

# THE BOUNDARIES OF EXECUTIVE DISCRETION: DEFERRED ACTION, UNLAWFUL PRESENCE, AND IMMIGRATION LAW

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#### INTRODUCTION

If a policy's wisdom rebutted all concerns about its legality, American law would be a vastly different domain. However, the Framers' design places process over policy. In crafting a government in which each branch can "resist encroachments of the others,"<sup>1</sup> the Framers limited the opportunities for unilateral executive action. When unilateral actions are myopic, structural design and sound policy happily coincide. Conversely, the Framers' architecture of power can elicit frustration when executive action appears wise and benevolent, while Congress's stubborn inaction suggests it does not understand the full nature of the problem. While these occasions test the Framers' design, they do not warrant discarding the Framers' structural choices. The tension between President Obama's Deferred Action for Parents of Americans and Legal Permanent Residents (DAPA) program and the Immigration and Nationality Act (INA) is a case in point.<sup>2</sup>

1. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2. See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs, Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., 3, 5 (Nov. 20, 2014) [hereinafter November 2014 DAPA Memo], available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) (describing the

The framework of the INA is clearly inconsistent with the sweeping award of benefits DAPA would confer on unlawful entrants into the United States. To determine whether a statute clearly prohibits an agency action, a court considers statutory language in its overall “context.”<sup>3</sup> DAPA would award sought-after immigration benefits, including work authorization and a reprieve from removal, to a huge cohort of foreign nationals who face substantial barriers under current law in acquiring a legal immigration status.<sup>4</sup> Potential DAPA recipients are currently unlawfully present in the United States, have been in this country for five years, and have U.S.-citizen children.<sup>5</sup> While the last two factors might elicit positive discretion if immigration officials could write on a blank slate, Congress’s only relief for similarly situated foreign nationals entails a far more

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policy changes made under the DAPA program). The Office of Legal Counsel (OLC) has issued an opinion supporting DAPA’s legality. The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C. 1, 33 (2014) [hereinafter OLC Opinion], *available at* <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>. In February 2015, Judge Andrew Hanen of the U.S. District Court for the Southern District of Texas held that DAPA should have gone through the Administrative Procedure Act’s (APA) rulemaking process prior to its announcement. As a result, Judge Hanen entered a nationwide preliminary injunction against DAPA’s implementation. *Texas v. United States*, No. B-14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015). As of April 2, 2015, an appeal of Judge Hanen’s order and the government’s request for a stay of the preliminary injunction were pending in the U.S. Court of Appeals for the Fifth Circuit. For a defense of DAPA by a prominent immigration scholar and former immigration official, see Stephen H. Legomsky, *Written Testimony of Stephen H. Legomsky Before the S. Comm. On the Judiciary: Confirmation Hearing on the Nomination of Loretta Lynch as Attorney General of the United States*, SENATE COMMITTEE ON THE JUDICIARY, 2–3 (Jan. 28–29, 2015), <http://www.judiciary.senate.gov/imo/media/doc/01-29-15%20Legomsky%20Testimony.pdf> [hereinafter Legomsky Testimony] (finding support for DAPA in Congress’s actions such as appropriating resources to deport only a limited number of noncitizens and providing express authorization to the Department of Homeland Security (DHS) to exercise prosecutorial discretion).

3. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (noting that statutory interpretation must account for both the specific context in which the language is used and the broader context of the statute).

4. By legal status I mean a statutorily recognized basis for an immigrant or nonimmigrant visa that will allow the recipient of the status to enter or remain in the United States.

5. November 2014 DAPA Memo, *supra* note 2, at 4.

rigorous test.<sup>6</sup> The narrow parameters of Congress's dispensation cast doubt on DAPA's legality: the INA's rigorous test would suggest that Congress did not authorize immigration officials to readily grant more expansive relief.<sup>7</sup> Overall, DAPA's blanket grant of benefits clashes with three pillars of the INA: (1) comprehensive deterrence of unlawful entry, presence, and work in the United States; (2) enumerated categories of legal status that reflect Congress's longstanding resolve to impede unlawful entrants' use of post-entry U.S.-citizen children for immigration purposes; and (3) strict limits on administrative awards of benefits, such as work authorization, when those benefits are not ancillary to an enumerated legal status.<sup>8</sup>

In announcing DAPA, the government failed to understand that the INA is not merely a mechanical guide to allocating immigrant and nonimmigrant visas; it is a code of conduct that promotes certain outcomes, such as naturalization and refuge from persecution, while deterring actions that undermine immigration enforcement.<sup>9</sup> Consider the enumerated categories based on a foreign national's familial relationship with a U.S. citizen or lawful permanent resident (LPR). For more than sixty years, Congress has imposed an age requirement on the ability of U.S. citizens to sponsor a foreign

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6. 8 U.S.C. § 1229b(b) (2012) (requiring *ten years* of physical presence in the United States and a showing of "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident (LPR)).

7. The presumption that express mention of one form of relief in a statute excludes other forms is known as *expressio unius* after the Latin canon, *expressio unius est exclusio alterius*, meaning that inclusion of specific terms implies an intent to exclude others. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 930–33 (2013) (reporting on a survey of congressional staffers that indicated staffers were familiar with the canon and used it in legislative drafting). Supporters of DAPA might argue that the relief authorized by the INA is distinguishable because it leads to LPR status. Cf. Legomsky Testimony, *supra* note 2, at 15 (arguing that limits on obtaining LPR status are irrelevant to the provision of temporary relief short of legal status). However, as I explain later in this Article, see *infra* notes 347–48 and accompanying text, DAPA provides recipients with benefits such as a substantial reprieve from removal and work authorization that constitute the intermediate-term equivalent of LPR status. Congress's concern extended not just to grants of status but also to *any* categorical incentives for unlawful entry and presence beyond a narrow subset of cases.

8. See, e.g., 8 U.S.C. § 1229c(a)(2)(A) (setting a maximum period of 120 days in the United States that immigration officials could allow prior to the voluntary departure of foreign nationals who lacked any legal basis for remaining).

9. See H.R. REP. NO. 104-828, at 1 (1996) (noting that the purpose of the statute was "to improve deterrence of illegal immigration to the United States . . . by reforming exclusion and deportation law and procedures").

national for an immigrant visa. In requiring that U.S. citizens be at least twenty-one years old to sponsor a parent,<sup>10</sup> Congress has sought to prevent unlawful entrants from obtaining immigration benefits linked to a post-entry U.S.-citizen child. As Senator Sam Ervin of North Carolina, who later chaired the Senate Watergate Committee, explained in a colloquy with Senator Robert Kennedy of New York that influenced the drafting of the Immigration and Nationality Act Amendments of 1965 (“1965 Act”), the age requirement was necessary, and its omission from an early draft of the 1965 Act would have been “unwise.”<sup>11</sup> Without the age requirement, Senator Ervin warned, “[f]oreigners can come here as visitors and then have a child born here, and they would become immediately eligible for admission.”<sup>12</sup>

Insertion of the age requirement was a key element in passage of the 1965 Act, which established the foundation of current U.S. immigration law.<sup>13</sup> The 1965 Act abolished national origin quotas that had long restricted legal immigration.<sup>14</sup> That liberalization, like changes in the INA in 1986 and 1996, was part of an ongoing legislative dialectic that also strengthened deterrence of unlawful immigration.<sup>15</sup>

The INA also reflects Congress’s aim to deter the continued presence of foreign nationals who lack any reasonable prospect of obtaining a legal immigration status. Deterrence here includes, *inter alia*, a ten-year bar on the admission of foreign nationals who have remained in the United States unlawfully for a year or more.<sup>16</sup>

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10. 8 U.S.C. § 1151(b)(2)(A)(i); see STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 251 (5th ed. 2009) (explaining the immediate relative category).

11. *Hearings on S. 500 Before the Subcomm. on Immigration & Naturalization of the S. Comm. on the Judiciary*, 89th Cong. 20 (1965) [hereinafter 1965 Senate Judiciary Hearings] (statement of Sen. Sam Ervin).

12. *Id.* at 231; see Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE (forthcoming 2015) (manuscript at 12 n.68), available at <http://ssrn.com/abstract=2545544> (discussing the 1965 exchange incorporating this restriction on the age of U.S.-citizen children sponsoring their parents).

13. Immigration and Nationality Act Amendments, Pub. L. No. 89-236, § 201(b), 79 Stat. 911, 911 (1965).

14. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279–80 (1996) (describing the national origins quota system in place prior to the 1965 legislation).

15. S. REP. NO. 89-748, at 12 (1965) (noting that under the 1965 Act, admission of immigrants would be “highly selective” and enforcement efforts would prevent unlawful migration of inadmissible individuals); *id.* at 15 (describing additional steps required of foreign nationals seeking to work in United States); *id.* at 18 (imposing new restrictions on immigration from other Western Hemisphere countries).

16. 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2012).

Congress intended the ten-year bar as a powerful legislative signal to foreign nationals who were unlawfully present not to linger in the United States. Congress has also sought to neutralize the “magnet” of U.S. employment,<sup>17</sup> which Congress has long viewed as the principal cause of unlawful migration.<sup>18</sup> As a matter of law and practice, immigration officials have accordingly offered work authorization to only three discrete groups of foreign nationals: (1) those with a legal status or a reasonable prospect of gaining such status;<sup>19</sup> (2) those suffering from extraordinary individual hardships;<sup>20</sup> or (3) those at risk because of exigent events abroad, including increased government repression or natural disasters.<sup>21</sup> DAPA’s scope far exceeds these narrow categories, rendering Congress’s carefully crafted limits superfluous.

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17. See H.R. REP. NO. 104-469, at 111 (1996).

18. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360 (requiring the imposition of sanctions on employers who hire undocumented aliens). This Article uses the term “undocumented alien” to denote a foreign national who has neither legal status nor any other valid official basis for remaining in the country.

19. Memorandum from Gene McNary, Comm’r, Immigration & Naturalization Serv., to Reg’l Comm’rs (Feb. 2, 1990), reprinted in 67 INTERPRETER RELEASES 164 (1990) [hereinafter McNary Memo]; see 8 U.S.C. § 1227(d)(1), (2), (4) (providing for a stay of removal and acknowledging the availability of deferred action for U and T visa applicants, available under the INA for individuals who respectively have been victims of crime or assisted in the prosecution of human traffickers).

20. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 259–60 (2010) (discussing prior immigration guidance that provided for favorable exercises of discretion for cases involving parents of U.S.-citizen children with serious medical conditions).

21. Congress has expressly authorized relief of this kind as a grant of Temporary Protected Status (TPS). See 8 U.S.C. § 1254a(b)(1) (stating the criteria for TPS); see also *id.* § 1254a(g) (stating that TPS is the “exclusive authority” delegated by Congress to immigration officials to “to permit aliens who are . . . deportable . . . to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality”). President George H.W. Bush issued a signing statement regarding the Immigration Act of 1990 that claimed that the Executive Branch might have independent constitutional authority to act to protect foreign nationals in the United States from harm they would encounter if they returned to their country of origin, even if those foreign nations did not meet the criteria for TPS. See George H.W. Bush, Former President of the United States, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117> (interpreting the TPS provision as not detracting any authority from the Executive Branch to exercise prosecutorial discretion in certain immigration cases).

While immigration officials have some discretion, Congress has tailored that discretion to fit the INA's deterrence objectives.<sup>22</sup> Any exercise of discretion that is favorable to those who have violated the law triggers the problem of moral hazard: individuals who know in advance they will be immunized from the consequences of wrongdoing have a heightened incentive to break the law.<sup>23</sup> Moral hazard undermines the deterrent purposes of any framework of rules. Congress has expressed concern that unchecked discretion in immigration law can produce moral hazard.<sup>24</sup> As a result, Congress has markedly reduced that discretion in several key areas of immigration law. For example, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress sharply limited the award of extended voluntary departure (EVD) to preclude protracted stays in the United States by foreign nationals who had been placed in removal proceedings.<sup>25</sup> DAPA circumvents these congressional curbs.

In assessing the quantum of discretion delegated by Congress in light of moral hazard, we should distinguish between enforcement *priorities* in individual cases and affirmative *benefits* that flow to entire categories of unlawful immigrants. Congress has empowered

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22. See 8 U.S.C. § 1182(d)(5)(A) (limiting parole or admission into the United States of individuals without a visa to “case-by-case” decisions based on “urgent humanitarian reasons or significant public benefit”); see also *id.* § 1229c(a)(2)(A) (limiting grants of voluntary departure).

23. Nobel Prize winner Kenneth Arrow first explained the concept of moral hazard. See Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 961 (1963) (noting that in the provision of health care, the availability of reimbursement for care diminishes a consumer's incentive to seek the most cost-effective provider); Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 270 (1996) (discussing the phenomenon as exacerbated by insurance in that individuals with insurance will take less care and incur more loss, even if they will not experience such loss themselves); Steven Shavell, *On Moral Hazard and Insurance*, 93 Q. J. ECON. 541, 541–42 (1979) (discussing the workings of the moral hazard model in the context of insurance); cf. Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 55, 79–80 (2006) (discussing the phenomenon in corporate compensation policies regarding reimbursement of defense costs).

24. See 142 CONG. REC. 9773 (1996) (statement of Sen. Alan Simpson) (commenting during legislative debate as a leading sponsor of immigration legislation, and issuing a warning about “people gimmicking the system” to stay in the United States without a pathway to a legal status through officials' unchecked awards of extended voluntary departure (EVD)).

25. See 8 U.S.C. § 1229c(a)(2)(A) (curtailing EVD from no time limit to a voluntary departure of 120 days from the foreign national's agreement to depart the United States).

immigration officials to set priorities for enforcement in a system characterized by limited resources.<sup>26</sup> In exercising discretion regarding priorities, immigration officials may elect to forego or terminate removal proceedings in certain cases. This is the largely tacit discretion that the Supreme Court has acknowledged, most recently in *Arizona v. United States*.<sup>27</sup> In contrast, benefits are express, not merely tacit, advantages for which individuals apply in advance. If an application is successful, the recipient can reasonably assume that the benefit will last for a definite period of time. In immigration law, such affirmative benefits include deferred action, which provides a reprieve from removal for a fixed period and work authorization for that period. Moral hazard is more readily manageable with priority-setting than it is with the award of benefits, particularly when those benefits are available to large categories of people.

The example of criminal law illustrates why moral hazard is a greater risk in the categorical award of benefits. Prosecutors routinely set priorities that result in devoting fewer resources to certain crimes, compared with others. For example, prosecutors may devote greater resources to arrest and prosecute murderers than they do for burglars. As a result, some burglars may well escape prosecution.<sup>28</sup> However, burglars or other individuals who have committed wrongs outside prosecutorial priorities generally cannot apply in advance for prosecutorial forbearance or rely on that forbearance as they persist in wrongdoing.<sup>29</sup> Prosecutors view the moral hazard problem with enforcement priorities as manageable because of information asymmetries between law enforcement officials and the universe of potential wrongdoers. Prospective wrongdoers in the broader community may not know enough about

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26. See *id.* § 1103(a)(3) (empowering the Secretary of Homeland Security to “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)).

27. 132 S. Ct. 2492, 2499 (2012) (noting that, as an initial matter, federal immigration officials must first decide if it makes sense to pursue removal at all in specific cases).

28. Of course, some murderers also escape prosecution. My only point here is that prosecutors strive to hold murderers accountable and devote greater resources to the effort.

29. See generally Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1281–85 (1999) (discussing the premises of the criminal model as compared with the administrative regulation model).



law enforcement officials' internal priorities to game the system.<sup>30</sup> The provision of benefits, in contrast, ratchets up moral hazard. The news of benefits travels quickly and more people want to "join the party" when officials concretely *reward* wrongdoing instead of merely tolerating it.<sup>31</sup> A categorical award of benefits can therefore incentivize wrongdoing on a mass scale.

In immigration law, making the categorical award of benefits, like work authorization, ancillary to an application for legal status manages moral hazard. Discretion in this context serves the overall immigration framework and does not clash with the INA's goal of deterrence. As an example, consider how the administrations of Presidents Ronald Reagan and George H.W. Bush collaborated with leading members of Congress on a "Family Fairness" program that granted deferred action to the spouses and children of persons legalized under the Immigration Reform and Control Act of 1986<sup>32</sup> ("IRCA"). Since an IRCA beneficiary could become an LPR and, in due course, a U.S. citizen, each beneficiary's spouse and children were *already* likely to obtain a legal status within a reasonable time.<sup>33</sup> Family Fairness merely resolved a timing problem that would otherwise have put those close relatives at risk for removal while they

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30. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634–35 (1984) (noting that the law sometimes balances ex ante deterrence and ex post compassion by sending different messages to lay and elite audiences: the law sends a uniform message to the public about compliance with rules but then, in a manner hidden from public view, may send a more complex message to officials such as sentencing judges about the importance of tempering deterrence with compassion); John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 181 (2001) (analyzing a study showing that many people were not familiar with laws on the books, and therefore, by extension, knew little about enforcement priorities). Sometimes information asymmetries erode over time; repeat players among lawbreakers may share information about their experiences with law enforcement priorities, shaping prospective lawbreakers' expectations about the probability of prosecution. The distinction between priorities and benefits is a rough heuristic that blurs at the margins, like most distinctions in law or fact.

31. See *Adams v. Richardson*, 480 F.2d 1159, 1161–62 (D.C. Cir. 1973) (en banc) (per curiam) (requiring heightened agency response to complaints of discrimination in education after upholding the district court's injunction and noting that providing federal funding to wrongdoers undermined antidiscrimination norms).

32. Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394; see McNary Memo, *supra* note 19, at 1 (clarifying the policy surrounding eligibility for voluntary departure to ensure uniformity for those who qualify).

33. See 8 U.S.C. § 1153(a)(2) (2012) (allocating preferences for family-sponsored immigrants to spouses and unmarried sons and daughters of LPRs).

waited.<sup>34</sup> In contrast, DAPA provides benefits to unlawful immigrants who have no reasonable prospect of obtaining a legal status under the INA. It thus presents moral hazard problems that Congress has persistently sought to avoid.

As is always the case, Congress may be wrong about the policies it has written into the INA. Indeed, compelling policy reasons support a legislative program of immigration reform that would grant legal status to *all* those to benefit from DAPA, and more.<sup>35</sup> However, as the Justice Department's Office of Legal Counsel (OLC) admits in its opinion supporting DAPA, the program stands or falls not on its policy wisdom, but on its fealty to Congress's dictates.<sup>36</sup> That is where DAPA falls short.

Administrative law principles allow courts to push for greater deliberation by immigration officials. As a binding norm that substantially affects the interests of millions, DAPA should have undergone the rigors of the rulemaking process set out in the APA. Furthermore, as a "general enforcement policy,"<sup>37</sup> DAPA fits within the presumption that agency action is reviewable.<sup>38</sup> Limits on judicial

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34. For more detail on the Family Fairness program, see *infra* notes 187–88 and accompanying text. Defenders of DAPA's legality analogize it to the Family Fairness program. See OLC Opinion, *supra* note 2, at 14, 30 n.15 (referencing the Family Fairness program, which granted extended voluntary departure and work authorization to an estimated 1.5 million spouses and children of noncitizens); see also Mark Noferi, *When Reagan and GHW Bush Took Bold Executive Action on Immigration*, HILL (Oct. 2, 2014, 12:00 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/219463-when-reagan-and-ghw-bush-took-bold-executive-action-on> (stating that, similar to President Obama's action, the Family Fairness program was estimated to assist over forty percent of the undocumented population at that time). However, because Family Fairness provided benefits that were merely a bridge to an application for legal status, it is not an apt precedent for DAPA.

35. See November 2014 DAPA Memo, *supra* note 2, at 1, 3 (highlighting certain policy reasons for implementing DAPA, including the limited resources available for immigration enforcement and the need to prioritize those who present public safety or national security concerns).

36. See OLC Opinion, *supra* note 2, at 31 (asserting that DAPA is "consistent with congressional policy").

37. See *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676–77 (D.C. Cir. 1994) (providing that general enforcement policies may be reviewable for legal sufficiency because they may present the special risk that the agency is abdicating its statutory responsibilities).

38. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 141–42 (1967) (emphasizing that the presumption of judicial review of agency action is so important that it is only overcome if a showing of clear and convincing evidence of contrary legislative intent can be made).

review of *individual* enforcement decisions<sup>39</sup> do not apply to review of general policies. Consistency of a general enforcement policy with the statutory framework supplies a workable standard for assessing agency action.<sup>40</sup> Judicial review is particularly valuable because a sweeping non-enforcement policy decision like DAPA may constitute an agency's "abdication" of its role.<sup>41</sup> This risk is particularly severe for policies such as DAPA, which involve the categorical grant of benefits to unlawful entrants. Indeed, the wholesale conferral of benefits may shift DAPA from the domain of agency inaction to the realm of agency *action*, which is presumptively reviewable.<sup>42</sup> Conferring benefits such as work authorization on large groups who have violated immigration law exacerbates the problem of moral hazard that Congress has sought to address. Judicial review diminishes this risk, restoring the balance that Congress sought.

