikrishna Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 Yale L.J. 991, 1001-1002 (1993).

into execution the national laws. . . .”⁷⁴ At this point, there were no qualifications for faithfulness. A proposal to give the President the power “to carry into execution the nationl. [sic] laws” was agreed to unanimously on July 17.⁷⁵

On July 26, this provision was sent to the Committee of Detail.⁷⁶ The Committee of Detail considered two different formulations. First, “[h]e shall take Care to the best of his Ability. . . .”⁷⁷ Second, John Rutledge suggested an alternate: “[i]t shall be his duty to provide for the due & faithful exec[ution] of the Laws.”⁷⁸ The final version, reported out by the Committee on August 6, hewed closer to Rutledge’s proposal: “he shall take care that the laws of the United States be duly and faithfully executed.”⁷⁹ The Committee of Detail rejected a provision that would have been linked to the “best of” the President’s “ability,” which was ultimately adopted in the oath of office.⁸⁰ Rather, the Committee of Detail focused on “due” and “faithful” execution.

The draft that was “referred to the Committee of Style and Arrangement”⁸¹ on September 8 still included the phrase “duly.”⁸² However, the final report of the Committee of Style dated September 12, phrased the “take care” clause in its final form, dropping the “duly.” It read, “shall take care that the laws be faithfully executed.”⁸³ There is no recorded account of why “duly” was dropped, and the focus was placed solely on “faithfully.”

The progression over the summer of 1787 speaks to the designs of the framers. The initial draft from the Virginia Plan imposed no

74. Farrand’s Records, Volume 1 at 63.

75. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 32 (Max Farrand ed.), *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=llfr&fileName=001/llfr001.db&recNum=132&itemLink=r%3Fammem%2Fhlaw%3A%40field%28DOCID%2B%40lit%28fr0012%29%29%230010003&linkText=1> [hereinafter Farrand’s Records, Volume 2].

76. *Id.* at 116-17. The august Committee of Detail was chaired by John Rutledge (2nd Chief Justice of the United States), and included as members Edmund Randolph (the first Attorney General), Oliver Ellsworth (3rd Chief Justice of the United States), James Wilson (the first Associate Justice confirmed to the Supreme Court), and Nathaniel Gorman (former President of the Continental Congress).

77. *Id.* at 171.

78. *Id.*

79. *Id.* at 185. This resembles phrasing in the Charter of Massachusetts Bay, which required the Governor to “undertake the Execucon [sic] of their saide [sic] Offices and Places respectivelie [sic], take their Corporal Oathes [sic] for the due and faithfull [sic] Performance of their Duties in their severall [sic] Offices and Places.” Charter of Mass. Bay (Mar. 4, 1629).

80. U.S. CONST., article II, § 1.

81. The Committee of Style and Arrangement included Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouverneur Morris.

82. Farrand’s Records, Volume 2 Report of Committee of Style at 600.

83. *Id.*

qualifications—the President was simply to “execute the National laws.”⁸⁴ Full stop. The Committee of Detail considered proposals that would restrict the duty to either (a) “the best of his Ability” or (b) “the due & faithful exec[ution] of the Laws.”⁸⁵ The Committee chose the latter. Finally, the Committee of Style—staffed by Madison and Hamilton, 2/3 of Publius—narrowed the duty to focus only on “faithfully.” This account is confirmed by Alexander Hamilton’s Plan, which though “not formally before the Convention in any way,” was read on June 18 and proved to be influential.⁸⁶ His plan eliminated the phrase “duly” and only focused on “faithfully”—“He shall take care that the laws be faithfully executed.”⁸⁷ A year later, Hamilton echoed this phrasing in Federalist No. 77, where he wrote about the President “faithfully executing the laws.”⁸⁸

What is the difference between “duly” and “faithfully”? Johnson’s Dictionary defines “due” as “that which any one has a right to demand in consequence of a compact. . . .”⁸⁹ The omission of “duly” and focus on “faithfully” suggests a shift away from legal duties to one of faithfulness on the part of the President.

This construction was confirmed by the Oath Clause of Article II: “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.”⁹⁰ Again, the framers required the President to swear that he will “faithfully execute” those duties charged to him. However, unlike the “Take Care” clause, which is imposed *without qualification*, the Oath only binds the President “to the *best of [his] Ability*.” In this sense, the imperative to “preserve, protect and defend the Constitution of the United States,” though it must be “faithfully executed,” exists to a lesser degree—to the “best of my Ability.”⁹¹ In contrast, the New York Constitution of 1777 provided that the governor is “to take care that the laws are faithfully executed to the best of his ability.”⁹² Further, the “Take Care” clause did not include language such as “shall think proper,” as this optional language is used in the

84. Farrand’s Records, Volume 1 at 21. For a detailed analysis of the history of the Take Care clause, see Prakash, *supra* note 73 at 1000-1002.

85. Farrand’s Records, Volume 2 at 171.

86. Farrand’s Records, Volume 3 at 617-30.

87. *Id.* at 624.

88. THE FEDERALIST NO. 77 (Alexander Hamilton).

89. JOHNSON’S DICTIONARY at 659.

90. U.S. CONST., art II, § 1.

91. Delahunty, *supra* note 19, at 801.

92. N.Y. CONST. of 1777 art. XIX.

adjournment clause.⁹³ The duty looks to one of faith. This understanding was further confirmed in the ratification conventions.

At the Pennsylvania Ratification Convention, James Wilson—himself a member of the Constitutional Convention and a future Supreme Court Justice—explained the relationship between the President and Congress: “It is not meant here that the laws shall be a dead letter; it is meant, that they shall be carefully and duly considered, before they are enacted; and that then they shall be *honestly and faithfully* executed.”⁹⁴ Wilson equates the duty of “faithfulness” with that of “honesty.”⁹⁵ Ten days later, Wilson stressed that the “Take Care” clause was “another power of no small magnitude entrusted to this officer,” the President.⁹⁶

During the North Carolina Ratification Convention, delegate Archibald Maclaine stressed the importance of the “Take Care” clause: “One of the best provisions contained in it is, that he shall commission all officers of the United States, and *shall take care that the laws be faithfully executed*. If he takes care to see the laws faithfully executed, it will be more than is done in any government on the continent, for I will venture to say that our government, and those of the other states, are, with respect to the execution of the laws, in many respects, mere cyphers.”⁹⁷

The history of the Take Care clause reveals a focus on execution based on faith and honesty. As Prakash explained, “If the officer performed his duties honestly, adequately, and within the boundaries of his statutory discretion, the presidential inquiry would end, for the President would have taken care that the laws were faithfully executed.”⁹⁸

93. U.S. CONST., article II, §.3. *See also* NLRB v. Canning, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., concurring).

94. *Thomas Lloyd's Notes of the Pennsylvania Ratification Convention (December 1, 1787)*, CONSOURCE, <http://consource.org/document/thomas-lloyds-notes-of-the-pennsylvania-ratification-convention-1787-12-1/>.

95. The oath of office for a member of the assembly in Pennsylvania directly tied the notion of “faithful” execution of an oath to one of “honesty”: “I do swear (or affirm) that . . . will in all things conduct myself as a *faithful honest* representative and guardian of the people, according to the best of only judgment and abilities.” (emphasis added) (quoting the PA. CONST. of 1776, § 10).

96. *Thomas Lloyds Notes of the Pennsylvania Ratification Convention (December 11, 1787)*, CONSOURCE, <http://consource.org/document/thomas-lloyds-notes-of-the-pennsylvania-ratification-convention-1787-12-11-2/>.

97. *North Carolina Ratification Convention Debates (July 28, 1788)*, CONSOURCE <http://consource.org/document/north-carolina-ratification-convention-debates-1788-7-28/>.

98. Prakash, *supra* note 73, at 1000-1001.

2. The Duty of Good Faith

With this selection of “faithful,” the framers seem to have adopted a standard stretching back to the times of Herodotus⁹⁹ to Roman law¹⁰⁰ to Canon law¹⁰¹, and was well known in the 17th¹⁰² and 18th¹⁰³ century English common law of contracts¹⁰⁴—one of “good faith.”¹⁰⁵ Johnson’s dictionary defines “faithfully” as imposing a very precise standard: acting “[w]ith *strict adherence* to duty and allegiance,” “[w]ithout failure of performance; honestly; exactly,” and “[h]onestly; without fraud, trick or ambiguity.”¹⁰⁶ Webster’s offers a similar explanation: “in a faithful manner; with *good faith*.”¹⁰⁷ The second definition imposes an even higher standard: “with *strict adherence* to allegiance and duty.”¹⁰⁸ Webster even offers an example that references the Constitution: “the treaty or contract was faithfully executed.”¹⁰⁹ As Professor Price observes, “the term ‘faithfully,’ particularly in eighteenth-century usage, seems principally to suggest that the President must ensure execution of existing laws in *good faith*.”¹¹⁰

Professor Burton’s canonical work on the common law duty to perform in good faith is consistent with the text and history of the

99. Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 80 (1993) (“*Good faith* in dealings and negotiation practices was the element of binding value in these ancestral societies, and served as the religious basis for maintaining the word given.”) (emphasis added).

100. Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith’s Unnatural History*, 72 TEX. L. REV. 1317, 1319 (1994) (“The essence of a duty of *good faith* existed at least two thousand years ago in the law of the Romans.”) (emphasis added).

101. *Id.* at 1324 (“Under the influence of the Church, the ceremony of *fides facta* was transformed into the pledge of faith. In effect, the gage provided by the debtor was the debtor’s Christian *faith* and his hope of salvation.”) (emphasis added).

102. *Id.* at 1327 (citing Raphael Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROBS. 16, 22 (1956)) (“but with ever-increasing monotony the plea is that the debtor has acted ‘against good faith and conscience’ or the petitioner prays that the debtor shall be compelled to do ‘what *good faith* and conscience require.’”) (emphasis added).

103. *Carter v. Boehm*, 97 Eng.Rep. 1162 (K.B.1766) (Mansfield, J.) (“*Good faith* forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.”) (emphasis added).

104. Palmieri, *supra* note 99, at 84 (“[G]ood faith and fair dealing increasingly became a part of the common law of contract performance and enforcement.”).

105. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (“Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness”).

106. JOHNSON’S DICTIONARY at 763.

107. WEBSTER’S DICTIONARY (emphasis added).

108. *Id.* (emphasis added).

109. *Id.*

110. Price, *supra* note 19, at 698.

Take Care clause.¹¹¹ Burton sketches two views of failing to comply with a contract. First, a party may deviate from the terms of the contract, resulting in the “deprivation” of “anticipated benefits” based on a “legitimate” or “good faith” reason.¹¹² Here, there is no breach of contract, even though the contract was not strictly complied with. Second, however, “[t]he same act will be a breach of the contract if undertaken for an illegitimate (or bad faith) reason.”¹¹³ How should we distinguish between the former (lawful) and the latter (unlawful)? It is not enough to focus on the contractual duties owed to the promisee, and what “benefits [are] *due*” to him. Rather, to determine “good faith,” an inquiry must be made into the motivations of the promisor’s actions.

Burton explains, “Good faith performance, in turn, occurs when a party’s discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract.”¹¹⁴ To put this in constitutional terms, we would ask whether the President is acting within the realm of possible discretion contemplated when Congress enacted a statute. If the answer is yes, the deviation from the law is in good faith, and is permissible. However, if the departure from the law is “used to recapture opportunities forgone upon contracting,” the action is not in good faith.¹¹⁵ As Professor Barnett explains, “According to Burton, when a contract allows one party some discretion in its performance, it is bad faith for that party to use that discretion to get out of the commitment to which he consented.”¹¹⁶ To place this dynamic into constitutional terms, when the President relies on a claim of authority Congress withheld, as a means to bypass that statute, the action is in bad faith, and unlawful.

Under this theory, “[w]hat matters is the purpose or motive for the exercise of discretion.”¹¹⁷ Good faith deviations that “honor the spirit” of the law or rely on “scarcity of enforcement resources” are valid motives for discretion.¹¹⁸ But the same action, “intended to evade the

111. See, Steven J. Burton, *Breach Of Contract And The Common Law Duty To Perform In Good Faith*, 94 HARV. L. REV. 369, 373 (1980).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Randy Barnett, *The President’s Duty of Good Faith Performance*, WASH. POST, Jan. 12, 2015, www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/12/the-presidents-duty-of-good-faith-performance/.

117. *Id.* Delahunty, *supra* note 19, at 847 (Professors Delahunty and Yoo also note that the “motivation and intent behind nonperformance may also be relevant to its evaluation.”).

118. Barnett, *supra* note 116.

commitment,” is unlawful if premised on a “disagreement with the law being enforced.”¹¹⁹ It is not the case that “any deliberate deviation . . . is presumptively forbidden.”¹²⁰ Rather, the deviation must be done in bad faith, as an intentional means to bypass the legislature.

Burton’s conclusion provides further insights into the Committee of Style’s decision to amend the Take Care clause. First, by eliminating the reference to “duly,” the framers moved away from focusing on what obligations the President owes to the Congress. Instead, they focused on “faithfully” alone. This inquiry directs attention to the President’s motivations, instead of the legal obligations to Congress in the abstract. The important qualification of “faithfully” vests the President with *additional* discretion, so long as he is acting with good faith.

A careful examination of the four elements of the “Take Care” clause provides a comprehensive framework to determine whether the Executive has complied with his constitutional duty. I should stress that looking to the President’s state of mind is a last resort in this balancing test: the President (1) failed to comply with the “shall” command, (2) he did not act with “care,” and (3) he disregarded “the Laws.” Only then, as the final check, should we inquire into his motivations for acting contrary to the Constitution.

II. DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY (“DAPA”)

On November 20, 2014, the Department of Homeland Security, through memos by Secretary Jeh Johnson, announced a policy that came to be known as Deferred Action for Parental Accountability (“DAPA”).¹²¹ DAPA was built on the Department’s 2012 Deferred Action for Childhood Arrivals (“DACA”) initiative.¹²² DAPA established a new class of eligible beneficiaries for deferred action. DACA was limited to certain minors who entered the country without authorization, regardless of whether the child was related to a citizen (the “Dreamers”).¹²³ DAPA now covered the parents of U.S. citizens and lawful permanent residents (LPRs), who would be eligible for

119. *Id.*

120. Delahunty, *supra* note 19, at 785.

121. *See*, Johnson, *supra* note 3.

122. The Ninth Circuit erroneously referred to DACA as a “program” enacted by the federal government. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1057 (9th Cir. 2014). This is misleading, as only one branch of the government instituted this policy.

123. Johnson, *supra* note 3, at 2.

deferred action and work authorization.¹²⁴ The memorandum also indicated that discretion inhered in DHS officers to grant deferred action upon consideration of all relevant factors, including the eligibility criteria: “Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.”¹²⁵

In advance of its announcement of DAPA, the Obama Administration made public a legal opinion from the Office of Legal Counsel. The opinion concluded that “DHS’s proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS’s discretion to enforce the immigration laws.”¹²⁶ Extrapolating from Supreme Court and court of appeals’ precedent regarding the scope of enforcement discretion countenanced by the Take Care Clause, the opinion established a four-factor inquiry to ascertain whether any particular discretionary initiative comports with relevant constitutional and legal principles.¹²⁷ “First, enforcement decisions should reflect ‘factors which are peculiarly within [the enforcing agency’s] expertise.’”¹²⁸ Second, the exercise of discretion cannot constitute an effective rewrite of the law so as to “match [the Executive’s] policy preferences.”¹²⁹ Practically, this means that “an agency’s enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering.”¹³⁰ Third, and as an effective corollary to the second factor, the Executive “cannot . . . ‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”¹³¹ Fourth, non-enforcement decisions are most comfortably characterized as proper “exercises of enforcement discretion when they are made on a case-by-case basis.”¹³² The first factor is not in dispute. I address the

124. *Id.* at 3.

125. *Id.* at 5.

126. Thompson, *supra* note 5, at 2.

127. *Id.* at 6-7.

128. *Id.* at 6 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

129. *Id.* at 6.

130. *Id.*

131. *Id.* at 7 (citing *Chaney*, 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc))).

132. *Id.*

second factor in Part I of this series.¹³³ This article’s analysis will focus on the third and fourth factors.

III. FAILING TO ENFORCE THE LAWS

The first step in the “Take Care” clause analysis is to determine whether the President is complying with the imperative “shall” of Article II: is he executing the laws or suspending them? In most cases, non-enforcement falls along a spectrum from a categorical refusal to enforce the law,¹³⁴ to a perfect enforcement of the law—which is impossible due to constraints of time and resources. While the line is invariably fuzzy,¹³⁵ this inquiry can and should be completed to determine whether the President has complied with his constitutional duty.¹³⁶

Through the Administrative Procedure Act (APA), the federal courts have inched close to resolving this separation of powers conflict through the context of non-enforcement of agency actions.¹³⁷ In this arena, the Supreme Court has stated in *Heckler v. Cheney* that an executive policy would be reviewable (and potentially invalidated) in federal court if the “agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”¹³⁸ If reviewable, non-enforcement would be void if it was “arbitrary, capricious, or an abuse of discretion.”¹³⁹ The D.C. Circuit’s decision in *Crowley v. Pena*—favorably cited by the OLC opinion—added some flesh to the bones of *Heckler*’s footnote: “A broad policy against enforcement poses special risks that [an agency] ‘has consciously and expressly adopted a general policy that is so extreme as to amount to an *abdication* of its statutory responsibilities.’”¹⁴⁰

The APA is not the “Take Care” clause, and vice versa. This test,

133. See Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE __ (Forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545544.

134. Price, *supra* note 19, at 705.

135. Price, *supra* note 19, at 706.

136. Price, *supra* note 19, at 677-79.

137. 5 U.S.C. § 701 (establishing presumption of judicial review except where statute precludes it); 5 U.S.C. § 706(2)(B) (“the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity”).

138. *Heckler v. Chaney*, 470 U.S. 821 n.4 (1985) (citing *Adams v. Richardson*, 156 U.S. App. D. C. 267, 480 F. 2d 1159 (1973) (en banc)).

139. *Id.* at 826 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967)); 5 U.S.C. § 706(2)(A).

140. *Crowley*, 37 F.3d at 677, citing *Heckler*, 470 U.S. at 833 n.4.

though framed in terms of reviewability, at its core parallels the failure of the executive branch to execute the laws. The agency “*shall* take care that the laws be faithfully executed.” The President’s duty here, as always, derives from the “Take Care” clause first, and the APA second. Complying with the latter, but not the former, is still unconstitutional. With this understanding, *Heckler* is the closest facsimile we have in the Court’s jurisprudence to determine whether DAPA is lawful—this is the approach the OLC Opinion adopted.

As the following analysis in Parts IV-VI demonstrates, HHS has adopted an extremely “broad policy” that restricts the ability of officers to enforce the immigration laws. The policy cabins their discretion both procedurally (requiring less thorough reviews of applications) and substantively (eliminating grounds for denial beyond the Secretary’s preferences). Second, this policy was deliberately crafted in this manner. It was “consciously and expressly adopted” to exempt nearly 40% of undocumented aliens in the United States—even those who were not previously subject to any enforcement action—from the threat of removal.

Third, the decision to defer deportations by itself is not enough to “amount to an abdication of its statutory responsibilities.” In all likelihood, the overwhelming majority of the four million aliens exempted would not have been removed anyway. Rather, the decision to establish a program to solicit registrations for deferrals as a means to provide work authorization to bring these aliens “out of the shadows” elevates the policy to the level of a disregard of the law. Exacerbating this policy is the fact that the aliens selected by the President—parents of minor U.S. Citizens and Lawfully Permanent Residents—were never deemed by Congress to be worthy of such relief.¹⁴¹

Fourth, the size and scope of those exempted from the laws greatly exceeds any previous policy-wide deferrals, by several orders of magnitude.¹⁴² While the policy is based on the selective enforcement

141. Blackman, Part I, *supra* note ____.

142. The OLC Opinion repeated an oft-cited, but incorrect statistic that President George H.W. Bush’s “Family Fairness” deferred the deportation of 1.5 million. *See* OLC Opinion at 14. This statistic has been repeated by the President. *This Week* (Nov. 23, 2014) <http://abcnews.go.com/ThisWeek/week-transcript-president-obama/story?id=27080731> (“If you look, every president—Democrat and Republican—over decades has done the same thing. George H W Bush—about 40 percent of the undocumented persons, at the time, were provided a similar kind of relief as a consequence of executive action.”). The actual estimate was roughly 100,000. Glenn Kessler, *Fact Checker: Obama’s Claim that George H.W. Bush Gave Relief to ‘40 percent’ of Undocumented Immigrants*, Wash. Post (Nov. 24, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/24/did-george-h-w-bush-really-shield-1-5-million-illegal-immigrants-nope>. The origin of this false number is subject to some

of the immigration laws, it is entirely without precedent to excuse over four million people, as a class, from the scope of the naturalization power. Professor Zachary Price observed that the DACA—DAPA’s progenitor—“amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization.”¹⁴³ By waiving myriad legal requirements, “[t]he action thus is presumptively beyond the scope of executive authority: to be valid, it requires a delegation from Congress.”¹⁴⁴ The OLC opinion acknowledged that “deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion.”¹⁴⁵ In a word, this action is *unprecedented*.

