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Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement

Peter Margulies*

I. INTRODUCTION

Although agencies rightly have discretion in interpreting statutes, that discretion does not extend to unraveling carefully crafted legislative compromises. In immigration law, Congress has for fifty years pursued a classic trope in the annals of legislative craft: liberalizing the law in certain respects, while strengthening enforcement in others.¹ Agency discretion that is interstitial in character² preserves such compromises, allowing Congress to do its work against a predictable backdrop of administrative enforcement. In contrast, agency discretion that ignores the “context” of compromises embodied in legislation undermines the rationale for judicial deference to agency decisions.³ Moreover, such

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1. See Jane Hong, *The Law that Made America diverse; When Congress Overhauled Immigration in 1965, it Ended a Racist Quota System – and Helped Create Today’s Border Problem*, L.A. TIMES, Oct. 2, 2015, A17, <http://www.latimes.com/opinion/op-ed/la-oe-1002-hong-1965-immigration-act-20151002-story.html> [<http://perma.cc/BESP-D6CR>] (noting that legislators in 1965 who were initially reluctant to vote for doing away with facial discrimination in immigration statutes agreed to this reform on condition that amendments impose a uniform per-country cap on legal immigration to the United States).

2. See *Mayburg v. Sec’y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) (observing that touchstone is what “a sensible legislator would have expected given the statutory circumstance . . . [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.”).

3. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see also *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). The structure of deference alluded to in the text emerges from administrative law doctrine. See generally *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* held that courts should defer to agency decisions if: (1) the statute is ambiguous, and, (2) the agency’s interpretation is reasonable. *Id.* at 842–45. If a court determines at step one that the statute unambiguously precludes the proposed agency action, the court does not proceed to step two. *Id.* at 842–43. In determining whether a statute is ambiguous, *Chevron* instructed courts to use “traditional tools of statutory construction.” *Id.* at 843 n.9. In *Brown & Williamson*, the Court made clear that construing statutory meaning under step one of *Chevron* includes reading the words of a statute “in their context and with a view

agency excesses threaten the paradigm of the separation of powers itself, which is premised on coordination between the two political branches.⁴ Despite its basis in sound policy, the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program is a case in point.⁵

DAPA grants or facilitates acquisition of most of the benefits of legal status,⁶ such as freedom from removal and work authorization, to over forty percent of adult noncitizens who are now unlawfully present in the United States. DAPA's sweeping benefits undermine the cornerstones of compromise in the Immigration and Nationality Act ("INA"): (1) barriers to legal status for undocumented noncitizens,⁷ such as prospective DAPA recipients, whose claims for immigration benefits turn on post-entry U.S. citizen children, (2) comprehensive deterrence of unlawful entry, presence, and work in the U.S., and (3) curbs on the exercise of agency discretion that is not interstitial in character.

In his contribution to this Issue, Professor Motomura seeks to elide this clash between the DAPA program and the INA by positing the existence of administrative discretion under immigration law to reconcile the age-old conflict between "law on the books" and "the law in action."⁸ On this view, the text of a statute or regulation (law on the books) matters less, both descriptively and normatively, than the situation on the ground subsequent to a statute's enactment (the law in action). While this distinction can be useful, Professor Motomura's deployment of the distinction to support DAPA's legality fails for three reasons.

First, and most importantly, Professor Motomura offers no normative limiting principle to distinguish between agency discretion that respects legislative bargains and discretion that undermines such bargains. Fundamentally, Professor Motomura disagrees with a key

to their place in the overall statutory scheme." See *Brown & Williamson*, 529 U.S. at 133.

4. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

5. In November, 2015, the Fifth Circuit affirmed a nationwide injunction against DAPA's implementation, finding that DAPA failed to comply with the Administrative Procedure Act ("APA"). See *Texas v. United States*, 2015 U.S. App. Lexis 19725 (5th Cir. Nov. 9, 2015), affirming *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (granting nationwide injunction against implementation of DAPA), *stay of injunction denied*, 787 F.3d 733 (5th Cir. 2015). This Article analyzes the substantive APA issue addressed by the Fifth Circuit: whether, read in context under *Chevron's* test of the judicial deference owed to agency decisions, the INA unambiguously precludes DAPA. See *Texas*, 2015 U.S. App. Lexis 19725, at 95–116.

6. 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.

7. Throughout this Article, I use the term, "noncitizen," in place of the earlier term, "alien," which has now become loaded with adverse connotations that distract from reasoned debate.

8. See Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015).

compromise that paved the way for the 1965 Act: coupling the elimination of express national origin discrimination with the installation of a uniform annual cap on admission of immigrants from *any* country, including Mexico.⁹ Professor Motomura rightly contends that Congress was unrealistic in seeking to control the flow of immigrants from the United States' southern border. That lack of realism should spur efforts for *legislative* immigration reform. However, legislative wishful thinking does not authorize unbounded agency discretion to revise the clear compromise that Congress struck. Judicial deference to such unfettered agency discretion would also undermine the canonical separation of powers framework articulated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁰

Second, Professor Motomura's purported distinction between the law on the books and the law in action proves too much. The executive branch has justified DAPA as a program that does not alter law on the books.¹¹ The government's argument hinges on the distinction between formal legal status (such as lawful permanent residence) and immigration benefits (such as a reprieve from removal and work authorization) that DAPA provides or facilitates. That distinction is artificial because of overwhelming evidence that Congress wished to limit both status *and* benefits to deter unlawful entry or presence.¹² However, the government has viewed the status/benefits distinction as central to its defense of DAPA. By dismantling that distinction, Professor Motomura actually validates the arguments of DAPA's critics, who contend that the status/benefits distinction obscures the core issue: whether DAPA fits under the INA, when the latter is read in context as a "harmonious whole."¹³

Third, Professor Motomura inaccurately depicts the law in action, by severely underestimating marked *pre-DAPA* reductions to interior immigration enforcement. Before announcing DAPA, the current

9. *Id.* at 16.

10. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

11. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents at 2–3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/2K3L-CMML>] [hereinafter DAPA Memorandum]; Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Sec'y of Homeland Sec. and the Counsel to the President at 11 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [perma.cc/8M53-3NJB] [hereinafter OLC Memorandum].

12. See Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 Am. U. L. Rev. 1183, 1201–03 (2015) [hereinafter Margulies, *Boundaries of Executive Discretion*].

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

Administration reduced, by *almost sixty percent*, removals of noncitizens who had already unlawfully entered the United States or accrued periods of unlawful presence.¹⁴ While Professor Motomura portrays DAPA as a means to discipline an overzealous federal enforcement bureaucracy, immigration officials' decisive shift in enforcement priorities undermines that rationale.

This Article is in five Parts. Part II discusses the bedrock principle of statutory interpretation that courts should read a statute in context and as a "harmonious whole." I discuss this principle's application in cases such as *FDA v. Brown & Williamson Tobacco Corp.*¹⁵ on agency discretion, and in the Supreme Court's recent decision in *Yates v. United States*¹⁶ that a fish is not a "tangible thing" within the meaning of the Sarbanes-Oxley Act. Part III discusses the *Youngstown* test of Justice Jackson, which ties judicial deference to an executive action under the constitutional separation of powers to the level of coordination between the political branches that the action exhibits. Administrative law's checks on executive branch statutory interpretation serve not only statutory objectives, but constitutional purposes. DAPA defies these constraints. Deferring to an agency reading of the INA that distorts the statute's context creates an easy escape route from the separation of powers architecture that Justice Jackson described in *Youngstown*.

To clarify the conflict between DAPA and the INA, Part IV of the Article discusses the cornerstones of the INA, including deterrence of unlawful entry, presence, and employment and curbs on executive discretion. Finally, Part V of the Article deconstructs Professor Motomura's flawed arguments for DAPA based on the distinction between law on the books and the law in action.

II. STATUTORY INTERPRETATION IN CONTEXT

In statutory interpretation, context prevails over reading statutory provisions in isolation from the structure, logic, and purpose of legislation. On occasion, the justices of the Supreme Court have disagreed about how to read a statute as a whole.¹⁷ However, the Court has typically held that when a statute's logic, structure, and purpose are clear, these factors should inform interpretation of specific statutory provisions.

14. ICE Enforcement and Removal Operations Report, Fiscal Year 2014, at 9 (Dec. 19, 2014), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf> [<https://perma.cc/WJ2H-4939>] [hereinafter ICE Enforcement Report].

15. 529 U.S. 120 (2000).

16. 135 S. Ct. 1074 (2015).