Upon review, administrative law principles demonstrate that DAPA is unworthy of judicial deference. The Supreme Court's *Chevron* doctrine establishes that courts should defer to agency decisions only if: (1) the statute is ambiguous, and (2) the agency's interpretation is reasonable.<sup>43</sup> The agency fails at *Chevron's* step one if the statute clearly precludes the agency's reading. To assess ambiguity, a court interprets "the words of a statute . . . in their context and with a view to their place in the overall statutory scheme."<sup>44</sup> In judging the scope of delegation to an agency, the touchstone should be "common sense."<sup>45</sup> The Supreme Court has required a close fit between the scale of an agency action's effects and the specificity of the statutory authorization.<sup>46</sup> Just as Congress does not "hide elephants in mouseholes,"<sup>47</sup> it does not customarily authorize the use of "vague terms" to decree "fundamental" changes in a regulatory framework.<sup>48</sup>

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39. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to the agency's absolute discretion.").

40. *Id.* at 830.

41. *Crowley*, 37 F.3d at 677 (citing *Chaney*, 470 U.S. at 833 n.4).

42. *Abbott Labs.*, 387 U.S. at 140–41.

43. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

44. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989)) (internal quotation marks omitted).

45. *Id.*

46. *Id.*

47. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

48. *Id.*

To fit the dictates of “common sense,” a change of enormous legal and “political magnitude”<sup>49</sup> wrought by an agency would have to be authorized by specific statutory language.

The fundamental legal and “common sense” problem with DAPA is its shunning of any intelligible limiting principle that situates executive discretion within the INA’s comprehensive framework. The carefully wrought provisions of the INA clash with DAPA’s blanket grant of immigration benefits. Awarding work authorization and a reprieve from removal to millions of foreign nationals undermines Congress’s deterrence goals. While DAPA happens to constitute a sound policy choice because of the human cost of the status quo for the United States’s undocumented population,<sup>50</sup> few measures could so clearly clash with Congress’s intent. That intent, not the wisdom of the policy, should be controlling.

This Article is in five Parts. Part I discusses the text and context of the INA, centering on its three-pronged approach to deterrence. Part II discusses the history of executive discretion in immigration and Congress’s effort in the last twenty years to limit discretion in the award of immigration benefits. Part III argues that DAPA is a legislative rule requiring notice-and-comment procedures under the APA. This Part also argues that DAPA is reviewable as a “statement of general enforcement policy,”<sup>51</sup> and that judicial review will further the INA’s aims without disrupting its implementation. Part IV argues that DAPA should not receive deference under the *Chevron* doctrine because the INA unambiguously precludes a discretionary award of benefits of DAPA’s size and scope. Part V concludes that DAPA also fails the separation of powers test outlined by Justice Jackson in *Youngstown*.

## I. THE STRUCTURE OF DETERRENCE IN IMMIGRATION LAW

The INA is a comprehensive framework that authorizes specific categories of lawful immigration and deters unlawful migration to the United States. As the Judiciary Committee stated in its report on the foundational 1965 Immigration Act, which abolished the rigid national quota system that had long restricted legal immigration, this

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49. *Brown & Williamson*, 529 U.S. at 133.

50. For discussion of one aspect of this human tragedy, see Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 463–65 (2012) (detailing the efforts to push legislation at the state and federal level to allow undocumented college students to access financial aid).

51. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

balance of invitation and deterrence was premised on enumerated, “highly selective” criteria for admission<sup>52</sup> and clear penalties for noncompliance. Preserving that balance is central to a stable U.S. immigration policy, which has produced the highest levels of legal immigration in the world since the passage of the 1965 Act.<sup>53</sup>

A. *The INA and Enumerated Forms of Legal Status*

As a comprehensive framework, the INA’s method recalls the approach taken in the Constitution itself: just as the Constitution hinges on enumerated powers, the INA relies on enumerated categories of legal status for migrants.<sup>54</sup> For example, the INA specifies that immigrants to the United States fit into certain clearly demarcated categories such as “immediate relatives” of U.S. citizens—who can enter the United States without numerical restriction<sup>55</sup>—and other family-based categories such as unmarried sons or daughters of citizens, married sons or daughters of citizens, and siblings of citizens—who are subject to yearly caps on migration and must therefore wait their turn.<sup>56</sup> Subject to similar caps, LPRs can petition for spouses, minor children, and adult children but not parents or siblings.<sup>57</sup> Individuals who are currently LPRs cannot sponsor parents or siblings for immigrant visas.<sup>58</sup> To sponsor a parent or sibling, a current LPR must become a U.S. citizen.<sup>59</sup> As Congress has long made clear, this carefully calibrated hierarchy is based on the relative urgency of reunification and the importance of other policy goals, such as encouraging LPRs to naturalize and deterring unlawful migration.

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52. S. REP. NO. 89-748, at 12 (1965).

53. See Adam Ozimek, *Is the U.S. the Most Immigrant Friendly Country in the World?*, FORBES (Nov. 18, 2012, 8:41 PM), <http://www.forbes.com/sites/modeledbehavior/2012/11/18/is-the-u-s-the-most-immigrant-friendly-country-in-the-world> (referencing data that demonstrates that the United States ranks highest in the world for the number of immigrants moving to the country each year).

54. See *Toll v. Moreno*, 458 U.S. 1, 13 (1982) (quoting *Elkins v. Moreno*, 435 U.S. 647, 664 (1978)) (describing the INA as a “comprehensive and complete code covering all aspects of admission of aliens to this country”).

55. 8 U.S.C. § 1151(b) (2012).

56. *Id.* § 1153(a)(1), (3)–(4).

57. *Id.* § 1153(a)(2).

58. *Id.* § 1151(b)(2)(A)(i); *id.* § 1153(a) (establishing remaining categories of family-based visas, barring LPRs from bringing in parents or siblings and noting that LPRs must first become U.S. citizens to do so).

59. *Id.* § 1153(a).

In the domain of family relationships, Congress in the last twenty-five years has greatly expanded relief for foreign nationals who have suffered abuse as the spouses of U.S. citizens and LPRs, allowing the survivors of such abuse to obtain a legal status independent of their abusers.<sup>60</sup> Moreover, in a limited category of cases, Congress has provided relief to otherwise unlawful immigrants who can demonstrate that they have been here for ten years and that their removal would impose “exceptional and extremely unusual hardship” on a U.S. citizen, typically a minor child.<sup>61</sup> In addition to family-based immigration, Congress has also provided nonimmigrant visas for students and tourists, immigrant and nonimmigrant visas for skilled workers, and visas for a closely regulated and specified array of other individuals, including refugees and victims of crime.<sup>62</sup> In addition, in 1986, Congress agreed to legalize the status of millions of unlawful immigrants.<sup>63</sup> In 1990, in collaboration with immigration officials, Congress also ensured that close relatives of 1986 legalization recipients would be allowed to remain in the United States until those relatives had an opportunity to acquire a legal status themselves based on the family relationships designated for legal status in the INA.<sup>64</sup> Congress made clear that any further comprehensive legalization was a task for Congress,<sup>65</sup> not a sphere where the Executive Branch could act unilaterally.

These enumerated categories largely exhaust the domain of legal immigration. There are no residual categories of legal immigration status beyond those enumerated in the statute. Foreign nationals who fall outside the enumerated categories are removable unless they qualify for narrowly circumscribed forms of relief.<sup>66</sup> That state of

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60. See, e.g., Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1504, 114 Stat. 1464, 1522–23 (improving access to cancellation of removal for immigrant victims of spousal abuse); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1953 (creating an option for immigrant victims of spousal abuse to self-petition for permanent residency).

61. 8 U.S.C. § 1229b(b)(1).

62. See, e.g., *id.* § 1101(a)(15)(B), (F), (U) (defining nonimmigrant visa options for tourists, students, and crime victims, respectively).

63. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (providing a path to lawful residency for immigrants with unlawful status who entered the United States before 1982).

64. McNary Memo, *supra* note 19, at 1.

65. S. REP. NO. 99-132, at 16 (1985) (describing the 1986 legalization as a “one-time only” program”).

66. See *infra* notes 136–38 and accompanying text (describing limited forms of relief short of legal status).

affairs does not necessarily connote harshness. It is simply the legislative price for the enumerated forms of legal status that the INA provides.

In addition to enabling legal immigration, the INA deters unlawful entry into the United States and unlawful presence by foreign nationals. Indeed, deterrence of unlawful migration is also a crucial factor in the crafting of enumerated forms of *legal* status. Deterrence results from an intricate latticework of definitions, penalties, and statutory bars. The law seeks to deter a range of conduct that drives foreign nationals to unlawfully enter the country and remain unlawfully present in the United States.<sup>67</sup> However, Congress's framework couples *ex ante* deterrence with a finely calibrated degree of *ex post* equitable adjustment. This framework provides relief for people who have a pathway to legal status, including victims of human trafficking.<sup>68</sup> Congress has also arguably acquiesced in relief for a smaller group of people presenting extreme hardship cases, including those who are very young, very old, infirm,<sup>69</sup> or at risk because of sudden dangers abroad such as government repression or the effects of natural disasters.<sup>70</sup> Such discretionary benefits are designed to be modest to prevent the exception from overwhelming the rule. DAPA undermines that balance.

#### B. *Deterrence Under the INA: A Three-Legged Stool*

To discourage unlawful immigration, Congress has inserted provisions into the INA that form a three-legged stool. First, a long-standing provision of the INA impedes unlawful entrants who seek to gain a legal status through post-entry U.S.-citizen children.<sup>71</sup> Second, the INA deters unlawful entrants from remaining in the United

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67. *E.g.*, 8 U.S.C. § 1182(a)(9)(B)(i) (barring re-entry for three years for noncitizens unlawfully present for less than one year but more than 180 days, and for ten years for noncitizens unlawfully present for more than one year).

68. *See id.* § 1227(d)(1) (providing for stays of removal for certain applicants for U and T visas, which are available to victims of crime and human trafficking, respectively).

69. *See* Wadhia, *supra* note 20, at 259–60; Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 830–31 (2004) (listing the number of cases where each age-related factor was determinative).

70. *See* OLC Opinion, *supra* note 2, at 16 (describing deferred action granted to foreign students in New Orleans who, because of Hurricane Katrina, were temporarily unable to fulfill the terms of their student visas).

71. *See* 8 U.S.C. § 1151(b)(2)(A) (stating that U.S.-citizen children can only petition their foreign-born parent when the child turns twenty-one).

States.<sup>72</sup> Third, the INA seeks to neutralize the “magnet” of U.S. jobs for unlawful entrants.<sup>73</sup>

DAPA knocks over that three-legged stool. Potential DAPA recipients are by definition currently unlawfully present in the United States, have been in this country for five years, and have U.S.-citizen children.<sup>74</sup> Instead of signaling that such acts undermine the INA’s carefully crafted framework, DAPA rewards recipients with deferred action, a form of relief that translates into the receipt of work authorization and a reprieve from removal.<sup>75</sup> Moreover, DAPA’s scale is vast, potentially including forty percent of the United States’ undocumented population.<sup>76</sup> In this sense, DAPA is a far broader program than Deferred Action for Childhood Arrivals (DACA), an earlier initiative that provided deferred action to foreign nationals below a certain age who came to the United States as children with their parents.<sup>77</sup> While DACA seemed inconsistent with the INA in

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72. *See id.* § 1182(a)(9)(B) (noting that “unlawfully present” noncitizens will be inadmissible for a term of three or ten years depending on the length of their unlawful presence in the United States).

73. *See id.* H.R. REP. NO. 104-469, at 108, 111 (1996) (detailing how the INA will establish programs to verify work eligibility as a means of deterring employers from hiring noncitizens).

74. November 2014 DAPA Memo, *supra* note 2, at 4.

75. *Id.* at 4–5.

76. Press Release, Migration Policy Inst., MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program (Nov. 19, 2014), *available at* <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new> (estimating that the Deferred Action for Childhood Arrivals (DACA) and DAPA programs combined will benefit more than 5.2 million people, nearly half of the estimated 11.4 million undocumented immigrants).

77. *See* Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 107–08 (2014) (arguing that DACA was an appropriate exercise of presidential power to protect “intending Americans” from hostile non-federal sovereigns, such as individual states like Arizona that had enacted restrictive immigration laws). I recognized in that Article that DACA’s legal underpinnings would be weakened by the success of legal attacks on restrictive state laws. *See Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (holding that the INA preempted portions of Arizona’s restrictive immigration law); *see also* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 496 (2012) (discussing the unique position of states in the federal immigration scheme); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2077–78 (2013) (refuting arguments used by anti-immigrant legislation supporters to justify strict state-level immigration policies, such as the federal government’s inaction in the realm of immigration and critical necessity due to high levels of illegal immigration to certain states); Margaret Hu, *Reverse-Commandeering*, 46 U.C.



certain respects, DAPA's breadth poses a much more severe challenge to Congress's framework.

*1. Deterring unlawful entrants from gaining legal status through post-entry U.S.-citizen children*

For decades, Congress has been alert to the risk posed by unlawful entrants gaining a legal status through post-entry U.S.-citizen children. The INA expressly warns unlawful entrants against relying on post-entry U.S.-citizen children to gain a legal status by erecting formidable barriers against attempts to game the U.S. immigration system. Indeed, the INA permits such attempts only in cases involving "exceptional and extremely unusual hardship" and ten years of physical presence in the United States,<sup>78</sup> not the five years that DAPA stipulates. Although DAPA does not grant recipients a legal status, it provides substantial benefits like a reprieve from removal and work authorization that undercut the INA's clear message.

The INA's restrictions on unlawful entrants relying on post-entry U.S.-citizen children go back more than sixty years. The McCarran-Walter Act of 1951<sup>79</sup> provided that a foreign national was eligible for admission for lawful permanent residence based on parentage of a U.S. citizen only if the sponsoring citizen was *at least twenty-one years old*.<sup>80</sup> The landmark 1965 Act, which abolished the national quota

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DAVIS L. REV. 535, 539–40 (2012) (arguing that states' attempts to create strict immigration policy via "mirror-image" laws interfere with federal power); Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 728–30 (2014) (arguing that federal administrative action on immigration should have a preemptive effect on state laws); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1365–68 (1999) (discussing immigration federalism and the expanding role of states in immigration-related legislation, beginning with Proposition 187 in California that attempted to bar undocumented noncitizens from accessing a wide range of public services); cf. David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1148 (2012) (criticizing the preemption arguments as circular). Today, legal challenges have blunted those state laws and DACA's continued legality is questionable, although the President might have the power to "wind up" the program at his own pace. See *Ludecke v. Watkins*, 335 U.S. 160, 163–64, 173 (1948) (holding that the President had full discretionary power over the removal of "enemy aliens" and that the power was not judicially reviewable).

78. 8 U.S.C. § 1229b(b)(1) (2012).

79. Pub. L. No. 82-414, 66 Stat. 163 (1952).

80. *Id.* § 203(a)(2).

system that had curbed legal immigration for decades, continued these restrictions.<sup>81</sup>

The abolition of the national quota system was a watershed event, but it only occurred because its sponsors and supporters signaled that they were committed to a “highly selective system for the admission of immigrants,” not to open borders.<sup>82</sup> In its report on the bill that became the 1965 Act, the Senate Judiciary Committee acknowledged that “there are far more people who would like to come to the United States than the United States can accept.”<sup>83</sup> Consistent with this understanding of the need for immigration controls, the Senate Judiciary Committee report specified that the “parents of *adult* U.S. citizens . . . may enter the United States without numerical limitation.”<sup>84</sup>

Exchanges between Senator Robert M. Kennedy, Democrat of New York (and former Attorney General) and Senator Sam Ervin, Democrat of North Carolina (who later chaired the Senate Watergate Committee) reveal the importance of these restrictions to the legislative bargain embodied in the 1965 Act. Senator Ervin articulated the concern that drove this provision at a pivotal hearing of the Senate Judiciary Committee.<sup>85</sup> Commenting on an early version of the legislation that provided for the admission of a parent of *any* U.S. citizen, regardless of the citizen’s age, Senator Ervin cautioned his colleagues about the unintended consequences of this departure from current law. Relying on this provision, Senator Ervin warned that “[f]oreigners can come here as visitors and then have a child born here, and they would become immediately eligible for admission . . . .”<sup>86</sup> Such a change from previous law would be “unwise,” Senator Ervin cautioned,<sup>87</sup> because it would encourage foreign nationals who entered on temporary visas (or, presumably, without any visa at all) to use post-entry U.S.-citizen children to gain immigration benefits.

Responding to Senator Ervin, Senator Kennedy readily agreed, saying of Ervin’s warning, “That is right. I think [the provision allowing citizens to petition for parents] should go back as it was.”<sup>88</sup>

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81. Immigration and Nationality Act Amendments, Pub. L. No. 89-236, § 201(b), 79 Stat. 911, 911 (1965).

82. S. REP. NO. 89-748, at 12 (1965).

83. *Id.* at 14.

84. *Id.* at 13.

85. See 1965 Senate Judiciary Hearings, *supra* note 11, at 230–31, 270.

86. *Id.* at 231.

87. *Id.* at 230–31.

88. *Id.* at 231.

Kennedy ascribed the change to a “technical mistake in the drafting.”<sup>89</sup> Shortly thereafter, Assistant Attorney General Norbert Schlei testified before the Senate Judiciary Committee, echoing Senator Kennedy’s view that the change was a mere drafting “error”<sup>90</sup> and proposing the language in the statute today, requiring a U.S. citizen to be “at least 21 years of age” to sponsor parents.<sup>91</sup> Schlei affirmed Kennedy and Ervin’s understanding of the policy behind this language, explaining that it was necessary “to preclude an inadvertent grant of . . . immigrant status to aliens to whom a child is born while in the United States on a tourist visa.”<sup>92</sup> Senators Kennedy and Ervin would have been puzzled at DAPA’s award of immigration benefits like work authorization to foreign nationals who engaged in precisely the conduct that the age requirement for citizen sponsors was designed to prevent.

## 2. *Deterring unlawful presence*

The second leg of the deterrence stool—discouraging unlawful presence in the United States—is just as sturdy. In IIRIRA, Congress augmented deterrence of foreign nationals’ lingering in the United States without a legal status.<sup>93</sup> IIRIRA imposed bars on reentry for foreign nationals who remained in the United States unlawfully. Individuals who left the United States after having been unlawfully present between 180 days and one year were subject to a three-year bar on admission to the United States.<sup>94</sup> Congress sent an even starker message to foreign nationals who left the United States after having been unlawfully present for one year or more: they were subject to a *ten-year* bar.<sup>95</sup>

As the House Judiciary Committee report put it, foreign nationals who remained in the United States without a lawful status eroded the

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89. *Id.* at 230.

90. *Id.* at 270.

91. *Id.*

92. *Id.*

93. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

94. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2012).

95. *Id.* § 1182(a)(9)(B)(i)(II); see Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 361 (2005) (explaining that an immigrant who departs the country after one year of unauthorized stay is barred from receiving any immigration benefits for ten years).

foundations of immigration law and national sovereignty.<sup>96</sup> A chief goal of immigration law, the House report asserted, was the prompt processing of persons entitled to lawful status, and the “prompt exclusion or removal of those who are not so entitled.”<sup>97</sup> The House report identified individuals who came to the United States on a temporary visa (as students or tourists) and overstayed as a prime source of the problem.<sup>98</sup> The context of the House discussion makes it clear that foreign nationals who entered without inspection and then remained unlawfully were also targets of heightened enforcement.<sup>99</sup> Congress imposed the unlawful presence bars to deter foreign nationals from both entering the United States and remaining here without a lawful status.

Related INA provisions highlight Congress’s efforts to deter foreign nationals from remaining in the United States without a lawful status, even when those individuals had post-entry U.S.-citizen children. Under the INA, a foreign national who has entered the United States without being inspected, admitted, or paroled *cannot* “adjust” to the coveted LPR status.<sup>100</sup> As a practical matter, this means that a foreign national who entered the United States without inspection (like a substantial percentage of prospective DAPA beneficiaries) has *no chance* to acquire any lawful status unless that person first leaves the United States and applies for a visa at a U.S. consulate abroad. Then, Congress’s trap is sprung: once that person leaves, he or she is subject to the three- and ten-year bars discussed above. In other words, the foreign national who enters without inspection faces substantial obstacles to obtaining a legal status—obstacles that Congress deliberately placed in the path of persons who violated the immigration laws.<sup>101</sup>

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96. See H.R. REP. NO. 104-469, at 110 (1996) (recommending a “fundamental re-orientation of immigration policy” that would create an immigration system that serves the national interest, but also serves economic and humanitarian needs).

97. *Id.* at 111.

98. *Id.* at 114–16.