Finally, the presumption of reviewability should be strongest when the non-enforcement of the law amounts not only to a disagreement about policy, but a violation of the Constitution. In his concurring opinion in *Heckler v. Chaney*, Justice Marshall elaborated on the Court’s framework concerning the “complete abdication of statutory responsibilities.”¹⁴⁶ He wrote:

If inaction can be reviewed to assure that it does not result from improper abnegation of jurisdiction, from complete abdication of statutory responsibilities, from *violation of constitutional rights*, or from factors that offend principles of rational and fair administrative process, it would seem that a court must always inquire into the *reasons for the agency’s action* before deciding whether the presumption applies.”¹⁴⁷

The violation of the structure of the Constitution is of equal, if not greater magnitude, to the violation of constitutional rights.

At issue with DAPA is not a mere disagreement about how an agency enforces its priorities, but a knowing disregard for the limits imposed by Congress. While the D.C. Circuit’s reversed-decision in

dispute, and seems to be based on an error in congressional testimony. INS Commissioner Gene McNary himself told the *Washington Post*, “I was surprised it was 1.5 million when I read that. I would take issue with that. I don’t think that’s factual.” Ultimately, by October 1 of 1990, INS had received *only 46,821 applications*. *Id.* The next month, President Bush signed the Immigration Act of 1990, which ended the temporary family fairness program.

143. Price, *supra* note 19, at 760.

144. *Id.*

145. *Id.*

146. *Heckler v. Chaney*, 470 U.S. 821, 853, (1985) (Marshall, J., concurring).

147. *Id.* (emphasis added).

Heckler was a “clear intrusion upon powers that belong to Congress, the Executive Branch and the states,”¹⁴⁸ the review of DAPA would serve to reinforce the powers of Congress to limit the President’s power.¹⁴⁹

IV. DAPA WAS NOT DESIGNED WITH “CARE” TO THE LAWS

Second, our inquiry turns to whether the President’s agencies have executed the law with “care.” With respect to DAPA, the case-by-case discretion at the heart of all aspects of prosecution was supplanted by the Secretary’s priorities.¹⁵⁰ Deviations were not allowed for individualized judgment—despite the Office of Legal Counsel’s assurances to the contrary.¹⁵¹ These policies represent a deliberate effort to undermine the discretion of officers, both procedurally and substantively. By restricting the scope of their reviews of applicants, and limiting the grounds for denial to those identified by the Secretary, DAPA deliberately hobbles the enforcement of the immigration laws as designed by Congress. These steps are taken not to conserve resources—as they increase the agency’s workload and budget—but as a means to bypass the laws of Congress.

A. *The Secretary’s Policy Displaces Individualized Officer Discretion*

To analyze the constitutionality of DAPA, we must first address its progenitor—DACA. Secretary Johnson, in establishing DAPA, “direct[ed] USCIS to establish a process, *similar to DACA*, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis.”¹⁵² Secretary Johnson’s memorandum mirrors his predecessor, Secretary Janet Napolitano’s invocation of discretion. It begins that “DHS must exercise *prosecutorial discretion* in the enforcement of the law.”¹⁵³ While DAPA has not yet gone into effect, it is safe to assume that it will adopt priorities and guidelines “similar” to those of DACA, except on a much larger scale. This section will dissect the degree of discretion inherent in DACA, and draw parallels

148. *Chaney v. Heckler*, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (Scalia, J., dissenting) rev’d, 470 U.S. 821 (1985).

149. *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting) (“But there has come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A Federal Government that *does not want to enforce the immigration laws as written*, and leaves the States’ borders unprotected against immigrants whom those laws would exclude.”) (emphasis added).

150. Johnson, *supra* note 3, at 3.

151. Thompson, *supra* note 5, at 11.

152. Johnson, *supra* note 3, at 4.

153. *Id.* at 1 (emphasis added).

to how the government has described DAPA, and how it will likely be implemented.

Secretary Napolitano's memorandum announcing DACA employs an oxymoronic understanding of discretion. On the one hand, the memo directs USCIS to "establish a clear and efficient process for exercising *prosecutorial discretion*, on an *individual basis*, by deferring action against individuals who meet the above criteria."¹⁵⁴ The memo adds, that all "requests for relief pursuant to this memorandum are to be decided on a case by case basis."¹⁵⁵

However, it is the Secretary's discretion, not the discretion of officers that determines who does not receive deferred action. The very first sentence gives away the whole ballgame: "By this memorandum, *I* am setting forth how, in the exercise of *our* prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws."¹⁵⁶ There is no room for "discretion, on an individual basis" outside the Secretary's broad criteria.¹⁵⁷ The final sentence of the memorandum drives the point home—it is not discretion for the officers to exercise, but for the Secretary to impose. "It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. *I have done so here.*"¹⁵⁸

This process amounts to discretion in name only—or more precisely, discretion in the Secretary's name only. This philosophy is encapsulated in Slide 31 of a training presentation provided to agents, that was released through a FOIA request.¹⁵⁹ "Deferred action," it begins, "is discretionary."¹⁶⁰ But not the kind of "case-by-case" discretion in the hands of the officer that the Secretary described in her memorandum. Rather, this discretion comes from the Secretary herself. "In setting the guidelines, *the Secretary* has determined how this discretion is to be applied for individuals who arrived in the United States as children."¹⁶¹ In case anyone didn't get the memo, literally and figuratively, the Slide states it clearly for the officers: "Although discretion to defer removal is applied on a case-by-case

154. Napolitano, *supra* note 2, at 2 (emphasis added).

155. *Id.*

156. *Id.* at 1 (emphasis added).

157. *Id.* at 2.

158. *Id.* at 3 (emphasis added).

159. Pls. Reply at Ex. 10.h, 0444, Texas. v. U.S., 1:14-cv-00254 (S.D. Tex. 2014). All Exhibits are attached to Texas's motion for a preliminary injunction reply, available at <http://joshblackman.com/blog/2015/01/08/filings-in-texas-v-united-states/>.

160. *Id.*

161. *Id.*

basis, according to the facts and circumstances of a particular case, *discretion should be applied consistently.*¹⁶² *Consistent discretion* is oxymoronic, and inconsistent with the individualized discretion extolled by the OLC opinion as the constitutional basis for DACA.

The slide explains further, “Absent unusual or extenuating circumstances, similar facts should yield similar results.”¹⁶³ That, by itself, seems reasonable enough, if the policy actually granted the agents leeway to enforce the laws of Congress. But it doesn’t. The policy is guided to *only* deny applications in cases where the Secretary’s guidelines are not met. So much so, that “to facilitate consistent review and adjudication, a series of . . . templates have been developed and *must* be used.”¹⁶⁴ Specifically, a “standard denial template in checkbox format *will* be used by officers.”¹⁶⁵ Checking off boxes—where none of the boxes is “other”—is inconsistent with an individualized judgment.¹⁶⁶ (More on the template later). The veneer of discretion is just that—a façade.¹⁶⁷

A detailed study of how DACA has been implemented confirms the Secretary’s admonition. DACA is a blanket policy, and “broad policy against enforcement.”¹⁶⁸ Individual officers have no room to exercise judgment on a case-by-case basis within the confines of the INA, beyond the criteria established by the secretary. While each case is analyzed on an “individual basis,” officers can only proceed along a predefined “template,” where the only ground for denial is the failure to meet the Secretary’s criteria. This schizophrenic approach to discretion reveals that individualized judgment is but a mirage. It sheds light on the “special risks” posed by a “general policy” that seeks to “abdicate[e] its statutory responsibilities.”¹⁶⁹ As the D.C. Circuit warned, this “general policy” reflects a deliberate effort to disregard the law.

As the Supreme Court recognized two centuries ago, “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”¹⁷⁰ When the executive fails to apply the rules to individuals, his actions blurs into

162. Exhibit 10h, 0444.

163. *Id.*

164. *Id.*

165. *Id.*

166. FA

167. Delahunty, *supra* note 19, at 845.

168. *Crowley*, 37 F.3d at 677, citing *Heckler*, 470 U.S. at 833 n.4.

169. *Id.*

170. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

that of the legislature.

B. The USCIS Policy Undermined The Role of Officer Discretion

The U.S. Citizenship and Immigration Services (USCIS), the agency charged with enforcing DAPA for aliens not yet subject to enforcement actions, took the Secretary's lead in confining the inherent discretion officers traditionally exercise on a case-by-case basis. Through a series of FOIA requests, USCIS has released internal policy documents, standard operating procedures, and training manuals. These documents reveal how the government has restricted the scope of discretion both procedurally and substantively.¹⁷¹ First, through the so-called "Lean & Lite" review, DHS limited the depth of investigation that officers could employ to dig into an application. In this sense, the officers were procedurally constrained from investigating various indicia of fraud that would normally counsel against providing relief. Second, DHS weakened the scope of officer discretion, as it limited the grounds for denial to checking boxes on a "template." These grounds were the exact criteria set by the Secretary's policy. Substantively, discretion was confined to the preferences of the Secretary, displacing any meaningful case-by-case review. Discretion is nothing more than a veneer to justify awarding benefits to millions of aliens that Congress deemed unworthy of such benefits.

1. Transitioning to "Lean and Lite" Review Limits Discretion
Procedurally

Procedurally, DHS hobbled its officers from conducting a thorough review of each DACA applicant. This was done by design—DACA was crafted as a means to provide relief to as many applicants as possible, not as a way to conserve resources. Denials were meant to be the rare exception, rather than the rule. These priorities are reflected in a September 14, 2012 memorandum to field officers that explains the new "lean and lite" process of reviewing applicants.¹⁷² Under this policy, the National Benefits Center (NBC)¹⁷³ would take the lead in the preliminary step of reviewing "all initial evidence," with field officers following up.

The memo notes that "certain changes will occur in this process"

171. All Exhibits are attached to Texas's motion for a preliminary injunction reply, available at <http://joshblackman.com/blog/2015/01/08/filings-in-texas-v-united-states/>.

172. Exhibit 9a, 0191.

173. <http://www.uscis.gov/news/alerts/workload-transfer-service-centers-field-operations>

that diminish the discretion of the individual officers in the field.¹⁷⁴ First, “[w]here before a case might have gone to an officer for more detailed review and/or application of *officer discretion* (ORB) before RFE [Request for Evidence], instead the case will [now] go to the field for officer review and adjudication.”¹⁷⁵ The primary review was now conducted by the National office, removing individual officers from the process. Second, “where before” a “case would have gone to an officer for further review, possible denial, or application of officer discretion (Failed Validation),” under the “lean and lite” process “if the [Request for Evidence] is NOT sufficient,” “instead the case will go to the field for officer review and adjudication.”¹⁷⁶

Third, the National Benefits Center will “no longer have officers review cases where the applicant might currently be in proceedings to determine if USCIS has jurisdiction over their I-485.”¹⁷⁷ Under the new streamlined approach, “[i]nstead these cases will go to the field for review and adjudication.”¹⁷⁸ At every juncture, the USCIS guidelines diminished the opportunity for discretion in the officers in the field, and consolidated the authority in the national office.

Chapter 8 of USCIS’s Standard Operating Procedures for DACA provides guidance for the “Adjudication of the DACA Request.”¹⁷⁹ The second paragraph makes clear the officer understands the thrust of the policy: “Officers will **NOT**”—the word “**NOT**” is capitalized and bolded in the original—“deny a DACA request solely because the DACA requester failed to submit sufficient evidence with the request (unless there is sufficient evidence in our records to support a denial).”¹⁸⁰ The memo explains where the discretion lies—not in the officer’s discretion, but “as a matter of policy officers will issue an RFE [Request for Evidence] or a Notice of Intent to Deny (NOID)” prior to denying a DACA request.¹⁸¹

The Standard Operating Procedures further minimize the scope of individual discretion. “When articulable fraud indicators exist,” the guide provides, “the officer should refer the filing with a fraud referral sheet prior to taking any adjudication action.”¹⁸² This is so, “even if there are other issues which *negate the exercise of prosecutorial*

174. Exhibit 9a, 0191.

175. Exhibit 9a, 0191.

176. Exhibit 9a, 0191.

177. Exhibit 9a, 0191.

178. Exhibit 9a, 0191.

179. Exhibit 10c, App. 0318.

180. Exhibit 10c, App. 0318.

181. Exhibit 10c, App. 0318.

182. Exhibit 10e, 0363.

discretion to defer removal.”¹⁸³ Further, if an application has “discrepancies [that] still don’t add up,” and the “DACA requestor’s attempts to explain” fail, the Officer is *not to deny the* request, but “refer the case to the [Center for Fraud Detection Operations] for further research.”¹⁸⁴ Officers should take the hint that the answer should almost never be “deny.”

Even when the officer determines that an applicant should be denied she must “obtain supervisory review before issuing the denial” if the “denial involves one of the” five broad grounds covering the eligibility criteria for DACA.¹⁸⁵ A guidance PowerPoint slide reiterates that an “officer *must* obtain supervisory review before entering the final determination” of a denial.¹⁸⁶ Even where the officer determines the applicant committed a “crime before reaching age 18,” has been “convicted of a ‘significant misdemeanor,’” “poses a threat to national security or safety,” or “has not met the educational guidelines,” the officer is *not* allowed to deny the application on her own.¹⁸⁷ The application must be turned over to the supervisor. Slide 208 of the training presentation poses what must be a rhetorical question: “When is a supervisory review required before issuing a denial?”¹⁸⁸ The answer is virtually always, yes.

These restrictions were not lost on the employees of USCIS. The Field Office Director in St. Paul, Minnesota noted that applications generated under the “lean & lite” process are not “[a]s complete and interview ready as we are used to seeing.”¹⁸⁹ Stressing that the DACA guidelines represented a departure from standard operating procedures, she added, “[t]his is a temporary situation—I just can’t tell you when things will revert back to the way they used to be.”¹⁹⁰ Kenneth Palinkas, the President of the National Citizenship and Immigration Services Council (the USCIS Union), and a decade-plus veteran at the agency, submitted a sworn declaration in Texas’s lawsuit on behalf of 24 other states challenging the legality of DAPA. Rather than allowing the officers to exercise independent judgment, Palinkas claimed, the administration “has taken several steps to ensure that DACA applications receive *rubber-stamped approvals* rather than

183. Exhibit 10e, 0363.

184. Exhibit 10h, 0426 (emphasis added).

185. Exhibit 10e, 0370

186. Exhibit 10m, 0596.

187. Exhibit 10e, 0370.

188. Exhibit 10m, 0602.

189. Exhibit 8, 0129.

190. Exhibit 8, 0129.

thorough investigations.”¹⁹¹ The system promulgated “is designed to automatically approve applications rather than adjudicate each application with all the tools necessary to reach a fair and equitable decision.”¹⁹²

Palinkas further observed that the administration has taken away the key tools that officers have traditionally employed in enforcing the immigration laws through a case-by-case approach. For example, “USCIS management routes DACA applications to [national] service centers instead of field offices.”¹⁹³ However, the “USCIS officers in service centers (as opposed to those in field offices) do not interview applicants.”¹⁹⁴ Palinkas stressed that “An interview is one of the most important tools in an officer’s toolbox because it is one of the most effective ways to detect fraud and to identify national-security threats.”¹⁹⁵ He adds that this new process “further erodes and inhibits an officer’s ability to root out fraud and screen out national security threats.”¹⁹⁶ Logistically, it would have been impossible to conduct interviews of a million people in order to grant them all benefits in a manner of months, which is what DACA demanded. The “lean and lite” process was necessary in order to push through as many “grants” as possible.

In addition, Palinkas stated that one of the few-hard-and-fast rules in DACA—the \$465 fee—was often waived. With respect to the fees, public affairs guidance signed by Secretary Napolitano on July 25, 2012 advised the media that “fee waivers are not available.”¹⁹⁷ This \$465 barrier proved to be short-lived. The only exercise of “discretion” Palinkas identified is that the government is “waiving those fees” that “DACA applications [were] originally . . . required to pay.”¹⁹⁸ As a preview of things to come, Secretary Johnson’s memo also explains that “There will be no fee waivers and, like DACA, very limited fee exemptions.”¹⁹⁹ If past is prologue, we should expect this barrier to also be significantly relaxed for DAPA.

USCIS’s external guidance reflects the nature of “Lean and Lite” review. On the USCIS’s FAQ section explaining DACA, question 21 asks: “Will USCIS verify documents or statements that I provide in

191. Decl. of Kenneth Palinkas, *supra* note 13.

192. Exhibit 23, 0855

193. Exhibit 23, 0854

194. Exhibit 23, 0854

195. Exhibit 23, 0854

196. Exhibit 23, 0855

197. Exhibit 9b, 0222.

198. Exhibit 23, 0855

199. Johnson memo, 5

support of a request for DACA?” Rather than providing an unequivocal *yes*, the answer suggests that individual documents need not be verified to qualify for deferred action. “USCIS has the authority to verify documents, facts, and statements that are provided in support of requests for DACA. USCIS may contact education institutions, other government agencies, employers, or other entities in order to verify information.”²⁰⁰ *May*, not *will*.

In a letter to HHS Secretary Jeh Johnson, Sen. Charles E. Grassley (Ranking Member of the Senate Judiciary Committee), and Rep. Bob Goodlatte (Chairman of the House Judiciary Committee) expressed concern that through FAQ 21 the government has publicly “assur[ed] potential DACA applicants that USCIS has no plans to actually verify the validity of any evidentiary documents submitted in support of an application.”²⁰¹ In response, Leon Rodriguez, Director of USCIS replied, “USCIS immigration officers are trained to evaluate evidence submitted to satisfy the DACA guidelines on a case-by-case basis and to identify indicators of fraud.”²⁰² However, the individual officers were cut out of the process of providing a comprehensive review under the “lean and lite” approach, and their tools to identify fraud were removed. Congress’s alarms were indeed well-founded. Procedurally, officers were restricted from conducting full investigations, and exercising the type of discretion that would satisfy the concerns, and laws of Congress. And all of these steps were taken deliberately to grant approval to as many applications as possible, in a short of a period of time. The goal was bestowing benefits, rather than screening applicants. These facts are sufficient to rebut the generally-warranted presumption that “executive enforcement discretion extends only to case-specific considerations.”²⁰³

2. Restricting Grounds For Denial Limits Discretion Substantively

In addition to procedurally hobbling officers from conducting comprehensive reviews of applicants, the policy also restricts their discretion substantively: the grounds for denial are circumscribed to those selected by the Secretary. In the *rare* event that the “supervisor

200. <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> A federal court has found that through an FAQ, HHS has changed the agency’s policy, without notice-and-comment rulemaking. The court enjoined the agency from “enforcing, applying or implementing FAQ No. 33.” *Texas Children’s Hosp. v. Burwell*, No. CV 14-2060 (EGS), 2014 WL 7373218 (D.D.C. Dec. 29, 2014).