17. See generally *Yates v. United States*, 135 S. Ct. 1074 (2015).

As a paradigmatic illustration, consider the Court's opinion in *Brown & Williamson*. Justice O'Connor, writing for the Court, found that the Food and Drug Administration ("FDA") lacked authority to regulate tobacco.¹⁸ To justify this holding, Justice O'Connor reminded readers that an agency had to consider a statute in context.¹⁹ Each provision of the statute fits into the "overall statutory scheme."²⁰ Accordingly, courts read a statute as a "harmonious whole,"²¹ not a crazy quilt of random fabrics. In considering whether a statute's context unambiguously precludes an agency action, "common sense" proportion is also vital.²² Since Congress does not "hide elephants in mouseholes,"²³ it is reasonable for a court to require clear and specific evidence of Congress's intent to delegate to an administrative agency a "policy decision of . . . [great] economic and political magnitude."²⁴

In *Brown & Williamson*, Justice O'Connor used this traditional tool of statutory construction to assess the deference the Court owed to the FDA's determination that it could regulate tobacco. To answer this question, the *Brown & Williamson* Court first had to answer whether the Food and Drug Act was ambiguous regarding the FDA's authority. If the Court had found that the statute was ambiguous, it would then have moved on to the second step of the *Chevron* inquiry: whether the agency's reading was reasonable. Because the *Brown & Williamson* Court found that the statute precluded the FDA from regulating tobacco, the Court did not reach this second inquiry.

Reading the Act as a whole, along with other enactments addressing tobacco, Justice O'Connor concluded that Congress had clearly placed tobacco beyond the FDA's reach. Justice O'Connor's reading was pragmatic, weaving together statutory provisions into a "harmonious whole."²⁵ Justice O'Connor observed that to permit marketing of a product subject to the FDA's jurisdiction, the agency would have to find that the product was safe under the conditions recommended by the manufacturer.²⁶ Because tobacco cigarettes are unsafe under any conditions, the FDA would have been unable to make this finding.²⁷ Therefore, Justice O'Connor inferred, the inevitable result of tobacco's amenability to FDA regulation would have been an

18. *Brown & Williamson*, 529 U.S. at 133. Congress eventually granted the Food and Drug Administration ("FDA") this authority. See *Sottera, Inc. v. FDA*, 627 F.3d 891, 894 (D.C. Cir. 2010).

19. *Brown & Williamson*, 529 U.S. at 132.

20. *Id.* at 133.

21. *Id.* at 132.

22. *Id.*

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

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

25. *Id.* at 133 (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)).

26. *Id.* at 136-37.

27. *Id.*

outright ban on the substance's marketing.²⁸

Justice O'Connor tried to match this hypothetical result against other legislative provisions, and found that it did not fit. Congress had proclaimed in another provision of the U.S. Code that, "the marketing of tobacco constitutes one of the greatest basic industries of the United States . . . and stable conditions therein are necessary to the general welfare."²⁹ Rather than ban tobacco, Justice O'Connor explained, Congress had expressly provided that the government should address tobacco's health impacts by ensuring that consumers received adequate information about those health risks.³⁰ Justice O'Connor concluded that this and similar provisions would be meaningless if Congress intended to delegate to the FDA the choice to promulgate an outright ban.³¹ Since a complete assessment of statutory ambiguity had to consider all of the pertinent provisions enacted by Congress, Justice O'Connor concluded that the statute in context barred such a broad delegation.

More recently, the Court decided *Yates v. United States*, again illustrating the importance of statutory context. *Yates* is not a *Chevron* case, but it also stresses reading a statute in a common-sense fashion. In *Yates*, the Court held that the deliberate misrecording of the weight of a fish was not a violation of the federal Sarbanes-Oxley Act ("SOX"). Justice Ginsburg, writing for a five justice majority, found that SOX, which bars deception in records and other tangible things, had been passed to address deception and overreach in corporate governance. According to Justice Ginsburg, the statute's context—which had been passed in the wake of the Enron fiasco, in which investors lost billions as a result of a publicly traded companies' inflation of profits and assets—had little to do with fishing on our nation's waters. Expanding the reach of SOX to such activities would transform the statute's implementation in a way that Congress could not have intended.³²

28. *Id.* at 136–37 (noting that FDA would be prohibited from granting preapproval a marketing plan).

29. *Id.*

30. *Id.* at 138–39.

31. *Id.* at 139–40. While the FDA had asserted that it could accomplish public health goals by regulation short of a ban, Justice O'Connor found that the agency had disregarded the Food, Drug, and Cosmetic Act's requirement that the agency find that the product *itself*—i.e., tobacco—was safe. *Id.*

32. See also *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (noting that, in determining the meaning of the term, "exchange," under the Affordable Care Act, a court must consider the term's place in the "context" of the statute as a whole) (citing *Brown & Williamson*, 529 U.S. at 132). Cf. *ACLU v. Clapper*, 785 F.3d 787, 813–16 (2d Cir. 2015) (holding that statute authorizing collection of tangible things including phone records that were "relevant" to an investigation did not authorize government collection in so-called metadata program of virtually all land-line call records for purposes of querying those records with identifiers such as phone numbers, which the government had a "reasonable and articulable suspicion" were linked to terrorist groups such as Al Qaeda); but see Peter Margulies, *Dynamic Surveillance: Evolving Procedures in Metadata and Foreign Content*

In sum, a court's common-sense interpretation of statutory context keeps the executive branch honest. Attention to context constrains run-away executive branch interpretations, and keeps Congress in the loop, requiring legislative sign-off on expansive readings that strain an existing statute to the breaking point. Attention to context thus ensures that delegations to the executive serve Congress's intent, instead of promoting other policy agendas. In some cases, those policy agendas may be appropriate. This was arguably true, for example, of the FDA's efforts to regulate tobacco. The proper course in such situations, as *Brown & Williamson* requires, is to ask the legislature for additional authority. Congress ultimately provided the FDA with the authority over tobacco that it sought. That inter-branch dialogue represents healthy interaction between the political branches, rather than the precipitous unilateralism that *Brown & Williamson* seeks to deter.

III. THE SEPARATION OF POWERS AS BACKDROP FOR CONSTRAINTS ON DEFERENCE IN ADMINISTRATIVE LAW

The absence of these constraints would undermine the separation of powers edifice crafted by Justice Jackson in *Youngstown*.³³ This subsection first lays out Justice Jackson's canonical approach. It then explains why sweeping administrative law deference undermines the separation of powers, by allowing the executive to do through the backdoor of statutory interpretation what it cannot do through a straightforward assertion of executive power. We should be hesitant to embrace a vision of administrative law that permits this result.

Justice Jackson divided presidential actions into three categories, based on the degree of collaboration between the President and Congress. The extent of collaboration determines the deference that a court will display. The President receives greatest deference for actions that are consistent with Congress's will, some deference for acts that occur against a background of congressional silence, and little or no deference for actions that conflict with legislative intent.³⁴

If the executive branch, in a case like *Brown & Williamson*, did not have to read a statute as a "harmonious whole," the executive could interpret a statutory provision in isolation as a fig-leaf for unilateral acts.

Collection After Snowden, 66 HASTINGS L.J. 1 (2014) (arguing narrow reading of statutory language authorizing metadata program failed to consider both congressional intent to grant government flexibility in tracking terrorist groups and safeguards, such as judicial review, built into program).

33. 343 U.S. 579, 635–38 (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. & Politics 2015 (2015) (discussing DAPA in light of *Youngstown*).

34. *Youngstown*, 343 U.S. at 635–38.

For example, in *Youngstown* itself, the executive branch could have argued that Congress did not expressly bar the President from taking over steel mills in the event of a labor dispute, and that Congress had therefore either impliedly consented to or acquiesced to the President's power.³⁵ The executive could have focused on the lack of an express bar, rather than on Congress's rejection of an express authorization. The latter was surely part of the overall context of the Labor Management Relations Act's enactment, as the majority found.³⁶ However, relieved of the task of reading the statute as a whole, the executive would not have to address this point.

Similarly, in *Hamdan v. Rumsfeld*,³⁷ the U.S. Supreme Court held that the President lacked the power to unilaterally establish military commissions that operated without the procedural safeguards that Congress wished to include. The executive could have set up a military commission with materially fewer rights than ordinary courts-martial, such as the right not to be tried in absentia.³⁸ Under a *Chevron* analysis that read the statute through isolated provisions, the court would again have focused on the lack of a clear bar to the President's unilateral creation of military commissions. While the executive would have had to demonstrate that such rights were not "practicable,"³⁹ a court providing deference without context would have countenanced a very narrow interpretation of that statutory term. Relying on this narrow reading, the President would have gotten his way without even entering the *Youngstown* arena.

A sweeping view of deference would also undermine the second category of Justice Jackson's concurrence, dealing with decisions on which Congress has been silent.⁴⁰ Here, courts often look to the course of dealing between Congress and the President. Courts uphold

35. Granted, in *Youngstown* itself, the detailed nature of the labor-management dispute resolution process outlined in applicable statutes made it difficult to argue that Congress had implicitly authorized additional remedies beyond those it had listed. *Id.* at 586. However, at the time of *Youngstown*, administrative law had not yet recognized deference in the systematic way that the Court did three decades later in *Chevron*. A reading of deference that does not heed statutory context could give the executive branch an opening to argue that a presidential seizure of the steel mills is merely a supplemental remedy implied in Congress's framework.