99. *Id.* at 116.

100. 8 U.S.C. § 1255(a).

101. The Supreme Court has recently observed that even *legal* immigration often “takes time.” *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2199 (2014). Congress has drafted the INA to place far more daunting obstacles in the path of unlawful entrants whose only prospect for legal status stems from a post-entry U.S.-citizen child. In individual cases involving hardship, immigration officials could grant “advance parole” to an unlawful entrant who would have to leave the United States pursuant to 8 U.S.C. § 1255(a) to adjust to LPR status and then would be faced with a ten-year bar on readmission. See 8 U.S.C. § 1255(a). In a case involving a

While there is a waiver available for the unlawful presence bars, the narrow scope of the waiver demonstrates that Congress rejected precisely the relief that DAPA seeks to provide. The waiver is only available to an immigrant who is the “spouse or son or daughter” of a U.S. citizen or LPR.<sup>102</sup> Parents of U.S. citizens and LPRs are *not* eligible.<sup>103</sup> Indeed, Congress changed the text of IIRIRA to harmonize it with the INA’s efforts to deter unlawful entrant parents of post-entry U.S.-citizen children from using their children to acquire a legal status. An early House version of the bill that eventually became IIRIRA had included parents of U.S. citizens and LPRs as persons eligible for the unlawful presence waiver.<sup>104</sup> However, the Conference Report and the statute itself changed the waiver’s scope, rendering parents of U.S.-citizen or LPR children ineligible unless they had another qualifying relative such as a U.S.-citizen or LPR “spouse or parent.”<sup>105</sup> The Department of Homeland Security (DHS) recently affirmed that interpretation.<sup>106</sup> Courts have regarded this kind of evidence as definitive proof that Congress disapproved of the remedy that it deleted.<sup>107</sup>

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foreign national who returned to his country of origin under a grant of advance parole to care for aged parents, the Board of Immigration Appeals (BIA) held that the foreign national’s trip did not constitute a “departure” from the United States that rendered him subject to the ten-year bar. *See* *Matter of Arrabally*, 25 I. & N. Dec. 771, 775–80 (2012). However, because Congress has restricted parole to case-by-case relief, immigration officials could not use advance parole in a categorical way to shield the approximately four million potential DAPA beneficiaries from the ten-year bar. *See infra* notes 154–56 and accompanying text (discussing Congress’s restrictions on parole).

102. 8 U.S.C. § 1182(a)(9)(B)(v).

103. The applicant for the waiver must also show that the refusal of admission to the applicant would result in “extreme hardship” to the citizen or LPR “spouse or parent” of the immigrant. *Id.*

104. *See* H.R. REP. NO. 104-469, at 226–27 (1996) (asserting that the ground for inadmissibility may be waived if refusal of admission would create extreme hardship to the lawfully resident spouse or parent).

105. H.R. REP. NO. 104-828, at 207–08 (1996) (Conf. Rep.).

106. *See* Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 535, 543 (Jan. 3, 2013) (to be codified at 8 C.F.R. 212) (noting that the “statute only permits a showing of extreme hardship to a spouse or parent as a basis for granting the waiver”).

107. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (holding that President Truman’s seizure of steel mills was not authorized by statute and observing that “Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency”).

### 3. *Eliminating unlawful entrants' U.S. employment*

Congress's treatment of unlawful immigrants' work in the United States reflects the same attention to the deterrence goals of the INA. Congress has consistently acknowledged that the chance to work in the United States was a "driving force" behind unlawful immigration.<sup>108</sup> IRCA authorized legalization for well over one million undocumented individuals, but did so only as part of a compromise that imposed sanctions on employers who hired undocumented workers.<sup>109</sup> In legislative history, IRCA's Senate sponsors expressly noted their belief that employer sanctions would deter future "[i]llegal immigration."<sup>110</sup> Highlighting this belief, Congress also stressed in the Senate Report that IRCA's legalization would be a "'one-time only' program."<sup>111</sup>

This congressional drive to counter the appeal of U.S. jobs for unlawful entrants was also evident ten years after IRCA, when Congress passed IIRIRA, which streamlined the employer verification process. The IIRIRA House report described U.S. jobs as "a primary magnet for illegal immigration."<sup>112</sup> The House report identified inadequate enforcement of IRCA's employer sanctions program as a cardinal reason for the "failure" of U.S. immigration policy.<sup>113</sup> Citing the "four million illegal aliens residing in the United States," the House report savaged the flaws in IRCA's employer sanctions program, castigating it as "ineffective in deterring both the hiring of illegal aliens and the illegal entry of aliens seeking employment."<sup>114</sup> Congress's response was not to weaken employer sanctions, but to strengthen the process by limiting the documents that could prove that a foreign national was authorized to work.<sup>115</sup> The Congress that reinforced employer sanctions in this fashion would have flatly rejected DAPA's blanket award of employment authorization to millions of unlawful entrants with no prospect of obtaining a legal status.

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108. See H.R. REP. NO. 104-469, at 108.

109. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360-61, 3365-68.

110. S. REP. NO. 99-132, at 16 (1985).

111. *Id.*

112. H.R. REP. NO. 104-469, at 126.

113. *Id.* at 110.

114. *Id.*

115. See *id.* at 128-29 (explaining that only twenty-nine documents may be used to establish identification and eligibility to work, and these documents are divided by statute and regulation into three categories).

## II. THE LIMITED SPHERE OF IMMIGRATION DISCRETION

For the past half-century, U.S. immigration law has featured liberalized statutory grants of legal status and a shrinking sphere of administrative discretion. Through much of the twentieth century, the immigration statute expressly authorized substantial administrative discretion. However, administrative discretion existed in the shadow of the restrictive national origin quota system that Congress had established in 1925.<sup>116</sup> In a kind of statutory quid pro quo, immigration officials exercised their discretion to admit individuals who would otherwise have been excluded by the narrow categories of enumerated status that Congress prescribed. In recent decades, Congress has substantially liberalized the enumerated forms of legal status available to immigrants. As a trade-off for that liberalization, Congress has cabined administrative discretion, recognizing that discretion outside of a limited sphere would undermine the contemporary framework of immigration law. Language on executive discretion in recent Supreme Court opinions must be understood against that backdrop. In stressing Congress's consistent efforts to curb the Executive Branch's discretion in granting immigration benefits, the account offered here critiques the skewed narrative of expansive executive discretion offered elsewhere.<sup>117</sup>

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116. See Chin, *supra* note 14, at 279–83 (explaining that the Immigration Act of 1924 provided for about 150,000 immigrant visas per year and these visas were awarded to a country “based on the number of American citizens who traced their ancestry to that nation based on the 1920 census”).

117. See Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 33 (asserting that the Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012) “consolidates tremendous immigration policymaking power in the executive branch”); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 474–76 (2009) (suggesting that the Supreme Court, in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), hinted at concurrent authority between the legislative and executive branches concerning the admissibility of aliens). The piece by Cox and Rodríguez is an important contribution to immigration scholarship. However, it relies too much on extrapolation from dicta in a handful of Supreme Court cases that upheld *statutes*. See *id.* at 474–76 (discussing *Knauff*). Cox and Rodríguez also point to President Truman's continuation of the Bracero Program for Mexican agricultural workers from 1948–1951. *Id.* at 485–90. However, the analysis of the Bracero Program's continuation unduly discounts the role of the Ninth Proviso of the Immigration Act of 1917, which furnished statutory authority for Truman's action. See *infra* notes 146–48 and accompanying text (discussing the Ninth Proviso); *infra* notes 142–44 and accompanying text (discussing the Bracero Program). Because of these flaws, Cox and Rodríguez overstated the role of free-standing executive discretion in immigration law. Cf. KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 26–

A. *Bifurcated Discretionary Regimes: Priorities and Benefits*

To understand contemporary discretion in immigration law, we should bifurcate discretion into enforcement *priorities* and affirmative *benefits*. Congress and the courts have accorded immigration officials substantial leeway in framing priorities. However, in recent years, Congress has repeatedly sought to limit discretionary benefits because of their adverse impact on deterrence. This subsection explains each in turn.

Priorities are internal guides for official discretion. Because officials have limited resources, they must set priorities on what kind of conduct to target first. The Supreme Court highlighted this largely tacit discretion in *Arizona v. United States*.<sup>118</sup> In exercising discretion regarding priorities, immigration officials may elect to forego removal proceedings or may terminate proceedings in certain cases, just as prosecutors pursue certain kinds of criminal wrongdoing.<sup>119</sup>

Officials establish discretionary priorities within certain operational limits. In issuing priorities for their own guidance, officials do not establish a formal application process for the targets they plan to forego. Nor do officials obligingly inform targets that official forbearance will last until a certain date and may be renewed thereafter.<sup>120</sup>

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28 (2013) (suggesting that prosecutorial discretion is broad but may be limited by Congress's power); Margulies, *supra* note 77, at 118, 127–28 (discussing Cox and Rodríguez's account of the Bracero Program).

118. 132 S. Ct. 2492, 2527 (2012).

119. For example, immigration authorities will elect not to pursue removal of an individual who has been apprehended and served with a notice to appear in immigration court if the individual does not fit a checklist of enforcement priorities. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel 4 (June 17, 2011) [hereinafter June 2011 Morton Memo], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (reciting a list of non-exhaustive factors, including childhood arrival, ties to the community, and person's criminal history); Memorandum from Doris Meissner, Comm'r, U.S. Immigration & Naturalization Serv., to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg'l & Dist. Counsel 7 (Nov. 17, 2000) [hereinafter Meissner Memo], available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00> (outlining factors in prosecutorial discretion, including "extreme youth or advanced age" of the alien). For a persuasive defense of this brand of discretion, see David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 183–86 (2012) ("Enforcement without a sense of proportion—or even of sensible administration in the real world of limited resources—will fail at restoring the rule of law in this fractious and troubled realm.").

120. See Margulies, *supra* note 77, at 114–16, 169–76 (discussing these provisions of DACA).



In criminal law, which provides our most familiar examples of prosecutorial discretion, a formalized application process and an expressly demarcated period of forbearance would clash with the paradigm in place. Prosecutors know that any use of discretion favorable to wrongdoers poses a problem familiar to students of insurance law: moral hazard. Moral hazard is an unintended consequence of insurance. It arises because individuals who know they will be held harmless for wrongdoing tend to do more of it.<sup>121</sup> Prosecutors who exercise discretion favorable to wrongdoers ex post therefore strive ex ante to keep prospective lawbreakers in the dark. Establishing an affirmative system that would allow wrongdoers to apply in advance for a fixed period of forbearance would effectively license that wrongdoing.

Consider the case of burglary. When an admitted burglar is youthful and the burglar's "take" is relatively modest, judges may not wish to sentence the offender to prison, and may look with favor on a plea bargain that reflects this sentiment.<sup>122</sup> However, it would be difficult to imagine prosecutors soliciting applications from known burglars for a "burglars' holiday" that would guarantee a specific period of immunity.<sup>123</sup>

In contrast, benefits are express, not merely tacit, advantages for which individuals apply in advance. If an application is successful, the recipient can reasonably assume that the benefit will last for a definite period of time. In immigration law, such affirmative benefits include permission to live and work in the United States. DAPA's benefits exacerbate the problem of moral hazard that inheres in any

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121. See Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1083 (2008) (noting that if insurance eases the penalties for misconduct, "insureds engage in more of that behavior"); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1406 (1999) (explaining moral hazard in corporate misconduct). See generally Baker, *supra* note 23, at 270–71 (discussing the theory of moral hazard).

122. See Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 274–75 (1987) (explaining that some tribunal judges felt uneasy imposing confinement in burglary cases because they observed that juries almost always sentenced first-time offenders to probation).

123. Members of the Senate Judiciary Committee and legal experts made similar points in connection with DAPA at a confirmation hearing for Attorney General nominee Loretta Lynch. See *Hearing on the Nomination of Loretta Lynch for U.S. Attorney General Before the S. Comm. on the Judiciary*, 113th Cong. (Jan. 29, 2015) (questioning by Sen. Mike Lee and Sen. Jeff Sessions and statements of professors Nicholas Quinn Rosenkranz and Jonathan Turley). In response to a question from Senator Sessions, Professor Rosenkranz criticized "giving [lawbreakers] permits" as "unheard of [in] traditional prosecutorial discretion." *Id.*

favorable exercise of enforcement discretion.<sup>124</sup> DAPA therefore clashes with repeated congressional efforts to reduce the moral hazard of discretionary immigration benefits. The following paragraphs trace the relationship between status and benefits from the former regime of restrictive grants of status and wide discretionary benefits that prevailed until the watershed 1965 Act to the modern regime of broader statutory grants of status and narrower discretion.

*B. A Short History of Shrinking Discretion Over Immigration Benefits*

From 1925 to 1965, Congress rigidly limited statutory grants of legal status by tying them to restrictive national origin quotas. Congress took this step to mark a retreat from the virtually unchecked immigration that characterized U.S. policy through the nineteenth and early twentieth centuries.<sup>125</sup> In the transition from largely unrestricted immigration to national origin quotas, Congress authorized administrative discretion that would leaven the harshness of the national origin quota system.

The Ninth Proviso of the Immigration Act of 1917<sup>126</sup> (“1917 Act”) is the best example from this period of broad, statutorily authorized executive discretion coinciding with narrow enumerated forms of legal status. In the Ninth Proviso, Congress empowered executive agencies to “control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission.”<sup>127</sup> Acting pursuant to this statutory authority, immigration officials

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124. In immigration enforcement, priorities that result in dismissing cases that have already been commenced raise fewer moral hazard issues than programs such as DAPA that invite applications from individuals not yet in the enforcement system. See June 2011 Morton Memo, *supra* note 119, at 5–6 (asserting that ICE prefers to exercise prosecutorial discretion early in enforcement proceedings to prevent unnecessary government spending). In the former situation, an individual receives relief only if he is *already* in removal proceedings. Typically, an undocumented alien will wish to avoid this situation. As a result, relief for individuals already in removal proceedings does not erode deterrence as significantly as do benefits for which an individual can apply in advance.

125. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1127–29 (1998) (describing the national origins quota system, established in 1924, which preferred certain nationalities over others and “permitted annual immigration of up to two percent of the number of foreign-born persons of a particular nationality in the United States as set forth in the 1890 census”—a much more strict quota than existed previously).

126. Pub. L. No. 64-301, § 3, 39 Stat. 874, 878.

127. *Id.*

granted temporary admission to agricultural workers,<sup>128</sup> refugees, and other foreign nationals.<sup>129</sup> The 1952 McCarran-Walter Act repealed the 1917 Act, and supplanted the Ninth Proviso with a provision that limited the President's discretion to admission of aliens who could not have ascertained their inadmissibility "by the exercise of reasonable diligence."<sup>130</sup>

The passage of the 1965 Act liberalized enumerated forms of legal status by abolishing national origin quotas, but also sought to close the "back door" of discretionary and unauthorized admissions.<sup>131</sup> It was not successful in the latter respect. Through the 1980s, the Executive Branch granted EVD to immigrants, allowing them to stay for protracted periods in the United States without a legal status.<sup>132</sup> Immigration officials also freely granted parole to large categories of foreign nationals on a number of occasions.<sup>133</sup>

In the 1990s, Congress rolled back immigration officials' discretion. IIRIRA limited EVD<sup>134</sup> and imposed limits on parole.<sup>135</sup>

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128. See R- L-, 1 I. & N. Dec. 624, 625 (1943) (discussing the "blanket waiver of . . . inadmissibility" under the Ninth Proviso for an agricultural worker who had previously been ordered deported).

129. See Honorable J. Howard McGrath, Att'y Gen. of the U.S., Address at the Savannah Bar Association 10 (Feb. 14, 1951), available at <http://www.justice.gov/sites/default/files/ag/legacy/2011/09/12/02-14-1951.pdf> (noting the permitted exercise of authority under the Ninth Proviso to admit an immigrant who would otherwise have been inadmissible as a member of the totalitarian party).

130. See McCarran-Walter Act, Pub. L. No. 82-414, § 211(c), 66 Stat. 163, 181 (1952); *Cadby v. Savoretti*, 256 F.2d 439, 441 (5th Cir. 1958) (discussing the repeal of the INA of 1917). The McCarran-Walter Act, including this narrowing of administrative discretion, was enacted over President Truman's veto. Office of the Historian, *Milestones 1945–1952: The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. DEP'T STATE, <https://history.state.gov/milestones/1945-1952/immigration-act> (last visited May 11, 2015).

131. See John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 828–30 (1982) (discussing the goals of 1965 Act).

132. See Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 152, 157–58 (1986) (explaining that no statute or regulation explicitly allows the Executive Branch to grant EVD to all nationals of a specific country but that the practice began in 1960 when the INS granted EVD status to Cubans).

133. See Cox & Rodríguez, *supra* note 117, at 502–05 (discussing how, prior to passage of the 1980 Refugee Act, the Executive Branch allowed a large number of Haitian and Cuban refugees to enter for humanitarian purposes).

134. See 8 U.S.C. § 1229c(a)(2)(A) (2012) (providing that permission for voluntary departure in lieu of removal "shall not be valid for a period exceeding 120 days"); *Barroso v. Gonzales*, 429 F.3d 1195, 1206 (9th Cir. 2005) (asserting that automatic tolling does not extend the amount of time granted for voluntary departure); *cf.* Inspection and Expedited Removal of Aliens; Detention and Removal

Since then, apart from the Obama administration's DACA program, which is substantially larger than any past program and also clashes with the INA,<sup>136</sup> administrative discretion has fallen into three limited categories. First, immigration officials have granted relief that is either expressly authorized by Congress or ancillary to statutory grants of status, for example, by allowing migrants to stay in the country to submit applications for a status that would be available within a reasonable time period.<sup>137</sup> Second, Congress has acquiesced in a small number of grants of relief based on hardships such as extreme youth, age, or infirmity.<sup>138</sup> Third, the Executive Branch has provided relief tailored to emergencies abroad such as government repression or natural disasters.<sup>139</sup> Within these carefully demarcated categories, executive officials have had broad discretion to grant relief; however, executive officials did not seek—until DACA—to expand relief *beyond* those categories. Moreover, Congress has never authorized or acquiesced in a blanket award of benefits to a large group of foreign nationals, such as the 4 million prospective DAPA

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of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,324 (Mar. 6, 1997) (codified at scattered sections of 8 C.F.R.) (noting that under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), “for the first time, there are statutory restrictions limiting the time [to 120 days] for which voluntary departure may be authorized”). Prior to these statutory changes, immigration officials had freely awarded grants of EVD, which had sometimes entailed allowing foreign nationals to remain in the United States for years without any hope of obtaining a legal status. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,324. (acknowledging that, “[t]oo often, . . . voluntary departure has been sought and obtained by persons who have no real intention to depart”). IIRIRA halted this practice, although Congress continued to permit grants of TPS to foreign nationals facing exigent circumstances abroad. *See* 8 U.S.C. § 1254a(b)(1).

135. 8 U.S.C. § 1182(d)(5)(A).

136. *See* Margulies, *supra* note 77, at 111, 122–23 (explaining that DACA establishes “a system of blanket immigration relief”).

137. *See infra* Part II.C (describing the Bracero Program, parole in retreat, cancellation of removal, and stays of removal as examples of expressly authorized discretion).

138. *See* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 7–9 (2012) [hereinafter Wadhia, *Sharing Secrets*] (discussing the background of deferred action); Wadhia, *supra* note 20, at 261–62 (recognizing that a person's medical condition influenced grants of deferred action, especially when coupled with separation from family); Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 48 (2013) (explaining that U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS) released documents related to prosecutorial discretion in cases involving widows and widowers of U.S. citizens and their unmarried children under twenty-one years old).

139. OLC Opinion, *supra* note 2, at 16.

recipients, who have no prospect of obtaining legal status in a reasonable period of time.

*C. Expressly Authorized Discretion*

Through much of the twentieth century, Congress delegated broad power to the Executive Branch to admit foreign nationals who were otherwise inadmissible. The Ninth Proviso of the Immigration Act of 1917 provided authority for the admission of foreign agricultural workers, and parole authority under the INA permitted the admission of thousands of refugees, including Hungarians fleeing Soviet repression after the ill-fated Hungarian Revolution in 1956.<sup>140</sup> This statutorily authorized discretion is not an apt precedent for DAPA, which lacks such authorization. In addition, Congress has narrowed many forms of expressly authorized discretion, suggesting its wariness about executive freelancing.

*1. Expressly authorized discretion and the Bracero Program*

Some have claimed that the Bracero Program's continuation by President Truman between 1948 and 1951 is precedent for DAPA.<sup>141</sup> However, this argument unduly discounts the clear statutory authority for President Truman's action. That authority sets President Truman's action apart from DAPA.