201. Exhibit 17, App. 0811

202. Exhibit 29, App. 0985.

203. Price, *supra* note 19, at 705.

concurr with the issuance of a denial,” the officer “shall check the appropriate box on the denial template.”²⁰⁴ The “DACA Denial Template,” as it is called, permits the agent, only with the concurrence of his supervisor, to deny an application by checking a box on the template next to 11 possible grounds.²⁰⁵

All of the grounds are repetitions of the criteria established by the Secretary: the applicant (1) is “under age 15,” (2) “failed to establish [arrival before] the age of sixteen,” (3) “failed to establish [applicant] under age of 31 on June 15, 2012,” (4) “failed to establish [continuous residence] since June 15, 2007,” (5) had “one or more absences” during “period of residence,” (6) “failed to establish [applicant] in the United States on June 15, 2012,” (7) “failed to establish” educational criteria, (8) was “convicted of a felony or a significant misdemeanor,” (9) “failed to pay the fees,” (10) “failed to appear for the collection of biometrics,” or (11) “failed to respond to a Request for Evidence.”

There is no box for “other”—which would seem to be a natural choice if each applicant was analyzed on a case-by-case basis. Here, discretion would be figuratively, and literally thinking outside the (check) box. Under DACA, no such judgment is allowed. The only reason for denying an application is that an alien fails to meet the broad criteria selected by the Secretary. Any two agents would have to arrive at the exact same resolution. Palinkas noted that “USCIS management, however, has undermined immigration officers’ abilities to do their jobs.”²⁰⁶ The Secretary’s policy was designed to exempt a very specific group of aliens—over a million in size—from the scope of the immigration laws. Agents are only allowed to deny relief to those who fall outside that class. For everyone who fits the criteria, the officer must use a rubber stamp.

Director Rodriguez’s letter to Congress reveals the grounds on which applications were “rejected.”²⁰⁷ In explaining that 42,906 requests were “rejected” between 8/15/12 and 8/31/14, he cited “[t]he top 4 rejection reasons”: (1) “expired version” of form I-821D, (2) “[f]ailure to provide a valid signature,” (3), “[f]ailure to file” form I-765, and (4) “[f]iling while under the age of 15.”²⁰⁸ None of these

204. Exhibit 10e, 0370.

205. DACA Standard Operating Procedures, Part M at Ex. 10m, 0594, *Texas v. U.S.*, 1:14-cv-00254 (S.D. Tex. 2014).

206. Exhibit 23, 0854

207. While the letter to DHS asked for the reasons why applications were “rejected” or “terminated,” it (unfortunately) did not ask about the reasons why applications were “denied.”

208. Leon Rodriguez, Letter to Charles E. Grassley at Ex. 29, 0978, *Texas v. U.S.*, 1:14-cv-00254 (S.D. Tex. 2014).

grounds for rejection would exhibit any actual discretion on the part of the agent. These are ministerial facts that can be checked fairly easily. Similarly, 113 cases were “terminated,” based on factors consistent with the Secretary’s guidance, rather than any individualized determinations: (1) “approval in error,” (2) “fraud,” (3) “conviction of a disqualifying offense,” or (4) “posing a threat to national security or public safety.”²⁰⁹ It is difficult to determine that discretion was present in any of these decisions.

A training presentation given to officers explains that the “[u]se of this denial template is *mandatory*. *Individualized*, locally created denials shall not be used.”²¹⁰ This training should make abundantly clear to individual officers that they are not to deviate from the template. The guidance stresses: “When an officer encounters an issue for which there is no check box on the denial template, the officer must work through his/her supervisor to identify the issue for SCOPS [Service Center Operations Directorate] so that the template can be amended.”²¹¹ Nothing in USCIS’s letter to Congress, or the documents released through FOIA, suggests that any new grounds were added for denials beyond those listed. If there were, the government would have certainly raised these points in the course of litigation, which it has not. Palinkas speaks to this change: the Executive Branch “has intentionally stopped proper screening and enforcement, and in so doing, it has guaranteed that applications will be *rubber-stamped* for approval, a practice that virtually guarantees widespread fraud and places public safety at risk.”²¹²

That these check boxes mirror the Secretary DACA’s memo is no coincidence. The Agency’s guidance make clear that it is the Secretary’s discretion to set the policy, and not the officer’s judgment, that drives the granting of DACA applications. The “Objectives and Key Elements” PowerPoint slide seeks to teach officers to “understand the Secretary’s specific guidelines for DACA.”²¹³ While the objectives also include a discussion on the “authority for exercising

209. *Id.*

210. DACA Standard Operating Procedures, Part M, *supra* note 205, at 0594 (emphasis added). In its sur-reply in *Texas v. United States*, a declaration from Donald Neufield, Associate Director for Service Center Operations (SCOPS) for USCIS failed to identify any grounds, beyond those identified in the Secretary’s memorandum, for denial of DACA benefits. Josh Blackman, Government Sur-Reply Part 10: DACA Denials for Discretionary Reasons?, Josh Blackman’s Blog, <http://joshblackman.com/blog/2015/02/07/government-sur-reply-part-10-daca-denials-for-discretionary-reasons/> (Feb. 7, 2015).

211. *Id.*

212. Decl. of Kenneth Palinkas *supra* note 13 (emphasis added).

213. DACA Standard Operating Procedures, Part G at Ex. 10.g, 0415, *Texas v. U.S.*, 1:14-cv-00254 (S.D. Tex. 2014).

discretion,”²¹⁴ and cites the “discretionary nature of deferred action,”²¹⁵ every step of the tutorial is aimed at eliminating any deviation from the “Secretary’s specific guidelines.”²¹⁶

Secretary Napolitano’s memo lists the five “criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion.”²¹⁷ This isn’t exactly right. First, they aren’t just eligible—they will receive it automatically. Second, if the first fact is true, the appearance of a case-by-case analysis is mere window dressing. However, there is no discretion of the sort. If the five criteria—identified solely by the Secretary without any reference to Congress’s statutes—are identified, then the officer cannot deny deferred action. There is no evidence that *anyone* who met these criteria was denied deferred action.

Likewise, Secretary Johnson’s memo says that applicants who meet the requirements for DAPA “are eligible for deferred action on a case-by-case basis.”²¹⁸ He adds, “[D]eferred action, on a case-by-case basis” may be awarded so long as the applicant “present[s] *no other factors* that, in the exercise of discretion, makes the grant of deferred action inappropriate.”²¹⁹ However, if DAPA employs a similar denial template, there is no check box for “other factors.” The only grounds for denial are those identified by the Secretary’s policy. As the template for denial makes clear, there are *no other factors* that an agent could rely on to exercise discretion.

With respect to DAPA, the OLC opinion begrudgingly countenances this omission of individualized discretion, explaining that “The proposed policy does not specify what would count as [a factor that would make a grant of deferred action inappropriate]; it thus leaves the relevant USCIS official with *substantial discretion* to determine whether a grant of deferred action is warranted.”²²⁰ But, as DACA has demonstrated, individual USCIS officials have *no* discretion to determine if deferred action is warranted. All of the heavy lifting is done by the Secretary with the policy memo, and everyone down the line merely picks up the rubber stamp, and slams it down on the application.

214. *Id.* at 0418.

215. DACA Standard Operating Procedures, Part H at Ex. 10.h, 0441, *Texas v. U.S.*, 1:14-cv-00254 (S.D. Tex. 2014).

216. DACA Standard Operating Procedures, Part G, *supra* note 213.

217. Napolitano, *supra* note 2, at 1.

218. Johnson Memo 1, *supra* note 3, at 3.

219. *Id.* at 4 (emphasis added).

220. Thompson, *supra* note 5, at 29.

In *Arpaio v. Obama*, a constitutional challenge to DACA, the district court explained that even though “the challenged deferred action programs represent a large class-based program, such breadth does not push the programs over the line from the faithful execution of the law to the unconstitutional rewriting of the law for the following reason” because they “still retain provisions for meaningful case-by-case review.”²²¹ This echoes Secretary Johnson’s memo which said, “As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis.”²²² The OLC memo repeats, “the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.”²²³ But this simply *isn’t true* of DACA or DAPA. The entire scope of the “case-by-case review” *is* the criteria of the “large class-based program.”

Compare DACA with an earlier memorandum from ICE Director John Morton, explaining for officers how to exercise “prosecutorial discretion.”²²⁴ Morton explains that “When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to” nineteen different factors. They range from “agency’s civil immigration enforcement priorities” to “the person’s ties and contributions to the community” to “whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking.”

The memo further lists both “positive factors” and “negative factors” that “prompt particular care and consideration.” While the agency’s priorities and policies are stated, ultimately the discretion inheres in the officer. Unlike the DACA memo these factors, which are not “exhaustive,” allow officers to “consider prosecutorial discretion on a case-by-case basis . . . based on the totality of the circumstances, with the goal of conforming to ICE’s enforcement priorities.” No two officers are likely to come to the same conclusion for these nineteen factors. The same cannot be said for DACA’s formulaic approach. With DACA, the agency’s priorities *are* the

221. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 208 (2014).

222. Johnson Memo 1, *supra* note 3, at 2.

223. *Id.* at 5.

224. John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

totality of the circumstances.

While the “categorical” enforcement of policies may indeed be salutary,²²⁵ and “reasonable presumptions and generic rules” are generally valid, DACA fails to accord *any*, let alone “some level of individualized determination” to officers.²²⁶ Even the questions identified in *Reno v. Flores*, that the Supreme Court recognized as exhibiting sufficient “particularization and individuation”—such as whether there is “reason to believe the alien deportable” or if the “the alien’s case so exceptional”—entail judgment calls that could reasonably go either way.²²⁷ Two officers may differ about what amounts to an “exceptional” case. But there can be no grounds of disagreement among officers implementing DACA—either the alien meets the criteria, or not. It is a binary choice. Yes, or no—and the answer is seldom the latter.

The policy seeks to impose the oxymoronic standard of “consistent discretion.” With DACA, there is no “particularization and individuation” beyond checking the right boxes. The Court’s decision in *Arizona v. United States* acknowledged that “Discretion in the enforcement of immigration law embraces immediate human concerns,” but it stressed that the “case may turn” on the “equities of an *individual case*.”²²⁸ Here, there is no analysis of the “equities of an *individual case*.”²²⁹ A clerk, with no discretionary duties, could make the same judgment calls as a trained officer. Such a “categorical and prospective nonenforcement of statutes is impermissible without statutory authorization.”²³⁰ DAPA is in effect a statute, without the support of Congress. This blanket policy amounts to unconstitutional law making in and of itself.

C. *The Denial Rate Is Not An Accurate Measure of Prosecutorial Discretion*

In a decision rejecting a constitutional challenge to DACA, the District Court for the District of Columbia praised the initiative, as “statistics provided by the defendants reflect that such case-by-case

225. Gillian Metzger, *Must Enforcement Discretion be Exercised Case-by-Case?*, BALKINIZATION, Nov. 24, 2014 (1:30 PM), <http://balkin.blogspot.com/2014/11/must-enforcement-discretion-be.html>.

226. *Reno v. Flores*, 507 U.S. 292, 313 (1993).

227. *Id.*

228. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (emphasis added).

229. *Id.*

230. Price, *supra* note 19 at 746.

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review is in operation.”²³¹ Specifically, “[a]s of December 5, 2014, 36,860 requests for deferred action under DACA were denied and another 42,632 applicants were rejected as not eligible.”²³² Out of the total 719,746 individuals who made initial requests for deferred action, this amounts to roughly a 5% denial rate.²³³

As far as exercises of discretion go, 5% is a fairly low denial rate for such a significant benefit. But this bottom line hardly tells the whole story. Focusing on a 5% denial rate, as a measure of whether DACA amounts to a case-by-case review is the wrong inquiry. The fact that DACA yields such a staggeringly low denial rate is a function of the blanket policy adopted by the Secretary, and the stripping of any discretion from individual agents to actually assess the alien on a case-by-case basis. Indeed, the memo offers absolutely no guidance about what the “exercise of discretion” should consist of and what the grounds are for rejecting an application.

DAPA is a “general enforcement policy,” with a very modest role for “case-by-case” factors. The eligibility criteria are extremely broad (entry into U.S. by certain date and citizen children). Applicants do not need to show an extreme hardship to U.S. citizens or other compelling circumstances that Congress has used to limit the availability of statutory relief, such as cancellation of removal or waivers of certain exclusion grounds. The disqualifying criteria (criminal record) are narrow. While the OLC opinion casts DAPA as “case-by-case” decisionmaking, DAPA will operate as a general grant of immigration benefits.

D. DAPA Redirects Resources Away from Congress’s Mandates and Towards the President’s Policies

An oft-cited rationale for DACA, as well as DAPA, is that it amounts to a re-allocation of resources from low priority to high priority cases.²³⁴ But this assertion is not supported by the impact of the policy.²³⁵ Secretary Napolitano wrote in her memorandum that DACA was “necessary to ensure our enforcement resources are not expended on these low priority cases but are instead appropriately

231. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 209 n.13 (D.D.C. 2014).

232. *Id.*

233. Defs. Mem. of P. & A. in Opp’n to Pl.’s Mot. for Prelim. Inj. at 29 n.23, *Arpaio v. Obama*, 27 F. Supp. 3d 185 (D.D.C. 2014), (No. 1:14CV01966).

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

235. Delahunty, *supra* note 19 at 847.

focused on people who meet our enforcement priorities.”²³⁶ DACA was not limited to conserving resources to already-existing cases. Rather, it required the government to expend new resources to provide benefits for its “customers.”²³⁷

Secretary Napolitano’s memorandum countenances three situations where the “Dreamers” will receive deferred action: (1) “individuals who are *encountered* by” immigration officials, (2) “individuals who are *in* removal proceedings [but] not yet subject to a final order of removal,” and (3) “individuals who are *not in* removal proceedings.” Deferring the deportations of aliens in the first two categories could conserve resources, as these are people already in the removal pipeline. Failing to remove them could be conceived as prosecutorial discretion—specifically, the decision *not* to prosecute them.

However, the third category consists of aliens who remain in the proverbial “shadows,” and are presumptively unknown to the government. These are people who otherwise *would and could not* be removed, because the government has not yet even “encountered” them. (If this is not the case, they would be in either of the first two categories). Allowing those “customers” in the third category to register for DACA has the explicit purpose of deferring removals for over a million aliens, even though they have not encountered immigration officials, or had removal proceedings commenced against them.²³⁸ Further, the act of registering, and receiving benefits, results in them immediately receiving work authorization.

In this case, the tail wags the dog. The size of the class of aliens in the first two categories, where there could be a plausible case made for prosecutorial discretion and conservation of resources, is dwarfed by the gigantic third category. Aliens are brought into the immigration system for the sole purpose of deferring non-existent deportations, and conferring upon them the benefit of work authorization. A program limited to the first and second categories could stake a more plausible claim to conserving resources because they are already in the pipeline.²³⁹ The third category gives the game away.

Further, DACA, providing benefits to the third category of aliens, is

236. Napolitano, *supra* note 2 at 1.

237. Pls. Reply at Ex. 23, 0854, Texas. v. U.S., 1:14-cv-00254 (S.D. Tex. 2014) (“Aliens seeking benefits are now referred to as ‘customers.’”).

238. Adam B. Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 520 (2009) (“For many years, for example, the INS and ICE initiated proceedings mostly against immigrants who had had a run-in with the criminal justice system. Unlawful entrants who managed to avoid criminal arrest or conviction were extremely unlikely to be deported.”).

239. Delahunty, *supra* note 19 at 848 n.419.

not about conserving resources. Additional resources needed to be expended the process the two-year deferrals, which would soon have to be renewed. USCIS had to rearrange staffing to accommodate the influx of new applicants under DACA. Gary Garman, the Associate Regional Director of Operations observed the necessity to shift resources because of DACA: “As you may recall, this work is transitioning from the Service Centers to the field as a result of the deferred action for childhood arrivals.”²⁴⁰ Another officer stressed that the “process has changed recently to accomodate [*sic*] the additional work coming in from DACA-related shifts of resources.”²⁴¹ An Assistant Regional Director for adjudications confirmed that the “Lean & Light [*sic*] NBC process is due to the workload shift” concerning DACA.²⁴²

The Field Office Director for USCIS in St. Paul wrote that “Due to the volume of DACA work at the Service Center, it has been determined that the field will be sent I-130’s [*sic*] to adjudicate.”²⁴³ She added that there had been a “workload shift from the NBC to the field. NBC is seeking to bring on additional staff to assist with their increased workload due to DACA.”²⁴⁴ A USCIS District Director wrote that “in order to prepare for DACA, “we have been challenged with doing everything we can to eliminate older cases and continued pending cases so that more time can be devoted to these petitions.”²⁴⁵ Further, “additional overtime funds have been made available to USCIS staff, and there is a likelihood that more may be available” for DACA processing.²⁴⁶ Specifically, as a result of DACA, Palinkas asserts that the “agency has been buried in hundreds of thousands of DACA applications since 2012.”²⁴⁷ DACA was not about re-organizing priorities to conserve resources. Additional resources were focused on processing the DACA applicants.

Secretary Johnson’s DAPA memo makes a similar point: “in the exercise of that *discretion*, DHS can and should develop smart enforcement priorities, and ensure that use of its *limited resources* is

240. Pls. Reply at Ex. 9a, app. 0182 *Texas v. U.S.*, 1:14-cv-00254 (S.D. Tex. 2014).

241. *Id.* at Ex. 8, app. 0129.

242. *Id.* at Ex. 9a, app. 0188.

243. *Id.* at Ex. 9a, app. 0180. (Form I-130 is a form for “citizen or lawful permanent resident of the United States to establish the relationship to certain alien relatives who wish to immigrate to the United States.” *available at* www.uscis.gov/i-130).

244. *Id.*

245. *Id.* at Ex. 9a, 0192.

246. *Id.*

247. *Id.* at Ex. 23, 0854.

devoted to the pursuit of those priorities.”²⁴⁸ However, DAPA does no such thing. It expands the amount of resources DHS must expend. Nearly 1,000 *new* employees were hired in Crystal City, Virginia to deal with the influx of four million new cases resulting from DAPA.²⁴⁹ The policy states its ultimate goal directly: DAPA “encourage these people to come out of the shadows.”²⁵⁰ While this is a laudable humanitarian goal, which I agree with as a matter of policy, the act of bringing them out of the shadows through deferring deportations and granting work authorizations, is no longer an exercise of prosecutorial discretion and conserving resources—it requires the expenditures of new resources.

Finally, DAPA represents only a two-year reprieve of deportation, which can be renewed. Of course, the unstated hope is that by deferring the deportations for two years, Congress will pass some sort of comprehensive legislative reform, providing DAPA beneficiaries a permanent reprieve from removal. In the absence of legislation, deferred action merely kicks the can of removal costs down the road. While it may be true that the aliens pay a fine, work, pay taxes, and “get right with the law,” in the interim two-year period, these four million, who were previously not within the government’s sights, represent an increased cost and drain on DHS’s resources.

Justice Marshall explained in his concurring opinion in *Heckler* that “When an agency asserts that a refusal to enforce is based on enforcement priorities, it may be that, to survive summary judgment, a plaintiff must be able to offer some basis for calling this assertion into question or for justifying his inability to do so.”²⁵¹ Six decades earlier, Justice Brandeis made a similar point about the interaction between inadequate funding and faithful execution: “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

248. Jeh Charles Johnson, *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*, U.S. DEP’T. OF HOMELAND SECURITY (Nov. 20, 2014), www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

249. Michael D. Shear, *U.S. Agency Hiring 1,000 After Obama’s Immigration Order*, N.Y. TIMES (Dec. 25, 2014), <http://www.nytimes.com/2014/12/26/us/politics/little-noticed-immigration-overhaul-a-government-hiring-rush.html> (“In a crucial detail that Mr. Obama left out, the Citizenship and Immigration Services agency said it was immediately seeking 1,000 new employees to work in an office building to process ‘cases filed as a result of the executive actions on immigration.’ The likely cost: nearly \$8 million a year in lease payments and more than \$40 million for annual salaries.”).

250. Johnson, *supra* note 3 at 2.

251. *Heckler v. Chaney*, 470 U.S. 821, 853, n. 12 (1985) (Marshall, J., concurring).

enacted.”²⁵² Marshall and Brandeis agree that failing to enforce the law must be due to a genuine lack of resources according to the President’s “best endeavors to secure the faithful execution of the law,” and not an attempt to bypass Congress. DHS’s claim about conserving resources through rearranging priorities does not stand up to scrutiny: many more additional resources have to be added to provide deferred action for DACA, and DAPA. As Professors Delahunty and Yoo observed, “the contours of [DACA] dovetailed so neatly with those of the DREAM Act “[t]hat [it] 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.”²⁵³

Due to the limitations on the officer’s individual discretion, behind the pretense of conserving resources, DAPA was not designed with “care” for the laws, but as a deliberate means to bypass it.