36. *Youngstown*, 343 U.S. at 586 (noting that Congress had rejected an amendment to the pending labor-management legislation that would have expressly authorized presidential seizures in emergencies).

37. 548 U.S. 557 (2006).

38. *Id.* at 623–25.

39. *Id.* at 620 (citing Article 36 of the Uniform Code of Military Justice).

40. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see also *id.* at 610–11 (Frankfurter, J., concurring) (arguing that legislative acquiescence should elicit judicial deference). See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding congressional acquiescence in presidential claims settlements with other nations); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (holding that Congress had acquiesced in presidential protection of federal land for conservation and orderly development); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414–15 (2012).

presidential action that matches a venerable course of dealing,⁴¹ while striking down action that fails to dovetail with that set of understandings.⁴² However, an unduly deferential analysis of executive action would not take full account of congressional action that clashed with the executive branch's approach. Or courts might find congressional acquiescence where there was scanty evidence of a course of dealing and some evidence of congressional resistance over time. For example, in *Medellín v. Texas*,⁴³ in which the Court held that the President lacked the power to order Texas to comply with decisions of the International Court of Justice, the Court declined to find a pattern of acquiescence that would satisfy *Youngstown's* second category. While the President had claimed authority based on his power to interpret treaties such as the U.N. Charter and U.S. implementing legislation, the Court held that Congress had acquiesced only to a far more limited set of cases involving presidential settlement of claims with other states as part of recognition or other international negotiations.

If a sweeping view of *Chevron* deference applied in such cases, a court that would now reject a claim that Congress had acquiesced in presidential action might not even reach *Youngstown's* comparatively exacting second category, and might find that Congress had implicitly authorized the action under Justice Jackson's first category. This tendency would permit the President to sidestep Jackson's third and most demanding category, in which the President acts alone. Because the prospect of little or no judicial deference in the third *Youngstown* category checks executive unilateralism,⁴⁴ this move would undermine the structure of the separation of powers that the Framers designed.

Granting administrative decisions deference without regard to statutory context would also clash with *Youngstown* because it would require that Congress, rather than the President, assume the burden of inertia.⁴⁵ If Congress disagrees with an administrative interpretation

41. See *Dames & Moore*, 453 U.S. at 678–82 (discussing Congress's acceptance of executive practice of agreeing to settle U.S. persons' or entities' claims against foreign nations in exchange for receipt of diplomatic consideration, including reciprocal claims settlement or, as in *Dames*, the release of U.S. hostages).

42. See generally *Medellín v. Texas*, 552 U.S. 491 (2008) (declining to find that Congress had acquiesced in the President's unilateral effort to alter state rules of criminal procedure, despite the holding of the International Court of Justice, acting pursuant to authority granted by the U.N. Charter, that the U.S. had to take such action under international law); but see Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 5–8 (2009) (suggesting that resort to *Youngstown* framework in *Medellín* was confusing and unnecessary).

43. 552 U.S. 491 (2008).

44. 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, 700 (2008).

45. Cf. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 24 (2010) (discussing burden of inertia as guide to statutory interpretation).

that has received deference in the courts, Congress's only option is to seek to enact new legislation. Indeed, after officials of the Obama Administration announced DAPA, President Obama asserted that if Congress disagreed, it merely had to pass legislation of its own.⁴⁶

This assertion fails to reckon with *Youngstown's* allocation of interpretive default rules. Any legislation to curb executive overreaching is subject to a presidential veto. Suppose that Congress wished to counter an agency interpretation that conflicted with statutory context, but that had received judicial deference because courts had abandoned the *Brown & Williamson* contextual approach. If the President announced that he would veto any such attempt, Congress's only option would be to enact legislation with a super-majority that would override the President's veto. While it is entirely consistent with the constitutional scheme to impose this requirement when Congress enacts new legislation, Congress should not have to bear this burden when it merely wishes to counter an agency interpretation that ignores or discounts a current statute's context. Imposing this burden on Congress would eviscerate Justice Jackson's first and second categories, and leave the President virtually unfettered in the pursuit of unilateral executive action.

Separation of powers should not replace *Chevron's* wisdom on the deference owed to administrative interpretations of federal legislation. However, separation of powers is part of the backdrop for construing *Chevron's* scope. Cabining deference through consideration of the entire statutory context is a vital check on executive authority and a central vehicle for vindicating congressional intent.

A. DAPA Considered

DAPA presents a test case on the importance of statutory context as a limit on executive power. The concerns raised here do not reject the policy underlying DAPA. Regularizing the situation of the eleven million undocumented persons in the U.S. should be a national priority. However, a decent respect for constitutionalism requires that we address this problem in the way that the Framers intended: through an Act of Congress, not through unilateral executive action or a strained executive interpretation of a statute that ignores Congress's repeated efforts to cabin the executive branch's enforcement discretion.

The modern INA is a legislative bargain that eliminated facial

46. See Kate Zezima & David Nakamura, *Obama Takes Pitch for Immigration Reform to Nashville*, WASH. POST, Dec. 10, 2014, A8 (reporting that President Obama would tell Congress that if it disagreed with DAPA, it should "pass a bill").

discrimination in U.S. immigration law, but did so at the price of constructing a “highly selective system for the admission of immigrants.”⁴⁷ Professor Motomura in his defense of DAPA acknowledges the legislative bargain crafted in the landmark 1965 immigration amendments.⁴⁸ However, Professor Motomura’s position would undermine Congress’s well-crafted compromise.

The 1965 Act eliminated facial per-country quotas that had discriminated against various groups, including Asians. Congress and President Lyndon Johnson’s Administration concluded that these explicit quotas were both unfair and out of step with the message of freedom and equality that the United States wished to convey to the rest of the world.⁴⁹ However, Congress also wished to send the message that the regulation of immigration continued to be a sovereign prerogative. In its report on the 1965 legislation, 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.”⁵⁰ That stark fact required difficult choices. Having abandoned quotas that discriminated against nationals of particular countries, Congress imposed a uniform annual cap on legal immigrants from any given country.⁵¹ To highlight the move from disparate per-country quotas to a uniform, nondiscriminatory system, Congress imposed the uniform cap on Mexican immigrants, as well as nationals from virtually all other countries. Mexican nationals had formerly not been subject to a cap. Instead, Congress and the executive branch had allowed them liberal admission as guest workers for U.S. agricultural firms.⁵²

Professor Motomura rightly criticizes the self-delusion behind this effort to control Mexican immigration. The history of Mexican employment in the agricultural field and the long border between Mexico and the United States made limits on Mexican immigration easier to inscribe in law on the books than to implement as the law in action.⁵³ Self-delusion rarely makes for good policy.

While Professor Motomura’s policy analysis is right on target, it is nonetheless irrelevant to a *legal* analysis of the INA. Congress’s policy position was shortsighted. Corrective legislation is desperately needed.

47. S. REP. NO. 89-748, at 12 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328.

48. See Motomura, *supra* note 8, at 16–18.

49. 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, 279–83 (1996); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1127–1131 (1998).

50. S. REP. NO. 89-748, at 14.

51. Motomura, *supra* note 8, at 15.

52. *Id.* at 16.

53. *Id.* at 15–16.

However, accepting that Congress made the wrong choice as a policy matter does not cede power to the executive branch to revisit the choice Congress made or allow it to reinterpret the INA to accomplish that result.

B. DAPA as Undermining Congress's Design of Deterrence in the INA

In the years since 1965, Congress has repeatedly emphasized the deterrent purposes of immigration law. Congress's design for deterrence concentrated on the same individuals that DAPA aims to benefit: noncitizens who entered the United States or remained here unlawfully and relied on post-entry U.S. citizen children to obtain a lawful status. Congress also enacted provisions aimed at deterring unlawful presence, eliminating the "magnet" of U.S. jobs, and limiting discretionary awards of immigration benefits. DAPA undermines all of Congress's work.

For Congress, the deterrence of unlawful immigration is a necessary complement to the promotion of legal immigration. As the House Judiciary Committee report on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")⁵⁴ explained, cardinal objectives of immigration law include the timely processing of persons entitled to lawful status, and the "prompt exclusion or removal of those who are not so entitled."⁵⁵ The 1996 House report identified individuals who overstayed on temporary visas given to students and tourists as undermining this goal.⁵⁶ Foreign nationals who entered the U.S. without inspection and then remained unlawfully also undermined the system, and were thus targets of Congress's heightened efforts at deterrence of immigration law violations.⁵⁷ Instead of respecting Congress's deliberate choices, DAPA confers substantial benefits on a large proportion of the cohort that Congress wished to deter.

1. The Deterrent Effect of Bars to Admission Based on Unlawful Presence

As one example of Congress's repeated efforts to deter unlawful immigration, consider the bars imposed in IIRIRA on admission of noncitizens who have been unlawfully present in the United States.⁵⁸

54. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1997).