The Bracero Program, started in 1942, imported Mexican agricultural workers to cope with labor shortages during World War II.<sup>142</sup> In addition to the admission of Mexican workers who were in the United States on a seasonal basis, the program entailed government transportation of the workers to growers and

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140. See JOYCE VIALET, CONG. RESEARCH SERV., 44-151, U.S. IMMIGRATION LAW AND POLICY: 1952-1979: A REPORT PREPARED AT THE REQUEST OF EDWARD M. KENNEDY, CHAIRMAN, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, UPON THE FORMATION OF THE SELECT COMMISSION ON IMMIGRATION & REFUGEE POLICY 18 (1979), reprinted in 3 IMMIGR. & NAT'LITY L. REV. 95, 114 (1980) (explaining that as a result of the Hungarian revolution in 1956, President Eisenhower offered asylum to 21,500 Hungarians and that 6500 would receive visas under the Refugee Relief Act).

141. See Cox & Rodríguez, *supra* note 117, at 485-90 (asserting—without sufficient attention to the Ninth Proviso, executive actions, and definitive historical accounts—that President Truman believed that he had unilateral authority to establish a guest worker program).

142. KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 19 (1992); RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 45 (1971); PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 3-4 (1951); George O. Coalson, *Mexican Contract Labor in American Agriculture*, SW. SOC. SCI. Q., Jan. 1952, at 228, 232; Gerald P. Lopez, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1766-69 (2012).

government centers where the workers were recruited.<sup>143</sup> The program became controversial in some quarters because workers were often tied to particular growers, lacked bargaining power, and worked in substandard conditions. In 1947, after the end of the war, Congress decided to wind down government recruitment of foreign agricultural laborers.<sup>144</sup> However, the Truman administration continued to admit Mexican workers based on the pleas of growers who needed labor to harvest crops.<sup>145</sup>

The Truman administration's move was not a free-floating exercise of executive discretion, but an action pursuant to statutory authority found in the Ninth Proviso<sup>146</sup> that was heavily influenced by consultation with Congress. In granting immigration officials the discretion to admit "otherwise inadmissible aliens," the Ninth Proviso gave those officials authority to react to labor shortages or other pressing circumstances.<sup>147</sup> Moreover, as a leading scholar of the Bracero Program noted, the House Agriculture Committee actively invited the continuation of the program. The Agriculture Committee convened a hearing to encourage dialogue between federal administrators and growers on how to maintain the program, with the Committee announcing that it wished to "make available an

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143. See CALAVITA, *supra* note 142, at 20 (explaining that the United States paid for transportation from Mexican recruitment centers to places of employment); CRAIG, *supra* note 142, at 51 (contending that the Bracero Program created a unique bargaining system because the U.S. government functioned like an employer's representative and the Mexican government functioned like a labor union representative).

144. CALAVITA, *supra* note 142, at 25.

145. *Id.*

146. CRAIG, *supra* note 142, at 53; see PRESIDENT'S COMM'N ON MIGRATORY LABOR, *supra* note 142, at 4; Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 426 (2005) (describing the Ninth Proviso as an "escape clause"). While Cox and Rodríguez asserted that the Ninth Proviso did not authorize continuation of the program, they did not recognize that Congress's withdrawal of funding addressed only the government's role in actively *recruiting* foreign workers, not the admission of those workers. See Cox & Rodríguez, *supra* note 117, at 487-91 (contending that although the statutory authorization for the Bracero Program expired, the admission of temporary workers only stopped for a short time). After Congress cut funding for government recruitment, growers took over that task. See CALAVITA, *supra* note 142, at 27 (explaining that the government-to-government contracts that established the Bracero Program were replaced by direct grower-bracero work agreements).

147. Immigration & Nationality Act of 1965, Pub. L. No. 64-301, 39 Stat. 874, 878; see CALAVITA, *supra* note 142, at 27 (noting that the main concern with the extension of the Bracero Program was the growers' acceptance of the program).

ample labor supply for the producers of crops which require the foreign labor, the stoop type of labor.”<sup>148</sup>

While President Truman’s move did receive some congressional criticism, that criticism had little impact on Congress’s response. Criticism came only from *opponents* of the legislative reauthorization of the program in 1951.<sup>149</sup> Supporters of the legislation, backed by growers, were not troubled by Truman’s move, and secured the bill’s passage.<sup>150</sup> On this view, authority for President Truman’s 1948–1951 continuation of the program stemmed not only from the Ninth Proviso, but also from an invitation by Congress and eventual legislative ratification of Truman’s move.

## 2. *Parole in retreat*

While the Executive Branch used parole authority aggressively through the early 1990s to admit categories of foreign nationals fleeing repression abroad,<sup>151</sup> Congress came to view this authority as unduly broad. The statute had formerly permitted the Attorney General to grant parole to any foreign national “for emergent reasons or for reasons deemed strictly in the public interest.”<sup>152</sup> This language itself emerged in 1980 from congressional displeasure over expansive uses of discretion by the Executive Branch.<sup>153</sup> However, the House Judiciary Committee complained in 1996 that this limitation was insufficient. According to the Judiciary Committee,

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148. CALAVITA, *supra* note 142, at 26 (internal quotation marks omitted).

149. See 97 CONG. REC. 4974 (1951) (quoting, in the minority report opposing reauthorization, the Presidential Commission’s criticism of some aspects of the program). The relative ease of the Bracero Program’s reauthorization illustrates the hyperbole in Professors Cox and Rodríguez’s claim that the Bracero Program triggered a “significant power struggle” between Congress and the Executive Branch. See Cox & Rodríguez, *supra* note 117, at 490. There was no inter-branch struggle but, rather, merely a one-sided confrontation *within* Congress between a minority favoring U.S. organized labor and a majority eager to import cheaper Mexican workers. Perhaps, viewed through the lens of today’s perspective on labor and immigration policy, Congress should have viewed Truman’s conduct more skeptically. However, a majority of legislators declined to do so, undercutting the thesis advanced by Professors Cox and Rodríguez.

150. See CRAIG, *supra* note 142, at 71–72 (explaining the interests surrounding the codification of the Bracero Program).

151. Cox & Rodríguez, *supra* note 117, at 492–99 (detailing the refugee crises occurring off the coast of Florida that led many thousands of immigrants to enter the United States without authorization).

152. 8 U.S.C. § 1182(d)(5)(A) (2012).

153. Cox & Rodríguez, *supra* note 117, at 503.

parole authority was intended to be used on a case-by-case basis to meet specific needs, and not as a supplement to Congressionally-established (sic) immigration policy. In recent years, however, parole has been used increasingly to admit entire categories of aliens who do not qualify for admission under any other [immigration] category.<sup>154</sup>

In light of these concerns, the House Judiciary Committee concluded that “specific limitations on the Attorney General’s discretion are necessary.”<sup>155</sup> Acting on this sentiment, IIRIRA provided that parole would be available “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”<sup>156</sup> As a result, even champions of executive discretion acknowledge it is “far from clear . . . today” that the Executive Branch continues to have the power it did before Congress limited parole authority through IIRIRA.<sup>157</sup>

### 3. *Narrowing cancellation of removal*

Statutory provisions for the exercise of discretion to permit foreign nationals to either obtain or retain LPR status also reflect Congress’s accelerating unease with discretion. The INA’s cancellation of removal (“cancellation”) provisions illustrate this point. I discuss each of these provisions in turn.

One form of cancellation was, until IIRIRA, called suspension of deportation.<sup>158</sup> The term “suspension of deportation,” was somewhat misleading because approval of a petition provided not merely a reprieve from removal, but also a grant of permanent legal status. To reach this coveted outcome, foreign nationals who had unlawfully entered or remained in the United States confronted a daunting obstacle course. They had to be physically present in the United States for at least seven years and deportation had to cause “extreme hardship” to the applicant.<sup>159</sup> An applicant who met this test could receive LPR status.

In IIRIRA, Congress made this obstacle course even more rigorous. Congress increased the period of time required to ten years.<sup>160</sup> In

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154. H.R. REP. NO. 104-469, at 140 (1996).

155. *Id.*

156. 8 U.S.C. § 1182(d)(5)(A); *see id.* § 1182(d)(5)(B) (requiring a showing of “compelling reasons in the public interest with respect to [the] particular alien” whom the Executive Branch wishes to parole into the United States).

157. Cox & Rodríguez, *supra* note 117, at 504–05.

158. 8 U.S.C. § 1229b(b)(1).

159. *See INS v. Jong Ha Wang*, 450 U.S. 139, 144–46 (1981) (defining “extreme hardship”).

160. 8 U.S.C. § 1229b(b)(1)(A).



addition, to curb immigration officials' discretion, Congress required that a foreign national show "exceptional and extremely unusual hardship" (not merely "extreme hardship").<sup>161</sup> Moreover, the victim of the hardship could not be the applicant; it now had to be a current U.S. citizen or LPR. These steps made post-IIRIRA cancellation extraordinarily difficult to obtain. To underscore this difficulty, Congress limited immigration officials to a mere 4,000 grants in any fiscal year.<sup>162</sup>

The other form of cancellation illustrates an analogous pattern of curbing discretion.<sup>163</sup> Prior to IIRIRA, LPRs who had engaged in criminal conduct in the United States that made them deportable were often eligible for relief under then INA § 212(c), which allowed immigration officials to exercise discretion to permit most applicants to keep their LPR status. However, in IIRIRA, Congress repealed § 212(c).<sup>164</sup> Congress continued discretionary relief from removal for an LPR who had committed a crime when that crime was not an "aggravated felony."<sup>165</sup> To limit this relief, IIRIRA also vastly expanded the types of crimes considered aggravated felonies, which now include drug trafficking, theft offenses, fraud above \$10,000, and violence against either persons or property.<sup>166</sup> In one fell swoop, Congress radically narrowed the ambit of discretion for LPRs who had engaged in criminal conduct in the United States.

Many observers have regarded Congress's measures as harsh.<sup>167</sup> Indeed, the Supreme Court has on more than one occasion stepped in to mitigate the harshness of IIRIRA.<sup>168</sup> The Court correctly

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161. *Id.* § 1229b(b)(1)(D).

162. *Id.* § 1229b(e)(1).

163. *See id.* § 1229b(a) (providing strict categories for cancellation of removal for certain permanent residents, including retaining LPR status for at least five years, continuously residing in the United States for seven years after receiving LPR status, and having no aggravated felony convictions).

164. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597.

165. 8 U.S.C. § 1229(a)(3).

166. *See id.* § 1101(a)(43) (listing all meanings of "aggravated felony").

167. *See* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1698 (2009) (observing that relief from the harshness of removal provisions is "so circumscribed that it currently plays a role only at the margins").

168. *See* *Leocal v. Ashcroft*, 543 U.S. 1, 11-13 (2004) (holding that drunk driving was not a "crime of violence" and hence not an aggravated felony); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 565 (1990) (arguing that the Supreme Court has refined statutory interpretation by affording a measure of protection to aliens in order to temper the harshness of immigration law).

interpreted IIRIRA, and Congress's critics correctly identified the need to ameliorate the statute's harsh effects. That very harshness, however, reinforces Congress's emphatic rejection of broad exercises of discretion that aided either unlawful immigrants or LPRs who had committed crimes. As we shall see, Congress expressly *expanded* discretion only for unlawful immigrants with a colorable claim to an enumerated legal status.

4. *Stays of removal ancillary to legal status*

Since 1996, Congress has expressly expanded discretion only when the exercise of such discretion was ancillary to an enumerated grant of legal status. The forms of enumerated status bolstered by the availability of discretionary relief all entailed a foreign national's suffering of grievous intentional harm. In each case, the discretionary relief appeared to reflect Congress's judgment that applicants for such forms of status had suffered enough, and that removal while an award of status was pending would be inhumane.

Consider applicants for U and T visas, which are awarded respectively to individuals who have been victims of crime generally or human trafficking in particular.<sup>169</sup> Under the INA, an applicant for either status who has made out a "prima facie case for approval" is eligible for a stay of removal that will last until the applicant has actually received the visa.<sup>170</sup> Without this relief, the limits on the number of visas available in a given year for each status would result in the removal of persons who met the substantive standard and were "wait[ing] in line."<sup>171</sup> The suffering that gave rise to the individual's substantive eligibility would make removal in such circumstances manifestly inhumane. Moreover, the provision of relief from removal served Congress's policy goals: it encouraged vulnerable people to apply for these forms of enumerated status and facilitated agency adjudication of the substantive eligibility question, which an applicant's removal to a foreign country would disrupt.<sup>172</sup>

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169. 8 U.S.C. § 1101(a)(15)(T)(i)(I), (U)(i)(I).

170. *Id.* § 1227(d)(1).

171. Noferi, *supra* note 34.

172. *See* *Nken v. Holder*, 556 U.S. 418, 426–27 (2009) (explaining that the ability to grant a stay of removal is rooted in historical practice and facilitates orderly appellate review of removal orders). Congress provided similar relief for certain victims of violence against women, ensuring that individuals who as children had been abused by a U.S. citizen or LPR parent would not be removed if they became adults while their applications for relief were pending. *See* 8 U.S.C. § 1154(a)(1)(A)(iv), (a)(1)(D)(i)(II), (a)(1)(D)(i)(IV).

*D. A Bridge to Enumerated Forms of Status: The Family Fairness Program*

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,<sup>173</sup> this analogy is inapposite. Family Fairness was ancillary to enumerated grants of status and far smaller than DAPA. Moreover, Congress ratified Family Fairness within a short period in the Immigration Act of 1990—a prospect that is almost certain to elude DAPA, which has already generated substantial congressional opposition.

First and most importantly, Family Fairness was ancillary to Congress's grant of legal status to millions of undocumented persons in IRCA. Family Fairness started in the Reagan administration, when immigration officials confronted a wrinkle caused by the 1986 legalization: Congress had legalized several million undocumented people who had entered the United States by 1982 but did not grant a similar legal status to the spouses and children of IRCA beneficiaries. As a result, these spouses and children were still vulnerable to deportation.<sup>174</sup> However, the spouses and children of IRCA beneficiaries had a pathway to legal status that was more direct than the tangled route that DAPA recipients must traverse.

While Congress declined to provide immediate legalization to these close relatives of IRCA beneficiaries, it acknowledged that the ordinary operation of the INA made spouses and children of LPRs *eligible* for a grant of legal status.<sup>175</sup> Only a minor question of timing remained.<sup>176</sup> Once IRCA beneficiaries gained LPR status, for which they were eligible within eighteen months of receiving their IRCA approval, spouses and children would receive a second preference in the yearly allocation of family-based visas established by the INA.<sup>177</sup> The State Department estimates that second preference visa applicants typically have to wait between one and a

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173. Noferi, *supra* note 34 (citing past Republican administrations that relied on executive action to spur more family-friendly action concerning immigration).

174. *Id.*

175. See S. REP. NO. 99-132, at 4 (1985) (citing to an increase in the “immediate relatives” category in the United States because under “present law” there were no limits for this kind of family unification).

176. The Senate Judiciary Committee Report 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.” *Id.* at 16.

177. 8 U.S.C. § 1153(a)(2)(A) (authorizing immigrant visas for “spouses or children” of LPRs).

half to two years for their applications to become “current.”<sup>178</sup> In other words, noncitizen spouses and children of IRCA beneficiaries might wait only three and a half years from the date of an IRCA approval for their visas.<sup>179</sup>

Given the relatively short waiting time for a spouse or child’s receipt of a visa, an immigration official assessing enforcement priorities in the ordinary course of business might approve relief from removal.<sup>180</sup> The Reagan administration institutionalized this practice by making deferred action available if those relatives could show compelling circumstances.<sup>181</sup> By May 1989, as Immigration and Naturalization Service (INS) Commissioner Alan C. Nelson told the House Subcommittee on Immigration, immigration officials had issued blanket approvals for deferred action for “young children” of IRCA beneficiaries.<sup>182</sup>

Leading members of Congress urged further liberalization of this policy. In the 1989 hearing, Representative Bruce Morrison, the chair of the House Subcommittee on Immigration, questioned the wisdom of “having enforcement resources directed at [IRCA beneficiaries’ immediate relatives], . . . the class of people we generally try to make it easy to have join their family members.”<sup>183</sup> Another leading legislator, Representative Howard Berman of the House Subcommittee, praised the “creative ways” that INS had found to address the issue of removal of relatives that Congress had “wanted [INS] to deal with.”<sup>184</sup> INS Commissioner Nelson acknowledged that

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178. See *Visa Bulletin for December 2014*, U.S. DEP’T STATE (Dec. 2014), <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-december-2014.html> (noting that January 2013 visa applications for second preference beneficiaries from Mexico were current in December 2014, meaning that these applicants could enter the United States).

179. While waiting times can vary, other provisions of the INA supplied a six and a half year ceiling on a spouse or child’s wait. Five years after receiving LPR status, an immigrant can apply for naturalization and become a U.S. citizen. At that time, a spouse or child of the immigrant is considered an “immediate relative” entitled to admission without a waiting period. 8 U.S.C. § 1151(b)(2)(A)(i).

180. Admittedly, such relief would become increasingly likely as the sponsor of the foreign national got closer to U.S. citizenship.

181. See Noferi, *supra* note 34 (discussing how the Reagan administration provided relief for entire families as opposed to simply children).

182. See *Immigration Reform and Control Act of 1986 Oversight: Hearing Before the Subcomm. on Immigration, Refugees, and Int’l Law of the H. Comm. on the Judiciary*, 101st Cong. 459 (1989) [hereinafter *IRCA Oversight Hearing*] (statement of Alan C. Nelson, INS Comm’r).

183. *Id.* at 463 (statement of Rep. Bruce Morrison).

184. *Id.* at 479 (statement of Rep. Howard Berman).

legislators seeking to keep families together had raised “a legitimate issue.”<sup>185</sup> In response, Morrison invited Nelson to submit a list of IRCA reforms including deferred action.<sup>186</sup> Morrison’s invitation signaled that Congress would applaud INS’s use of discretion in favor of IRCA beneficiaries’ immediate relatives.

President George H.W. Bush’s administration heard leading legislators’ pleas and further liberalized the standard, making deferred action available to all spouses and children of IRCA beneficiaries.<sup>187</sup> That grant of deferred action included relief from removal and work authorization while spouses and children of IRCA beneficiaries waited for their visas to become current. Shortly after the McNary announcement, Congress passed the Immigration Act of 1990<sup>188</sup> (“1990 Act”), which expressly prohibited the removal of spouses and children of IRCA beneficiaries who had entered the United States as of 1988 and made them eligible for work authorization.<sup>189</sup> *All* of the relief provided under both Family Fairness and the 1990 Act was ancillary to legal status that would be available to recipients within a reasonably short period *in the ordinary course of immigration law*.

In addition to being ancillary to Congress’s grant of legal status to IRCA beneficiaries, the Family Fairness program was modest in scope. As of 1989, only 10,644 people had applied for relief under the Reagan program.<sup>190</sup> In 1990, new INS Commissioner Gene McNary predicted that the expanded Family Fairness program would assist approximately 100,000 spouses and children of IRCA beneficiaries.<sup>191</sup>

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185. *Id.* at 464 (statement of Alan C. Nelson, INS Comm’r).

186. *Id.*

187. McNary Memo, *supra* note 19, at 164.

188. Pub. L. No. 101-649, 104 Stat. 4978.

189. *Id.* § 301(a).

190. *IRCA Oversight Hearing*, *supra* note 182, at 403 (statement of Alan C. Nelson, INS Comm’r).

191. The OLC Opinion erroneously asserted that “Family Fairness” deferred the deportation of 1.5 million people. See OLC Opinion, *supra* note 2, at 14 (stating that the Family Fairness program “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”). President Obama has spoken about this misleading statistic. See “*This Week*” Transcript: *President Obama*, ABC NEWS (Nov. 23, 2014, 11:06 AM) <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.”). Journalists analyzing the Family Fairness program’s relevance to

In sum, the Ronald Reagan and George H.W. Bush deferred action programs were a bridge to a statutory grant of status in two ways. First, they stemmed from IRCA's vast legalization initiative. Congress, in enacting IRCA, had already dealt with the biggest problem posed by immigration reform then and now: granting legal status to a large group of undocumented adults. Once Congress made it over that hump, a grant of lawful status to beneficiaries' spouses and children was principally a matter of timing. Second, deferred action for this group of dependents resembled similar action taken for non-IRCA LPR sponsors whose spouses and children would be eligible for an immigrant visa within a bounded period. In both the IRCA and ordinary immigration context, deferred action for relatives of LPRs eliminated the hardship and disruption caused by deporting relatives who could within a discrete period claim a legal status.