V. PRESIDENTIAL POWER AT “LOWEST EBB” WHEN ACTING CONTRARY TO CONGRESS’S “LAWS”

Through DAPA, the President acts in conflict with the express and implied will of Congress, placing the policy in Justice Jackson’s bottom tier, and the Executive’s power is at its “lowest ebb.” At its core, the axiomatic holding of *Youngstown* is that the Legislature writes the laws, and the President must comply with them—not rewrite them to fit his policy preferences. Like President Truman before him, President Obama must comply with “the Laws” of Congress, not create new fonts of his own authority.

A. *Congressional Acquiescence and the Zone of Twilight*

To assess the conjunction or disjunction between the Congress and the President, we turn to the cornerstone of the Court’s separation of powers jurisprudence—*Youngstown Sheet & Tube Co. v. Sawyer*, and in particular the tripartite framework advanced by Justice Robert H. Jackson.²⁵⁴

In a fractured opinion, a majority of the Court found that President Truman could not seize steel mills in the face of imminent labor strikes. Justice Jackson concurred, finding the executive power is at its “lowest ebb” when the actions the President takes are “measures

252. *Myers v. United States*, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting).

253. Delahunty, *supra* note 19 at 848.

254. 343 U.S. 579 (1952).

incompatible with the expressed or implied will of Congress.” In such cases, Jackson explained, the President “can rely *only* upon his own constitutional powers minus any constitutional powers of Congress over the matter.”²⁵⁵ With this limited Article II arsenal, the “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” In this lowest zone, “presidential power [is] most vulnerable to attack and [is] in the least favorable of possible constitutional postures.”²⁵⁶ Jackson’s framework has become the canonical holding of the case, and separation of powers jurisprudence as a whole.

The Court per Justice Rehnquist (who clerked for Jackson the year *Youngstown* was decided²⁵⁷) would apply this framework in *Dames & Moore v. Regan*, to find that Congress had effectively authorized the President to nullify Iranian assets under the International Emergency Economic Powers Act (IEEPA).²⁵⁸ In recent years, Chief Justice Roberts,²⁵⁹ Justice Alito,²⁶⁰ Justice Sotomayor,²⁶¹ and Justice Kagan²⁶² all reaffirmed the vitality of *Youngstown*, and in particular Justice Jackson’s concurring opinion.

The OLC Opinion justifying the legality of DAPA sounds in Justice Jackson’s *Youngstown* decision, and roughly sketches the three zones of his opinion. First, deferred action programs could not be deemed per se impermissible, as Congressional authorization and recognition of such programs indicate *some* level of consistency with extant Congressional immigration policy.²⁶³ This is the first tier. If Congress has supported the President’s actions, then the President is presumptively not acting unlawfully.

255. *Id.*

256. *Id.*

257. Josh Blackman, *From Jackson to Rehnquist to Roberts on Youngstown Sheet & Tube and Dames & Moore v. Regan*, JOSH BLACKMAN’S BLOG (Feb. 14, 2014), <http://joshblackman.com/blog/2014/02/14/from-jackson-to-rehnquist-to-roberts-on-youngstown-sheet-tube-and-dames-moore-v-regan/>.

258. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

259. Transcript: Day Two of the Roberts Confirmation Hearings, The Washington Post, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html>. As fate would have it, John G. Roberts clerked for Justice Rehnquist the term that the Court decided *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which reaffirmed *Youngstown*.

260. U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court, The Washington Post, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>.

261. Sotomayor Confirmation Hearings, Day 3, The New York Times (July 16, 2009), http://www.nytimes.com/2009/07/15/us/politics/15confirm-text.html?pagewanted=all&_r=0.

262. Elena Kagan’s Confirmation Hearings, CNN (June 29, 2010), Elena Kagan’s Confirmation Hearings.

263. Thompson, *supra* note 5 at 23.

Later, OLC writes, despite the permissibility of such programs at a certain level of generality, the Executive does not possess a blank check in its promulgation of deferred action initiatives.²⁶⁴ This is the third tier. If Congress has not given authorization to the President's actions, then the President acts unlawfully, for these actions amount to lawmaking.

OLC takes a very nuanced approach to middle tier, the so-called "zone of twilight." The opinion explains a "particularly careful examination is needed to ensure that any proposed expansion of deferred action," beyond that which was done by previous executive actions, "complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it."²⁶⁵ The "general principles" the opinion identifies are not only the statutes of Congress, but more broadly congressional acquiescence or rejections of past actions. This inquiry is not as simple as parsing the plain text of the statute, and determining whether the President has complied with the four corners of the law. It is this sense of "the Laws," which I will refer to as *congressional policy*, that the President must comply with.

B. *Congress Has Not Acquiesced to DAPA*

How does DAPA fare under this framework? OLC acknowledged that DAPA "depart[s] in certain respects from more familiar and widespread exercises of enforcement discretion."²⁶⁶ However, the opinion looked to consistency with Congressional policy as a significant touchstone of the program's legality. "The proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action."²⁶⁷ This admission, based on "implicit[]" rather than express approval, would seem to put the policy slightly below the first tier, and thus presumptively lawful.

Based on these considerations, the opinion concluded that DAPA

264. *Id.* at 24 ("Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented.")

265. *Id.*

266. *Id.*

267. *Id.* at 29.

“is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process.”²⁶⁸ This conclusion, coupled with the expertise DHS possesses in relation to resource allocation, lead OLC to opine that DAPA represents “a permissible exercise of DHS’s enforcement discretion under the INA.”²⁶⁹

However, the factual predicates of this “particularly careful examination” yield a very different result, dropping DAPA to the third tier. “[A]ssessing the degree of Congress’s acquiescence in policy-based nonenforcement requires a sensitive examination of the particular statutory context.”²⁷⁰ The four programs the OLC memo identifies as precedents for DAPA fail to justify this unprecedented expansion of executive power. I explore these precedents at length in Part I of this series.²⁷¹ What follows is only a summary.

First, DAPA does not “resemble in material respects” previous deferred actions. These previous programs acted as a *temporary bridge* from one status to another, where benefits were construed as *immediately* arising post-deferred action. Second, Congress has not “implicitly approved in the past” such deferred action. This claim is demonstrably false, as the programs cited all countenanced some form of immediate relief, with the deferred action serving as a temporary bridge to permanent residence or lawful presence. Relief was ancillary to statutory reform.

Third, DAPA is not “consonant” with “interests reflected in immigration law as a general matter.” OLC’s review of existing statutory law regarding the relief available to the parents of U.S. citizen and lawful permanent residents is superficial and ignores the *very limited* nature of any “family unity” policy present in the INA. Fourth, and finally, DAPA is not consistent with “congressional understandings about the permissible uses of deferred action.” The scope of Congress’s acquiescence in the Executive’s use of deferred action is *far* more constrained than the OLC opinion suggests. Specifically, when not approved by Congress, the executive branch’s discretion to cancel removals is capped at 4,000 annually.²⁷² This is

268. *Id.* at 31.

269. *Id.*

270. Price, *supra* note 19 at 747.

271. See Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L. J. ONLINE __ (Forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545544.

272. 8 U.S.C. § 1229b(e)(1) (“the Attorney General may not cancel the removal and adjust

several orders of magnitude smaller than the 4,000,000+ covered by DAPA. The closing argument for this case is that Congress has, and will take affirmative steps to defund DAPA citing the constitutional violations.²⁷³ By every measure, DAPA flunks the very test OLC offered.

Without this acquiescence, even by OLC's own standard, DAPA falls into Jackson's third tier, where the Executive's power is at his "lowest ebb." First, the president is not acting in concert with Congress: Congress rejected or failed to pass immigration reform bills reflecting this policy numerous times.²⁷⁴ Second, there is no murky "twilight" about congressional intent—the House of Representatives recently passed a resolution opposing the policy.²⁷⁵ Third, Congress has not acquiesced in a pattern of analogous executive actions. Previous uses were typically ancillary to statutory grants of lawful status or responsive to extraordinary equities based on the extreme youth, age, or infirmity of the recipient.

Additionally, DAPA bears an even less tenuous relationship to foreign affairs than did *Youngstown*. Justice Black's majority opinion recognized that the domestic matter at the steel mills was outside the "theater of war," and was a "job for the Nation's lawmakers, not for its military authorities."²⁷⁶ Justice Jackson observed that it was "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 the Nation's armed forces to some foreign venture."²⁷⁷ On domestic matters, he cannot rely on his commander-in-chief powers.²⁷⁸

Efforts to utilize corrective powers to enact substantive policies in the face of congressional intransigence must be viewed skeptically.²⁷⁹

the status under this section, nor suspend the deportation and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year.").

273. Jennifer Rubin, *What will be Plan B for immigration?*, WASH. POST RIGHT TURN (Jan. 14, 2015), www.washingtonpost.com/blogs/right-turn/wp/2015/01/14/what-will-be-plan-b-for-immigration.

274. See Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS., 623, 632–37 (2011) (describing failed attempts to enact various versions of the DREAM Act in 2006, 2007, 2009, and 2010).

275. Seung Min Kim, *House sends Obama message with immigration vote*, POLITICO (Dec. 4, 2014), available at www.politico.com/story/2014/12/house-immigration-vote-obama-113327.html.

276. *Youngstown*, 343 U.S. at 587. *Youngstown*, 343 U.S. at 587.

277. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).

278. Delahunty, *supra* note 19 at 826.

279. Josh Blackman, *Gridlock and Executive Power*, <http://ssrn.com/abstract=2466707> (Forthcoming 2015).

The president is sidestepping Congress because the legislative branch has refused to enact his preferred policies. However, the architecture of separation of powers outlined by Justice Jackson in *Youngstown* has no place for unilateral executive action based solely on Congress's resistance to presidential preferences, even if those preferences reflect sound policy choices. At the core of the Constitution, Jackson found, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."²⁸⁰ On a complete examination, DAPA is a perfect storm of executive lawmaking, and descends to the lowest depths of *Youngstown*, beyond the "zone of twilight," and lurking below the "lowest ebb."²⁸¹

VI. DELIBERATE EFFORT TO BYPASS CONGRESS IS NOT IN GOOD FAITH

The final element in the "Take Care" clause is the most important—has the President acted in good "faith" to execute the laws of Congress, or is he taking proactive steps to bypass the laws of Congress he disfavors. This is, by far, the most difficult aspect of the "Take Care" clause to judge, as Presidents are usually presumed to act lawfully. But if the Executive has turned away from his constitutional duty, as evidenced by the preceding three factors, looking to his state of mind is the only method to separate a good faith mistake from a bad faith deliberate deviation. The former is regrettable, but acceptable. The latter is unconstitutional.

A. DACA and DAPA Arose from the Ashes of Congressional Defeat

Like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. The DREAM Act would have provided a form of permanent residency, and work permits, for certain immigrants who were brought to the United States as minors. Though the bill received bipartisan support in both houses, a Republican-led filibuster killed the bill in the Senate.²⁸² In response to this defeat, in

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

281. I have previously argued that such actions fall into a fourth tier where the "Court must assess the limits of the President's unenumerated Article II authority," and declare whether the President is rightly acting within his "own independent powers." See Josh Blackman & Elizabeth Bahr, *Youngstown's Fourth Tier. Is There A Zone of Insight Beyond the Zone of Twilight?*, 40 MEMPHIS L. REV. 541 (2010). But here, unlike Truman before him, President Obama lays no claim to any inherent executive powers. Rather, he relies entirely on authority delegated by Congress. If the delegated power is insufficient, the President acts unlawfully.

282. Scott Wong, *DREAM Act Dies in Senate*, Politico (Dec. 18, 2010), <http://www.politico.com/news/stories/1210/46573.html>.

June 2012, the President took matters into his own hands.²⁸³

As part of his “We Can’t Wait” campaign,²⁸⁴ the President announced the policy that came to be known as DACA.²⁸⁵ His remarks directly linked the defeat of the DREAM Act to his new executive action: “Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it.”²⁸⁶ This point he made clear: “[i]n the absence of any immigration action from Congress to fix our broken immigration system,” the President would act without Congress.²⁸⁷ DACA accomplished several of the key statutory objectives of the DREAM Act—a law Congress expressly declined to enact—without the benefit of a statute.²⁸⁸ Deportations were deferred for the so-called “dreamers,” and they were entitled to legal work authorization.

This pattern would repeat itself over the next two years. On June 27, 2013, the Senate passed the “Border Security, Economic Opportunity, and Immigration Modernization Act,” commonly known as comprehensive immigration reform, by a bipartisan vote of 68-32.²⁸⁹ Over the next year, the President lobbied House Republicans to take up the measure for a vote. However, this effort proved unsuccessful. On June 30, 2014, after much debate within his caucus, Speaker of the House John Boehner announced that the House would not bring an immigration bill to a vote in 2014.²⁹⁰

That same day, in impromptu remarks delivered in the Rose Garden, the President explained why he would take unilateral

283. 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”).

284. Frank James, *With DREAM Order, Obama Did What Presidents Do: Act Without Congress*, NPR (Jun. 15, 2012, 3:52 PM), <http://www.npr.org/blogs/itsallpolitics/2012/06/15/155106744/with-dream-order-obama-did-what-presidents-do-act-without-congress>.

285. Preston & Cushman, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, Jun. 16, 2012, p. A1.

286. Press Release, The White House, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

287. Press Release, The White House, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

288. Delahunty, *supra* note 19 at 784, 791.

289. S.744

290. Steven Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year*, President Says, Roll Call (Jun. 30, 2014), <http://blogs.rollcall.com/white-house/immigration-bill-officially-dead-boehner-tells-obama-no-vote-this-year/>.

executive action on immigration reform notwithstanding the House's decision: "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing."²⁹¹ He said, I will "fix the immigration system on my own, without Congress." In earlier remarks, the President cited Congressional "gridlock" to passing the laws he wants as a reason why "*we can't afford to wait* for Congress," and a justification why "I'm going ahead and moving ahead without them."²⁹² The President explained, "I'll keep taking actions on my own" with all of this "obstruction."²⁹³ For "as long as they insist on . . . obstruction *I'll keep taking actions on my own I'll do my job.*"²⁹⁴ In both cases, the laws were born from express repudiations by Congress. Congress said no, but the President said yes. Five months later, after the midterm elections, the President announced DAPA.

The pattern has become predictable: (1) Congress votes against granting the President new power; (2) the President explains he will exert power even though Congress denied it to him; (3) through an executive policy, the President exerts executive power that Congress denied him. Such behavior cannot be viewed as a good faith, but mistaken or misguided effort to comply with the law. Rather, it amounts to an open and notorious decision to disregard the democratic process, knowing that the Legislature does not concur. Implementing DACA and DAPA, after Congress voted down their antecedent bills, amounts to a prima facie bad faith effort to comply with the Take Care clause. As I discuss in the next section, this analysis is even stronger when the President repeatedly insists that he lacks the authority to act alone—until Congress handed him a defeat. Then, he suddenly, and unconvincingly discovered these new fonts of powers.

291. *Transcript: President Obama's June 30 remarks on immigration*, WASH. POST (Jun. 30 2014), http://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html.

292. Senate Democrats have voiced similar ideas: Mike Lillis, *Democrats: No bluff, Obama will go it alone on immigration*, THE HILL (Jun. 26, 2014, 3:00 PM), <http://thehill.com/homenews/house/210734-dems-no-bluff-obama-will-go-it-alone-on-immigration#ixzz35qBs16SS>.

293. Ben Wolfgang, *Obama ignores Boehner's lawsuit threat: 'I'll keep taking actions on my own'*, WASH. TIMES (Jun. 28, 2014), <http://www.washingtontimes.com/news/2014/jun/28/obama-ignores-boehners-lawsuit-threat-ill-keep-tak/>.

294. *Id.* The President's vision of the separation of powers is striking, particularly in light of the fact that only a few days earlier the Supreme Court in *Noel Canning* made abundantly clear this congressional intransigence does not strengthen executive powers, and afford him a license to redefine his authority. *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

*B. Dr. Jekyll and Mr. Hyde Approach to Executive Powers Reflects
Bad Faith Motivation*

To ascertain if the executive's non-compliance with the law is still in "good faith," we must look to the state-of-mind of the President, the "sole organ" of the Executive branch.²⁹⁵ In contrast to Congress—which is a *they*, not an *it*,²⁹⁶—the intent of the President can be more easily gleaned. A careful study should be made of all official, and unofficial administration statements, particularly if they are against interest. Professors Delahunty and Yoo explain, a careful study should be made of the Executive's "reasoned public explanation and defense" to determine "whether the excuse is factually true or not."²⁹⁷ Even if "it is not true," the excuse need not be "rejected" based on the "motivation and intent behind nonperformance."²⁹⁸ A good faith mistake will be saved. An excuse which is not made in good faith must be rejected.

With respect to the scope of his executive powers, President Obama has been both Dr. Jekyll and Mr. Hyde. While congressional reform remained a viable option, the President repeated over and over and over again that he could not grant the scope of temporary relief that advocates sought. However, this measured President vanished once Congress finally rebuffed his efforts. The transformed Mr. Hyde took matters into his own hands, and granted the very relief he once claimed impossible.²⁹⁹ These sudden reversals of position further reflect on the lack of good faith attending unprecedented exercises of presidential power.

1. President Consistently Disclaimed Authority to Defer Deportations
of Dreamers

Before the defeat of the DREAM Act, the President consistently

295. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 367-78 (1936).

296. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful."). See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930). Josh Blackman, *This Lemon Comes as a Lemon. The Lemon Test and the Pursuit of a Statute's Secular Purpose*, 20 *George Mason University Civil Rights Law Review* 351 (2010).

297. Delahunty, *supra* note 19 at 847.

298. *Id.*

299. This pattern of behavior is not limited to immigration. Brief of Amici Curiae Cato Institute and Professor Josh Blackman In Support of Petitioners, *King v. Burwell* before the United States Supreme Court (14-114) (discussing rule of law violations attending the implementation of the Affordable Care Act), <https://www.scribd.com/doc/251279503/King-v-Burwell-Brief-for-the-Cato-Institute-and-Prof-Josh-Blackman-as-Amici-Curiae-Supporting-the-Petitioners>.

explained that he lacked the power to unilaterally suspend deportations: “With respect to the notion that I can just suspend deportations through executive order,” he said, “that’s just not the case, because there are laws on the books that Congress has passed.”³⁰⁰ He repeated this point many times almost verbatim—he cannot act alone to bypass Congress and halt deportations.

At a Cinco De Mayo celebration, the President stressed that he could not fix the immigration laws himself. “Comprehensive reform, that’s how we’re going to solve this problem. . . . Anybody who tells you . . . that I can wave a magic wand and make it happen hasn’t been paying attention to how this town works.”³⁰¹ On Univision, he explained “I am president, I am not king. I can’t do these things just by myself. . . . [T]here’s a limit to the discretion that I can show because I am obliged to execute the law. . . . I can’t just make the laws up by myself.”³⁰² At a Town Hall meeting, he added, “I can’t solve this problem by myself. . . . We’re going to have to change the laws in Congress.”³⁰³ In El Paso, Texas, the President reminded the audience that “sometimes when I talk to immigration advocates, they wish I could just bypass Congress and change the law myself. But that’s not how a democracy works.”³⁰⁴ To the National Council of La Raza, the President stated, “[B]elieve me, the idea of doing things on my own is very tempting. . . . But that’s not how . . . our system works. . . . That’s not how our Constitution is written.”³⁰⁵

Finally, Gabriel Lerner from AOL Latino asked the President about “granting administrative relief for DREAMers.”³⁰⁶ The President clearly and directly replied that he could not grant such relief unilaterally.

300. Remarks by the President at Univision Town Hall, March 28, 2011, <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>.

301. President Obama’s Remarks at a Cinco de Mayo Celebration (May 5, 2010), <http://www.presidency.ucsb.edu/ws/index.php?pid=87844&st=immigration&st1=obama>

302. Transcript of President Barack Obama with Univision, *The L.A. Times*, <http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html> (Oct. 25, 2010).