55. See H. COMM. ON THE JUDICIARY, *Immigration in the National Interest Act of 1995*, H.R. Doc. No. 104-469, at 111 (2d Sess. March 4, 1996) [hereinafter 1996 House Judiciary Report].

56. *Id.* at 114-16.

57. *Id.* at 116.

58. 8 U.S.C. § 1182(a)(9)(B)(i) (2012).

The effect of these bars is stark. Individuals who leave the United States after having been unlawfully present for a period of more than 180 days but less than one year are subject to a three-year bar on admission to the United States.⁵⁹ Congress sent an even harsher message to foreign nationals who leave the United States after having been unlawfully present for one year or more: they are subject to a *ten-year* bar.⁶⁰

These provisions demonstrate Congress's commitment to deterring unlawful immigration. The unlawful presence bars adversely affect noncitizens such as prospective DAPA recipients who, because of a family relationship or an employment-related skill, might receive a U.S. visa in the future, but do not *currently* have a visa entitling them to lawfully enter the United States. By enacting the unlawful presence bars, Congress bridged a gap in enforcement which would otherwise have allowed noncitizens in this group to violate the immigration laws with impunity.

Suppose that such an individual decides to "jump the queue" by unlawfully entering or remaining in the United States *before* a visa becomes available. That person then accrues a period of unlawful presence that triggers the statutory bar. Once the noncitizen has accrued this period, Congress's design erects a formidable barrier to subsequent receipt of a visa.

Under the INA, persons who enter the United States without being lawfully inspected, admitted, or paroled *must leave* the United States before they can receive a visa entitling them to lawful entry into the United States.⁶¹ However, once such persons have been unlawfully present in the United States for more than 180 days, their departure will trigger an unlawful presence bar. While a waiver of the unlawful presence bars is available, Congress deliberately excluded from eligibility the parents of citizens and lawful permanent residents ("LPRs")—the very individuals who would be eligible for DAPA's benefits.⁶² This result is harsh, potentially separating close family members or requiring an individual to forego a visa that would otherwise be available. However, the harshness built into the unlawful

59. *Id.* at § 1182(a)(9)(B)(i)(I).

60. *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).

61. See 8 U.S.C. § 1255(a) (2015).

62. 8 U.S.C. § 1182(a)(9)(B)(v). The waiver is only available to an immigrant who is the "spouse or son or daughter" of a U.S. citizen or lawful permanent resident ("LPR"). 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.*

presence bars' operation is far from inadvertent. That harshness is a signal of Congress's commitment to deterring unlawful entry and presence across the board, *even* for noncitizens who might otherwise be eligible for a visa. DAPA muddles Congress's message.

C. The Age Floor on U.S. Citizens' Sponsorship of Immediate Relatives

Deterring unlawful entrants from using post-entry U.S. citizen children to acquire a legal status was a key element of the compromise underlying the 1965 Immigration Act. Just as Congress crafted the waiver of the unlawful presence bars to exclude this group, Congress in 1965 crafted the definition of an "immediate relative" under the INA to require that U.S. citizens must be *at least twenty-one years of age* to sponsor parents for lawful permanent residence.⁶³ The age floor on U.S. citizen sponsors was a deliberate decision by Congress to bolster deterrence.

The age floor figured in a telling exchange that influenced drafting of the 1965 Act. Senator Robert Kennedy of New York, a former Attorney General of the United States, agreed with Senator Sam Ervin of North Carolina, who subsequently became chair of the Senate Watergate Committee, that changing the age floor would be "unwise."⁶⁴ Both Senators acknowledged that abolishing the age floor on child sponsors would encourage more undocumented foreign nationals to stay or remain in the United States through the simple expedient of having a child within U.S. boundaries.⁶⁵

Senators Kennedy and Ervin did not view undocumented parents of U.S. citizens as blameworthy; they simply wanted to deter unlawful entry into or presence in the United States. Impeding undocumented noncitizens' reliance on U.S. citizen children for legal status was one cornerstone of the 1965 Act's deterrence strategy. DAPA, by rewarding parents of U.S. citizen children with prized indicia of legal status such as a formal, renewable reprieve from removal, and the strong likelihood of permission to secure legal employment, undermines the architecture of deterrence that Congress had put in place.

63. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 201(b), 79 Stat. 911 (1965). That provision remains the law today. See 8 U.S.C. § 1151(b)(2)(A)(i) (2012); see also STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 258 (6th ed. 2015) (explaining the immediate relative category); see also *Texas*, 2015 U.S. App. Lexis 19725, at 100 (finding that INA's age floor on citizen sponsors clashed with DAPA's provision and enabling of substantial immigration benefits to parents of younger citizens).

64. *Immigration: Hearings on S. 500 Before the Subcomm. on Immigration & Naturalization*, 89th Cong. 230 (1965) [hereinafter 1965 Senate Judiciary Hearings].

65. *Id.*; see also Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. Online 96, 107 n.68 (discussing 1965 exchange).

D. Reducing the Role of U.S. Jobs as a “Magnet” for Unlawful Immigration

In addition to discouraging undocumented noncitizens' reliance on post-entry U.S. children and deterring unlawful presence generally, Congress has also acted repeatedly to reduce the role that U.S. jobs play as a “magnet” for unlawful immigration.⁶⁶ In 1986, when Congress in the Immigration Reform and Control Act (“IRCA”) provided a pathway to LPR status for millions of undocumented noncitizens, it did so as part of a grand compromise that also for the first time imposed sanctions on U.S. employers who failed to require documentation of noncitizens' legal eligibility for work.⁶⁷ Congress stressed that legalization would be a “one-time only” program.⁶⁸ The Senate Report on IRCA confidently opined that there would be no need for further legalizations, because employer sanctions would deter future unlawful migration.⁶⁹

Congress is not known for its clairvoyance. Within a decade, legislators understood that the employer sanctions in IRCA were insufficient. In 1996, when Congress passed IIRIRA, it acted again to curb the prospect of U.S. employment, describing weak enforcement of IRCA's employer sanctions program as a cardinal reason for the “failure” of U.S. immigration policy.⁷⁰ The House Report on IIRIRA condemned inadequate enforcement of employer sanctions as “ineffective in deterring . . . the illegal entry of aliens seeking employment.”⁷¹ Underlining Congress's view that tougher enforcement was needed, the House Report used harsh language, blaming lax enforcement for the “four million illegal aliens residing in the United States.”⁷²

Congress's approach in 1996 is vulnerable to criticism on linguistic and policy grounds, but provides further proof of DAPA's inconsistency with the INA. One can fault Congress for its language; scholars of immigration law have rightly decided to use more neutral terms, such as “undocumented noncitizen,” to describe individuals who are unlawfully

66. 1996 House Judiciary Report, *supra* note 51, at 126 (describing U.S. jobs as the “primary magnet for illegal immigration”); *see also Texas*, 2015 U.S. App. Lexis 19725, at 103 (discussing tension between DAPA's enabling of work authorization for substantial percentage of undocumented noncitizens and “Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country”).

67. *See* Immigration Reform and Control Act of 1986, PUB. L. NO. 99-603, 100 Stat. 3359 (1986).

68. S. COMM. ON THE JUDICIARY, 99th Cong., 1st Sess., S. Doc. No. 99-132, at 16 (1985) [hereinafter 1985 Senate Judiciary Committee Report].

69. *Id.*

70. *See* 1996 House Judiciary Report, *supra* note 51, at 108.

71. *Id.*

72. *Id.*

present.⁷³ One can also fault the 1996 legislators as unencumbered by the gift of prophecy, since employer sanctions do not work better today than they did then and the ranks of undocumented noncitizens have swelled to approximately eleven million. The linguistic and policy critiques are compelling. However, Congress's harsh criticism of sanctions enforcement in 1996 also casts an unsparing light on DAPA's legality.

Given Congress's persistent steps to limit the lure of U.S. jobs, it simply defies "common sense"⁷⁴ to find that Congress delegated authority to immigration officials to promulgate DAPA. DAPA's facilitation of U.S. employment for forty percent of undocumented noncitizens stands in marked contrast with Congress's repeated efforts to limit the lure of U.S. jobs for foreign nationals who violate U.S. immigration law. The Congress that passed employer sanctions in 1986 and bolstered them in 1996 would see DAPA as a surrender to the unlawful immigration that Congress has repeatedly sought to deter. Some accommodation to unlawful migration is both wise and humane, particularly given the U.S. equities accumulated by the undocumented population.⁷⁵ However, the accommodation of unlawful migration is emphatically not the animating impulse behind the INA.

E. Congress's Efforts to Limit Executive Discretion

DAPA also clashes with repeated efforts by Congress to *narrow* administrative discretion. Congress has permitted interstitial uses of discretion, including reprieves from removal that form a bridge to a legal status that is attainable within a reasonable time.⁷⁶ However, Congress has repeatedly checked immigration officials' efforts to wield more sweeping discretion.⁷⁷

Consider Congress's limits on grants of extended voluntary departure ("EVD") to noncitizens who had been in removal proceedings. Until IIRIRA, undocumented foreign nationals who were

73. LEGOMSKY & RODRIGUEZ, *supra* note 63, at 1. (explaining that "'noncitizen' conveys essentially the same technical meaning [as the term, 'alien'] without the same baggage.").

74. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Texas*, 2015 U.S. App. Lexis 19725, at 104.

75. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 161-62 (2006) (discussing prevention of permanent underclass of noncitizens in U.S.).

76. See Margulies, *Boundaries of Executive Discretion*, *supra* note 12, at 1216-20; see also *Texas*, 2015 U.S. App. Lexis 19725, at 114 (discussing past "interstitial" uses of deferred action); *infra* notes 84-101 and accompanying text (same).

77. See Margulies, *Boundaries of Executive Discretion*, *supra* note 12, at 1209 (noting that in 1990s, "Congress rolled back immigration officials' discretion"). Another recent scholarly account of discretion errs by downplaying Congress's efforts. See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 465 (2009).

subject to removal had been able to apply for EVD. Grants of EVD allowed noncitizens who were removable to remain in the U.S. for protracted periods, sometimes amounting to several years.⁷⁸ Instead of merely granting a noncitizen a brief grace period to wind up his or her affairs in the United States and prepare to leave, immigration officials had transformed EVD into a vehicle for foreign nationals to linger in the U.S. indefinitely. Grants of EVD became a kind of small-scale precursor to the proposed DAPA program.

In IIRIRA, Congress decisively curbed this practice. Barring the protracted EVD periods that agency officials had granted to individuals in removal proceedings, Congress limited grants of voluntary departure to 120 days.⁷⁹ Tellingly, Congress cabined administrative discretion even though EVD was a far more modest program than DAPA. To be eligible for EVD, a noncitizen had to already be in removal proceedings. Few noncitizens choose this option, which places them at risk for removal from the United States. Nonetheless, Congress evidently felt that the license to linger through protracted periods of EVD undermined the deterrent purposes of immigration law. DAPA undermines deterrence in a far more comprehensive fashion, since it allows noncitizens to apply for substantial immigration benefits without the risk of removal proceedings. Having balked at the relatively modest discretionary benefits provided by EVD, the same Congress would surely bridle at the cornucopia of benefits provided by DAPA.

F. Past Uses of Discretion

Understanding the role of official discretion in the INA as a whole also requires understanding when Congress has approved or acquiesced in the exercise of discretion. Since Congress performs regular oversight regarding immigration enforcement,⁸⁰ past discretion is part of the INA's context. A use of discretion that is markedly broader than past exercises of discretion is more likely to intrude on a matter that Congress wished to decide itself. Moreover, past discretion also affects a separation of powers analysis. Under Justice Jackson's second

78. See generally Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152 (1986).

79. 8 U.S.C. § 1229c(a)(2)(A) (2012); cf. *Barroso v. Gonzales*, 429 F.3d 1195, 1206 (9th Cir. 2005) (explaining statutory changes); *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,324 (Mar. 6, 1997) (same).

80. Indeed, Congress's earlier attempt to create a structural check on agency discretion was actually struck down by the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983) (striking down legislative veto on award of discretionary relief to noncitizen). While *Chadha* may have been rightly decided, the relevant point here is that Congress has always been vitally concerned with discretion in immigration enforcement.

Youngstown category, past practice illuminates Congress's acquiescence in executive power. Courts that ignore past practice therefore defer unduly as a matter of administrative law, and give short shrift to the inquiry on legislative acquiescence that the separation of powers requires.

While Congress has often sought to curb discretion over immigration benefits for undocumented noncitizens,⁸¹ it has permitted discretion in only three bounded categories. Immigration officials may offer deferred action as a bridge to legal status for noncitizens who will acquire such status within a reasonable period of time.⁸² Deferred action has also aided a small group of noncitizens suffering from extraordinary individual hardships such as age or infirmity⁸³ or those at risk because of exigent events abroad, including civil strife or natural disasters.⁸⁴

1. Deferred Action as a Bridge to Legal Status

As straightforward examples of deferred action as a bridge to legal status, consider applicants for U and T visas⁸⁵ and the Family Fairness program initiated under President George H.W. Bush.⁸⁶ Congress generally authorized U visas for victims of crime, and in particular, authorized T visas for victims of human trafficking. 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, and is also eligible for deferred action in the event of the denial of a stay.⁸⁷ Without this relief, the

81. See *supra* notes 77–80 and accompanying text.

82. Memorandum from Gene McNary, Commissioner of INS, on *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens*, 67(6) *Interpreter Releases* 164 (1990) [hereinafter McNary, *Family Fairness Memorandum*]; 8 U.S.C. §§ 1227(d)(1), (2), (4) (2012) (providing for stay of removal and acknowledging availability of deferred action for applicants for U and T visas, available under the INA for individuals who respectively have been victims of crime or assisted in the prosecution of human traffickers).

83. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) [hereinafter Wadhia, *Prosecutorial Discretion*].

84. Relief of this kind has been expressly authorized by the Congress as a grant of Temporary Protected Status ("TPS"). See 8 U.S.C. § 1254a(b)(1) (stating criteria for TPS); *id.* § 1254a(g) (stating that TPS is "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 INA 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 President George Bush, *Statement on Signing the Immigration Act of 1990* (Nov. 29, 1990), <http://www.presidency.ucsb.edu/ws/index.php?pid=19117> [<http://perma.cc/6U5H-BV5W>].

85. 8 U.S.C. § 1101(a)(15)(U), (T).

86. The following paragraphs are based on previous work. See Margulies, *Boundaries of Executive Discretion*, *supra* note 12, at 1216–22.

87. 8 U.S.C. § 1227(d)(1).

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 merely “waiting their turn.” This result would be unfair and inefficient, since U and T visas typically become available in a couple of years and an individual removed from the U.S. would have her life disrupted and then have to resume it when a visa became current. Deferred action resolves these anomalies for the small number of prospective U and T visa recipients.

Similarly, the Family Fairness Program initiated by President George H.W. Bush⁸⁸ merely served as a bridge for the spouses and children of adults expressly granted LPR status by Congress under IRCA. All of the spouses and children granted relief under this program, which was expressly ratified by Congress soon after its implementation,⁸⁹ would have been eligible for visas within a short time under existing law.⁹⁰ Family Fairness merely provided a bridge to that status.

In contrast, the arduous route painstakingly engineered by Congress for prospective DAPA grantees is an obstacle course that no bridge can span. Because of the age floor on citizen sponsorship of parents and the unlawful presence bars, DAPA’s prospective beneficiaries cannot expect a visa within a reasonable period of time.⁹¹ The age floor on citizen sponsorship that emerged from the 1965 Kennedy-Ervin colloquy will often require prospective DAPA recipients to wait fifteen to twenty years to even *apply* for a legal status. If undocumented parents seek to remain in the United States unlawfully for that period, the ten-year unlawful presence bar will lengthen their wait by another decade. In other words, the INA would routinely require a wait of *twenty-five to thirty years* for many prospective DAPA recipients. It strains credulity to assert that Congress, which enacted the unlawful presence bars and modified extended voluntary departure to discourage lingering in the United States by undocumented immigrants, would implicitly authorize immigration officials to permit such a protracted sojourn in the United States for prospective DAPA grantees.

88. See McNary, *Family Fairness Memorandum*, *supra* note 82, at 164–65. One influential commentator has taken a broader view of the Family Fairness Program’s significance. See Mark Noferi, *When Reagan and GHW Bush Took Bold Executive Action On Immigration*, THE HILL (Oct. 2, 2014 12:00 p.m.), <http://thehill.com/blogs/congress-blog/foreign-policy/219463-when-reagan-and-ghw-bush-took-bold-executive-action-on> [http://perma.cc/NX7B-74NY]. For reasons given in the text of this Article, I view a broader reading of Family Fairness as overstating its role, which was merely ancillary to a legal status that would soon be available to its recipients.

89. See Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

90. See 8 U.S.C. § 1153(a)(2) (authorizing immigrant visas for “spouses or children” of LPRs); Margulies, *Boundaries of Executive Discretion*, *supra* note 12, at 1217–18 (discussing relatively brief waiting time for visas sought by Family Fairness recipients).

91. See Margulies, *Boundaries of Executive Discretion*, *supra* note 12, at 1120–21.

2. Deferred Action and Hardship

Immigration officials have also granted deferred action in a relatively small number of hardship cases. These cases typically involve extreme youth, age, or infirmity.⁹² 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. Indeed, data analyzed by the foremost scholar of hardship grants suggests that immigration officials grant less than a thousand such requests annually.⁹³ This is a tiny fraction of the millions of undocumented noncitizens who could claim benefits under DAPA. The compelling individual circumstances and small numbers of individuals aided by hardship-based deferred action firmly distinguish this cohort from DAPA's sweeping, blanket relief.⁹⁴

92. See 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 (2004). Ironically, Professor Shoba Sivaprasad Wadhia, a supporter of President Obama's DAPA program, has provided the most comprehensive analysis of the far more modest past uses of deferred action, including relief based on individual hardships. See SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 69 (2015) (noting that in a recent four-month period in 2013, one major immigration agency, U.S. Citizenship and Immigration Services, granted only 233 deferred action requests based on hardships such as age or infirmity); *cf. id.* at 75 (reporting that another major agency, U.S. Immigration and Customs Enforcement, granted just under 500 such requests in an eight-year period).