In contrast with Family Fairness, DAPA offers work authorization and relief from removal to a huge group of foreign nationals with a long and uncertain route to legal status. Recall that unlawful entrants with post-entry U.S.-citizen children cannot even *apply* for an immigrant visa until their children turn twenty-one.<sup>192</sup> For DAPA recipients who are parents of very young U.S.-citizen children, that could entail a wait of over twenty years. In addition, a foreign national who has been unlawfully present in the United States for a year or more is subject to the ten-year bar, and so must spend ten of

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DAPA have noted the inaccuracy of this claim. See Glenn Kessler, *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> (citing statements from former Immigration and Naturalization Service (INS) Commissioner McNary, who 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"). In fact, by October 1, 1990, INS had received only 46,821 applications. *Id.* While some higher estimates of potential Family Fairness recipients were floated at the time, former officials looking back at those estimates viewed them as puffery, perhaps calculated to expand INS's budget. See *id.* (referencing a retired career official, who explained that internally, "estimates were routinely inflated" to obtain necessary resources because the agency, then-part of the Justice Department, was often "short-changed"). Legislators would have been far more likely to rely on statistics of actual participation provided by INS. See *IRCA Oversight Hearing*, *supra* note 182, at 403 (referring to the Special Agricultural Worker Program, former Commissioner Nelson provided the specific number of applications filed but qualified this number by testifying that INS must investigate fraudulent applications, which would lower the final number).

192. 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

those years *outside* the United States.<sup>193</sup> DAPA recipients who do not wish to leave the United States for ten years and live apart from minor children who remain here may have to wait *thirty years* to be eligible for LPR status. That combination of protracted waiting time and prolonged enforced absence from the United States erects materially greater barriers to legal status than the short waiting period required of the spouses and children of IRCA beneficiaries. Compounding the distinctions between DAPA and Family Fairness, DAPA also offers work authorization and relief from removal to parents of LPRs, who have *no* ability under current law to petition for a visa.<sup>194</sup> In its opinion supporting DAPA's legality, OLC breezily touts potential DAPA beneficiaries' "prospective entitlement to lawful immigration status."<sup>195</sup> Given the sadly remote prospects for this cohort, OLC might as well have claimed that the narrator in The Beatles' classic ballad of anguished absence, "The Long and Winding Road," will promptly find his beloved conveniently located in an apartment down the hall. The Beatles' narrator was hopeful despite the odds; Congress has deliberately given prospective DAPA recipients little reason for analogous aspirations. That legislative choice is regrettable, but it is Congress's to make.

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193. *Id.* § 1182(a)(9)(B)(i)(II). Because a DAPA recipient must have been physically present in the United States for at least five years, the vast majority of potential DAPA beneficiaries will be subject to the ten-year bar.

194. *See id.* § 1153(a) (excluding parents of LPRs among family members eligible for immigrant visas).

195. OLC Opinion, *supra* note 2, at 29. Despite this unsupported optimism, even OLC acknowledges that DAPA would "likely not permit all [recipients] to remain together with their children for the entire duration of the time until a visa is awarded," assuming that the children stayed in the United States and the recipients had to leave because they had entered without being "inspected and admitted or paroled into the United States." *Id.* at 29 n.14 (internal quotation marks omitted) (citing 8 U.S.C. § 1255(a)). However, OLC *vastly understated* the percentage of DAPA recipients who would face this obstacle to legal status. A substantial percentage of undocumented persons have entered the United States without inspection. This percentage rises to over *ninety percent* for unlawful immigrants from Mexico. Virtually all of these immigrants would have to leave the United States to apply for LPR status, and virtually all would then be subject to the ten-year bar. *See* Douglas S. Massey & Fernando Riosmena, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 294, 304 (2010) (noting that "well over 90 percent of Mexican migrants simply crossed the border without inspection rather than entering with a visa and then violating its terms by staying too long"). Despite this considerable understatement by OLC of the barriers facing DAPA recipients, OLC's acknowledgment of the problem's existence suggests the distance between DAPA and the INA.

*E. Hardship-Based Deferred Action*

In the individual setting, immigration officials have also granted deferred action in a relatively small number of hardship cases. These cases typically include the extremely young, extremely old, or extremely infirm.<sup>196</sup> For example, immigration officials might grant deferred action in the case of an elderly foreign national suffering from Alzheimer's disease. While Congress has never expressly authorized deferred action in such cases, the exercise of discretion in cases of severe hardship does not undermine the statutory framework. Individuals who are very young, very old, or infirm are few and far between, so granting them relief does not adversely affect the deterrence that Congress sought to build into the INA.<sup>197</sup> Moreover, by definition, most recipients of such individualized discretion do not require work authorization and cannot take away jobs from citizens or LPRs—the very young are too young to work, the very old too old, and the infirm have physical or mental challenges that make work impossible. Granting deferred action in such cases does not present the economic risks that Congress associated with wide access of undocumented persons to the U.S. labor market. Hardship-based discretion is therefore not an apt analogy for DAPA.

*F. Dicta in Supreme Court Cases Does not Authorize DAPA*

OLC and supporters of DAPA point to language in two Supreme Court opinions extolling prosecutorial discretion in immigration law.<sup>198</sup> Reading this language broadly may create the impression that DAPA falls within immigration officials' ambit of discretion. However, the language cited does not expand the overall scope of congressional delegation to immigration officials, which occurs only in the carefully cabined areas discussed above. Read in context, the

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196. See Wadhia, *Sharing Secrets*, *supra* note 138, at 33–34; Wildes, *supra* note 69, at 830–31 (listing the factors and number of cases where each factor was determinative).

197. Wildes, *supra* note 69, at 831 (pointing out that a third of the deferred action cases were granted on the basis of extreme hardship).

198. See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (noting “broad discretion exercised by immigration officials”); *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 483–84 (1999) (noting that “[a]t each stage [of the removal process] the Executive has discretion to abandon the endeavor . . . in 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”); see also OLC Opinion, *supra* note 2, at 5 (discussing the broad discretionary power granted to immigration officials as found in *AADC* and *Arizona*).



language in each opinion is dicta dealing with enforcement *priorities*, not with the blanket award of *benefits*.

The Supreme Court's decisions protect executive discretion in setting enforcement priorities against incursions by two groups that could undermine the immigration law framework: migrants seeking a more formal mechanism for discretionary decisions that would result in more relief but elongate the removal process, and individual state governments seeking broader and less discerning enforcement that would drain federal resources or trigger conflicts with foreign nations. The Court's decisions protected executive discretion over priorities from such external threats, but did not expand discretion over categorical awards of benefits.

Consider the context of *Reno v. American-Arab Anti-Discrimination Committee (AADC)*,<sup>199</sup> in which the Court held that Congress could bar judicial review of individual decisions to commence deportation proceedings.<sup>200</sup> The case dealt with *expressly delegated* discretion—Congress's power to insulate the executive decision to start the removal process from a foreign national's request for judicial review.<sup>201</sup> The plaintiffs in *AADC*, who were foreign nationals whom immigration officials sought to deport, had argued that the INA authorized judicial review of decisions to *initiate* deportation proceedings prior to entry of a final administrative order of removal.<sup>202</sup> Justice Scalia, in his opinion for the Court, viewed the

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199. 525 U.S. 471 (1999).

200. *Id.* at 485, 487–88, 492.

201. 8 U.S.C. § 1252(g) (2012); *AADC*, 525 U.S. at 477–78.

202. See *AADC*, 525 U.S. at 479–80 (arguing that prior to an entry of a final order of removal, constitutional claims must be reviewable by a court); cf. David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 GEO. IMMIGR. L.J. 363, 365, 370–75 (2000) (discussing benefits of the *AADC* decision, including greater efficiency and enabling the exercise of discretion in an alien's favor without fear of triggering the formal model that would ultimately hamper administrative decision making); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 319–20 (2000) (discussing concerns that drove the *AADC* decision, including worry that forcing the government to litigate reasons for starting removal proceedings could reveal sensitive national security information). This same concern with avoiding undue delay in removal proceedings drove earlier decisions that regarded deferred action as discretionary. See, e.g., *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987) (denying judicial review sought by an alien of an official decision to proceed with deportation); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (granting summary judgment that denied review sought by the alien); *Pasquini v. Morris*, 700 F.2d 658, 659 (11th Cir. 1983) (denying the alien's petition for review of INS's decision to deny his application for a deferred action status); cf. *Perales v. Casillas*, 903 F.2d 1043, 1047, 1053 (5th Cir. 1990) (vacating an injunction

potential for such piecemeal litigation as antithetical to Congress's intent to avoid "separate rounds of judicial intervention outside the [INA's] streamlined process."<sup>203</sup> To head off this train wreck, the Court found that Congress intended to shield certain individual discretionary decisions from judicial review.<sup>204</sup>

Supporting the view that Congress wished to insulate decisions to initiate deportation, Justice Scalia observed that discretionary decisions to *defer* the start of deportation proceedings could similarly promote efficiency in the administrative process.<sup>205</sup> Justice Scalia's opinion for the Court reflected a narrow, hardship-based conception of executive discretion, not the broad, categorical view exemplified by DAPA. Justice Scalia cited only one case on deferred action, *Johns v. Department of Justice*,<sup>206</sup> which involved relief ancillary to a potential grant of legal status. The facts of *Johns* require attention because they exemplify the individualized discretion that has long characterized relief from removal.

In *Johns*, the court upheld deferred action for Cynthia, a five-year-old Mexican girl, who was the subject of a bitter custody dispute between two U.S. citizens who wished to adopt the girl, and her biological mother, a Mexican national.<sup>207</sup> Deportation while the custody dispute was pending might have impaired resolution of the

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sought by foreign national plaintiffs who had contested immigration officials' refusal to grant them voluntary departure and employment authorization). In defending DAPA, Professor Legomsky has cited *Mada-Luna*, *Romeiro*, *Pasquini*, and *Perales* as standing for the proposition that immigration officials have sufficient discretion to award the sweeping relief embodied in the new program. See Legomsky Testimony, *supra* note 2, at 7. However, like the Supreme Court's decision in *AADC*, the rationale of decisions denying judicial review sought by a respondent in removal proceedings prior to entry of a final order of removal is the concern about delays in the removal process. These decisions do not address the scope of discretion for *granting* benefits to large groups of foreign nationals without a reasonable prospect of obtaining legal status.

203. *AADC*, 525 U.S. at 485.

204. See *id.* at 487 (explaining that provision interpreted by the Court was "specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings").

205. See *id.* at 483–85 (explaining that the Executive has the discretion, based on its own convenience, to abandon its use of deferred action).

206. 653 F.2d 884 (5th Cir. 1981).

207. The prospective adoptive parents brought Cynthia to the United States when she was one day old. *Id.* at 886. Immigration officials believed that Cynthia had been brought to the United States illegally. *Id.* They placed her in deportation proceedings but then granted her deferred action, concluding that the most prudent course would be to delay deportation pending resolution of the custody dispute in Florida Family Court. *Id.*

dispute. Moreover, if the U.S. couple prevailed in the custody dispute, Cynthia's removal to Mexico would have hindered enforcement of the family court judgment. In addition, removal would have been both pointless and harsh if the U.S. couple ultimately prevailed in their custody case. As a minor child of U.S. citizens, Cynthia would have been entitled to immediate relative status under the INA with no wait for a visa.<sup>208</sup> Deporting an individual who has a visa immediately available does not serve the goals of U.S. immigration law.<sup>209</sup> Justice Scalia's citation to *Johns* bolsters the individualized account of discretion over benefits. It is hardly an endorsement of the categorical use of executive discretion in DAPA to benefit foreign nationals with no practical prospects of obtaining legal status.

The Court's discussion in *Arizona v. United States* is similarly cabined. In *Arizona*, the Court held that federal law preempted portions of Arizona's immigration statute.<sup>210</sup> Writing for the Court, Justice Kennedy acknowledged that executive discretion focused on the "equities of an individual case"<sup>211</sup> and observed that the Framers were wary of state interference in the foreign affairs of the new republic.<sup>212</sup> Justice Kennedy cited John Jay's argument in *The Federalist* No. 3 that states might be rash in their approach to foreign affairs, and that the disparate policy preferences of individual states could imperil the Framers' goal of a uniform, national foreign policy.<sup>213</sup> Federal discretion over priorities in individual cases could smooth out these bumps in the road. All of Justice Kennedy's discussion, including his statement that federal officials "must decide whether it makes sense to pursue removal at all,"<sup>214</sup> reflects this

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208. *See id.* at 888, 890 (referencing tender age as a reason for deferral).

209. In *AADC*, Justice Scalia also extensively cited an immigration treatise viewing deferred action as a "humanitarian" measure in cases involving compelling individual circumstances. *AADC*, 525 U.S. at 484 (citing 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (1998)). This reference buttresses the view that Justice Scalia was referring only to case-by-case hardship-based discretion over benefits and not to blanket relief.

210. *See Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (preempting a provision criminalizing failure to comply with federal alien-registration requirements, a provision criminalizing the unauthorized seeking or engaging in work, and a provision authorizing arrests for deportable offenses).

211. *Id.* at 2499.

212. *Id.* at 2498–99, 2505 (describing the well-settled constitutional state preemption doctrine and basic federalism principles).

213. *See id.* at 2498–99 (emphasizing the importance of a unified foreign relations policy, especially to protect U.S. nationals who are abroad).

214. *Id.* at 2499.

concern about the deleterious effects of federal-state clashes on immigration policy. In warning about the danger of state commandeering of national priorities, Justice Kennedy did not address the boundaries of executive discretion when Congress, rather than the states, sought to constrain that discretion.<sup>215</sup>

### G. Conclusion

In sum, discretion over benefits exists in a narrow range of cases. These include discretion expressly authorized by Congress, ancillary to a statutory grant of legal status, based on hardship, or triggered by exigencies abroad. This list is consistent with the INA and past practice. More expansive awards of immigration benefits clash with the INA's carefully crafted framework.

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215. Two U.S. district courts have recently come down on opposite sides regarding DAPA. One court rejected a challenge to DAPA on standing grounds but also offered dicta on the merits suggesting that DAPA was a lawful exercise of discretion. See *Arpaio v. Obama*, 27 F. Supp. 3d 185, 194, 199, 209 (D.D.C. 2014). However, the *Arpaio* court failed to acknowledge the distinction between discretion that acted as a bridge to legal status and discretion unmoored to status. Another court, addressing the issue from the odd procedural posture of a sentencing proceeding for a foreign national who would probably not be DAPA-eligible, found that DAPA was inconsistent with the INA. See *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 785–86 (W.D. Pa. 2014) (finding that mere congressional inaction does not authorize presidential action). The U.S. Court of Appeals for the Ninth Circuit has also opined that states violate the Equal Protection Clause of the Constitution's Fourteenth Amendment if they decline to provide driver's licenses to DACA recipients but provide them to other deferred action recipients. See *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063–67 (9th Cir. 2014) (finding that there is no rational basis to distinguish between the DACA recipients and other deferred action recipients and thereby granting a preliminary injunction), *stay denied*, 135 S. Ct. 889 (2014). The Ninth Circuit in *Arizona Dream Act Coalition* similarly failed to acknowledge the difference between DAPA and other, more modest traditional forms of deferred action. For a case that initially found that a DHS employee had standing to sue regarding DACA's legality, see *Crane v. Napolitano*, 920 F. Supp. 2d 724, 740 (N.D. Tex. 2013) (finding that immigration officers challenging DACA's legality had standing because of the risk of job-related discipline if they refused to implement the program's provisions, and expressing doubts about the legality of program), *vacated*, No. 3:12-CV-03247-O, 2013 WL 8211660, at \*1, \*2 (N.D. Tex. July 31, 2013) (holding that the lawsuit was an employment dispute governed by a collective bargaining agreement and the Civil Service Reform Act and, therefore, that the court lacked subject-matter jurisdiction), *aff'd on other grounds sub nom.* *Crane v. Johnson*, No. 14-10049, 2015 U.S. App. LEXIS 5573 (5th Cir. Apr. 7, 2015).

### III. OF DISCRETION AND DELIBERATION: RULEMAKING, JUDICIAL REVIEW OF ENFORCEMENT, AND THE ADMINISTRATIVE PROCEDURE ACT

Given this carefully devised legislative framework, it is not surprising that the precipitous announcement of a sweeping executive policy would trigger concerns under established principles of administrative law. Three questions present themselves. The first is whether DAPA is an “interpretive rule” or “policy statement” that DHS can merely announce, or whether it is a “legislative rule” that requires activating the rulemaking process mandated by the Administrative Procedure Act (APA), including notice-and-comment procedures that require informing relevant stakeholders. The second is informed by the first, even though in some ways it is logically antecedent: whether agency enforcement decisions are reviewable. The third question is whether, as a substantive matter, DAPA is consistent with the INA. I address the first two questions in this Part, and the substantive question in Part IV.

#### A. *DAPA, Deliberation, and the Need for Rulemaking*

A central feature of agency action is rulemaking, which requires notice to stakeholders of a proposed rule, an opportunity for stakeholders to comment, and agency response to that feedback prior to promulgation of a final rule in the Code of Federal Regulations.<sup>216</sup> Federal officials did not use the notice-and-comment process before announcing DAPA. Under the APA, an “interpretive rule” or “general statement[] of policy” does not require notice and comment, while a “legislative rule” does.<sup>217</sup> The choice is a fateful one, pitting administrative convenience against the importance of deliberation.<sup>218</sup> This section briefly discusses the rationale for notice-

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216. See 5 U.S.C. § 553(b) (2012) (listing requirements that must be included in the notice); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203–04 (2015); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (referencing substantive rules that implement statutes as having the force and effect of law).

217. *Mortg. Bankers Ass’n*, 135 S. Ct. at 1203–04.

218. The procedural question of whether rulemaking is required is distinct from the *substantive* question of whether agency action fits the statute that empowers the agency to act. An agency directive can be an interpretive rule and not require resort to the rulemaking process but still be *substantively* invalid. Under the APA, issues of procedure and substance typically constitute distinct and different inquiries. See *id.* at 1207–08. Nevertheless, in certain cases a substantive conclusion will dictate a procedural one. For example, in *Lincoln v. Vigil*, the Court held that a decision to close a regional program for Native American children and reallocate the resources devoted to the program to nationwide efforts to assist such children was entirely within the agency’s discretion since Congress had allocated the funds to run such

and-comment procedures. It then explains why DAPA is best viewed as a legislative rule requiring resort to the rulemaking process.<sup>219</sup>

Notice-and-comment procedures fit the model of legislative delegation that informs administrative law. Congress's delegation to agencies rests on its assumption that agencies will deliberate carefully before acting. In its deliberations, an agency will weigh the complementary and competing values that Congress identified when it passed legislation. Notice-and-comment procedures require an agency to deliberate about its rules against the backdrop of these values and take other perspectives into account.<sup>220</sup> These procedures reduce agency arbitrariness and maximize the soundness of agency action.<sup>221</sup> As the Framers knew, the chance to consider a problem from a spectrum of stakeholder perspectives ensures more refined deliberation,<sup>222</sup> encouraging government to eschew hasty, arbitrary,

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programs to the agency in a lump-sum appropriation with no additional constraints. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Since the agency's announcement of its decision to close the program dealt solely with matters entirely within the agency's discretion, that announcement was merely a "general statement of policy" that did not require notice and comment. *Id.* at 197. In contrast, when an agency's discretion is constrained by Congress in some manner, the APA's substantive and procedural inquiries will be distinct.

219. The district court addressing DAPA's legality found that it was a legislative rule requiring notice and comment. *Texas v. United States*, No. B-14-254, 2015 WL 648579, at \*56 (S.D. Tex. Feb. 16, 2015), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

220. *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011).

221. *Id.*; cf. HENRY J. FRIENDLY, BENCHMARKS 144 (1967) (noting that the "broad public notice and opportunity to participate required by [rulemaking procedures is] necessary . . . as an aid to the agency in seeing the ramifications of the problem and arriving at an optimum solution"); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 403 (arguing that the notice and comment procedure is important because "[a] rule is likely to be a better product if its drafters must consider seriously alternatives that they might have overlooked or take account of practical problems that otherwise would crop up only after a rule goes into effect"); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007) (asserting that the rigor imposed by notice-and-comment procedure is important because the "lack of procedural discipline can raise the risk of agency action that serves rent-seeking interests or does not properly engage public preferences").

222. HANNAH ARENDT, BETWEEN PAST AND FUTURE 242 (1954) (noting the process through which an "issue is forced into the open that it may show itself from all sides, in every possible perspective"). The Framers' own perspective was shaped by the classical tradition of political deliberation that also forged Arendt's thought. See John L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 519 (2004); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547 n.37 (1988). Agency decision making at its best strives to embody the deliberation

or invidious impulses and focus on the virtues and drawbacks of a decision. That said, it would be inefficient to require an agency to go through APA rulemaking procedures every time it wishes to convey instructions to agency personnel. The notice-and-comment process can be cumbersome, and requiring it in all cases would paralyze the administrative state. To balance these virtues of efficiency and deliberation, courts have derived distinctions between interpretive rules and statements of policy on the one hand, and legislative rules on the other.