303. Remarks at a Town Hall Meeting and a Question-and-Answer Session in Palo Alto, California (Apr. 20, 2011), <http://www.presidency.ucsb.edu/ws/index.php?pid=90290&st=immigration&st1=obama>.

304. Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas, May 10, 2011, <http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas>

305. Remarks by the President to the National Council of La Raza (July 25, 2011), <http://www.whitehouse.gov/the-press-office/2011/07/25/remarks-president-national-council-la-raza>

306. Remarks by the President in an “Open for Questions” Roundtable (Sept. 28, 2011), <http://www.whitehouse.gov/photos-and-video/video/2011/09/28/open-questions-president-obama#transcript>.

I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true. We are doing everything we can administratively. But the fact of the matter is there are laws on the books that I have to enforce. And I think there's been a great disservice done to the cause of getting the DREAM Act passed and getting comprehensive immigration passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true.

However, after the DREAM Act was defeated, his thinking about the scope of his executive powers “evolved.” He implemented the very relief that he previously said he lacked the power to effect—suspending the deportation of the Dreamers. The President's statements about his power before, and after the legislative defeat, are 180 degrees out of phase.

In one sense, the President's loquaciousness, and numerous statements against interest, weaken his claim to good faith execution. This framework may create a perverse incentive for President's to disregard the law, quietly. However, for non-enforcement to have its intended effect, people will have to know about it. If the President never announced DAPA or DACA, the aliens who are protected by it would continue to live in the “shadows.” And, as a practical matter, they would be ineligible for work authorization if they did not come forward. In a related context, if the President never announced his myriad delays of Obamacare deadlines, those subject to the mandates would continue to comply with them. The Executive's goal of exempting people from the mandates would be unfulfilled. If the President never announced that he was declining to enforce controlled substance laws in states that legalized marijuana, people would continue to abstain the drug for fear of prosecution. This ploy would be ineffective if the President said nothing.

The essence of non-enforcement is to remove the threat of prosecution, and comfort people in knowing they can break the law with impunity.³⁰⁷ With respect to Obamacare, immigration, or marijuana, so long as the threat remains, at the margins people will continue to modify their behavior. And this is exactly what Congress intended, even if it knew a law could not be enforced 100%—the threat of enforcement nudges people to behave in accordance with the

307. Price, *supra* note 19, at 705.

law.³⁰⁸ Deterrence works even with under-enforcement. This realization further explains why non-enforcement cannot be consistent with congressional policy.

2. President Consistently Disclaimed Authority To Defer Deportations of Parents of U.S. Citizens

DAPA bears a similar pedigree to DACA. From 2012 through 2014, the Congress considered comprehensive immigration reform. During this time, the President consistently stated that he lacked the authority to defer deportations of more aliens. Further, he reasserted that he pushed the boundaries as far as he could with DACA. His comments ranged from the general, to the very specific. First, he explained that the Constitution imposes limits on what he can do as President: “[A]s the head of the executive branch, there’s a limit to what I can do. . . . [U]ntil we have a law in place that provides a pathway for legalization and/or citizenship for the folks in question, we’re going to continue to be bound by the law.”³⁰⁹

Second, during the Presidential debate he said that he could not stretch his executive powers any further beyond DACA: “we’re also a nation of laws. So what I’ve said is, we need to fix a broken immigration system. *And I’ve done everything that I can on my own.*”³¹⁰ Third, the President directly refuted the notion that he could defer removals to protect families. During a Google+ Hangout on immigration reform, a question was asked about whether the President could halt deportations to prevent breaking up families. The President replied, “This is something I’ve struggled with throughout my presidency. The problem is that you know I’m the president of the United States, I’m not the emperor of the United States. My job is to execute the laws that are passed. Congress has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place.”³¹¹ However, with DACA the President stressed, “we’ve kind of stretched our administrative flexibility as much as we can.”³¹²

308. Price, *supra* note 19, at 761.

309. TRANSCRIPT: President Obama’s Remarks at Univision Town Hall (Sep. 20, 2012), <http://insider.foxnews.com/2012/09/20/transcript-president-obamas-remarks-at-univision-town-hall>

310. Presidential Debate in Hempstead, New York (Oct. 16, 2012), <http://www.presidency.ucsb.edu/ws/index.php?pid=102343&st=immigration&st1=obama> (emphasis added).

311. President Obama on Immigration Reform in a Google+ Hangout—Part 1 (Feb. 21, 2013), http://youtu.be/-e9lmy_8FZM?t=22s.

312. President Obama on Immigration Reform in a Google+ Hangout—Part 1 (Feb. 21,

Fourth, in an interview, the President was asked if he would “consider unilaterally freezing deportations for the parents of deferred action kids.”³¹³ The President replied that the DREAM Act could not be expanded beyond “young people who have basically grown up here . . . if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally. So that’s not an option.”³¹⁴

Fifth, during a town hall meeting, the President was asked whether he could do for an “undocumented mother of three” what he “did for the dreamers.” The President replied that he could not extend the relief given to the dreamers to these parents:

“I’m not a king. . . . [W]e can’t simply ignore the law. When it comes to the dreamers we were able to identify that group. . . . But to sort through all the possible cases of everybody who might have a sympathetic story to tell is very difficult to do. This is why we need comprehensive immigration reform. . . . [I]f this was an issue that I could do unilaterally I would have done it a long time ago. . . . The way our system works is Congress has to pass legislation. I then get an opportunity to sign and implement it.”³¹⁵

However DAPA accomplished exactly what the questioner wanted—defer deportations for the parents of citizen-children. More directly the President was asked directly whether he could halt deportations of non-criminals—another category of aliens protected by DAPA. He replied, “I’m not a king. I am the head of the executive branch of government. I’m required to follow the law.”³¹⁶

Sixth, during a speech on immigration reform in San Francisco, hecklers called out, at least seven times, “Stop deportations!” The President replied:

2013), http://youtu.be/-e9lmy_8FZM?t=22s.

313. Obama: Halting Deportations “Not An Option,” Would Be “Ignoring The Law,” Real Clear Politics (Sept. 17, 2013), http://www.realclearpolitics.com/video/2013/09/17/obama_halting_deportations_not_an_option_would_be_ignoring_the_law.html. Ultimately, the OLC Opinion would find the President could not do this.

314. Obama: Halting Deportations “Not An Option,” Would Be “Ignoring The Law,” Real Clear Politics (Sept. 17, 2013), http://www.realclearpolitics.com/video/2013/09/17/obama_halting_deportations_not_an_option_would_be_ignoring_the_law.html.

315. Obama tells Telemundo he hopes for immigration overhaul within 6 months (Jan. 30, 2013), <http://nbclatino.com/2013/01/30/obama-tells-telemundo-he-hopes-for-immigration-overhaul-within-6-months/>

316. Glenn Kessler, *Obama’s royal flip-flop on using executive action on illegal immigration*, WASH. POST FACT-CHECKER (Nov. 18, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/18/obamas-flip-flop-on-using-executive-action-on-illegal-immigration>.

“[I]f in fact I could solve all these problems without passing laws in Congress, then I would do so. But we’re also a nation of laws. That’s part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I’m proposing is the harder path, which is to use our democratic processes to achieve the same goal.”³¹⁷

The President’s seventh, and most pointed comments, came on March 6, 2014, during an appearance on Univision.³¹⁸ The host asked him about “Guadalupe Stallone from California, [who] is undocumented. However, her sons are citizens.”³¹⁹ She feared deportation, even though her children could remain in the country. The President explained that he could not help Ms. Stallone. “[W]hat I’ve said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do.”³²⁰ DACA, he admitted “already stretched my administrative capacity very far.”³²¹ The President could go no further because “at a certain point the reason that these deportations are taking place is, Congress said, ‘you have to enforce these laws.’”³²² Citing Congressional power to distribute funding, the President reiterated, “I cannot ignore those laws any more than I could ignore, you know, any of the other laws that are on the books.”³²³ Under DAPA, Ms. Stallone’s deportation would almost certainly be deferred because she is a mother of minor citizen children. This is true, even though as the President explained, Congress imposed laws, and funded the agencies, so the President had to enforce the law.

However, leading up to November 2014, the President’s position evolved from “impossible” to “absolutely.” During this process, the President announced that in “the face of that kind of dysfunction, what I can do is *scour our authorities* to try to make progress.”³²⁴ What limits exist on how far he can scour? The President explained that to

317. Remarks by the President on Immigration Reform—San Francisco, CA, (Nov. 25, 2013), <http://www.whitehouse.gov/photos-and-video/video/2013/11/25/president-obama-speaks-immigration-reform#transcript>.

318. Univision News Transcript, *Interview with President Barack Obama*, UNIVISION (Mar. 5, 2014), <http://communications-univisionnews.tumblr.com/post/79266471431>.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Caitlin MacNeal, *Obama: When Congress Fails, I’ll ‘Scour’ Authorities To ‘Make Progress’*, TALKING POINTS MEMO (Aug. 6, 2014), <http://talkingpointsmemo.com/livewire/obama-scour-executive-authorities>.

resist the “temptation to want to go ahead and get stuff done” when “there’s a lot of gridlock . . . I’ve tried to . . . make sure that the Office of Legal Counsel, which weighs in on what we can-and-cannot do, is fiercely independent, they make decisions, we work well within the lines of that.”³²⁵

While claims of a supine OLC are nothing new—as the President has disregarded OLC’s opinion regarding “hostilities” in Libya³²⁶—this statement is particularly implausible because it was the President who personally pushed his legal team to go further and exert even broader assertions of executive power. The New York Times reported that the administration urged the legal team to use its “legal authorities to the fullest extent. . . .”³²⁷ When they presented the President with a preliminary policy, it was a “disappointment” because it “did not go far enough.”³²⁸ Scouring the bottom of the presidential barrel for more power, Obama urged them to “try again.”³²⁹ And they did just that. Politico reported that over the course of eight months, the White House reviewed more than “60 iterations” of the executive action.³³⁰ The final policy, which ultimately received the President’s blessing, pushed presidential power beyond its “fullest extent,” as it embodies discretion in name only. Further, the policy is in tension with numerous statements the President personally made explaining why he could not act alone.

The Washington Post Fact Checker awarded this reversal an “upside-down Pinocchio for his flip-flop.”³³¹ While flip-flops are par for the course in politics, and usually warrant no mention in constitutional discourse, they are salient for the “Take Care” clause. When the President repeats over and over again that he lacks the power to stop deportations, it has special salience that the Executive acknowledges the limitations imposed by the Separation of Powers—

325. Interview with President Barack Obama, THE COLBERT REPORT, (Dec. 8, 2014), <http://thecolbertreport.cc.com/videos/mpmtan/president-barack-obama-pt—2>.

326. Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), <http://www.lawfareblog.com/2011/06/president-obama-rejected-doj-and-dod-advice-and-sided-with-harold-koh-on-war-powers-resolution/>. <http://balkin.blogspot.com/2011/06/george-w-obama-and-olc.html>.

327. Michael D. Shear & Julia Preston, *Obama Pushed ‘Fullest Extent’ of His Powers on Immigration Plan*, N.Y. TIMES, (Nov. 28, 2014), www.nytimes.com/2014/11/29/us/white-house-tested-limits-of-powers-before-action-on-immigration.html.

328. *Id.*

329. *Id.*

330. Carrie Budoff Brown, Seung Min Kim, & Anna Palmer, *How Obama Got Here*, POLITICO, (Nov. 11, 2014), www.politico.com/story/2014/11/how-obama-got-here-113077.html.

331. ‘Kessler *supra* note 316. *Obama’s Immigration Amnesia*, FACTCHECK.ORG (Nov. 18, 2014), www.factcheck.org/2014/11/obamas-immigration-amnesia.

something the President rarely does.³³² This is true for Presidents “learned and unlearned in the law.”³³³

After the President disclaims inherent executive power, it sends a signal to the Congress: when voting, the Legislature can rest assured that if they vote against the law, it will not be done anyway. But when the President suddenly “discovers” such authority after Congress rebuffs his efforts, the usual framework for the democratic process and the rule of law itself is turned upside down.

With DACA and DAPA, there is a prima facie case that the change in constitutional analysis was not done in good faith. I do not mean “good faith” in the sense that the President is acting in good faith to make a certain policy work.³³⁴ Rather, by good faith I suggest the President knowingly disengaged from his constitutional duties to achieve just those policy objectives. The revised rationales speak directly to the motives of the Executive, and whether he mistakenly failed to comply with his constitutional duty, or deliberately bypassed disfavored legislation. All signs point towards the latter. These facts rebuts the “presumption that the Executive . . . ‘faithfully’ execute[s] federal laws.”³³⁵

Providing a “sympathetic reading” to “President Obama’s maneuvers,” as Professor Pozen suggests, could reflect a “species of constitutional self-help—attempts to remedy another party’s prior wrong rather than to ignore inconvenient legal barriers.”³³⁶ Relying on inherent executive powers, there is always room for some self-help within the realm of quasi-constitutional norms. However, a touchstone of this inquiry requires the President to still comply with his constitutional duties, among them to *execute* the law *faithfully*. Self-

332. Josh Blackman, Unprecedented: The Constitutional Challenge to Obamacare 135, 181 (2013)

333. *Youngstown Sheet & Tube Co. v. Sawyer* (Frankfurter, J., concurring) (noting that Presidents “learned and unlearned in the law,” had taken action). President Obama has opined that his experience as an attorney makes his statements on executive power more authoritative than those who are not “constitutional lawyers.” Interview with President Obama, *The New York Times*, (Jul. 27, 2013), <http://www.nytimes.com/2013/07/28/us/politics/interview-with-president-obama.html?pagewanted=all> (alleging that Congress frequently accuses him of usurping authority for anything, even “by having the gall to win the presidency. . . .” *But ultimately, I’m not concerned about their opinions—very few of them, by the way, are lawyers, much less constitutional lawyers.*) (emphasis added).

334. See Price, *supra* note 19, at 749.

335. Price, *supra* note 19, at 704.

336. Pozen, *supra* note 45, at 7. Price, *supra* note 19, at 745 (arguing that “increasing executive reliance on nonenforcement is a structural problem arising from Congressional gridlock);” *id.* at 687. Cox, *supra* note 238, at 532 (noting that the executive branch can respond faster to ““changing needs and public opinion,” and “sometimes help overcome counterproductive legislative deadlock.”).

help reflected in efforts to “ignore inconvenient legal barriers,” could still be conceived within the range of permissible discretion. This is true, only so long as the President acts within the sphere of constitutional duties, as demonstrated by both the text and tradition, reflected in what Congress has acquiesced to. Self-help effectuated through power not delegated by either the Constitution or congressional statutes or acquiescence, can never license efforts to “remedy” valid “prior wrong[s]” by the “another party.” Gridlock does not license the president to transcend his Article II powers and subjugate congressional authority.³³⁷ This is so, particularly where the President’s own justification for “ignor[ing] inconvenient barriers” is extremely weak, and cannot be afforded the President’s normal presumption of constitutionality. The action still must be defensible as a good faith effort to comply with the statutes, not a deliberate effort to bypass it. To do so may be effective as self-help, but in conflict with the Supreme Law of the land.

As the Supreme Court recently explained in a unanimous decision against this president’s similar end-run around Article I, “political opposition” in Congress does not “qualify as an unusual circumstance” to justify the unlawful exercise of presidential power.³³⁸ In that case, Justice Scalia concurred to reject the Solicitor General’s invitation to “view the recess-appointment power as a ‘safety valve’ against congressional ‘intransigence.’”³³⁹ The separation of powers remain just as strong whether the relationship between Congress and president is symbiotic or antagonistic. Where the people cannot agree, gridlock is the constitutional ideal form of government—it means the process is working. As Madison wisely observed, “Ambition must be made to counteract ambition.”³⁴⁰

President Obama himself made this point eloquently. On April 29, 2011, the President responded to calls for executive action on immigration, saying, “I know some here wish that I could just bypass Congress and change the law myself. But that’s not how democracy works. See, democracy is hard. But it’s right. Changing our laws means doing the hard work of changing minds and changing votes, one by one.”³⁴¹ DACA came up one vote short in the Senate. DAPA

337. Price, *supra* note 19, at 745.

338. *NLRB v. Noel Canning*, 134 S. Ct 2550, 2567 (2014).

339. *id.* at 2599 (Scalia, J., concurring) (noting that the “Solicitor General has asked us to view the recess-appointment power as a ‘safety valve’ against congressional ‘intransigence.’”).

340. THE FEDERALIST NO. 51 (James Madison).

341. Remarks by the President at Miami Dade College Commencement, April 29, 2011, <http://www.whitehouse.gov/the-press-office/2011/04/29/remarks-president-miami-dade-college->

never even came up for a vote in the House. Despite all of the hard work to change minds, not enough votes were changed. It is up to Congress, and not the president to decide whether the INA needs to be changed. No self-help can fix this.

C. *Youngstown Redux*

To assess the faithfulness of the President's execution, consider a *Youngstown* counter-factual that is fairly close to reality. Five years before the steel seizure crisis arose, Congress had considered the issue of labor strikes, and deliberately chose *not* to give the President the power to seize mills unilaterally. As Justice Frankfurter explained in his concurring opinion, "By the Labor Management Relations Act of 1947, Congress said to the President, 'You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation.'"³⁴² Congress in the wake of World War II, "very familiar with Governmental seizure as a protective measure . . . [o]n a balance of considerations . . . chose not to lodge this power in the President. It chose not to make available in advance a remedy to which both industry and labor were fiercely hostile."³⁴³ Yet, relying on his inherent executive powers, President Truman did so anyway.³⁴⁴

After ordering Secretary of Commerce Charles Sawyer to take over the mills, "the next morning," the President "addressed [a] message to Congress" notifying them about the seizure, and indicated that Congress may "wish to pass legislation," or "deem it [not] necessary to act at this time."³⁴⁵ In either event, the President wrote, he would "continue to do all that is within [his] power to keep the steel industry operating and at the same time make every effort to bring about a settlement of the dispute."³⁴⁶ On these facts, the Court found the President acted unconstitutionally.

Let's change up the facts, though well within the realm of what happened in 1952. Leading up to the labor crisis, President Truman urged Congress to pass a statute giving him the sole authority to seize the steel mills in the event of a strike. As he lobbied for this legislation, Truman repeated over and over again that he did not have the authority to do so alone, and Congress needed to fix the "broken" the labor system. Congress refused to pass this new bill, content to

commencement.

342. *Youngstown*, 343 U.S. at 603 (Frankfurter, J.).

343. *Id.* at 601 (Frankfurter, J.).

344. Delahunty, *supra* note 19 at 832.

345. *Id.* at 677 (citing Cong. Rec., April 9, 1952, pp. 3962-63).

346. Cong. Rec., April 21, 1952, p. 4192.

leave in place the 1947 Labor Management Relations Act. Congress declined, knowing that without further legislation, the President could not act.³⁴⁷ The President was furious at this defeat, and announced “I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing.”³⁴⁸

When the labor crisis came to a head, the President announced a newly-discovered font of authority to control the mills. After seizing the mills, the President explains to Congress that in “the absence of any action from Congress to fix our broken” labor system I will act alone.³⁴⁹ In anticipation of Congress opposing his actions, the President explains that Congress cannot defund the seizure of his steel mills without shutting down the entire federal government during the ravages of the Korean War. The President urges Congress to “pass a clean bill” giving him the authority he sought, with no conditions. Congress, however, has a different bill in mind. Both houses begin debate on the Steel Mill Restoration Act of 1952, which would have denied funding to any executive branch officials who attempts to take control of a steel mill. The bill passes the House. Rather than treating that unicameral statement as an indication that he lacks the power to take the mills, President Truman threatens to veto the bill should it pass the Senate.³⁵⁰ After the veto threat, the bill stalls in the Senate. With that altered background, the case is argued before the Supreme Court.

If Justice Jackson had any doubts about whether President Truman’s actions fell within the second or third tier, two additional factors would render the case much, much easier. First, unlike the actual *Youngstown*, in our counterfactual Congress did not remain silent after the President seized the mills. Rather, both houses debated how to halt the seizures, and one House passed a bill to stop the President. Though short of bicameralism and presentment,³⁵¹ these actions express a congressional policy in opposition to the Executive’s assertion of inherent power. Even more strikingly, the President threatened to veto the very bill that would have constrained his

347. Delahunty, *supra* note 19 at 795.

348. *Transcript: President Obama’s June 30 remarks on immigration*, WASH. POST (Jun. 30 2014), http://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html.