93. See WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES*, *supra* note 92, at 69, 71, 75.

94. Immigration officials also provide relief pursuant to constitutional and statutory requirements to noncitizens whom officials cannot remove because of lack of cooperation from the noncitizen's home country. This issue affects Cuban nationals who have committed crimes in Cuba that make them inadmissible to the United States and former lawful permanent residents who have received a final order of removal because they have been convicted of certain crimes in the United States. The countries of origin of these individuals are often reluctant to consent to their return, precisely because they have committed crimes. In other cases, the United States will not remove noncitizens to certain countries because the noncitizens might face persecution or torture, even in cases where the noncitizen does not qualify for a grant of asylum status. The Supreme Court has held that the Constitution prohibits indefinite detention of such individuals when immigration officials cannot demonstrate that removal is possible within a reasonable period. See *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). In such cases, the government grants individuals release from detention pursuant to an order of supervision, which will often provide the noncitizen with work authorization. See Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1146-48 (2015). That order of supervision resembles the supervised release that law enforcement provides to convicted felons in the form of probation or parole. Because immigration officials grant orders of supervision pursuant to the Constitution or statutory requirements, this relief is not "discretionary" in the same sense as relief that officials would award under DAPA.

3. Limited Parole

The executive branch also has limited power under the INA to extend parole or related relief to individuals at risk because of crises abroad, including natural disasters such as earthquakes, and man-made crises such as civil war. However, this power also is distinguishable from DAPA's sweeping relief.

To the extent that parole power rests directly on executive authority granted by Article II of the Constitution,⁹⁵ it derives support from a direct relationship with foreign affairs that DAPA lacks, because DAPA deals only with foreign nationals who are already in the United States and wish to remain here indefinitely. To the extent that the President's power stems from delegation by Congress, Congress has limited that power to "case-by-case" decisions supported by "urgent humanitarian reasons or significant public benefit."⁹⁶ In light of the multiple provisions of the INA that discourage undocumented foreign nationals' reliance on U.S. citizen children to gain a legal status, it would be incongruous to read the INA's parole provisions as encompassing the sweeping relief that DAPA provides. Indeed, even champions of executive discretion have conceded that, it is "far from clear . . . today" that the executive branch continues to have the power it did before Congress limited parole authority.⁹⁷

G. Congress's Express Delegations to Immigration Officials Cannot Bear DAPA's Weight

Seeking to blunt the force of Congress's efforts to curb

95. Cf. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that the President had exclusive power over matters involving recognition of foreign governments and that Congress was therefore precluded from taking measures such as requiring listing of Israel as country of birth for U.S. citizen born in Jerusalem, when Executive viewed status of Jerusalem as matter to be determined in future negotiations between Israel and Palestinian Authority).

96. See 8 U.S.C. § 1182(d)(5)(A); see also *id.* § 5(B) (requiring 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).

97. Cox & Rodriguez, *supra* note 77, at 505. The Supreme Court's dicta in cases such as *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (holding that portions of Arizona law were preempted by INA) and *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, 525 U.S. 471, 483–84 (1999) does not bolster the case for DAPA. That dicta supports discretion to curb delay caused by foreign nationals' challenges to denials of deferred action, *AADC*, 525 U.S. at 484–85, or disruption caused by state laws that clash with executive immigration enforcement. *Arizona*, 132 S. Ct. at 2499. In the first situation, foreign nationals' challenges would have hindered timely immigration enforcement. Making discretionary denials unreviewable removed that threat. In the second situation, state laws would have effectively abrogated executive discretion over immigration enforcement priorities and subjected sensitive immigration-related foreign affairs decisions to a veto by any one of fifty disparate state governments. Praising discretion here highlighted the foreign affairs aspect of immigration enforcement and curbed the risk of state sabotage of federal immigration policy. In contrast, cabining the sweeping discretion exhibited in DAPA would not delay enforcement or displace federal enforcement priorities—it would merely curb the executive branch's power to establish massive new immigrant benefits programs that clash with the INA's carefully crafted provisions deterring unlawful presence in the United States.

discretionary immigration benefits and the narrow relief available historically, immigration officials have looked to grants of statutory authority. However, these grants are generic provisions that authorize agency action within a preexisting statutory context. That context also contains Congress's curbs on discretion and the course of dealing between Congress and the President that has previously engendered limited relief.

For example, the INA stipulates that the Attorney General (along with the Secretary of Homeland Security) 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]*."⁹⁸ While the reference to what the Attorney General "deems necessary" may suggest substantial discretion, the section ties official discretion to the "provisions" of the INA. As the Supreme Court observed in *Brown & Williamson*, courts should read those provisions as a "harmonious whole."⁹⁹ The agency can perform acts, including the issuance of regulations, that are necessary to uphold the power granted by the statute; nothing in this provision gives the agency license to exceed that power. Indeed, much of the authority alluded to in the section, such as the reference to "forms of bond, reports, entries, and other papers," involves either the routine work of keeping Congress and the public informed about immigration enforcement or the equally routine case-by-case determination of individual claims.

Similarly, Congress's definition of immigrants authorized to work as those granted employment authorization by immigration officials¹⁰⁰ does not give those officials unfettered power. This subsection provides guidance for employers, who need clarity about which noncitizens they can hire legally to stay on the right side of Congress's employer sanctions. The subsection instructs employers that they will not be subject to sanctions if they hire a noncitizen who provides them with a government-issued employment authorization document. The generic guidance for employers in this section cannot underwrite the profound departures from past practice that DAPA entails.¹⁰¹

98. 8 U.S.C. § 1103(a)(3) (emphasis added); see *Texas*, 2015 U.S. App. Lexis 19725, at 112-13 (arguing that this and similar provisions are generic grants of authority for routine administrative tasks, not authorizations for unprecedented relief such as DAPA).

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

100. 8 U.S.C. § 1324(h)(3).

101. Common sense would indicate that if Congress had granted immigration officials authority to exponentially increase the number of undocumented immigrants granted employment authorization, Congress would have had a more formal mechanism in place to discern the agency's reasoning for such moves. A more formal mechanism might include the certification process that Congress has required in a number of sensitive areas, such as the release of detainees from Guantanamo. That certification process requires a cabinet-level official to attest that the action

IV. PROFESSOR MOTOMURA'S DICHOTOMY BETWEEN "LAW ON THE BOOKS" AND "LAW IN ACTION" DOES NOT ADDRESS CONCERNS ABOUT DAPA'S LEGALITY

Professor Motomura's contribution to this debate is a distinction well known to law and society scholars: the distinction between "law on the books" and the "law in action."¹⁰² This dichotomy, which I will call the formal/contextual distinction, has assumed importance in sociolegal scholarship as a *descriptive* thesis. For sociolegal scholars, describing legal norms is not merely a matter of quoting from statutes or even citing judicial opinions—it also requires reckoning with how the law works in practice.¹⁰³ The formal/contextual distinction arises because the factors that drive the law in action can produce enforcement regimes that a law's drafters did not intend or expect. Professor Motomura contends that the formal/ contextual distinction cements the legal case for DAPA.

Professor Motomura's effort to support DAPA's legality through the formal/contextual distinction encounters three basic problems. First, because the distinction is primarily descriptive, it requires an accurate account of the law in practice. The facts regarding the key issue of pre-DAPA interior (as opposed to border) immigration enforcement—simply do not support Professor Motomura's argument. Second, the distinction actually highlights DAPA's inconsistency with Congress's framework. The distinction focuses on the actual effects of DAPA, such as its facilitation of work authorization for DAPA recipients, and how those effects square *vel non* with the INA. Third, precisely because the formal/contextual distinction is fundamentally descriptive in nature, it is often irrelevant to the interpretation of normative legal requirements. Statutes such as the INA, as we have discussed, frequently emerge from compromises between opposing

taken, such as the release of a detainee, is consistent with U.S. interests. See Supplemental Appropriations Act, Pub. L. No. 11-32, § 14103, 123 Stat. 1859, 1920–21 (2009); cf. David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179 (2012) (discussing congressional restrictions); see generally *Brown & Williamson*, 529 U.S. at 160 (discussing Court's view that substantial new exercises of executive discretion should have an anchor in statutory text). A certification for substantially raising the number of employment authorization grants would require the Secretary of Homeland Security to attest that such massive grants would not disrupt the U.S. economy. However, Congress has never tried to enact such a procedure. The absence of such a procedure, together with the track record of far more modest use of deferred action, see *supra* notes 84–101 and accompanying text, suggests that Congress authorized only the interstitial use of deferred action that was the established norm prior to DAPA's implementation.