The distinctions between these categories of agency directives flow from the nature of congressional delegation to administrative agencies.<sup>223</sup> According to courts, agencies act legislatively when they convert a vague or open-ended statutory term into binding norms that substantially influence the legal benefits, disabilities, or interests of parties affected by the rule.<sup>224</sup> Courts have viewed Congress as being cognizant of the potential for administrative arbitrariness when agencies implement open-ended delegations.<sup>225</sup> An agency that converts broad statutory language into specific directives may be under- or over-inclusive in implementing Congress's intent. While these concerns may ultimately play out in *substantive* review of agency decisions,<sup>226</sup> requiring notice-and-comment procedures provides a preliminary check on arbitrariness. Stakeholders commenting on a proposed regulation will inform the agency of possible flaws in the rule's rationale, coverage, or drafting. The agency will then have an

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that the Framers prized. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 460 (2010) (discussing the Framers' views in the context of models of agency decision making).

223. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494–96 (D.C. Cir. 2010).

224. *Id.*; *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 n.19, 596 (5th Cir. 1995); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam). Courts have recognized that resolving what rules are legislative in character can be difficult. See *Cnty. Nutrition Inst.*, 818 F.2d at 946 (noting that this distinction is “tenuous,” “fuzzy,” “baffling,” and “enshrouded in considerable smog” (internal quotation marks omitted)). Scholars have eased this task while also acknowledging its challenges. See Asimow, *supra* note 221, at 383–84; Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 570 (2012) (observing that “[d]istinguishing between nonlegislative and legislative rules is one of the most complex tasks in administrative law”); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278–79 (2010); Kristen E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 476, 480 (2013).

225. *Catholic Health Initiatives*, 617 F.3d at 495.

226. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (holding that the FDA lacked statutory authority to regulate the tobacco industry).

opportunity to take these concerns into account in its deliberations. In its final regulatory product, the agency will also have to explain why it heeded some concerns but discounted others.

In refining the deliberative process, notice-and-comment procedures also serve separation of powers concerns. Because the notice-and-comment process can head off certain substantive challenges to agency action, it minimizes judicial intrusion into agency decision making. Instead of requiring judicial intervention, which can create its own risk of arbitrariness,<sup>227</sup> the agency has an opportunity to correct its own mistakes. Since agencies, unlike Article III courts, are subject to substantive legislative oversight, notice-and-comment procedures also preserve democratic legitimacy.

The district court in *Texas* was correct in noting that the first element in deciding whether an agency action constitutes a legislative rule is whether that rule has a “significant” impact on stakeholders.<sup>228</sup> The D.C. Circuit recently held that an agency action will be considered “legislative” in character when it constitutes a binding norm that works “a substantial regulatory change” to the underlying regime.<sup>229</sup> In *Electronic Privacy Information Center v. DHS*,<sup>230</sup> the D.C. Circuit ruled that the Transportation Security Administration (TSA) policy requiring either full-body screening, which allowed TSA employees to view the “naked” image of a screened individual or conduct a bodily search if the individual refused, “substantially change[d] the experience of airline passengers.”<sup>231</sup> As a result, the

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227. See *Hocort v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (observing that courts seek to avoid “arbitrary choices,” and prefer “democratic legitimacy” and administrative expertise embodied in notice-and-comment procedures).

228. *Texas v. United States*, No. B-14-254, 2015 WL 648579, at \*53 (S.D. Tex. Feb. 16, 2015) (citing *Shalala*, 56 F.3d at 595 n.19) (discussing “rules that award rights, impose obligations, or have other significant effects on private interests”), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

229. *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 6–7 (D.C. Cir. 2011). The Supreme Court’s recent decision in *Perez v. Mortgage Bankers Ass’n* does not change that analysis because the Court held only that a revision of an interpretive rule is also by definition an interpretive rule, even if the later rule materially changes the earlier directive. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015). In *Mortgage Bankers Ass’n*, the parties stipulated that the previous rule was interpretive. *Id.* at 1205.

230. 653 F.3d 1 (D.C. Cir. 2011).

231. *Id.* at 7; see *Shalala*, 56 F.3d at 601–02 (holding that the agency rule at issue was not subject to notice-and-comment procedures because it was a statement of policy that did not cause a substantive change in regulations); see also *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974) (noting an agency directive’s “impact on ultimate agency decisions” regarding parole of federal prisoners); Lewis-



court held, the policy was not merely “interpretative.”<sup>232</sup> Rather, the decision was legislative in character, requiring use of notice-and-comment procedures.

DAPA has a substantial impact on noncitizens. While DAPA does not change the legal status of any foreign nationals in the United States, it profoundly affects their legal interests. DAPA provides undocumented foreign nationals with an official document allowing those individuals to remain in the United States for a specific time period.<sup>233</sup> Moreover, as Judge Hanen discerned, the program constitutes a “massive change in immigration practice.”<sup>234</sup> Immigration officials designed the program to give valuable immigration benefits such as work authorization and a reprieve from removal to 4.3 million undocumented foreign nationals who have no clear path to a legal status.<sup>235</sup> Even OLC, in the course of defending DAPA, recognized that its scale was without parallel in the annals of executive discretion.<sup>236</sup>

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*Mota v. Sec’y of Labor*, 469 F.2d 478, 481–82 (2d Cir. 1972) (noting that the agency directive dealing with employment of aliens in various occupations had “substantial impact” because it impeded efforts of aliens to find employment and efforts of employers to find qualified workers).

232. *Elec. Privacy Info. Ctr.*, 653 F.3d at 7.

233. *Texas*, 2015 WL 648579, at \*55.

234. *Id.*

235. *Id.*

236. See OLC Opinion, *supra* note 2, at 30–31 (recognizing that DAPA would “likely differ in size from [earlier] deferred action programs” and that the “potential size of the program is large”). OLC confirmed this point in a backhanded way in its specific description of the number of people that DAPA could affect. The OLC Opinion conceded that DAPA would confer benefits on “approximately 4 million individuals.” *Id.* at 30. The OLC Opinion then asserted that 4 million individuals constitute “only a fraction” of the “approximately 11 million undocumented aliens” in the United States. *Id.* at 31. As a matter of arithmetic, OLC was literally correct: 4 million is indeed “a fraction” of 11 million. However, since 4 million is more than a *third* of 11 million, OLC’s use of the qualifier “only” seems misplaced. Perhaps OLC would also say that in 1941, Ted Williams “only” hit .406! After all, the “Splendid Splinter” only exceeded DAPA’s fraction by a measly four percent.

OLC’s language reflects substance, not merely word choice. Here, as elsewhere, DAPA seems to lack a limiting principle. Suppose that DAPA covered 10 million of the estimated 11 million undocumented individuals in the United States. It is literally true that 10 million is also “a fraction” of 11 million. However, in that latter case, the fraction amounts to over ninety percent. Presumably, OLC would agree that under the INA, immigration officials could not provide ninety percent of undocumented individuals with work authorization and a reprieve from removal. See *id.* at 7 (noting that immigration officials cannot abdicate their responsibilities entirely). Yet OLC provided no principle for distinguishing the thirty-six percent of

The next element is whether the challenged action establishes a “binding norm.” That test focuses on the action’s effect on the agency’s own decision makers.<sup>237</sup> In assessing whether an action binds agency decision makers, courts look to whether the agency guidance gives decision makers a range of factors on which to base a decision, or whether the guidance prescribes a particular outcome.<sup>238</sup> The latter is far more likely to produce the conclusion that the challenged action is a “binding norm,” legislative in character. In addition, in determining whether a challenged action is a binding norm, courts will consider the action’s practical effect, not merely the language that the agency has used.<sup>239</sup>

Courts’ provision of greater leeway to agency guidance that announces a range of criteria has its roots in notions about the scope of delegation that the agency has received from Congress. When an agency publishes guidance that permits individual decision makers to use a sliding scale, a court will likely defer to the particularized, finely grained judgment used in such cases, and view the application of such finely grained judgment as consistent with the legislative scheme. At first blush, allowing an individual agency decision maker to select the appropriate blend of factors that will be dispositive in a particular case may seem like a recipe for subjective decision making. However, courts have viewed this flexibility as useful in *avoiding* arbitrariness and subjectivity because it preserves the agency official’s ability to consider the circumstances of a particular case and the arguments made by individual stakeholders.

In contrast, courts have kept agencies on a tighter leash when agency guidance was “unbending,”<sup>240</sup> robbing agency decision makers of the opportunity to tailor their decisions to the circumstances of a particular case.<sup>241</sup> An agency may have the power to issue such inflexible guidance. However, to reduce the risk that guidance will be arbitrary, agencies should rely on the deliberation built into the notice-and-comment process. For example, in his opinion in *Guardian Federal Savings & Loan Ass’n v. Federal Savings &*

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undocumented individuals potentially granted benefits under DAPA from this latter, apparently impermissible, figure.

237. *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995); *Texas*, 2015 WL 648579, at \*53.

238. *Shalala*, 56 F.3d at 599.

239. *Id.* at 596.

240. *See Hocter v. U.S. Dep’t of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996).

241. *Id.*

*Loan Insurance Corp.*,<sup>242</sup> Judge Leventhal classified certain procedural requirements for bank audits as part of a general statement of policy, not a legislative rule.<sup>243</sup> Judge Leventhal explained that in practice government bank examiners had the discretion to accept an audit report that did not conform to the agency's guidance, as long as that report had other indicia of reliability.<sup>244</sup> Judge Leventhal attached crucial importance to the agency decision maker's freedom to base a decision on those other factors when the overall situation warranted this flexibility.<sup>245</sup>

Courts have been particularly attentive to the risk of arbitrariness posed by reducing agency discretion to numerical formulas.<sup>246</sup> A numerical formula that specifies amounts or times as essential elements of compliance or eligibility could be arbitrary in one of two ways. First, the formula could be radically over-inclusive: it could make it too easy for individuals to qualify for a benefit, or subject regulated entities to needless agency intrusions that Congress did not envision.<sup>247</sup> The formula could also be markedly under-inclusive, shutting out people entitled to a benefit, or failing to regulate individuals or entities that Congress intended to reach. In each situation, an agency that converts a vague statutory term into "numerical terms" risks arbitrary action that undermines legislative intent.<sup>248</sup>

As an example of the arbitrariness created by numerical formulas, consider *Catholic Health Initiatives v. Sebelius*.<sup>249</sup> In *Catholic Health Initiatives*, the Department of Health and Human Services (HHS) issued a formula governing when premiums hospitals paid to certain insurers in whom the hospitals had a financial stake would qualify as

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242. 589 F.2d 658 (D.C. Cir. 1978).

243. *Id.* at 665–66.

244. *Id.* at 666.

245. *Id.* at 668.

246. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010); FRIENDLY, *supra* note 221, at 144–45 (observing that an "agency's statement of a principle in numerical terms" is "peculiarly suited for rule-making" because it is "legislative" in character (internal quotation marks omitted)).

247. *Cf. Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 598–99 (5th Cir. 1995) (noting that "rote determination whether a given case is within the rule's criteria" is a hallmark of legislative rules (internal quotation marks omitted)); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 945–47 (D.C. Cir. 1987) (holding that a rule was legislative when it established "action levels" of contaminants in food that would allow companies with contaminants below those levels to avoid agency enforcement action).

248. *Catholic Health Initiatives*, 617 F.3d at 495.

249. 617 F.3d 490 (D.C. Cir. 2010).

reimbursable “reasonable costs” under Medicare.<sup>250</sup> According to the HHS formula, officials would not deem these premiums to be “reasonable costs” if the insurer had more than ten percent of its assets invested in U.S. equity securities.<sup>251</sup> The rationale for the agency directive was that stocks are more risky than other kinds of investments. The rule was presumably designed to ensure that the insurers made prudent investments so that they would remain viable as insurers, and to ensure that the insurance firms were bona fide insurers, not merely investment vehicles for the hospitals.<sup>252</sup> The court found that the formula was the product of “arbitrary choices” that required notice-and-comment procedures.<sup>253</sup>

While these choices may not be substantively unreasonable,<sup>254</sup> they are arbitrary since a particular number, such as the ten percent figure in *Catholic Health*, may be no more reasonable than other numbers that are almost identical. Without the deliberation provided by the rulemaking process, the formulaic choice made by the agency might stem from “hunch or guesswork or even the toss of a coin.”<sup>255</sup> Consider the ten percent level for investments in U.S. equity securities that the agency designated in *Catholic Health*. Insurer A, which instead invested *twelve percent* of its assets in U.S. stocks, might also be acting prudently, if its investment advisers used traditional indicia of sound investing, such as selecting companies with a low price/earnings ratio. Conversely, Insurer B, which invested only *eight percent* of its assets in stocks, might be acting imprudently if its investment advisers were unduly aggressive in their investment advice, investing only in speculative Internet companies that did not currently make a profit. It is arbitrary in the *Catholic Health* sense to deprive the agency decision maker of the ability to both approve reimbursement of premiums paid to prudent insurer A and deny premiums paid to imprudent insurer B. An agency might still be able to take this more inflexible approach, but it would need to first

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250. 42 U.S.C. § 1395x(v)(1)(A) (2012).

251. *Catholic Health Initiatives*, 617 F.3d at 492.

252. *Id.* at 493.

253. *Id.* at 495 (internal quotation marks omitted) (citing *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170–71 (7th Cir. 1996)).

254. *Hocor*, 82 F.3d at 170.

255. *Id.* (finding that notice and comment procedures were required when an agency sought to implement the “secure containment” standard of the Animal Welfare Act, 7 U.S.C. § 2151 (2012), by mandating that animal dealers accommodate “Big Cats” within an eight-foot perimeter fence as opposed to a fence that measured seven and a half feet).

have the larger conversation with stakeholders embodied in the rulemaking process.

The existence *vel non* of a binding norm hinges on facts on the ground, not on the labels the agency uses to describe its actions. Courts recognize that agencies have incentives to cloak binding norms in the language of discretion, to avoid the rigors of rulemaking. The label that an agency puts on its use of power is not determinative.<sup>256</sup> Courts view agency language critically in light of the agency's "track record."<sup>257</sup> The absence of discretion in practice was central to the decision in *Pickus v. U.S. Board of Parole*,<sup>258</sup> in which the D.C. Circuit held that notice-and-comment procedures were required for a set of computations regarding parole eligibility that left little or no room for the parole board's exercise of discretion in particular cases.<sup>259</sup> Even though the court conceded that parole determinations were committed to agency discretion,<sup>260</sup> it held that the guidance's "formalized criteria" made parole eligibility a "purely mechanical operation."<sup>261</sup> Hence the court regarded the directive as legislative in nature.

As Judge Hanen found, there is precious little practical discretion in DAPA's planned operation. There is no discretion to grant relief if an applicant has compelling equities, but fails to meet DAPA's criteria. Judge Hanen observed that if DHS officials find that an applicant does not meet the criteria set out, such as continuous residence in the United States since January 1, 2010, officials must

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256. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995) (citing *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979)).

257. *See id.* (noting focus on "what the agency does in fact" (citing *Brown Express, Inc.*, 607 F.2d at 700)); *Family*, *supra* note 224, at 576; *see also* *Phillips Petrol. Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994) (explaining that, despite the agency's announcement that its rule was interpretive, the rule had substantive effects and was therefore not interpretive). Here, too, Judge Leventhal's analysis is insightful. *See Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666–67 (D.C. Cir. 1978) (observing that, "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is[—]a binding rule of substantive law," and also noting that "[t]he mere existence of some discretion is not sufficient, although it is necessary, for a rule to be . . . a general statement of policy[, and]. . . stringent substantive commands are not removed from [the requirement for notice-and-comment procedures] because they have some provision for discretionary waiver").

258. 507 F.2d 1107 (D.C. Cir. 1974).

259. *Id.* at 1113.

260. *Id.* at 1110.

261. *Id.* at 1113.

summarily deny the application.<sup>262</sup> An applicant with four and a half years of continuous residence will not receive relief under DAPA, even if, for example, that applicant has a U.S.-citizen child with a serious medical condition that could not be treated adequately in the applicant's country of origin. As discussed above, that may well be a reasonable choice, but it is inherently "arbitrary" in the *Catholic Health* sense. Because of that arbitrariness, notice-and-comment procedures are appropriate.

The government's experience with DACA, the only deferred action program to even approach DAPA's projected size and scope, is part of the agency's "track record" on discretion. As Judge Hanen found, DACA's operation testifies not to the exercise of discretion, but to discretion's absence. The government's own statistics demonstrated that it had granted DACA relief to over *ninety-five percent* of DACA applicants.<sup>263</sup> Officials denied DACA applications only for failing to meet criteria, having a criminal record, errors in filling out the form, or fraud—all factors governed by or closely related to DACA's formula.<sup>264</sup> Judge Hanen noted that supervisors must review certain denials of DACA relief, thus sending another signal that denials are disfavored.<sup>265</sup> In this sense, DHS's dutiful disclaimers about the preservation of discretion ring hollow, as Judge Hanen rightly found.<sup>266</sup>

The absence of discretion as a practical matter is also evident from immigration officials' rapid processing of applications for DACA *renewals*, which involved a longer removal reprieve than the initial round of DACA approvals. Although immigration officials had pledged to the district court that they would delay implementation of *all* of the changes announced in November 2014 pending the court's decision, the government instead proceeded with the three-year DACA renewal period it had just announced. Immigration officials approved over *100,000* DACA renewal applications in about eleven weeks.<sup>267</sup> For asylum-seekers and other noncitizens with a colorable

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262. *Texas v. United States*, No. B-14-254, 2015 WL 648579, at \*54–55 (S.D. Tex. Feb. 16, 2015), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

263. *Id.* at \*55 n.101.

264. *Id.*

265. *Id.* at \*55.

266. *Id.*

267. See Defendant's Advisory 3, *Texas v. United States*, Civ. No. 14-254 (S.D. Tex. Mar. 3, 2015), available at <http://www.judicialwatch.org/wp-content/uploads/2015/03/Amnestyadvisory.pdf>; Aaron Nelson, *Administration's Immigration Policy Comes Under Fire: Federal District Judge Questions Whether Justice Department Lawyers Misled Him on Deferral Guidelines*, HOUS. CHRON., Mar. 20, 2015, at B1. In April 2015, Judge

claim to a legal status expressly authorized by Congress who often wait inordinately long periods for relief,<sup>268</sup> immigration officials' headlong rush to approve applications by noncitizens *without* any such colorable claim to status is a cruel irony. While too many meritorious applications by asylum applicants languish in the recesses of DHS back offices, the government's race to renew DACA applications provides no evidence of even a perfunctory review. The government "talks the talk" of discretion when it describes DACA. However, as Judge Hanen observed, this neutral language is a "pretext"<sup>269</sup> masking a regime of rote approvals. Such mechanical norms may be appropriate; however, they require the deliberation ensured by the rulemaking process.<sup>270</sup>

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Hanen found that DHS and its lawyers had violated his order and reneged on their commitments to the court. *See Texas v. United States*, 2015 U.S. Dist. LEXIS 45482, at \*20–23 (S.D. Tex. Apr. 7, 2015). He also found that the Justice Department lawyer representing the government had failed to comply with her duty of candor toward the court. *Id.* at \*23. In his decision, Judge Hanen decided not to impose the extreme sanction of striking the government's pleadings, although he indicated that he might impose a more modest remedy. *Id.* at \*24.

268. *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 815–16 (2015) (discussing waits experienced by asylum-seekers requesting employment authorization).

269. *Texas*, 2015 U.S. Dist. LEXIS 18551, at \*187 n.101.

270. On April 7, 2015, the Fifth Circuit denied standing to the plaintiffs in *Crane v. Johnson*, No. 14-10049, 2015 U.S. App. LEXIS 5573 (5th Cir. Apr. 7, 2015). This decision, moreover, does not vitiate this argument. In *Crane*, the court described DACA as a program in which officials retain case-by-case discretion. *Id.* at \*6. However, this description occurred in review of a record that was sparser than the record on which Judge Hanen based his decision in *Texas*. Moreover, the issue in *Crane* was far different. The issue of discretion arose in *Crane* because a number of the plaintiffs were DHS agents who alleged an injury-in-fact based on employee discipline they would suffer if they failed to cooperate in DACA grants. According to the plaintiffs, this risk of discipline was a harm that supported their standing to sue. *Id.* at \*23. The court found that the plaintiffs had not demonstrated any reason to believe that they would suffer employee discipline. *Id.* at \*21–25. By contrast, a procedural APA challenge needs to show only that as a practical matter, the challenged directive constitutes a binding norm. As noted in the text, courts make this assessment based on the agency's entire track record. A plaintiff arguing that an agency directive is a legislative rule does not need to show that officials were reprimanded, suspended, or fired when they failed to approve applications within the agency's formula. That standard would preclude virtually all procedural APA challenges. In cases like *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995), and *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987), courts have found that the challenged directive was a binding norm without any evidence of employee discipline for failing to follow the agency's rule. *See* 56 F.3d at 596; 818 F.2d at 946. In this sense, the standing issue in *Crane* and the APA challenge in *Texas* are apples and oranges.