349. Press Release, The White House, Remarks by the President on Immigration (June 15, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

350. <http://www.politico.com/story/2015/01/white-house-threatens-veto-house-gop-immigration-bill-114193.html>

351. *INS v. Chadha*, 462 U.S. 919 (1983).

executive action. Such a brazen flouting of the separation of powers would make an easy case for unconstitutionality, despite the harm that such a decision could inflict on American war efforts. Further, the fact that President changed his position on the scope of his executive powers only after Congress rebuffed him further diminishes the presumption of authority usually owed to the Executive to faithfully execute the laws.

This counterfactual illustrates why DAPA cannot withstand *Youngstown* scrutiny. In both cases, Congress declined to change the law as the executive sought. The President has called the INA “broken,” and championed the DREAM Act in 2011 and Comprehensive Immigration Reform in 2014. However, for better or (mostly) worse, Congress left the immigration laws as they were. Despite the serious humanitarian concerns, the Dreamers and parents of U.S. Citizens continue to remain outside the category of favored aliens embodied in Congressional policy. The President’s concerns about the “broken immigration system” were well-founded, but as he admitted, he lacked an executive remedy. The changed position, as convenient it is, is not entitled to the normal presumption of good faith.

Second, unlike President Truman who told Congress that they may “wish to pass legislation,” President Obama threatened to veto a bill cutting off funding for his program.³⁵² His oft-repeated imperative to “pass a bill”³⁵³ uses the incorrect article—it should be “pass *my* bill.” Anything short of that would be met with a veto. The veto remains the prerogative of the President, but it is unseemly for a President to wield it to stop Congress from checking his extra-constitutional assertions of power. Unlike the facts of *Youngstown*, Congress has not remained silent, but has opposed this action.

Third, and perhaps most importantly, the stakes of *Youngstown* were exponentially higher than the implications of DAPA.³⁵⁴ If the steel seizure were halted, the American war effort could have been hampered, and the Commander in Chief would have been hamstrung. American soldiers could have died.³⁵⁵ With DAPA, if Secretary Johnson’s memo were enjoined, the *only* result would be to maintain

352. Ashley Parker, Expansive House G.O.P. Immigration Bill Undercuts the President, *The New York Times* (Jan. 9, 2015), http://www.nytimes.com/2015/01/10/us/house-gop-proposes-sweeping-reversal-of-obama-immigration-steps.html?_r=0

353. Justin Sink, Obama to Congress: ‘Pass a bill’, *The Hill* (Nov. 20, 2014), <http://thehill.com/homenews/administration/224948-obama-to-congress-pass-a-bill>

354. Delahunty, *supra* note 19 at 829

355. Delahunty, *supra* note 19 at 827

the ex ante status quo. No one would be removed who would not have been removed under the law Congress passed. Justice Jackson would “indulge the widest latitude of interpretation to sustain [the Commander in Chief’s] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”³⁵⁶ However when this power “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.”³⁵⁷ Further, unlike Truman before him, President Obama does not rely on any species of inherent power. This leaves him to rely entirely on the authority Congress has not delegated to him. While halting DAPA would harm aliens, it is not even in the same realm as the gravity of harm attending the steel seizure case.

Under any reading of *Youngstown*, DAPA flunks Justice Jackson’s most charitable vision of executive power.³⁵⁸ The President is not acting as a faithful agent of Congress, and the sovereign people, but is implementing his own laws. As Justice Frankfurter recognized in *Youngstown*, “Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President.”³⁵⁹ These are matters for Congress to decide, not the President alone.

VI. CONCLUSION

DAPA, in its full scope, stems from the President’s interest in enacting his agenda. That agenda may well be appropriate as a policy matter, but the pathway designed by the Framers for implementing that policy agenda is clear: it goes through the halls of Congress. Unilateral exercises of power such as DAPA undermine that agenda, as well as the Constitution’s scheme.

The test to determine whether the “Take Care” clause has been violated is a high one. First, it is not enough to assert that the President has not enforced the law to the standards set by his political opponents. A careful study of the underlying congressional policy, and

356. *Youngstown*, at 645.

357. *Id.*

358. Delahunty, *supra* note 19 at 2013

359. *Id.* at 603-04 (Frankfurter, J.).

the scope of the discretion vested, will limit challenges to only the most egregious exertions of lawmaking power. As President Obama explained many times *before* he acted, he lacked the power to defer deportations unilaterally. This view was correct, and reflected a long-standing executive branch policy towards the scope of authority. Historically, this background served as an important check.³⁶⁰

Second, it is not enough to claim that the Executive is prioritizing some cases over others, in light of limited resources. Agencies retain broad discretion to allocate resources in ways to achieve certain priorities. However, the decision to reallocate resources must be viewed against the backdrop of whether the agency is attempting to further congressional policy, or bypass it. In the case of DAPA, the administration hobbled officers to turn discretion into a rubber stamp. Further, the policy *adds* millions of people to the system who were not even in the government's sights, and imposes additional costs. Here, the tail wags the dog.

Third, it is really, really tough to make it into Justice Jackson's lowest tier. In the six decades since *Youngstown*, the Supreme Court has not found a single executive action that violated this test. Even Justice Rehnquist, who clerked for Justice Jackson that fateful term, found a way to save the settlement program at issue in *Dames & Moore v. Regan* by identifying some tacit congressional approval. No such refuge can be found for DAPA, however, which clashes with *past* and *present* congressional opposition.

In all but the most severe cases, these three hurdles will be insurmountable. Partisan politics may claim a violation of the "Take Care" clause, but the facts will foreclose such a challenge. However, if each of these factors points towards a President deliberately disregarding a law he disfavors, only the last resort of "good faith" can save the action.

With DACA and DAPA, the case for "bad faith" is palpable. The President instituted these policies after Congress voted down the legislation he wanted. Further, the President repeated over and over again that he could not act unilaterally. But this position changed almost overnight once he recognized Congress would not give him what he wanted. His actions and statements create the *prima facie* case

360. As an aside, a rededication of the "Take Care" clause would result in the salutary effect of Congress placing *more* limitations on the President's discretion. Josh Blackman, "Obama's overreach? Look in the mirror, Congress," Los Angeles Times, November 22, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-blackman-obama-immigration-20141123-story.html>.

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of bad faith, and point towards a violation of the “Take Care” clause.

Appendix A**Basic DACA Guidelines (Continued)**

Deferred action is discretionary. In setting the guidelines, the Secretary has determined how this discretion is to be applied for individuals who arrived in the United States as children.

Although discretion to defer removal is applied on a case-by-case basis, according to the facts and circumstances of a particular case, discretion should be applied consistently.

- Absent unusual or extenuating circumstances, similar fact patterns should yield similar results.
- To facilitate consistent review and adjudication, a series of RFE and NOID templates have been developed and must be used. They are included in the SOP appendices.
- A standard denial template in checkbox format will be used by officers.



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Appendix B

Appendix F**NOTICE OF DENIAL OF CONSIDERATION OF DEFERRED ACTION
FOR CHILDHOOD ARRIVALS, FORM I-821D**

USCIS has evaluated your Form I-821D, Consideration of Deferred Action for Childhood Arrivals. For the reason(s) indicated below, USCIS has, in its unreviewable discretion, determined that it will not defer action in your matter. Accordingly, your Form I-765, Application for Employment Authorization, has also been denied. Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. You may not file an appeal or motion to reopen/reconsider this decision.

- You are under age 15 and are not in removal proceedings, do not have a final removal order, and do not have a voluntary departure order.
- You have failed to establish that you came to the United States under the age of sixteen (16).
- You have failed to establish that you were under age 31 on June 15, 2012.
- You have failed to establish that you have continuously resided in the United States since June 15, 2007, until the date of filing your request.
- During your period of residence in the United States, you had one or more absences that did not qualify as "brief, casual, and innocent."
- You have failed to establish that you were present in the United States on June 15, 2012 and that you were unlawfully present in the United States on that date.
- You have failed to establish that you are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or that you are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.
- You have been convicted of a felony or a significant misdemeanor, or you have been convicted of three or more misdemeanors, or you otherwise do not warrant a favorable exercise of prosecutorial discretion because of national security or public safety concerns.
- You have failed to pay the fee for your concurrently filed Application for Employment Authorization, Form I-765, and/or your biometrics fee, because your payment has been rejected for insufficient funds and you have failed to correct the fee deficiency within the allotted time.
- You failed to appear for the collection of biometrics at an Application Support Center.
- You failed to respond to a Request for Evidence within the time prescribed.

United States District Court
Southern District of Texas
Brownsville Division

STATE OF TEXAS, *ET AL.*,
Plaintiffs,
v.
UNITED STATES OF
AMERICA, *ET AL.*,
Defendants.

Case 1:14-cv-254

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Interest

The Cato Institute was established in 1977. It is a nonpartisan public-policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. Cato has been indefatigable in its opposition to laws and executive actions that go beyond constitutional authority, regardless of the underlying policy merits.

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Amici submit this brief to address the separation-of-powers violations attending the policy known as Deferred Action for Parental Accountability (DAPA). As a matter of policy, *amici* support comprehensive immigration reform that provides relief to the aliens protected by DAPA (among many other purposes). It is not, however, for the president to make such legislative changes alone, in conflict with the laws passed by Congress and in other ways that go beyond the constitutionally authorized executive power.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Summary of Argument

In the architecture of separation of powers crafted by the Framers, unilateral executive action based solely on Congress's resistance to the president's policy preferences has no place. Justice Jackson's canonical concurrence in *Youngstown Sheet & Tube* links judicial deference in separation-of-powers cases to the degree of presidential collaboration with Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). The sweeping Deferred Action for Parental Accountability (DAPA) program, which awards reprieve from removal and work authorization to millions of unlawful entrants into the United States, fails Justice Jackson's test.

DAPA is inconsistent with the comprehensive framework that Congress established in the Immigration and Nationality Act (INA). After establishing a process for immigrant and nonimmigrant entry to the United States, taking into consideration policy criteria such as employment needs, family reunification, and humanitarian concerns, the INA implements this vast, complicated, often contradictory immigration regime through various enforcement and deterrence mechanisms.¹ At its core, this enforcement system is built on a three-legged stool that is designed to promote the orderly administration of immigration law. First, the INA deters foreign nationals from unlawfully entering the United States and relying on post-entry U.S.-citizen children to gain a legal immigration status. 8 U.S.C. § 1151(b)(2)(A)(i). Second, the INA deters foreign nationals' unlawful presence in the country through the persistent threat of removal. 8 U.S.C. § 1182(a)(9)(B). Third, Congress has sharply restricted unlawful immigrants' access to employment as a means to deter unlawful aliens from remaining. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. DAPA knocks out each leg of the stool, and thus topples the structure of the INA.

As a "general enforcement policy," DAPA is subject to judicial review. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994). Because DAPA contravenes long-standing congressional policies, a reviewing court should not display deference toward the program. *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 842-43 (1984). Indeed, it defies "common sense," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000), to believe that Congress would silently delegate to the president the power to grant substantial immigration benefits to millions

¹ *Amici* take existing law as given but by no means endorse the status quo of our immigration laws as a matter of policy.

of unlawful entrants with no presently viable claim to legal status. The executive branch itself disclaims that DAPA is legally binding, maintaining instead that it is an exercise of executive discretion—which by definition merits no *Chevron* deference.

Moreover, earlier deferred action programs, to the extent they comply with the law, are not appropriate analogies. Previous exercises of discretion have been ancillary to a statutory legal status.² They served as a *bridge* to obtaining that status, not a *tunnel* that undermines the legislative structure.³ The Court should find that DAPA exceeds the executive branch’s lawful authority and grant the plaintiffs’ motion for a nationwide injunction.⁴

Argument:

**The policy is unconstitutional,
and its enforcement should be enjoined.**

I. DAPA clashes with the INA’s comprehensive framework.

Congress has sought over decades to minimize the incentives for unlawful migration to the United States. That effort has resulted in a set of interlocking provisions that seal gaps in enforcement. Some may doubt Congress’s wisdom—*amici* among them—but its constancy is not open to question.

A. The INA deters unlawful entry by precluding minor citizen children from petitioning for parental visas.

To deter unlawful immigrants from relying on post-entry U.S.-citizen children to gain a lawful status, Congress has required that such children be “at least 21 years of age” if they wish to sponsor parents. 8 U.S.C.

² See Gene McNary, INS Commissioner, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990), available at <http://bit.ly/1FpWTse> (granting deferred action to certain immediate relatives of IRCA legalization beneficiaries).

³ Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEORGETOWN L.J. ONLINE __ (forthcoming 2015), available at <http://ssrn.com/abstract=2545544>.

⁴ Josh Blackman, *Can a District Court Issue a Nationwide Injunction?*, JOSH BLACKMAN’S BLOG (Dec. 11, 2014), available at <http://bit.ly/1s6Owf6> (nationwide injunction proper, particularly when many states are united in single litigation so opportunities for circuit split from multiple cases are diminished).

§ 1151(b)(2)(A)(i). This age requirement has been a fixture of U.S. immigration law for more than 60 years. *See* McCarran-Walter Act, § 203(a)(2), Pub. L. No. 82-414, 66 Stat. 163 (82nd Cong., 2nd Sess.) (June 27, 1952) (granting eligibility for visa to “Parents of *adult* citizens of the United States”) (emphasis added). The 1965 Immigration Act continued this restriction. *See* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 201(b), 79 Stat. 911 (providing that for parent to qualify as “immediate relative” of a citizen, citizen “must be at least twenty-one years of age”). Senator Sam Ervin warned that omitting this language in an early draft of the bill was “unwise.” *Faustino v. INS*, 302 F. Supp. 212, 215–16 (S.D.N.Y. 1969). Senator Ervin feared that, absent the provision, “Foreigners can come here as visitors and then have a child born here, and they would become immediately eligible for admission.” *Id.* Senator (and former Attorney General) Robert Kennedy seconded Ervin’s concern, describing the omission as a “technical mistake in ... the drafting.” *Id.* at 215. Echoing the senators’ assessment at a subsequent hearing session, Assistant Attorney General Norbert Schlei suggested an amendment that restored the language, pronouncing the change necessary “to preclude an inadvertent grant of ... immigrant status to aliens to whom a child is born while in the United States.”⁵ This longstanding pillar of the INA provides a clear signal to visitors and unlawful entrants that they cannot rely on post-entry U.S.-citizen children to gain immigration benefits.

DAPA’s operation is accordingly contrary to both the text of the statute and legislative intent. As noted, the statute contemplates only a limited petitioning mechanism for the parents of citizen children. Beyond this textual point, the history of this limitation reveals that Congress *explicitly rejected* the exact type of expansive family-unity principle that DAPA is enacting administratively.

B. The INA deters unlawful presence through persistent threat of enforcement.

The INA also strongly discourages the unlawful entry and presence of foreign nationals. Individuals are unlawfully present in the United States if they lack a currently valid legal status and have no currently pending claim

⁵ U.S. Senate Cmte. on the Judiciary, Subcmte. on Immig. & Naturalization, 89th Cong., 1st Sess., *Hearings on S. 500*, at 270 (Feb. 10, 1965).

for such status. *See* 8 U.S.C. § 1182(a)(9)(B).⁶ Under the INA, an individual who has been unlawfully present for one year or more and then departs the United States is barred from readmission for ten years. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

This reinforces another section of the statute, which requires foreign nationals who entered without inspection to leave the country to become eligible for lawful permanent resident (LPR) status. *See* 8 U.S.C. § 1255(a) (foreign national is eligible for LPR status *only* if national has been inspected, admitted, or paroled into the United States). The departure from the country of an alien who was unlawfully present for a year or more triggers the unlawful-presence bar, requiring that individual to wait *10 years* before seeking legally reentry. These provisions present virtually insurmountable barriers for unlawful entrants who wish to use post-entry U.S.-citizen children to obtain a legal status.

While the INA allows DHS to waive the unlawful presence bar, the provisions of the waiver reinforce Congress's policy of deterring entry without inspection by adult foreign nationals who later seek to gain a lawful status through post-entry U.S.-citizen children. The waiver, 8 U.S.C. § 1182(a)(9)(B)(v), is limited to *spouses* and *children* of U.S. citizens or LPRs; it has no provision for *parents*. The omission of parents of either U.S. citizens or LPRs is not a clerical error. It buttresses longstanding congressional policy that deters unlawful entrants from relying on post-entry U.S.-citizen children to gain a lawful status.

In sum, unlawful entrants in this situation have no presently viable prospect for a legal status; they can expect to wait up to 21 years from the birth of a U.S.-citizen child, with 10 years of that time spent abroad. The Supreme Court has recently observed that *legal* immigration often “takes time.” *See Scialabba v. Cuellar do Osorio*, 134 S. Ct. 2191, 2199 (U.S. 2014). Congress has deliberately engineered the INA to place far more substantial obstacles in the way of unlawful entrants whose only prospect for legal status stems from a post-entry U.S.-citizen child.

⁶ By statute, a foreign national is not “unlawfully present” and is eligible for deferred action if he is applying for a legal status authorized by statute, such as political asylum; a T visa, available to victims of human trafficking; or a U visa, available to a foreign national who has been a victim of crime and provides information useful in a criminal prosecution. *Cf.* 8 U.S.C. § 1227(d)(2).

C. The INA deters unlawful presence by restricting access to lawful employment.

In addition to deterring unlawful presence and the use of U.S.-citizen children to gain immigration status, Congress has also repeatedly sought to neutralize the “primary magnet for illegal immigration”: U.S. jobs. *See* U.S. House of Representatives, Cmte. on the Judiciary, 104th Cong., 2d Sess., *Report on H.R. 2202*, available at <http://1.usa.gov/1yCrcbv>, at 126 (March 4, 1996). In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which granted legalization to millions of undocumented aliens and imposed sanctions on employers who hired undocumented workers. Pub. L. No. 99-603, 100 Stat. 3359. This congressional commitment to neutralizing the magnet of U.S. jobs was also evident 10 years after IRCA, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009. The House Judiciary Committee’s report on that act identified inadequate enforcement of IRCA’s employer-sanctions program as a cardinal reason for the “failure” of U.S. immigration policy. *Report on H.R. 2202 at 110*.

DAPA clashes with the INA by providing work authorization and a reprieve from removal to millions of unlawful adult entrants who have post-entry U.S.-citizen children. DAPA does not entitle recipients to LPR status. But work authorization and a reprieve from removal are substantial benefits that undercut Congress’s goals of deterring unlawful entry, precluding parents’ leveraging of post-entry U.S.-citizen children, and neutralizing the magnet of U.S. work.

II. DAPA is subject to judicial review.

DAPA is subject to judicial review because its broad eligibility criteria make it a “general enforcement policy.” *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994). General policies are reviewable because they entail analysis of purely legal questions, such as the “commands of the substantive statute.” A general enforcement policy’s consistency with statutory commands is a “meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998). Courts are well-suited to conduct that legal analysis. Moreover, judicial review of general enforcement policy is a salutary check on arbitrariness and overreaching in agency decisionmaking. Sweeping decisions on enforcement policy may

constitute an agency’s “abdication of ... statutory responsibilities.” *Crowley*, 37 F.3d at 677, citing *Heckler*, 470 U.S. at 833 n.4. Judicial review reduces this risk.

DAPA is a “general enforcement policy” with a modest role for “case-by-case” factors. The eligibility criteria are extremely broad (entry into U.S. by certain date and U.S. citizen or LPR children). The disqualifying criteria (such as a criminal record) are extremely narrow. The Office of Legal Counsel’s opinion supporting DAPA seeks to cast DAPA as “case-by-case” decisionmaking,⁷ but DAPA’s broad criteria will in reality operate as a blanket grant of immigration benefits. Approving these applications is an exercise not of prosecutorial discretion, but of clerical approval. Courts can readily test DAPA against the policies outlined in the INA. There is no presumption of unreviewability.

Abdication is a special concern where the general policy involves not just agency “refusal to institute proceedings” against individuals who have violated a statute, *Heckler*, 470 U.S. at 835, but also the blanket grant of benefits to statute violators. Giving benefits to individuals who have disregarded core tenets of a congressional scheme creates a special risk of undercutting legislative commands. For example, Congress has consistently articulated the view that the “employment of illegal aliens ... causes deleterious effects for U.S. workers.” See [Report on H.R. 2202 at 126](#). But DAPA grants illegal aliens employment authorization.