102. See Motomura, *The President's Dilemma*, *supra* note 8, at 19–21; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 778 (1988) (discussing how distinction plays out in area of law and sexuality).

103. This focus will often involve studying persons and groups affected by the law, as well as the "street-level bureaucrats" who enforce legal norms.

camps with differing normative and descriptive perspectives. As Professor Motomura acknowledges, legislative compromise may turn on particular factors, including difficult trade-offs between dealing with the realities of Mexican immigration and dismantling the express discrimination that pervaded the INA before the 1965 Act. The formal/contextual distinction may counsel *changing* current law to better accommodate these trade-offs, but has nothing definitive to say about current law's content.

A. The Law in Action Currently Reflects Policymakers' Stated Priorities

One "law in action" justification frames DAPA as a means to ensure that field-level officials comply with policymakers' priorities and efficiently use limited resources.¹⁰⁴ This justification fails to persuade for three reasons. First, current immigration enforcement closely tracks policymakers' prioritization of border, as opposed to interior, enforcement and the removal of noncitizens who have committed serious or multiple crimes. Second, immigration officials have provided no support for their claim that their growing multi-billion dollar budget precludes the interior enforcement pursued by previous administrations. Third, the resource argument proves too much. While immigration officials, like all other officials tasked with enforcing the law, have limited resources, no other agency has unilaterally and without legislative authorization proposed a program that allows a substantial proportion of individuals who have broken the law to enhance the benefits gained through their violations.

Touting DAPA as promoting the priorities set for U.S. Immigration and Customs Enforcement ("ICE") ignores ICE's own removal statistics. While immigration opponents claim that border enforcement is lax,¹⁰⁵ statistics show that the Department of Homeland Security ("DHS") has successfully concentrated its removal efforts at points of entry into the United States. According to ICE, over two-thirds of its removals concern individuals who were apprehended while seeking to enter the country.¹⁰⁶ On the other hand, while immigration advocates have disparaged President Obama as a "deporter-in-chief"

104. Motomura, *supra* note 8, at 24–27.

105. See Editorial, *Crazy Talk*, N.Y. TIMES, Sept. 18, 2015, at A28 (describing positions on immigration taken by Republican presidential candidates at debate).

106. See ICE Enforcement Report, *supra* note 14, at 7 (noting that 213,719 removals out of a total of 315,943 stemmed from border enforcement). Less than one-third of all removals involved individuals located within the U.S. interior, who had already entered the United States and been in the country for lengths of time ranging from days to years. *Id.* (citing 102,224 removals from the interior of the United States).

who broke up immigrant families long established in the United States, government statistics demonstrate the flaws in this claim. ICE removal statistics indicate that enforcement in the interior portions of the United States directed at apprehending noncitizens *after* a period of unlawful presence has dropped *almost sixty percent* during the Obama administration.¹⁰⁷ Moreover, ICE's interior enforcement focuses, as its priorities dictate,¹⁰⁸ on individuals who have committed crimes. Eighty-five percent of interior removals involved individuals who had been convicted of a crime,¹⁰⁹ and seventy-five percent of this group involved the commission of either crimes classified as "aggravated felonies" under the INA, other felonies, or at least three misdemeanors.¹¹⁰

ICE's own statistics prove that DAPA is unnecessary as a vehicle for reforming enforcement priorities. Even before DAPA, a scant percentage of ICE enforcement resources went to the removal of law-abiding undocumented immigrants in the U.S. interior. According to ICE's own records, ICE employees follow ICE's priorities by focusing on points of entry and interior immigrants who have committed serious or multiple offenses. Given this decisive pivot in enforcement priorities, DAPA would merely gild the lily.

B. Immigration Officials Have Not Shown That Limited Resources Require Resorting to DAPA

While the executive branch has argued that resource constraints require implementation of DAPA,¹¹¹ that assertion is also on shaky ground. In its defense of DAPA, the Justice Department's Office of Legal Counsel ("OLC") asserted that Congress had prioritized the removal of noncitizens convicted of a crime, and that this priority precluded removal of most other noncitizens who are unlawfully present

107. See Brian Bennett, *High Deportation Figures Are Misleading*, L.A. TIMES, Apr. 1, 2014, <http://www.latimes.com/nation/la-na-obama-deportations-20140402-story.html> [<http://perma.cc/VUJ9-AKV9>] (reporting that interior removals dropped from 237,941 in 2009 to 133,551 in 2013); cf. ICE Enforcement Report, *supra* note 107, at 7 (reporting that in 2014 ICE removed 102,224 individuals from the U.S. interior). The drop from almost 238,000 interior removals in 2009 to about 102,000 in 2014 amounts to a reduction of *fifty-seven percent*. Cf. David A. Martin,

Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System, 30 J. L. & POL. 411, 425 (2015) (arguing that interior enforcement has received short shrift in current and previous administrations and that "[s]uccessful immigration enforcement necessarily rests on complementary action both at the border and in the interior").

108. See Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants at 3-4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<http://perma.cc/VLV3-PVED>].

109. ICE Enforcement Report, *supra* note 14, at 9.

110. *Id.* at 9-10; cf. *id.* at 9 (reporting that over half of this group involved individuals who had been convicted of an aggravated felony).

111. See OLC Memorandum, *supra* note 11, at 10.

in the United States.¹¹² However, OLC's math is an *ipse dixit*, not a reasoned conclusion from available evidence.

Congress has budgeted over \$5.2 billion for immigration enforcement.¹¹³ Immigration officials have claimed that this amount, in conjunction with the prioritization of noncitizens who have committed crimes, allows ICE to remove 400,000 noncitizens annually.¹¹⁴ However, immigration officials have cited no support for this contention.¹¹⁵ Congress required federal officials to devote \$1.6 billion to the identification of noncitizens who had committed crimes.¹¹⁶ That leaves *\$3.6 billion* available for other immigration enforcement. To be worthy of deference, a claim that \$3.6 billion is insufficient should cite some supporting evidence, since many agencies and individuals would find this amount sufficient for their own needs. Immigration officials have not deigned to furnish budgetary analyses or studies to support their claim.

Of course, as OLC asserted, immigration officials lack the resources to remove *all* undocumented individuals in the United States.¹¹⁷ However, that state of affairs is neither surprising nor unique to immigration. Budgets constrain enforcement in virtually every area of law.¹¹⁸ This requires governments to set priorities. However, it does not require the establishment of an affirmative program that grants or facilitates receipt of valuable benefits, such as work authorization or a formal reprieve from removal, for a substantial proportion of individuals or entities who have violated the law. Enforcement officials faced with analogous resource constraints in other areas of law do not provide such benefits. For example, even though the U.S. Securities and Exchange Commission lacks the resources to pursue all securities law violators, it has not invited violators to apply for a declination letter disclaiming any intent to prosecute for a renewable period.¹¹⁹ Nothing

112. *Id.*

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

114. See Memorandum from John Morton, Dir., U.S. Customs & Immigration Enforcement, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, & Removal of Aliens, at 1, (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<http://perma.cc/MXC2-U4U4>].

115. *Id.* By "no support," I mean that neither the Morton Memo cited above, nor other ICE documents made public, disclose budgetary analysis done by ICE to arrive at this figure.

116. See Consolidated Appropriations Act, 2014, 128 Stat. at 251.

117. See OLC Memorandum, *supra* note 11, at 10.

118. See, e.g., James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 127 (2012) (noting, in securities law context, that "public enforcers may underenforce because they face resource limitations.").

119. *Id.* at 147-48 (describing consequences of delay in Securities and Exchange Commission enforcement and listing consequences of that delay, which do not include issuance of declination letters). When Congress has expressly authorized benefits to violators in contexts such as tax law, it has typically required that violators accompany their request with payment of an amount

in the INA requires a departure from this prudent practice.

C. The Law in Action Establishes DAPA's Conflict with the INA

While inaccuracy undermines the pro-DAPA “law in action” arguments regarding enforcement priorities and resources, several law in action arguments actually highlight DAPA’s clash with the INA. Consider the argument made by immigration officials and scholars favoring DAPA that these benefits are revocable at any time and therefore do not intrude on Congress’s prerogatives.¹²⁰ Empirical results from Professor Motomura’s “law in action” demonstrates that revocation rarely occurs, while renewal of deferred action is virtually automatic.

Consider the government’s track record under the Administration’s earlier Deferred Action for Childhood Arrivals (“DACA”) program. The government’s responses to congressional queries indicate that DACA grants have remained in effect in 99.98% of cases analyzed by DHS.¹²¹ Moreover, the government has readily renewed grants of DACA benefits, including grants of an additional year, which the government has since acknowledged were barred by the injunction in the *Texas v. United States*¹²² case challenging DAPA.¹²³ DACA is a useful template for analysis of DAPA because it is the only deferred action program that is even remotely comparable to DAPA in size and scope. If DACA’s track record is indicative of how DAPA will be implemented, DAPA renewals will be routine, while DAPA terminations will occur far less often than a lunar eclipse. In other words, DAPA will not provide a mere respite from removal, but the functional equivalent of an indefinite stay.