B. *DAPA and the Reviewability of Enforcement Policies*

DAPA's impact on the carefully crafted framework of the INA makes it reviewable under established principles of administrative law. Courts have distinguished a "statement of a general enforcement policy,"<sup>271</sup> which is reviewable, from "single-shot," discrete non-enforcement decisions, which carry a presumption of non-reviewability.<sup>272</sup> As this subsection explains, DAPA belongs in the former category.

Administrative law has long accepted the presumption that agency action is reviewable.<sup>273</sup> The shift to a presumption *against* reviewability of single-shot enforcement decisions is an exception that should be narrowly read. This pivot with respect to individual enforcement springs from an inference about Congress's respect for agency expertise and a judgment that judicial review would reduce the predictability and uniformity of agency decision making.

These themes first emerged in *Heckler v. Chaney*,<sup>274</sup> in which the Supreme Court addressed a claim by death penalty opponents arguing that the U.S. Food and Drug Administration (FDA) had failed to proceed against producers of drugs required for lethal injections.<sup>275</sup> The respondents in *Chaney* sought a court order requiring the FDA to commence proceedings against the drug manufacturers.<sup>276</sup> Holding that the FDA's decision in that particular case was unreviewable, the Court invoked Congress's view of the special province of administrative agencies.<sup>277</sup> According to the Court, it was reasonable to assume that Congress regarded the informal "balancing . . . of factors"<sup>278</sup> in such individual decisions as suited to the agency's expertise. As the U.S. Court of Appeals for the District of Columbia Circuit noted in a subsequent case applying the Court's rationale in *Chaney*, such decisions are necessarily "ad hoc" and "context-bound" "assessments of fact, policy, and law."<sup>279</sup> Moreover, as the Supreme Court explained in *Chaney*, the agency was

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271. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676–77 (D.C. Cir. 1994).

272. *Id.*

273. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) (finding that congressional intent in the APA allowed for review of a "broad spectrum" of administrative action).

274. 470 U.S. 821 (1985).

275. *Id.* at 823–25.

276. *Id.*

277. *Id.* at 837–38.

278. *Id.* at 831.

279. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994).



in the best position to determine if action in a given case was consistent with its priorities and the resources it could bring to bear.<sup>280</sup> The Court in *Chaney* analogized an agency's "refusal to institute proceedings" to prosecutorial discretion in the criminal justice system, such as prosecutors' decisions "not to indict."<sup>281</sup> The Court noted that this type of decision "has long been regarded as the special province of the [e]xecutive [b]ranch."<sup>282</sup>

Challenges to such single-shot decisions would undermine the predictability and uniformity of agency enforcement. Consider the challenge in *Chaney* to the FDA's decision not to proceed against certain drug manufacturers whose products were used in lethal injections.<sup>283</sup> Allowing judicial review would have ushered in a parade of special-interest challenges to discrete non-enforcement decisions. The Supreme Court apparently worried that courts would lack clear standards for adjudicating such cases<sup>284</sup> precisely because each challenge would entail a different mix of policy, fact, and law.<sup>285</sup> Inevitably, courts would apply a shifting set of standards that could befuddle agencies and their stakeholders. This deluge of challenges would trigger a tragedy of the commons in which multiple

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280. See *Chaney*, 470 U.S. at 831–32 (noting that the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities" including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all"); cf. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing the importance of prosecutorial discretion in criminal law enforcement, which hinges on factors such as the "strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan").

281. *Chaney*, 470 U.S. at 832.

282. *Id.*

283. See *id.* at 823 (alleging that the drugs used in lethal injections violated the federal Food, Drug, and Cosmetic Act).

284. See *id.* at 830 ("[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'").

285. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188–89 (1994) (discussing "uncertainty and excessive litigation" that can arise from burgeoning private litigation); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 662 (2000) (noting a similar concern regarding implied private rights of action for violation of federal statutes, which critics claim can "disrupt an agency's priorities").

challengers with private agendas could undermine the uniformity and predictability of agency action.<sup>286</sup>

In contrast, courts have held that a “statement of a general enforcement policy” is reviewable.<sup>287</sup> The review of general enforcement policies entails analysis of purely legal questions, such as the “commands of the substantive statute.”<sup>288</sup> Consistency of a general enforcement policy with statutory commands provides a “meaningful standard against which to judge the agency’s exercise of discretion.”<sup>289</sup> Courts are well-suited to conduct such legal analysis.<sup>290</sup> Moreover, judicial review of general enforcement policy curbs agency arbitrariness. Without that check, agency officials may be tempted to promulgate policies based on personal bias or political expediency.<sup>291</sup> Unchecked, such decisions might amount to a “conscious[]” “abdication of . . . statutory responsibilities.”<sup>292</sup> Divergent ideological agendas at the policy level, like judicial second-guessing of single-shot enforcement decisions, could undermine the uniformity and predictability of agency decision making.

DAPA is a “general enforcement policy” that should be reviewable under *Chaney* and its progeny. DAPA’s eligibility criteria are broad (entry into the United States by a certain date and U.S.-citizen or LPR

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286. Cf. Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 600–03 (2010) (discussing prisoner’s dilemma games, in which parties seek short-term private objectives that undermine aggregate welfare, and coordination games, in which multiple equilibria could be equally beneficial, but noting that the difficulty of coordinating the actions of private parties engenders uncertainty); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138–45 (2012) (discussing coordination games in the context of overlapping agency jurisdiction). Judicial review of challenges to discrete non-enforcement decisions would create a massive coordination problem between courts and agencies. A presumption of unreviewability eases these problems.

287. See *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (finding statements of general enforcement policies reviewable).

288. See *id.* at 677 (focusing less on the “fact[s], polic[ies], and law[s] that drive an individual enforcement decision”).

289. *Chaney*, 470 U.S. at 830.

290. Cf. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1374, 1393–94, 1404 (2009) (discussing institutional competence arguments in national security litigation).

291. See *Adams v. Richardson*, 480 F.2d 1159, 1161–62 (D.C. Cir. 1973) (en banc) (holding reviewable an alleged blanket agency decision to decline to enforce civil rights laws against educational institutions receiving federal funds). The *Adams* court relied on a distinction akin to the distinction between priorities and benefits discussed in this Article. See *infra* notes 308–09 and accompanying text.

292. *Crowley*, 37 F.3d at 677 (citing *Chaney*, 470 U.S. at 833 n.4).

children).<sup>293</sup> Disqualifying criteria (such as a criminal record) are narrow.<sup>294</sup> While OLC's opinion supporting DAPA characterizes it as "case-by-case" decision making,<sup>295</sup> DAPA's sweeping criteria will dictate outcomes in most cases.<sup>296</sup> The discretion exercised under DAPA has already occurred at the *policy level*, in the formulation of eligibility criteria. Officials applying those criteria may exercise some residual discretion. For example, officials considering DAPA applications may reject applications if an applicant is charged with a crime, even if the applicant has not yet been convicted.<sup>297</sup> However, virtually any policy leaves some such discretion in place. DAPA's broad eligibility criteria do most of the work. A court can readily assess whether those criteria are consistent with the INA's overall framework, making DAPA a reviewable "general enforcement policy."<sup>298</sup>

Ironically, DAPA's supporters have provided the most persuasive evidence that "case-by-case" decision making under DAPA is a chimera. Professor Legomsky, in recent testimony before Congress, analogized DAPA to DHS's earlier DACA program.<sup>299</sup> Professor Legomsky acknowledged that DACA has had a ninety-five percent approval rate.<sup>300</sup> Most people would say that a ninety-five percent approval rate is high. Indeed, Professor Legomsky acknowledged this first impression.<sup>301</sup> However, Professor Legomsky then attributed the outstanding performance of DACA applicants to their overall "strong cases."<sup>302</sup> In reality, the strength of the cases stemmed from DACA's underlying criteria, which were easy to meet.

As a comparison, suppose a law professor furnished students with an advance copy of the professor's own answers to the final exam. Lo

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293. November 2014 DAPA Memo, *supra* note 2, at 4 (requiring entrance into the United States before the individual's sixteenth birthday, continuous presence in the United States since January 1, 2010, graduation from high school or receipt of a GED, and no convictions of certain criminal offenses).

294. *See id.* (including "being a terrorist or national security threat, certain convictions or conduct relating to gangs, conviction of an 'aggravated felony' . . . , conviction of any felony, conviction of three or more misdemeanors that arise from three separate incidents, or conviction of one 'significant misdemeanor'").

295. OLC Opinion, *supra* note 2, at 11.

296. *Texas v. United States*, No. B-14-254, 2015 WL 648579, at \*55 (S.D. Tex. Feb. 16, 2015) (finding that under DAPA, discretion will be "virtually extinguished"), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

297. I am indebted to Steve Legomsky for this example.

298. *See Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994).

299. *See Legomsky Testimony, supra* note 2, at 10.

300. *Id.* at 10 n.8.

301. *Id.*

302. *Id.*

and behold, the answers given by students were stellar! Befitting this sublime performance, nineteen out of twenty students in the class received an A. Despite the students' astronomical grades, no law professor worthy of the name would consider such an exam rigorous. It is safe to assume Professor Legomsky would not dream of assessing his students in such a slapdash fashion. Executive officials purporting to do the will of Congress should be no less demanding.

Unfortunately for DAPA's supporters, more rigorous criteria would undermine the point of the program, which is to provide benefits that Congress is unwilling to legislate. Suppose, for example, that DHS required undocumented parents of post-entry U.S.-citizen children to show that their children would undergo "exceptional and extremely unusual hardship" if the parents were removed.<sup>303</sup> If that standard sounds familiar, it should—that is the standard Congress has set for cancellation of removal.<sup>304</sup> As we have discussed, that standard is extraordinarily difficult to meet, as Congress intended.<sup>305</sup> However, setting a standard this rigorous would exponentially diminish the pool of people eligible for DAPA, harking back to the regime of hardship-based discretion that is now in effect for individuals without a reasonable prospect of obtaining legal status. Immigration officials issued DAPA because they believed that the status quo was inadequate. DAPA would be a failure on its own terms, if not in terms of the relevant law, if it yielded a volume of benefits no greater than the current regime.

Impaled on the horns of this dilemma, DAPA's supporters have evoked the rhetoric of case-by-case adjudication without setting criteria that ensure its reality. Rather than attempting to persuade the public that chimeras exist, the executive officials who drafted DAPA would better serve the cause of constitutionalism by holding *themselves* to a higher standard. This would entail the admittedly challenging task of crafting arguments that would sell the worthy cause of immigration reform to Congress and to each recalcitrant legislator's constituents.<sup>306</sup>

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303. See, e.g., 8 U.S.C. § 1229b(b)(1)(D) (2012) (identifying the standard for qualifying for a cancellation of removal under IIRIRA).

304. *Id.* § 1229b(b)(1).

305. See *supra* notes 158–59 and accompanying text. Of course, Congress's standard is tougher still since the INA requires ten years of physical presence in the United States instead of the five years that suffice under DAPA. See *supra* note 160 and accompanying text.

306. Although this political fix for legislative gridlock is cumbersome, messy, and uncertain, it is ultimately better for our democracy than viewing gridlock as an

Courts are well situated to persuade DAPA's executive drafters to take that constitutionally salutary course. Courts can readily assess whether DAPA comports with the INA, including legislative policies deterring reliance on post-entry U.S.-citizen children, unlawful presence, and work by foreign nationals without a colorable claim to a legal status. Courts can also assess whether DAPA's broad criteria fit within the parameters of past discretion over immigration benefits. Therefore, no presumption of unreviewability applies.

Abdication is a special concern where the general policy involves not merely agency "refusal to institute proceedings"<sup>307</sup> against individuals who have failed to comply with a statute, but also the blanket award of benefits to individuals who have defied statutory directives. The award of benefits to those who have flouted fundamental statutory norms heightens the moral hazard inherent in any favorable exercise of discretion. It thus imperils the integrity of the statutory scheme. As the D.C. Circuit stated in *Adams v. Richardson*,<sup>308</sup> where it reviewed the Nixon administration's alleged failure to enforce nondiscrimination provisions on federal education funding, "[i]t is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say [federal officials] may affirmatively continue to channel federal funds to defaulting schools."<sup>309</sup> The award of benefits winks at wholesale statutory violations, risking collapse of Congress's carefully wrought framework.

Indeed, the wholesale grant of such benefits may well remove DAPA from the realm of agency action, and restore it to the domain of agency *action*, where the presumption of reviewability holds full sway. Consider the employment authorization awarded to DAPA beneficiaries. Congress has consistently articulated the view that the "employment of illegal aliens . . . causes deleterious effects for U.S. workers."<sup>310</sup> DAPA's blanket awards of employment authorization to millions of undocumented foreign nationals clash with this

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occasion for unilateral executive action. For a different view, see David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 48 (2014) (suggesting that the executive and legislative branches both engage in self-help that responds to obstinacy by the other branch, while conceding that developing norms for regulating self-help is challenging and that it is unclear whether increased use of self-help would be healthy for democratic values).

307. *Heckler v. Chaney*, 470 U.S. 821, 835 (1985).

308. 480 F.2d 1159 (D.C. Cir. 1973).

309. *Id.* at 1162.

310. See H.R. REP. NO. 104-469, at 126 (1996).

congressional policy assumption.<sup>311</sup> OLC's acknowledgment of the risks of such blanket awards makes DAPA a knowing and "conscious[]" abdication under *Chaney*.<sup>312</sup> That reckless clash is a sufficient reason to classify DAPA as a reviewable blanket grant of benefits, rather than unreviewable agency inaction.

#### IV. CHEVRON AND THE CASE AGAINST DEFERENCE TO DAPA

Upon review, DAPA is unworthy of the deference that courts sometimes show to agency decisions. In *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*,<sup>313</sup> the Supreme Court noted that the test for deference has two prongs.<sup>314</sup> A court first asks whether the statute is ambiguous. If step one is satisfied, the court moves on to step two, asking whether the government's interpretation is reasonable. DAPA fails at *Chevron*'s step one because the INA clearly rules out the blanket award of benefits to unlawful entrants that DAPA contemplates.

In construing ambiguity, courts must keep in mind that "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"<sup>315</sup> The court should "fit, if possible, all parts into an harmonious whole."<sup>316</sup> Moreover, the Court observed in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>317</sup> which

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311. The OLC acknowledged the difference between setting priorities and individualized relief on the one hand and the categorical award of benefits on the other. See OLC Opinion, *supra* note 2, at 20 (noting differences between deciding on priorities for removing foreign nationals and programs that "invite individuals . . . to apply" for immigration benefits such as work authorization). However, it viewed this distinction as illusory because it regarded immigration officials' discretion over work authorization as absolute. See *id.* at 21 n.11 (citing 8 U.S.C. § 1324a(h)(3) (2012)) (defining an "unauthorized alien" barred from employment as an alien not "admitted for permanent residence, or . . . authorized to be so employed by [the INA] or by the Attorney General"). As I discuss in the next Part, the OLC's account interprets immigration officials' discretion far too broadly, uninformed by any intelligible limiting principle that respects the INA's deterrence goals. Congress *could* delegate such unfettered discretion to immigration officials. However, the INA's emphasis on deterrence makes it unreasonable to believe that Congress has done so here.

312. *Chaney*, 470 U.S. at 831 n.4.

313. 467 U.S. 837 (1984).

314. *Id.* at 842-43.

315. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

316. *Brown & Williamson*, 529 U.S. at 133 (citing *FTC v. Mandel Bros.*, 359 U.S. 385, 388 (1959)).

317. 529 U.S. 120 (2000).

addressed whether the FDA had authority to regulate the tobacco industry, “common sense” is vital in assessing how “Congress is likely to delegate a policy decision of . . . economic and political magnitude to an administrative agency.”<sup>318</sup>

Delegation in administrative law is driven by reasonable inferences about the scope of delegation intended by Congress. The Supreme Court has viewed “common sense” as requiring a correlation between the magnitude of an agency action’s effects and the specificity of the statutory authorization for such action.<sup>319</sup> As the Court has put it, Congress does not customarily “hide elephants in mouseholes.”<sup>320</sup> Courts should require a clear statement from Congress for an agency decision that entails a change of enormous legal and “political magnitude” in the overall statutory scheme.<sup>321</sup> If a statute does *not* expressly provide an agency with authority to decide a matter of exceptional importance for the overall statutory framework, courts should be reluctant to find implicit authority to resolve this issue lurking in a more generic delegation. The courts will be even more skeptical when Congress has repeatedly addressed the issue in a way that seems inconsistent with the proposed regulatory action.

Reflecting this doctrine, in *Brown & Williamson*, the Supreme Court rejected the FDA’s attempt to use generic statutory language to authorize regulating the tobacco industry.<sup>322</sup> The Court viewed such language as insufficient evidence that Congress intended to delegate to the FDA authority to affect the U.S. economy in such a substantial

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318. *Id.* at 133.

319. *Id.*

320. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (holding that the FCC overreached in eliminating rate regulation for “40% of a major sector of the industry” on the theory that regulation was only necessary when markets were uncompetitive, and further holding that it was “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion”).

321. *Brown & Williamson*, 529 U.S. at 133. Justice Breyer, when he was a judge on the U.S. Court of Appeals for the First Circuit, articulated this point well. *See Mayburg v. Sec’y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) (observing that the touchstone is what “a sensible legislator would have expected given the statutory circumstances[;]. . . [t]he less important the question of law, the more interstitial its character . . . the less likely it is that Congress . . . ‘wished’ or ‘expected’ the courts to remain indifferent to the agency’s views”). Conversely, Justice Breyer implied, there is greater occasion for judicial scrutiny when the question is one of great magnitude because a legislator might well have wished to weigh in on such a high-stakes issue. *Id.* at 104.

322. *Brown & Williamson*, 529 U.S. at 126.

fashion, given repeated congressional acknowledgment of tobacco's economic importance.<sup>323</sup> Similarly, in *ABA v. FTC*,<sup>324</sup> the D.C. Circuit found that the Federal Trade Commission Act, viewed in context, did not authorize the Federal Trade Commission (FTC) to regulate the legal profession.<sup>325</sup>

As the *ABA* court explained, the agency bore the burden of showing a clear textual warrant for a change from the status quo of *state* regulation of lawyers.<sup>326</sup> Because the burden of proof is on the agency in such cases, a lack of a clear statement *precluding* such agency action "is not enough per se to warrant deference."<sup>327</sup> Rather, the text and structure of the statute "must . . . make it appear that Congress either explicitly or implicitly delegated authority" to the agency to take the action proposed.<sup>328</sup> In *ABA*, the court found that the "length, detail, and intricacy of the [statute]" supported an inference that Congress did not intend to authorize regulation of the legal profession, which had not been the subject of previous regulation and was not mentioned in the statute.<sup>329</sup>

DAPA defies the common-sense construction of legislative delegations that the Supreme Court has required. The policy advanced by DHS conflicts with INA provisions that deter unlawful entry and continued unlawful presence in the United States, limit unlawful entrants' ability to work, and curb unlawful entrants' and overstays' reliance on post-entry U.S.-citizen children to acquire legal status. Moreover, DAPA is a vast change in the nature and scope of discretionary grants of immigration benefits, which have been ancillary to statutory grants of legal status, related to individualized hardships, or triggered by foreign crises. Congress has pushed back vigorously against far less sweeping examples of discretion.<sup>330</sup> Common sense suggests that Congress could not have intended to delegate to DHS authority to order a change that clashed with so many provisions of the INA and dwarfed past paradigms of discretionary relief.

This lack of common sense is particularly compelling given the INA's language on the role of the agency, which highlights both the individualized nature of executive discretion and the need to adhere

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323. *Id.* at 137.

324. 430 F.3d 457 (D.C. Cir. 2005).

325. *Id.* at 467.

326. *Id.* at 471–72.

327. *Id.* at 469.

328. *Id.*

329. *Id.*

330. *See supra* notes 313–29 and accompanying text.



to the statutory framework. The INA stipulates that the Attorney General (joined by the DHS Secretary) 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]*.”<sup>331</sup> While the reference to what the Attorney General “deems necessary” may suggest substantial discretion, the section tethers official discretion to the “provisions” of the INA. This language does not appear to grant the Attorney General authority to act in ways that clash with the INA’s overall framework.