When deferred action, including employment authorization, serves as a bridge to a *statutory* legal status—as has traditionally been the case—the statutory scheme is not undermined. Deferred action in these cases serves the INA’s purposes by encouraging individuals to apply for a legal status that is authorized by Congress. Deferred action in those circumstances simply preserves, like a stay in ordinary litigation, the *status quo ante*.⁸ Under

⁷ See Karl R. Thompson, Office of Legal Counsel, U.S. Dept. of Justice, *Dept. of Homeland Security’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others*, available at <http://1.usa.gov/1AtB5ZD>, at 11 (Nov. 19, 2014) .

⁸ This policy strengthens the case for granting the plaintiffs’ motion for a nationwide preliminary injunction, in order to maintain the ex ante status quo and preserve the laws designed by Congress. Otherwise, benefits conferred on DAPA beneficiaries would amount to irreparable harm, rendering future corrections extremely difficult. Even President Obama acknowledged that a future president is unlikely to

DAPA, though, benefits flow to individuals who have little or no realistic prospect of obtaining a legal immigration status.

DAPA is not a bridge, but a tunnel under the legislative structure—and also a detour that bypasses the normal operation of the law Congress has enacted. Proceeding with deferred action and work authorizations, despite these evident risks, amounts to a “conscious” abdication of statutory obligations.

III. **Because DAPA clashes with the INA, DAPA is not entitled to judicial deference.**

Under *Chevron*, the agency receives no deference if the statute is unambiguous. To assess ambiguity, a court must interpret “the words of a statute ... in their context and with a view to their place in the overall statutory scheme.” *Brown & Williamson*, 529 U.S. at 133. The court must “fit, if possible, all parts [of the statute] into an harmonious whole” and use “common sense” to determine the scope of Congress’s delegation to an agency. *Id.*

The INA’s provisions, read together as the Supreme Court requires, are unambiguous in rejecting DAPA’s blanket grant of immigration benefits to a substantial percentage of undocumented adults in the United States. Awarding work authorization, as well as a reprieve from removal, to millions of foreign nationals undermines Congress’s careful three-pronged approach. Rather than deterring leveraging of post-entry U.S. citizen children and entry without inspection, DAPA rewards this conduct with the very lure—employment in the U.S.—that Congress has repeatedly sought to neutralize.

DAPA also defies the Supreme Court’s requirement to construe legislative delegations using common sense. “Common sense” requires a correlation between the magnitude of the effects of an agency action and the specificity of the statutory authorization for that action. *Brown & Williamson*, 529 U.S. at 133. To fit the dictates of “common sense,” a change of enormous legal and “political magnitude” wrought by an agency must be authorized by specific statutory language. *Id.* In *Brown & Williamson*, for example, the Supreme Court rejected the Food and Drug Administration’s attempt to use generic statutory language on issuing regulations to regulate the tobacco in-

undo DAPA. Ben Wolfgang, *Next president won’t dare reverse my executive action*, WASH. TIMES (Dec. 9, 2014), <http://bit.ly/1wW3qAw> .

dustry. That generic language was insufficient evidence that Congress intended to delegate to the FDA authority to affect the U.S. economy in such a substantial fashion, given repeated congressional acknowledgment of tobacco's economic importance. *Id.* at 137.

The INA's language on the role of the relevant agency highlights both the individualized nature of executive discretion and the need to adhere to the statutory framework. *See* 8 U.S.C. § 1103(a)(3) (attorney general should "establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority *under the provisions of this Act*") (emphasis added). In assessing DAPA's legality, the Court should read the INA as the Supreme Court read analogous statutory language in *Brown & Williamson*, which precludes exercises of discretion beyond the interstitial measures in which Congress had acquiesced.

IV. Previous exercises of discretion do not support DAPA's broad provision of benefits.

Previous exercises of discretion, to the extent they are both legal and relevant, have typically been far narrower than DAPA. Many have been ancillary to statutory grants of status, such as deferred action for individuals seeking visas as victims of crime. *See* 8 U.S.C. § 1227(d)(2). Other cases are based on compelling individual equities, such as extreme youth or age, physical infirmity, or mental illness. *See* Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship & Immig. Svcs.: A Possible Remedy for Impossible Immig. Cases*, 41 SAN DIEGO L. REV. 819 (2004). A third category is predicated on foreign-policy concerns, including mitigating risk from natural disasters abroad. The four primary deferred actions identified by the OLC Opinion⁹—involving VAWA self-petitioners, T- and U-visa applicants, foreign students affected by Hurricane Katrina, and widows and widowers

⁹ The first federal district court to uphold DAPA cited the OLC Opinion's superficial analysis almost verbatim, without any discussion of what other varieties of deferred action actually entailed, and how they differ from DAPA. *Arpaio v. Obama*, No. 14-cv-01966, ___ F. Supp. 3d ___, 2014 WL 7278815 *3 (D.D.C. Dec. 23, 2014) ("The executive branch has previously implemented deferred action programs for certain limited categories of aliens, including: certain victims of domestic abuse committed by United States citizens and Lawful Permanent Residents; victims of human trafficking and certain other crimes; students affected by Hurricane Katrina; widows and widowers of U.S. citizens; and certain aliens brought to the United States as children.") (citations omitted).

of U.S. citizens—acted as a *temporary bridge* from one status to another, where benefits were construed as *immediately* arising post-deferred action.¹⁰

As an example of deferred action that was a bridge to a statutory grant of legal status, consider the Family Fairness program implemented in the Reagan and George H.W. Bush administrations, which OLC cited in justifying DAPA. See [OLC Opinion at 14](#). IRCA allowed for the legalization of millions of undocumented noncitizens. Within a discrete period after IRCA beneficiaries became LPRs, the INA allowed them to sponsor immediate relatives such as spouses and children for an immigrant visa. See 8 U.S.C. § 1153(a)(2). Removing people who would within a relatively short time qualify for a visa seemed both pointless and harsh.

Soon after IRCA’s passage, immigration officials began a temporary program that provided blanket protection to children of IRCA beneficiaries, and relief from removal for spouses who could show compelling circumstances. See House Cmte. on the Judiciary, Subcmte. on Immig., Refugees, and Intl. Law, *Immig. Reform & Control Act of 1986 Oversight*, available at <http://bit.ly/1zVcFTL>, at 459 (May 10 & 17, 1989) (*IRCA Oversight*) (testimony of INS Commissioner Alan C. Nelson). Leading members of Congress urged immigration officials to do even more to protect spouses of IRCA beneficiaries from removal. See [id. at 463](#) (committee chairman urging reprieve from removal for “immediate family members” of IRCA beneficiaries, who “are of the class of people we generally try to make it easy to have join their family members”). Despite disagreements about the economics of the bill, “few dispute[d] the humanitarian aim of uniting families.”¹¹ Immigration officials acquiesced to these legislators’ suggestions in February 1990, extending blanket relief to spouses of IRCA beneficiaries.¹² That exercise of discretion was quickly ratified only nine months later in the Immigration Act of 1990.¹³

¹⁰ Blackman, *Constitutionality Part I*, 103 GEORGETOWN L.J. ONLINE at ____.

¹¹ Nathaniel C. Nash, *Immigration Bill Approved in House*, N.Y. TIMES (Oct. 4, 1990), available at <http://nyti.ms/1xT0ubW>.

¹² See [McNary, Family Fairness Guidelines, at 1](#).

¹³ Pub. L. 101-649, 104 Stat. 4978; see also President George H.W. Bush, Stmt. on Signing the Immig. Act of 1990 (Nov. 29, 1990), available at <http://bit.ly/1DnuoK1> (The Act “accomplishes what this Administration sought from the outset of the immigration reform process: a complementary blending of our tradition of family reunification...”).

In addition to being ancillary to Congress's grant of legal status to IRCA beneficiaries, Family Fairness was also far smaller than the millions of people eligible to apply for DAPA. As of 1989, only 10,644 people had applied for relief under the Reagan program. See *IRCA Oversight* at 403. In 1990, new INS Commissioner Gene McNary estimated that the expanded Family Fairness policy would assist roughly 100,000—not 1.5 million—spouses and children of IRCA beneficiaries.¹⁴

In contrast with Family Fairness, DAPA offers work authorization and relief from removal to cohorts that have far more protracted and uncertain pathways to legal status. Consider parents of post-entry U.S.-citizen children. Under the INA, this cohort may need to wait up to 21 years to petition for a visa and spend 10 of those years outside the United States. That is a far cry from the discrete waiting period required of the spouses and children of IRCA beneficiaries. DAPA also offers work authorization and relief from removal to parents of LPRs, who have *no* ability under current law to petition for a parental visa.¹⁵ A visa remains an impossibility for most and a potentially prolonged slog for the remainder.

Perhaps because DAPA is both far larger than Family Fairness and not ancillary to a statutory grant of legal status, no similar consensus in Congress has accompanied DAPA. Indeed, the House of Representatives recently

¹⁴ The OLC Opinion repeated an oft-cited, but incorrect statistic that “Family Fairness” deferred the deportation of 1.5 million, see *OLC Opinion* at 14, a statistic that has been repeated by the President. *This Week* (ABC television broadcast Nov. 23, 2014), transcript available at <http://abcn.ws/1wInPEg> (“If you look, every president—Democrat and Republican—over decades has done the same thing. George H W Bush—about 40 percent of the undocumented persons, at the time, were provided a similar kind of relief as a consequence of executive action.”). The actual estimate was roughly 100,000. Glenn Kessler, *Fact Checker: Obama's Claim that George H.W. Bush Gave Relief to “40 percent” of Undocumented Immigrants*, WASH. POST ONLINE (Nov. 24, 2014), available at <http://wapo.st/1HPNBDM>. The origin of this false number is subject to some dispute, and seems to be based on an error in congressional testimony. McNary himself stated, “I was surprised it was 1.5 million when I read that. I would take issue with that. I don’t think that’s factual.” Ultimately, by October 1, 1990, INS had received *only 46,821 applications*. *Id.* The next month, President Bush signed the Immigration Act of 1990, which ended the temporary program.

¹⁵ See 8 U.S.C. § 1153(a) (not listing parents of LPRs among family members eligible for immigrant visas).

passed a resolution opposing the measure.¹⁶ In sum, Family Fairness is not an apt precedent for DAPA's sweeping relief.

V. DAPA exists at the executive's "lowest ebb."

A president's efforts to use executive powers to enact substantive policies in the face of congressional intransigence must be viewed skeptically.¹⁷ The president is sidestepping Congress because the legislative branch has refused to enact his preferred policies. However, the architecture of separation of powers, outlined by Justice Jackson in *Youngstown*, has no place for unilateral executive action based solely on Congress's resistance to presidential preferences, even if those preferences reflect sound policy choices. 343 U.S. at 634 (Jackson, J., concurring).

As a result, DAPA finds refuge in *none* of *Youngstown*'s three tiers :

- *First*, the president is not acting in concert with Congress: Congress rejected or failed to pass immigration reform bills reflecting this policy several times.
- *Second*, Congress has not acquiesced in a pattern of analogous executive actions. Congress has instead approved and even encouraged much narrower uses of deferred action, such as the "Family Fairness" program. But previous uses were typically ancillary to statutory grants of lawful status or responsive to extraordinary equities based on the extreme youth, age, or infirmity of the recipient. And there is no murky "twilight" about congressional intent; the House recently passed a resolution opposing the policy.
- *Third*, the president is not resisting a rebellion or foreign invasion that poses an imminent threat; on domestic matters, he cannot rely on his commander-in-chief powers. Nor is he exercising other powers under Article II of the Constitution. DAPA stems only from the president's desire to achieve legislative goals in the face of legislative gridlock.

¹⁶ Seung Min Kim, *House Sends Obama Message with Immigration Vote*, POLITICO (Dec. 4, 2014), <http://politi.co/1xGOnzU>.

¹⁷ Josh Blackman, *Gridlock and Executive Power* (forthcoming 2015), <http://ssrn.com/abstract=2466707>.

The president fails to take care that the laws be faithfully executed when he expressly declines to execute the laws as Congress wrote them.¹⁸ DAPA, in its full scope, stems from the president's interest in enacting his agenda. That agenda may well be appropriate as a policy matter, but the pathway designed by the Framers for implementing it is clear: it goes through the halls of Congress.

Conclusion and Prayer

Because of the executive's disregard toward the congressionally designed framework of the INA and the separation of powers, this court should find that DAPA is precluded by the INA and grant the Plaintiff's motion for a nationwide preliminary injunction.

Respectfully submitted,

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¹⁸ *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting) (“But there has come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A Federal Government that *does not want to enforce the immigration laws as written*, and leaves the States’ borders unprotected against immigrants whom those laws would exclude.”) (emphasis added). See Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. OF LAW & POL. ___ (forthcoming 2015), <http://ssrn.com/abstract=2545558>.

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Certificate of Service

On January 7, 2015, I served a copy of this brief on all counsel of record through the Court's CM/ECF system.

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Teaching

South Texas College of Law, Houston, TX (July 2012-present)

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- **Property II** (two sections): [Syllabus](#), [Exam](#), Evaluations ([Day Section](#)), Evaluations ([Evening Section](#))

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Pennsylvania State University School of Law, University Park, PA (January 2010-May 2011)

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- **Spring 2010- Federal Courts Practice**: [Syllabus](#), [Evaluations](#)
- **Spring 2011- Federal Courts Practice**: [Syllabus](#), [Evaluations](#)

Publications

Published Articles

Visit my [SSRN page](#) to view all of my works.

1. [The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action](#) , 103 *Georgetown Law Journal Online* __ (Forthcoming 2015).
2. [The Constitutionality of DAPA Part II: Faithfully Executing The Law](#) , 19 *Texas Review of Law & Politics* __ (Forthcoming 2015).
3. [Obamacare & Man at Yale](#), 2014 *Illinois Law Review* 1241 (2014).
4. [What Happens if Data is Speech?](#), 16 *University of Pennsylvania Journal of Constitutional Law Heightened Scrutiny* 25 (2014).
 - Cited in [Zhang v. Baidu, Inc. \(S.D.N.Y. Mar. 27, 2014\)](#).
5. [The 1st Amendment, 2nd Amendment, and 3D Printing](#), 81 *Tennessee Law Review* 479 (2014).
6. [The Shooting Cycle](#), 46 *Connecticut Law Review* 1513 (2014) (with Shelby Baird).
7. [The Burden of Judging](#), 9 *NYU Journal of Law & Liberty* 1105 (2014).
8. [John Marshall Harlan: Professor of Law](#), 81 *George Washington Law Review* 1063 (2013) (with Brian Frye and Michael McCloskey).
9. [Justice John Marshall Harlan: Lectures on Constitutional Law, 1897-98](#) , 81 *George Washington Law Review* Arguendo 12 (with Bryan Frye and Michael McCloskey).
10. [Popular Constitutionalism and the Affordable Care Act](#) , 27 *Public Affairs Quarterly* 3 (2013) (Peer-Reviewed).
11. [Back to the Future of Originalism](#), 16 *Chapman Law Review* 325 (2013).
12. [The Supreme Court's New Battlefield](#), 90 *Texas Law Review* 1207 (2012).
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22. [This Lemon Comes as a Lemon. The Lemon Test and the Pursuit of a Statute's Secular Purpose](#) , 20 *George Mason University Civil Rights Law Review* 351 (2010).
23. [Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet](#), 49 *Santa Clara Law Review* 313 (2009).

Books

- *Unprecedented: The Constitutional Challenge to Obamacare*, Public Affairs Books (2013).
 - “The definitive account,” [Professor Randy Barnett](#)
 - “This is an absorbing tale of how a landmark Supreme Court opinion was born,” [Professor Jack Balkin](#)
 - “It’s a rare combination of a page-turner and a careful explanation of the legal arguments,” [Professor Larry Tribe](#)
 - “Sure-footed narrative,” [Terry Eastland, The Weekly Standard](#)
 - “Riveting,” [Fred Barnes, The Weekly Standard](#)
 - “Excellent,” [The Wall Street Journal \(excerpts here\)](#).
 - “Deeply researched, highly readable,” [The American Prospect](#)
 - The “book plays it straight, offering a remarkably balanced and accessible account of the litigation,” [Tony Mauro, National Law Journal](#)
 - “Excellent,” [The National Law Journal – Notable Supreme Court Books of 2013](#)
 - “Gripping reading, really. It is likely to last as the definitive account” of the landmark Supreme Court case, [Adam Liptak, The New York Times](#)
 - Blackman “is a bit of a legal polymath. He can, with seeming ease, assimilate disparate streams of legal analyses, facts, political events, and government policy in service,” [Philadelphia Inquirer](#)
 - “Covers Both Sides,” [Pittsburgh Tribune](#)
 - “Deeply researched,” [Think Progress](#)
 - “The flair of a novelist and the eye of a historian,” [Library of Law & Liberty](#)
- *Unraveled: Obamacare, Religious Liberty, and Executive Power* (Forthcoming 2016)

Book Chapters

- “Popular Constitutionalism and the Affordable Care Act” in “[The Affordable Care Act Decision: Philosophical and Legal Implications](#),” Edited by Fritz Allhoff and Mark Hall, Routledge Mental Health (2014).
- [The Path of Big Data and the Law](#), in “Big Data and the Law” (West Academic Press 2015).
- [From Being One L to Teaching One L](#), in *One L*. (2016)

Draft Articles

- [Predicting the Behavior of the Supreme Court of the United States: A General Approach](#) (with Daniel Martin Katz & Michael James Bommarito II).
- [Gridlock and Executive Power](#)
- [State Judicial Sovereignty](#)
- [Robot, Esq.](#)

- Excerpted in Jones, Schall, & Shen, *Law & Neuroscience* (Aspen Publishers 2014).
- [My Own Theory of the Law](#) – 2012 (in response to Orin Kerr’s canonical “Theory of Law”).
- [A Brief History of Judging: From the Big Bang to Cosmic Constitutional Theory](#) – 2012 (A Review of Judge Wilkinson’s *Cosmic Constitutional Theory*).
- [Polling The Health Care Cases](#) – 2012 (co-authored with Adam Aft and Corey Carpenter)
- [Judging the Constitutionality of Social Cost](#) – 2012
- [Originalism for Dummies](#) – 2008
- [Much Ado About Dictum; or, How to Evade Precedent Without Really Trying: The Distinction Between Holding & Dictum](#) – 2008

Speaking

Academic Presentations

2015

1. “Popular Constitutionalism After Kelo,” AALS Annual Meeting, Hot Topic Program, January 4, 2014 (Audio and video [here](#)).
2. “Gridlock and Executive Power,” Federalist Society Faculty Conference, Young Legal Scholars Panel, January 4, 2014 (Audio [here](#)).

2014

1. Collective Liberty, Loyola Chicago Constitutional Law Colloquium, November 7, 2014 ([Video here](#)).
2. State Judicial Sovereignty, Junior Federal Courts Workshop, University of Georgia, Athens, GA, October 10, 2014.
3. Substantive Federalism, Georgetown Center for the Constitution Workshop, Washington, D.C., May 15, 2014.
4. [Backdoor Zoning in the Unzoned City](#), Association for Law, Property, and Society, Vancouver, BC, May 3, 2014 ([Video](#)).
5. “[Certiorari and the Supreme Court Bar](#),” Southwestern Political Science Association, San Antonio, TX, April 18, 2014.
6. The 1st Amendment, 2nd Amendment, and 3D Printing, Tennessee Law Review Symposium on the 2nd Amendment, March 1, 2014. ([Video](#)).
7. “What happens if data is speech,” [Federalist Society Faculty Conference](#), New York, NY, January 4, 2014 ([Video](#)).

2013

1. “Regulating Crises: Reactions to Shootings,” Connecticut Law Review Symposium, “ [Up In Arms: The Second Amendment in the Modern Republic](#),” November 15, 2013 ([Video available](#)).
2. “Kennedy’s Constitutional Chimera,” Loyola University Chicago School of Law’s [Constitutional Law Colloquium](#), November 2, 2013 ([Audio available](#)).
3. Robot, Esq., George Mason Law & Economics Center, September 20, 2013.