The empirical slant of “law in action” also highlights the artificiality of DAPA supporters’ argument that DAPA grants deferred action, *not* work authorization.¹²⁴ On this view, deferred action is merely a

corresponding to a portion of their violation. See, e.g., 26 U.S.C. § 7122(a) (2012) (authorizing acceptance of offers of compromise by Secretary of the Treasury prior to referral of tax arrears cases to Department of Justice); *id.* § 7122(c)(1) (requiring tender of partial payment of tax liability with offer of compromise); cf. Shu-Yi Oei, *Getting More By Asking Less: Justifying and Reforming Tax Law's Offer-in-Compromise Procedure*, 160 U. PA. L. REV. 1071, 1077 (2012) (discussing offers-in-compromise procedure).

120. See DAPA Memorandum, *supra* note 11, at 2 (asserting that deferred action “may be terminated at any time at the agency’s discretion.”).

121. See Record on Appeal, *Texas v. United States*, (S.D. Tex. Apr. 7, 2015) (No. 15-40238), at 2225 (available on PACER and on file with the author). Out of 591,555 DACA grants, there have been only 113 subsequent DACA terminations—a rate of approximately 1 in 5,000 or just .02%. *Id.*

122. 86 F. Supp. 3d 591 (S.D. Tex. 2015).

123. See *Texas v. United States*, No. B-14-254, 2015 U.S. Dist. LEXIS 45482, at *20-23 (S.D. Tex. Apr. 7, 2015).

124. See DAPA Memorandum, *supra* note 11, at 3 (asserting that immigration officials grant employment authorization under “separate [legal] authority”).

predicate for work authorization, which officials grant under a separate section of the statute.¹²⁵ However, this distinction between deferred action and work authorization is strained. At best, it concerns the *timing* of employment authorization, not whether DAPA's *effects* are consistent with the INA's overall context. According to the most diligent analyst of the government's statistics on grants of deferred action, the overwhelming majority of work authorization applications for deferred action recipients are approved.¹²⁶

Indeed, the government's own descriptions of DAPA assume that the vast majority of DAPA recipients will receive work authorization. In his prosecutorial discretion memorandum, DHS Secretary Jeh Johnson rightly described prospective DAPA recipients as "hard-working people."¹²⁷ Given that prospective DAPA recipients, like most other individuals, presumably work in order to support themselves and their families, it would be cruelly Kafkaesque to describe them in these terms and then deny work authorization. Secretary Johnson's prosecutorial discretion memorandum also expressed the hope that grants of deferred action would "encourage" DAPA recipients to apply for work authorization.¹²⁸ This encouragement would be futile if officials denied most requests. Indeed, common sense demonstrates that if prospective recipients learned through the "grapevine" that work authorization was unlikely, they would not bother to apply, given undocumented noncitizens' general wariness of contact with the government. In this sense, Secretary Johnson's urging to undocumented noncitizens to "come out of the shadows"¹²⁹ hinged on the sensible expectation shared by government, immigration advocates, and immigrants themselves that in the bulk of cases a DAPA grant would be a prelude to employment authorization.

Moreover, the underlying standard that the government follows in granting work authorization to deferred action recipients—whether such individuals can demonstrate an "economic necessity" for

125. See 8 U.S.C. § 1324(h)(3); 8 C.F.R. § 274a.12(c)(14) (2014); cf. Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 76 (2015) (arguing that DAPA does not itself confer employment authorization, and that likelihood of work authorization for DAPA grantees is legally irrelevant).

126. See Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, COLUM. J. RACE & L. (forthcoming 2016) (manuscript at 26–27) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630133 (click hyperlink "download this paper")) [hereinafter Wadhia, *Demystifying Employment Authorization*] (noting that in 2012 and 2013, the government approved at least eighty-six percent of work authorization applications from deferred action recipients).

127. See DAPA Memorandum, *supra* note 11, at 3.

128. *Id.*

129. *Id.*

employment¹³⁰—is a straightforward standard that appropriately leads to authorization in most cases.¹³¹ That is as it should be: once the government has *lawfully* granted deferred action—immigration officials should not unduly impede grantees’ efforts to support themselves and their dependents. However, grants of deferred action must be consistent with the INA. Determining whether the blanket grants of deferred action contemplated by DAPA meet that standard brings us back to the inquiry into the INA’s context and cornerstone principles. That inquiry finds DAPA wanting.

The “law in action” regarding the low likelihood of removal for deferred action recipients and the high likelihood of work authorization also counters the claim that DAPA is consistent with the INA because it provides no “legal status” to prospective recipients.¹³² As the House Judiciary Report on IIRIRA explained almost twenty years ago, the “driving force” behind unlawful immigration is not the hope of legal status per se, but the rational expectation of a U.S. job.¹³³ Professor Motomura readily acknowledges that millions of people from Mexico have decided to enter the U.S. unlawfully because of the benefits that this decision entails, even without the likelihood of legal status.¹³⁴

While lawyers know the difference between immigration benefits and legal status, to the millions of prospective DAPA recipients the distinction between status and benefits is of minimal relevance. In the short to intermediate term, DAPA provides prospective recipients with virtually all of the advantages that they would expect from permanent legal residence. Undocumented immigrants, like most human beings, make decisions based on the short term.¹³⁵ By providing prospective recipients with a renewable reprieve from removal and the strong probability of work authorization, DAPA would offer the short- and intermediate-term equivalent of legal status.¹³⁶ That functional

130. 8 C.F.R. § 274a.12(c)(14) (2014).

131. See Wadhia, *Demystifying Employment Authorization*, *supra* note 126, at mss. 26–27; *cf. id.* at mss. 18–19 (noting that in a sample of 233,245 work authorization applications received, officials approved eighty-seven percent of applications, while seven percent were still pending, and six percent were denied).

132. See DAPA Memorandum, *supra* note 11, at 2; *cf. Kalhan*, *supra* note 125, at 70–72 (developing this argument).

133. See 1996 House Judiciary Report, *supra* note 55, at 108.

134. See Motomura, *supra* note 8, at 19.

135. See George Loewenstein & Ted O’Donoghue, “We Can Do This the Easy Way or the Hard Way”: Negative Emotions, Self-regulation, and the Law, 73 U. CHI. L. REV. 183, 183 (2006) (summarizing data indicating that, “humans are inherently myopic . . .”).

136. A DAPA grant would give recipients many, although not all, of the advantages of legal status. Admittedly, it would not give recipients the right to vote in U.S. elections or other rights contingent on citizenship. Nor would it give recipients the right to sponsor their parents for admission to the United States. See 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (giving citizens over twenty-one the right to sponsor parents and other immediate relatives for admission as lawful permanent residents). The inability to sponsor parents is the only material short- or intermediate-term

equivalence, not the technical difference between status and benefits, provides the best yardstick for assessing DAPA's consistency with the INA. If immigration officials cannot award legal *status* unilaterally to noncitizens with no reasonable prospect of obtaining that status under the INA, officials should similarly not be able to award a bundle of immigration benefits that provides the functional equivalent of legal status.

The conclusion that DAPA is functionally equivalent to legal status in the short- and intermediate-term brings our inquiry back to where we started: the art of legislative compromise. Professor Motomura rightly argues that Mexican immigrants have from the start disregarded the limits on per-country immigration that Congress imposed in the 1965 Immigration Act when it abolished national origin quotas. While "law on the books" classifies this disregard as a violation of the INA, the law in action has not effectively deterred such conduct.¹³⁷ As Professor Motomura contends, the gap between law on the books and law in action requires action of its own.¹³⁸ However, for the sake of consistency with both the INA and the separation of powers, that action needs to come from Congress.

V. CONCLUSION

Professor Motomura's distinction between law on the books and the law in action performs valuable work in the current immigration debate. First, it highlights the importance of enactment of comprehensive immigration reform by Congress, to close the gap between the INA's provisions and facts on the ground. Second, it illustrates the adverse effects that DAPA will have on the INA's structure of deterrence. Read in context, as precedent requires, the logic, structure, and purpose of the INA unambiguously preclude DAPA's implementation. Failing to read the INA in context would license through administrative law the kind of unilateral executive action that the separation of powers prohibits. This emphasis on the INA's context may not have been Professor Motomura's intent. However, it calls us back to congressional intent, which should always be the touchstone of statutory interpretation. Reconnected with that foundation, we can continue the challenging work of immigration reform in a mode that is faithful to the Framers' vision.

immigration difference between a DAPA grant and legal status. While a DAPA recipient would also not have the right to sponsor a spouse or child for admission to the United States, for most DAPA recipients, that will be a moot point: by definition, the recipient's children are already U.S. citizens and the recipient's spouse, if he or she is also a parent of citizen children, will be DAPA-eligible.

137. See Motomura, *supra* note 8, at 19.

138. *Id.*