A similarly generic character pervades language charging DHS with “[e]stablishing national immigration enforcement policies and priorities.”<sup>332</sup> Both sections smack of statutory truisms. Of course, the Attorney General should “perform . . . acts . . . he deems necessary.”<sup>333</sup> The Attorney General should certainly not do anything unnecessary. Along these lines, the charge to DHS in the Homeland Security Act of 2002 simply conveys that this huge department, which also includes the Coast Guard, the Federal Emergency Management Administration, and counterterrorism and cybersecurity units, has inherited the immigration portfolio that belonged to the Justice Department before 9/11. The language conveys no mandate to disregard multiple provisions of the INA or depart freely from settled practice on the parameters of discretion.<sup>334</sup>

Finally, the same mundane conclusion governs the definition of “unauthorized alien” for employment purposes as a foreign national who is not an LPR or “authorized to be . . . employed by this chapter or by the Attorney General.”<sup>335</sup> This section was designed to guide employers who might otherwise be uncertain about how to avoid sanctions for hiring undocumented workers. More concretely, one can read the section as an acknowledgment that the Attorney General has limited discretion over benefits that are ancillary to a legal status, based on special hardships, or triggered by crises abroad. Nothing in the language even hints that immigration officials can award work

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331. 8 U.S.C. § 1103(a)(3) (2012) (emphasis added).

332. 6 U.S.C. § 202(5).

333. 8 U.S.C. § 1103(a)(3).

334. The same analysis prevails for language defining unlawful presence as presence in the United States “after the expiration of the period of stay authorized by the Attorney General.” *Id.* § 1182(a)(9)(B)(ii). Again, the language is generic and does not suggest that immigration officials can establish vast new programs that defer removal for foreign nationals with no clear path to a legal status.

335. *Id.* § 1324a(h)(3).

authorization to an enormous cohort of unlawful entrants with no direct path to a legal status. In other words, this language is just the kind of “mousehole” that, per Justice Scalia’s caution in *Whitman*,<sup>336</sup> cannot accommodate the elephant of blanket discretion that the government has purported to discover.

Since unlimited discretion would undermine virtually any regulatory scheme, a plausible account of executive discretion requires some intelligible limiting principle. The only intelligible principle evident in OLC’s defense of DAPA is the claim that DAPA recipients would have a “prospective entitlement to lawful immigration status.”<sup>337</sup> OLC asserts that this entitlement distinguishes DAPA recipients from parents of recipients under DHS’s DACA program.<sup>338</sup> OLC advised that parents of DACA recipients had no “prospective lawful status” and hence could not be included within the new program.<sup>339</sup> While this distinction may on the surface make the legal defense of DAPA appear tempered and reasonable, sometimes appearances deceive. Given the minefield that Congress has placed in DAPA recipients’ path to legal status, including waiting until their children turn twenty-one years of age,<sup>340</sup> requiring that most leave the United States to apply for LPR status<sup>341</sup> and imposition of a ten-year bar once they do so,<sup>342</sup> OLC’s heralding of DAPA recipients’ “prospective lawful status” must be news to them and any other careful reader of the INA.

This is an awfully thin reed for a limiting principle. The more conscientious conclusion would be that neither DAPA recipients nor the parents of DACA beneficiaries have a practical route available to gain legal status. That would at least be an accurate account of the law, although not one that supports DAPA’s legality.

OLC and other DAPA supporters argue that DAPA does not conflict with the INA because the benefits DAPA provides are not grants of legal status.<sup>343</sup> However, this argument reads Congress’s intent far too narrowly. The intricate latticework of provisions that deter unlawful entry and presence, discourage reliance on post-entry U.S.-citizen children, and limit unlawful entrants’ access to work are

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336. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

337. OLC Opinion, *supra* note 2, at 29.

338. *Id.* at 32.

339. *Id.*

340. 8 U.S.C. § 1151(b)(2)(A)(i).

341. *Id.* § 1255(a).

342. *Id.* § 1182(a)(9)(B)(i)(II).

343. See OLC Opinion, *supra* note 2, at 13; Legomsky Testimony, *supra* note 2, at 15.

not mere ministerial *ex post* guides for the allocation of visas. These provisions send a strong *ex ante* message deterring the underlying *conduct* that produces violations of immigration law. This *ex ante* focus is not unique to the INA; it is a pervasive feature of positive law.<sup>344</sup> Alexander Hamilton, for example, observed that judicial review of statutes “not only serves to moderate the immediate mischiefs of [statutes] which may have been passed, but . . . operates as a check upon the legislative body in passing them, who . . . are . . . compelled . . . to qualify their attempts.”<sup>345</sup> So, too, with immigration law.

Moreover, DAPA defenders’ facile distinction between status and benefit ignores the behavioral truth that Congress has recognized since IRCA: unlawful immigration is driven not by the allure of status, *per se*, but by the pull of benefits attached to status, including the ability to work legally. Immigration status is a bundle of benefits, as well as a formal legal category. Even without offering legal status, DAPA gives its recipients much of what led them to the United States. As the House Judiciary Committee said in its report on IIRIRA, jobs are the “magnet” for unlawful migration.<sup>346</sup> DAPA vindicates the magnetic attraction that U.S. employment exerted for DAPA’s recipients. DAPA also provides its recipients with the chance to remain in the United States for three years and the prospect for renewing relief after that date, as DACA has done.<sup>347</sup>

Viewed as an intermediate-term bundle of benefits, DAPA is surely the functional equivalent of LPR status. In the long term, DAPA lacks the certainty and path to citizenship that LPR status confers. However, as the great economist John Maynard Keynes once wryly observed, “[i]n the long run we are all dead.”<sup>348</sup> Intermediate effects often drive human action, and in the intermediate term, DAPA confers many of the benefits of LPR status.

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344. See Darley et al., *supra* note 30, at 165, 181 (noting that lawmakers believe that the essential function of law is to guide conduct but also finding that many ordinary citizens do not know specific state laws).

345. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

346. See H.R. REP. NO. 104-469, at 126 (1996) (explaining how the availability of jobs attracts illegal aliens to the detriment of U.S. workers).

347. To be sure, DAPA recipients will not obtain all that status has to offer. For example, DAPA recipients will not receive the ability to sponsor close relatives for admission to the United States. However, that ability may not be a relevant factor for most DAPA recipients: by definition, their children are *already* U.S. citizens, and their spouses will also frequently qualify for DAPA as parents of U.S. citizens.

348. See ROBERT SKIDELSKY, JOHN MAYNARD KEYNES: THE ECONOMIST AS SAVIOUR 1920–1937 62 (1992).

Reading the INA to preclude the unchecked discretion announced in DAPA would hardly eliminate executive discretion regarding immigration benefits. It would merely impose an intelligible limiting principle on discretion based on the INA's text, context, and implementation. Discretion regarding benefits would be permissible when it is expressly authorized by Congress, ancillary to a statutory grant of legal status, hardship-based, or triggered by exigencies abroad. That list is faithful to the framework of immigration law and to past practice. More expansive awards of immigration benefits should await a clear statement from Congress.

Immigration officials have also argued that the limiting principle governing DAPA relates to the resources that Congress has appropriated for the investigation, detention, and removal of undocumented persons.<sup>349</sup> However, OLC's legal and factual support for this argument is meager. Congress has budgeted over \$5.2 billion for immigration enforcement.<sup>350</sup> While OLC claimed that Congress had set priorities for the removal of noncitizens convicted of a crime that precluded removal of most other noncitizens subject to removal,<sup>351</sup> OLC's math is questionable. Congress required federal officials to devote \$1.6 billion to the identification of noncitizens who had committed crimes and may be subject to removal.<sup>352</sup> However, that leaves \$3.6 billion available for other immigration enforcement. Perhaps, as in its classification of the roughly 4 million people potentially granted benefits under DAPA as "only a fraction" of the total of 11 million undocumented people in the United States,<sup>353</sup> OLC would claim that \$3.6 billion is "only a fraction" of \$5.2 billion. That is literally true, but \$3.6 billion is quite a large fraction. Of course, as OLC asserted, immigration officials do not have the budgetary resources to remove *all* undocumented individuals in the United States.<sup>354</sup> However, that assertion proves too much. Budgets constrain enforcement in virtually every area of law enforcement, civil and criminal. That does require governments to set priorities. However, it does not require the wholesale grant of benefits, such as work authorization or a formal reprieve from removal. In other settings, including criminal law, environmental law, and food and

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349. See OLC Opinion, *supra* note 2, at 10.

350. See Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 250 (containing the DHS Appropriations Act).

351. OLC Opinion, *supra* note 2, at 10.

352. Consolidated Appropriations Act, 128 Stat. at 251.

353. OLC Opinion, *supra* note 2, at 31.

354. *Id.* at 10.

drug safety, government resources shape priorities. However, government does not award those who violate the law in any of these areas a license to continue to benefit from their violations or to reap additional benefits. Therefore, courts should read the INA as precluding the blanket grant of benefits that DAPA embodies.

DAPA's merits as policy are another matter. As policy, DAPA is *too modest* because it does not include a pathway to LPR status or citizenship. Executive branch officials framed DAPA as they did because they acknowledged that only Congress could provide legal status.<sup>355</sup> Those officials should have taken to heart President Obama's earlier, on-target judgment that the relief included in DAPA properly belongs in Congress's court.<sup>356</sup>

Making immigration reform Congress's responsibility promotes the Framers' scheme. As demographic changes transform the electorate by making it more diverse, Congress should be obliged to face voters squarely, rather than relying on the President to do its work. Moreover, voters should recognize the stakes of continuing to elect members of Congress who fail to address the pressing need for immigration reform. That realization might well create a more favorable legislative landscape for change.

In addition, immigration advocates should recognize that heaping discretion on the Executive Branch is a Faustian bargain. The Executive Branch has often exercised discretion that disadvantaged immigrants.<sup>357</sup> It will do so again. Immigration advocates may believe that courts will find a ratchet in executive discretion that frees it to help noncitizens but stops it from hurting them. That ratchet is a product of wishful thinking. OLC signaled the ratchet's absence when it cited to *United States ex rel. Knauff v. Shaughnessy*,<sup>358</sup> which upheld indefinite detention on flimsy grounds during the McCarthy Era.<sup>359</sup> Advocates and all devotees of our constitutional order would do well to remember that executive discretion that appears benevolent today can take on a decidedly different cast as the White

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355. *Id.* at 2.

356. See Catherine Rampell, *Whose Job Is it Anyway?*, WASH. POST, Nov. 28, 2014, at A19.

357. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544, 546 (1950) (upholding the Executive Branch's indefinite detention based on secret evidence alleging a security risk from the Holocaust refugee spouse of an ex-GI); Peter J. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 17–18 (1984) (discussing judicial deference to executive action in Cold War cases).

358. 338 U.S. 537 (1950).

359. See OLC Opinion, *supra* note 2, at 4 (noting the congressional understanding of immigration policy as flexible and adaptable and emphasizing the Secretary of Homeland Security's broad authority to establish such regulations).

House's occupant changes. Perhaps advocates believe that from here to eternity, a benevolent occupant will preside over the federal government. The Framers' conviction was otherwise. Their design wisely hedged against the risk of leaders' venality and arrogance. Preserving the Framers' architecture is more important than any policy benefit, no matter how overdue the policy.

#### V. DAPA COMES TO *YOUNGSTOWN*

The OLC opinion, although it deals mainly with DAPA's reviewability and validity in immigration law, also gestures toward broader constitutional issues involving the separation of powers.<sup>360</sup> The guiding text is Justice Jackson's canonical opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>361</sup> Justice Jackson famously divided presidential actions into three categories based on the degree of collaboration between the President and Congress.<sup>362</sup> The extent of collaboration determines the deference that a court will accord to presidential action. The President receives greatest deference for acts consistent with Congress's will, some deference for acts that occur when Congress is silent, and little or no deference for acts that clash with legislative intent.<sup>363</sup>

DAPA, for reasons described above, cannot fit in Justice Jackson's first category, predicated on congressional consent. The INA is comprehensive legislation, analogous to the labor-management legislation the Court cited in *Youngstown*.<sup>364</sup> DAPA clashes with INA provisions deterring reliance on post-entry U.S.-citizen children, unlawful presence, and work by foreign nationals who lack a

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360. This Part borrows from earlier work analyzing DACA. See Margulies, *Taking Care of Immigration Law*, *supra* note 77.

361. 343 U.S. 579, 637 (1952) (Jackson, J., concurring); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1924–25 (2012); cf. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. (forthcoming 2015), available at <http://ssrn.com/abstract=2545558> (arguing that, in light of *Youngstown*, DAPA violates separation of powers).

362. *Youngstown*, 343 U.S. at 637.

363. *Id.*

364. *Id.* at 586; see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–84, 829 (2013) (arguing that DACA failed the *Youngstown* test and that President Obama therefore violated the Constitution's Take Care Clause).

colorable claim to a legal status and fail to meet one of the other bases for exercising discretion to award immigration benefits.<sup>365</sup>

DAPA fares no better under *Youngstown's* second category, which centers on established executive practices in which Congress has long acquiesced.<sup>366</sup> This category includes the executive practice of settling claims with foreign nations<sup>367</sup> and protecting federal lands.<sup>368</sup> As this Article demonstrates, Congress has acknowledged and acquiesced in limited, case-by-case grants of immigration benefits for individuals, like DAPA recipients, without a reasonable path to a legal status. However, officials have based those grants of benefits on compelling individual hardship or exigent circumstances abroad. Congress has *never* acquiesced in a program approaching DAPA's sweep and scope. That gap between DAPA and past practice undermines any claim that DAPA fits under *Youngstown's* second category.

Tellingly, OLC has not even undertaken to justify DAPA under *Youngstown's* third category, which deals with the President's inherent power.<sup>369</sup> That reticence was well-founded. Because the

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365. The other bases are special hardship and risk based on foreign crises. See *supra* notes 335–36 and accompanying text.

366. *Youngstown*, 343 U.S. at 637; see also *Dames & Moore v. Regan*, 453 U.S. 654, 682, 684 (1981) (discerning congressional acquiescence in executive claims settlements with other nations); *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (discussing legislative acquiescence as triggering judicial deference); *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915) (holding that Congress had acquiesced in the Executive Branch's protection of federal land for orderly development); cf. WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 121–29 (1994) (explaining what authors call “customary national security law”); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 54–68 (1990) (discussing elements, such as numerosity and consistency, that should inform analysis of the ongoing interaction between Congress and the President); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 415 (2012) (noting that when doctrines such as standing restrain judicial review, “interactions between the political branches will, as a practical matter, determine the separation of powers”).

367. See *Dames & Moore*, 453 U.S. at 682, 684.

368. *Midwest Oil Co.*, 236 U.S. at 469.

369. For an analysis of Jackson's third category, see generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008). For debate on the presidential power to refuse to enforce laws, compare Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1117–19 (2013) (arguing that prosecutorial discretion in DACA was supported by reasonable enforcement priorities and public disclosure), with Blackman, *supra* note 361 (same), and Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674–75 (2014) (rejecting a broad view of presidential power not to enforce). See generally Elena Kagan, *Presidential*

President's constitutional power over immigration is limited, it fails to supply the support needed for DAPA's blanket grant of benefits. The Constitution does not mention immigration specifically.<sup>370</sup> However, where it mentions issues related to immigration, it grants power to Congress over such matters. For example, the Framers in the Migration and Importation Clause authorized Congress to regulate the slave trade in 1808.<sup>371</sup> The Constitution also grants Congress the power to establish rules for naturalization.<sup>372</sup> Finally, Congress may regulate interstate commerce and commerce with foreign nations.<sup>373</sup> If these powers imply a broader power over immigration, that power resides in Congress.<sup>374</sup>

The Constitution grants the President *no* enumerated powers over immigration. The closest power is the power to receive ambassadors, which implies sway over U.S. diplomatic efforts.<sup>375</sup> However, this power does not underwrite DAPA's wholesale award of benefits. The President has authority to defer deportation to deal with foreign crises, but DAPA does not implicate that power.

Advocates for presidential authority might argue that dicta in Supreme Court decisions support a more robust conception of presidential power. However, as in the language on executive

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*Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that the modern structure of U.S. governance requires according substantial discretion to the President).

370. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 602 (1889) (inferring basis for Congress's plenary power over immigration). For histories of the plenary power doctrine, see DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 113–16 (2007); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059–60 (1994); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 730–31 (1996); Ediberto Roman & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 441 (2002) (critiquing judicial deference to Congress in governance of territories). See generally GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996) (analyzing the consequences of territoriality under the Constitution).

371. U.S. CONST. art. I, § 9, cl. 1.

372. *Id.* art. I, § 8, cl. 4.

373. *Id.* art. I, § 8, cl. 3.

374. If power over immigration is an incident of sovereignty itself, the President may claim a stronger interest. Cf. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 1 (2002) (tracing this argument from its origins). However, a sovereignty-based argument that favors the President still must explain the contrary inferences from the Constitution's text.

375. U.S. CONST. art. II, § 3.



discretion in Supreme Court cases like *AADC* and *Arizona*, dicta can easily lead to dead ends.<sup>376</sup> For example, in *Fong Yue Ting v. United States*,<sup>377</sup> the Court upheld a law that permitted Chinese laborers to stay in the country only if they submitted a statement by a “credible white witness” that they met the statutory criteria.<sup>378</sup> In upholding the statute, the Court asserted that in extradition cases the President could act unilaterally.<sup>379</sup> However, this assertion occurred within a larger discussion recognizing that the President’s power over immigration was a function of congressional delegation. The Court noted that a statutory delegation to the executive was “the more common method.”<sup>380</sup> *Knauff* also contained dicta asserting an executive prerogative over immigration.<sup>381</sup> However, that case also involved discretion expressly delegated by Congress regarding the immigration ramifications of national security emergencies.<sup>382</sup> In short, the dicta supporters cite in favor of presidential power over immigration should be read modestly here, as in more recent cases dealing with executive discretion.

#### CONCLUSION

Statutes, like facts, are stubborn things. It would make for better policy if the INA encompassed the vast, unbridled discretion that DAPA asserts. For better or worse, however, that is not the law that Congress wrote. The INA is a comprehensive framework that both enables legal immigration and deters unlawful migration. To accomplish the latter, its provisions discourage unlawful entry, presence, and work, while its enumerated categories of legal status block unlawful entrants’ acquisition of status through post-entry U.S.-citizen children. The limits on legal status should be read broadly, not merely as mechanical formulas for the award of visas, but as guideposts for executive discretion.

Indeed, Congress for over a quarter-century has sought to limit discretion in the Executive Branch that undermines the INA’s

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376. See *supra* notes 198–215 and accompanying text.

377. 149 U.S. 698 (1893).

378. *Id.* at 742.

379. *Id.* at 714.

380. *Id.*

381. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950).

382. *Id.* at 539–42 (rejecting the petitioner’s argument that a statute enacted during World War II that gave the Executive Branch power to exclude foreign nationals whose entry would be “prejudicial to the interests of the United States” was an unconstitutional delegation of power).

deterrence goals. In curbing parole, extended voluntary departure, temporary protected status, and cancellation of removal, Congress has signaled that immigration officials should be sparing in administrative awards of benefits, such as work authorization, to categories of unlawful entrants without a reasonable prospect of obtaining a legal status. Since DAPA grants benefits to just such a group, it is inconsistent with the INA's comprehensive framework.

Judicial review of DAPA is appropriate to restore the immigration framework's balance. The first step would be to require that DAPA, as a legislative rule, go through the notice-and-comment process. That process alone might provide some of the deliberation that DAPA lacks.

In addition, DAPA is substantively reviewable because its broad criteria make it a "statement of general enforcement policy."<sup>383</sup> Such general policies fall within the presumption of reviewability of agency action. Courts can apply manageable standards to assess whether the policy embodied in DAPA comports with the INA. Of course, some residue of discretion remains in individual decisions implementing DAPA. As the Supreme Court indicated in *Chaney*, judicial review of those individual decisions would disrupt the statutory scheme.<sup>384</sup> However, review of DAPA's broad policy contours merely ensures the policy's consistency with statutory commands that are well-suited to judicial interpretation. Moreover, because of DAPA's sweeping grant of benefits, it may actually constitute agency *action*, which is presumptively reviewable.

Upon review, DAPA is unworthy of judicial deference. The INA's intricate latticework of deterrence is manifestly incompatible with the sweeping discretion that DAPA displays. DAPA defies the INA's deterrence goals. Instead of limiting moral hazard, as Congress has sought to do, DAPA compounds the problem. Moreover, DAPA fails the "common sense" test the Supreme Court outlined in *Brown & Williamson*.<sup>385</sup> Given Congress's focus on deterring unlawful entry and presence, it seems implausible that Congress would have authorized the sweeping discretion that DAPA entails. The discretion that Congress delegated to immigration officials must have a limiting principle. Limiting discretion over benefits to relief that is a bridge to a legal status, a help for extreme hardship, or a

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383. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

384. *Chaney*, 470 U.S. at 837-38.

385. 529 U.S. 120, 133 (2000).

shield against exigencies abroad fits the bill. DAPA's award of benefits to unlawful entrants with no reasonable prospects of obtaining a legal status is a bridge too far.

Admittedly, respecting the INA's limits will not fix the substantial immigration problem that the United States faces. Comprehensive immigration reform is necessary to begin addressing that issue. However, understanding why DAPA exceeds statutory authority at least clarifies the issues, and puts the issue of immigration reform back where it belongs: in Congress.