4. "Unprecedented: The Constitutional Challenge to Obamacare," George Mason University School of Law Levy Workshop, September 19, 2013.
5. Robot, Esq., [International Conference on Artificial Intelligence and the Law](#), Rome, Italy, June 10, 2013.
6. Robot, Esq., Law & Society Annual Meeting, Boston, MA, May 30, 2013.
7. Assisted Decision Making, Conference on Innovation and Communications Law, Traverse City, MI, May 16, 2013.
8. [Freedom of Expression Scholars Conference 2013](#), Yale Law School, New Haven, CT, May 4, 2013 (Discussant).
9. "Human Factors in Robotic Torts," [We Robot: Getting Down to Business](#), Stanford Law School, Palo Alto, CA, April 8, 2013 ([Video available here](#)).
10. [Constitutional Conversation](#) – "Unprecedented: The Supreme Challenge to Obamacare," Stanford Constitutional Law Center, Stanford Law School, Palo Alto, CA, April 8, 2013 ([video available here](#)).
11. "Unprecedented: The Supreme Challenge to Obamacare," Texas Southern University Thurgood Marshall School of Law, Houston, TX, March 1, 2013 ([video available here](#)).
12. "Assisted Decision Making: Big Data and the Law," on "[Big Data Application in Scholarship and Privacy](#)" Panel at Georgetown Law "[Big Data and Big Challenges for Law and Legal Information](#)," Georgetown University Law Center, Washington, D.C., January 30, 2013 ([Video available here](#)).
13. "Back to the Future of Originalism," Federalist Society Faculty Conference, New Orleans, LA, January 4, 2013 ([Video available here](#)).

2012

1. "Unprecedented," Georgetown University Law Center Constitutional Law Colloquium, Washington, D.C., December 3, 2012 ([Video available here](#)).
2. "Assisted Decision Making: Big Data and the Law," Stanford Law School CodeX, Center for Legal Informatics, Palo Alto, CA, November 9, 2012 ([Video available here](#)).
3. "Unprecedented," Third Annual Constitutional Law Colloquium at Loyola University, Chicago, IL, November 2, 2012 ([Video available here](#)).
4. "Assisted Decision Making: Big Data and the Law," Michigan State College of Law ReInvent Law Lab, East Lansing, Michigan, November 1, 2012 ([Video available here](#)).
5. "Unprecedented," Mid-Atlantic Law & Society Association, Drexel University School of Law, Philadelphia, PA, October 18, 2012 ([Video available here](#)).
6. "Unprecedented," 2012 Western Michigan University Medical Humanities Conference, Kalamazoo, Michigan, September 28, 2012 ([Video available here](#)).
7. "Unprecedented," South Texas College of Law, Houston, TX, September 14, 2012 ([Video available here](#)).

Other Presentations

2015

1. "1st Amendment, 2nd Amendment, and 3D-Printed Guns," Southwestern Law School Federalist Society Chapter, February 2, 2015 ([video here](#)).

2. "Supreme Court Roundup," University of Kentucky Federalist Society Chapter, February 11, 2015 ([video here](#)).
3. "Gridlock and Executive Power," Northern Kentucky University Federalist Society Chapter, February 11, 2015 ([audio here](#)).
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5. "What Happens if Data is Speech?," University of Illinois Federalist Society Chapter, February 19, 2015 ([audio and video here](#)).
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91. Interviewed by Philadelphia Inquirer for article on Unprecedented, [Law Review: Detailing his analysis of the fight over Obamacare](#), Philadelphia Inquirer, January 10, 2014.
92. Interviewed by Main Street about the implementation of the Affordable Care Act, [Does Obamacare Violate the Constitution?](#), January 9, 2014.
93. Interviewed by Wall Street Journal Law Blog for post about The Shooting Cycle and mass shootings, [Why Gun-Controllers Lose Ground After Mass Shootings](#), January 8, 2014.
94. Interviewed by [Texas Lawyer](#) about selection as Forbes 30 under 30, [Josh Blackman \(of fantasySCOTUS.net fame\) is one of Forbes' 2014 30 under 30 in law & policy](#), January 7, 2014.
95. Selected by Forbes Magazine for Forbes [30 under 30 in Law and Policy](#), Forbes Magazine, January 6, 2014.

2013

1. Quoted in Houston Chronicle for article on contraceptive mandate case, "[HBU wins ruling against birth control mandate](#)." The Houston Chronicle, December 27, 2013.
2. Quoted in Houston Chronicle for article on Ashby High Rise verdict and "back-door zoning," "[Verdict in Ashby high-rise trial fuels other fights](#)," The Houston Chronicle, December 19, 2013.
3. Quoted in Houston Chronicle for article on suit against Houston's decision to give benefits to same-sex couples, "[Same-sex benefits on hold after GOP leaders sue city](#)," The Houston Chronicle, December 18, 2013.
4. Featured in [Texas Lawyer 2013 Year in Review article](#), and awarded the "[Pope Pickin' Award](#)" for my work on FantasyPope.com, December 16, 2013.
5. Interviewed on Huffington Post Live "Legalese It!" segment on Supreme Court Justice's googling facts outside the record, [HuffPo Live](#), December 6, 2013.
6. Quoted in article in USA Today in article on other challenges to the Affordable Care Act, [Long-shot legal challenges to health care law abound, USA Today](#), November 29, 2013.
7. Quoted in article in USA Today in article on contraceptive mandate cases, [Justices will hear contraception challenge to Obamacare](#), USA Today, November 26, 2013.
8. Mentioned in article in The Texas Prosecutor for article on South Texas alum who argued before the Supreme Court, [The Texas Prosecutor](#), November 2013.
9. Quoted in article in The Texas Lawyer in article on Big Data and the Law, [Rise of the Machines: Using Big Data to Make Better Decisions](#)," The Texas Lawyer, November 18, 2013 ([PDF](#)).
10. Quoted in article in Houston Chronicle on Ashby High Rise land-use development trial, "[Residents will get day in court against Ashby high-rise](#)," Houston Chronicle, November 18, 2013.
11. Quoted in article on 2nd Amendment Symposium for Connecticut Law Review on [Connecticut News Junkie](#), November 15, 2013.
12. Interviewed on The David Webb Show on Sirius XM Radio about Obamacare, October 25, 2013.
13. Interviewed for news piece on 88.7 KUHF Houston Public Radio for report on Arms Control Treaty and the Second Amendment, October 22, 2013 (audio available [here](#)).
14. Interviewed for full hour on Jim Bohannon Show, October 17, 2013 (Audio at [40:00 mark](#)).
15. Interviewed for live radio hit on KTRH Houston on Michigan Affirmative Action case, October 17,

2013.

16. Interviewed and quoted in piece on [WSJ Market Watch](#) on Google and Privacy, October 16, 2013.
17. Interviewed for radio hit on KTRH Houston with Nik Rajkovic on Michigan Affirmative Action Case, October 16, 2013.
18. Interviewed by Utrice Leid on "[Leid Stories](#)" on Progressive Radio Networks, October 7, 2013.
19. [Interviewed by Shon Hopwood](#) for interview on the Cockle Bur, October 5, 2013.
20. [Interviewed by Damon Root on Reason.tv](#), October 2, 2013.
21. Interview with Jeff [Schecthman's "Specific Gravity,"](#) September 26, 2013.
22. C-SPAN Book TV, [Unprecedented the Constitutional Challenge to Obamacare](#), September 13, 2013.
23. Interviewed for [Cato Daily Podcast](#) on Unprecedented, September 16, 2013.
24. Interviewed on Pacifica Radio, KPFA's Letters and Politics, with Mitch Jeserich, about Unprecedented, September 16, 2013 ([audio available here](#)).
25. Interviewed by the Daily Caller on Unprecedented: "[New book takes you behind the scenes of the constitutional challenge to Obamacare](#)", September 10, 2013.
26. Interviewed on 88.7 KUHF Houston Public Radio for report on the Texas and Voting Rights Act, August 22, 2013 ([audio available here](#)).
27. Interviewed on KTSA Radio, San Antonio by Bill O'Neil for feature on DOJ Voting Rights suit against Texas, August 22, 2013.
28. Interviewed for CQ Roll Call for article on constitutionality of Supreme Court Ethics Act, on August 8, 2013 ([article here](#), [quote here](#)).
29. Interviewed on Houston matters on 88.7 KUHF Houston Public Radio for [program](#) on the Voting Rights Act, August 2, 2013 ([audio available here](#)).
30. Article on Justice Harlan's constitutional law lectures profiled in [National Law Journal](#), July 31, 2013 ([PDF here](#)).
31. Interviewed for Fox 26 Houston for feature on 5:00 News on TSA searching valet-parked cars, July 18, 2013.
32. Interviewed by Jess Bravin for an article in the Wall Street Journal about Samuel Alito's views on privacy in 1971, July 10, 2013 ([article here](#)).
33. Interviewed on Newsmakers on NBC 2 Houston to talk about the Supreme Court Term, June 30, 2013 ([post here](#)).
34. Interviewed on Houston matters on 88.7 KUHF Houston Public Radio for program on the end of the Supreme Court term, June 27, 2013 ([audio available here](#)).
35. Interviewed on The Near 90.3 FM Radio Program "The Brief" on Irish Public Radio about the end of the Supreme Court term, June 27, 2013 ([audio available here at the 30 minute mark](#)).
36. Interviewed for article in Houston Chronicle on implementing Voter ID laws in Texas following Supreme Court Voting Rights Act case, June 27, 2013.
37. Interviewed for ABC TV affiliate KTRK Houston for feature about aftermath of DOMA and Prop 8 decisions at [11:00](#), [11:30](#), and on [4:00](#) and [6:00](#) news, June 25, 2013 ([Video available here](#))
38. Interviewed for [article](#) in Houston Chronicle on Voting Rights Act, June 25, 2013.
39. Interviewed for article in Tyler Morning Telegraph on Voting Rights Act, June 25, 2013.

40. Interviewed for ABC TV affiliate KTRK Houston for feature about future of Voting Rights Act on 4:00 and 6:00 news, June 25, 2013 ([Video available here](#)).
41. Interviewed for ABC TV affiliate KTRK Houston for live broadcast on [11:00 news](#) on Fisher v. Texas, and feature about future of affirmative action on 4:00 and 6:00 news, June 24, 2013 ([Video available here](#)).
42. Interviewed on The Near 90.3 FM Radio Program “The Brief” on Irish Public Radio about the Supreme Court, June 6, 2013 (audio available [here](#). I come on in the last 5 minutes).
43. Interviewed for feature article in [The Houston Lawyer](#) about FantasySCOUTS, May 2013.
44. Interviewed on the [Dan Cofall Show](#), 1190 AM, Dallas-Ft. Worth, June 5, 2013 (podcast [here](#)).
45. Quoted in MSN Autos about We Robot Conference, “[Will lawsuits kill the autonomous car?](#),” April 15, 2013.
46. Quoted in CNET story about We Robot Conference, “[Robo-cars face a new threat: Lawyers](#),” April 9, 2013 ([excerpts here](#)).
47. Interviewed for News 92FM Houston for feature about FantasySCOTUS and Same-Sex Marriage Cases, March 26, 2013.
48. Interviewed for ABC TV affiliate KTRK Houston for feature about FantasyPope.com, March 12, 2013. [Houston Law Professor behind papal prediction website](#).
49. Interviewed for CBS Newsradio KRLD Dallas for feature about FantasyPope.com, March 12, 2013.
50. Interviewed for article in Bloomberg BNA The United States Law Week, “[Supreme Court Interprets FTCA To Revive Medical Battery Claims Against Government](#),” 81 U.S.L.W. 1232, March 5, 2013.
51. Interviewed for the Texas Lawyer Tex Parte Blog for [article](#) on FantasyPope.com, March 1, 2013.
52. Interviewed on The Near 90.3 FM Radio Program “The Brief” on Irish Public Radio about the passing of Ronald Dworkin, February 14, 2013.
53. Interviewed on Huffington Post Live for [segment](#) on the Second Amendment and civil liberties, February 4, 2013 ([Video available here](#)).
54. Panelist on Al Jazeera English program “[The Stream](#)” with Nassim N. Taleb, to discuss “Antifragile,” January 3, 2013 ([Video available here](#)).

2012

1. [The Year in Quotes: Predictions for the High Court](#), The National Law Journal, December 24, 2012.
2. Interviewed on [The Near 90.3 FM Radio Program “The Brief”](#) on Irish Public Radio about the Defense of Marriage Act Litigation, December 13, 2012 ([Audio available here](#)).
3. Interviewed on Huffington Post Live for [segment](#) on the 7th Circuit’s Second Amendment Opinion, December 12, 2012.
4. Interviewed on [The Near 90.3 FM Radio Program “The Brief”](#) on Irish Public Radio about the Defense of Marriage Act Litigation, November 2, 2012 ([Audio available here](#)).
5. Interviewed on [The Near 90.3 FM Radio Program “The Brief”](#) on Irish Public Radio about the Supreme Court term, October 12, 2012([Audio available here](#)).
6. Interviewed [live](#) on KTRK Channel 13, Houston’s ABC Affiliate, about Fisher v. University of Texas, October 7, 2012 ([Video available here](#)).
7. Interviewed on Huffington Post Live for [segment](#) on the opening of the October 2012 Supreme Court term, October 1, 2012.

8. Interviewed on Huffington Post Live for [segment](#) on granting concealed carry permits, September 6, 2012.
9. Interviewed on Huffington Post Live for [segment](#) on Texas Voting Rights Act cases, August 31, 2012.
10. Interviewed by Tam Herbert for article in the June 2012 issue of Law Technology News, titled [Can Computers Predict Trial Outcomes From Big Data?](#).
11. Interviewed by Tam Herbert for article in the June 2012 issue of Law Technology News, titled [Place Your Bets: Website Speculates on Supreme Court Outcomes](#).
12. Interviewed by Liz Goodwin of Yahoo! News for article titled '[FantasySCOTUS, a Supreme Court fantasy league, has players split over health care mandate](#)'. April 3, 2012.

2011

1. Guest on To The Best of My Knowledge on WPSU-TV to discuss Online Privacy. April 19, 2011 ([Video available here](#)).
2. Interviewed by Leslie A. Gordon for article in the [February 2011 issue of the ABA Journal](#), titled [Pending High Court Decisions Fan Interest in Fantasy League](#). February 1, 2011.

2010

1. '[Fantasy](#)' website helps students learn about Supreme Court, on [CNN.com](#), November 23, 2010.
2. [Fantasy Supreme Court league challenges enthusiasts, educates students](#) in The Washington Post, November 4, 2010
3. [Supreme Court Prediction Market: An interview with FantasySCOTUS.net's Josh Blackman](#) in Reason Magazine, October 2010 Issue.
4. [Courtside: Gaming the Supreme Court](#) in the National Law Journal on Law.com, September 22, 2010.
5. Interviewed on [Hearst Broadcasting Television](#) about pending Supreme Court nomination, May 10, 2010.
6. [Tailgating Outside the Supreme Court, Without the Cars](#) in The New York Times, March 2, 2010.

2009

1. Interviewed by Steven Portnoy for spot on ABC News Radio, December 17, 2009.
2. [Frustrated with fantasy football? Try the Supreme Court on CNN.com](#), December 16, 2009.
3. Interviewed by Tony Mauro for article in *National Law Journal* on *Citizens United v. FEC*, titled [The Long Vigil for Citizens United](#), December 14, 2009.
4. [Like To Gamble? Know the Supreme Court? It's Your Lucky Day](#) on Wall Street Journal Law Blog, November 11, 2009.

Experience

Clerkships

Judge Danny J. Boggs, U.S. Court of Appeals for the Sixth Circuit
Law Clerk (2011-2012)

Judge Kim R. Gibson, U.S. District Court for the Western District of Pennsylvania

Law Clerk (2009-2011)

Education

George Mason University School of Law

J.D. Magna Cum Laude, May 2009

Articles Editor, *George Mason Law Review*

The Pennsylvania State University

B.S. High Distinction (Magna Cum Laude) in Information Sciences & Technology, December 2005

Minor, Supply Chain & Information Sciences

Activities and Service

JoshBlackman.com (9/09-Present)

- Authored over 8,000 posts on law, policy, and legal theory.
- Honoree in 2010, 2013, 2014 ABA Blawg 100 as one of top 100 legal blogs on the Internet. Featured in the “Court Watch” section.
- Personal blog, receiving average of 40,000 views a month, where I analyze recent cases, track developments in the law, and discuss my scholarship and teaching.
- Featured on CNN.com, Wall Street Journal Law Blog, Volokh Conspiracy, How Appealing, SCOTUSBlog, Legal Theory Blog, Instapundit, Faculty Lounge, PrawfsBlawg, Above The Law, National Law Journal, Blog of the Legal Times, and others.

FantasySCOTUS.net (11/09-Present)

- Created the Internet’s First Supreme Court Fantasy League
- Over 20,000 members make predictions for pending Supreme Court cases.
- Generates prediction market that accurately forecasts 75% of Supreme Court cases.
 - Empirical data published in Northwestern journal of Technology & Intellectual Property.
- Featured in The New York Times, The Washington Post, The ABA Journal, and on CNN.com.

The Harlan Institute (www.HarlanInstitute.org) (2/2010-Present)

- Co-Founder & President of a Washington, D.C. based 501(c)(3), dedicated to educating high school students about the rule of law and the Supreme Court through social media and interactive games.
- Organized, coordinated, and developed Supreme Court Fantasy League (FantasySCOTUS.org) for high school students to learn about the Constitution, in which over 1,000 students participate.
- Collaborated with Justice Sandra Day O’Connor and her iCivics.org organization.

United States Commission on Civil Rights, Texas State Advisory Committee (1/2013 – Present)

- [Member](#)

TORCH, Houston (3/14 – Present)

- Member of Board of Directors

LexPredict (7/14 – Present)

- Director of Judicial Research

Institute for Human Studies (2/14-8/14)

- Adjunct Program Officer – mentoring students interested in legal academia

Guidepoint Global (12/14 – Present)

- Consultant – Consult informally with Guidepoint clients (investment funds, consultancies, and corporations) regarding Supreme Court and appellate cases

Disclosure: I engage from time to time in outside activities, some of which are compensated, that may relate to my scholarly activities. The disclosures are intended to provide interested parties information about potential conflicts of interest from the start of my tenure-track position (August 2012) through the present date that might exist between my scholarly and teaching activities, on the one hand, and my outside activities, on the other hand.

Litigation

- Signatory of [Brief for the Cato Institute and Law Professors as Amici Curiae Supporting Plaintiffs in Texas v. United States](#), before the Southern District of Texas (1:14-cv-245) (1/7/15).
- Signatory of [Brief for the Cato Institute and Prof. Josh Blackman as Amici Curiae Supporting the Petitioners](#) in King v. Burwell, et al, before the United States Supreme Court (14-114) (12/29/14).
 - Selected as “Brief of the Week” in National Law Journal for Amicus Brief to Supreme Court in King v. Burwell, [Brief of the Week: The Affordable Care Act and ‘Executive Lawmaking,’](#) January 13, 2015 ([PDF](#)).
- Signatory on [BRIEF OF HISTORY AND LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS](#) in JAMES COURTNEY AND CLIFFORD COURTNEY v. DAVID DANNER, CHAIRMAN AND COMMISSIONER OF THE WASHINGTON UTILS. & TRANSP. COMM’N, ET AL. before the United States Supreme Court, 13-1064 ([cert denied on 6/2/14](#)).
- Signatory on [BRIEF OF PREEMPTION AND FEDERALISM LAW PROFESSORS AS AMICI CURIAE SUPPORTING PETITIONER](#) in IMAD BAKOSS, M.D. v. CERTAIN UNDERWRITERS AT LLOYD’S, LONDON SUBSCRIBING TO POLICY NO. before the United States Supreme Court, 12-1429 (cert denied on 10/7/13).

Awards

- Selected to [Forbes Magazine 30 Under 30 For Law and Policy](#), 2014.
 - [ABA Journal](#), [Above the Law](#), [The Texas Lawyer](#), [The Houston Chronicle](#)

- Selected to [2013 ABA Blawg 100](#) .
- Selected to [2013 Fast Case 50](#) , as one of the top innovators in the law.
- Selected to [2010 ABA Blawg 100](#) .