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Jerome Perez
Catholic University of America (Student), perezje@cua.edu

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HEIRS OF AN ADMINISTRATION: UNLAWFUL EXECUTIVE ACTIONS

Jerome Perez[+]

The Supreme Court of the United States, in DHS v. Regents *on June 18, 2020, decided to stall the Trump administration from rescinding the Deferred Action for Childhood Arrivals (DACA) policy that the Obama administration created contrary to the Administrative Procedures Act (APA)—even though in 2016 the Supreme Court affirmed a preliminary injunction on the Deferred Action for Parents of Americans (DAPA) policy, which mirrors DACA. This blunder offhandedly sacrifices the Supreme Court's reputation as nonpartisan by enlisting itself as the future arbiter of administrative issues with self-evident resolutions and deciding contrary to those resolutions to endorse a political agenda. Now, when a President acts unlawfully through their administrative agencies, subsequent Presidents who wish to uphold their constitutional obligation and reverse those prior actions has to plea to the Supreme Court and satisfy the APA's arbitrary and capricious standard. Chief Justice Roberts, who wrote the* DHS v. Regents *opinion, held that the rescission of DACA by the Trump administration was reviewable and also arbitrary and capricious against the APA but failed to consider the illegality of DACA in the Court's analysis.*

This note illustrates the illegality of DACA utilizing the Texas v. United States *case that imposed the injunction on DAPA, juxtaposing the two policies. The note recommences with an analysis of* DHS v. Regents *revealing why the ruling is contrary to the Constitution, Immigration Nationality Act, Homeland Security Act, and the APA. Lastly, the note reveals the ramifications of the* Regents' *holding, citing the Trump administration's twist on midnight rulemaking.*

[+] J.D. expected 2022, The Catholic University of America, The Columbus School of Law.

INTRODUCTION

On June 15, 2012, President Barack Obama announced that the Department of Homeland Security (DHS) would begin enforcing a new policy: allowing young immigrants who met certain criteria to be eligible for relief from deportation.[1] President Obama stated that the new policy was designed to address America's broken immigration system that the Republican-majority Congress had failed to reform.[2] The Obama administration designed the new

1. U.S. DEP'T OF HOMELAND SEC, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012) ("The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum: came to the United States under the age of sixteen; has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum; is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and is not above the age of thirty.").

2. OFFICE OF THE PRESS SECRETARY, REMARKS BY THE PRESIDENT ON IMMIGRATION (2012) ("[I]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans . . . . *In the absence of any immigration action from Congress to fix our broken*

policies to balance America's history as a nation of immigrants, on the one hand, with prioritizing the deportation of immigrants who had violated criminal law, on the other.[3] More than 600,000 individuals have received relief from deportation under the Deferred Action for Children Arrivals (DACA) policy.[4] On November 20, 2014, President Obama's administration expanded DACA by issuing an executive action creating the Deferred Action for Parents of Americans (DAPA) program.[5] DAPA would have allowed over four million parents to receive relief from deportation based on their children's status, resulting in the parents' lawful presence in the United States.[6]

On January 25, 2017, President Donald Trump signed an executive order to ensure that the executive branch was "[executing faithfully] the immigration laws of the United States."[7] To comply with that order, Elaine Duke, acting Secretary of Homeland Security, rescinded DACA on September 5, 2017, "asserting that the original 2012 DACA memorandum is unlawful for the same reasons stated in the Fifth Circuit and district court opinions regarding DAPA."[8]

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immigration system . . . . Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people. Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization.") (emphasis added).

3. *Id.* ("We focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education . . . We have always drawn strength from being a nation of immigrants, as well as a nation of laws, and that's going to continue.").

4. Brief for Respondents at 3, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587) ("There is no dispute that this decision has life-changing implications for nearly 700,000 DACA participants and their families."). *See also*, *Deferred Action for Childhood Arrivals (DACA) Data Tools*, MPI, https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles (last visited Jan. 1, 2022).

5. U.S. DEP'T OF HOMELAND SEC., 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 (2014) ("By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.").

6. Texas v. United States, 809 F.3d 134, 148 (5th Cir. 2015) ("Of the approximately 11.3 million illegal aliens in the United States, 4.3 million would be eligible for lawful presence pursuant to DAPA.").

7. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017) (advocating in the policy section that the executive branch "ensure the faithful execution of the immigration laws.").

8. U.S. DEP'T OF HOMELAND SEC., RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS DACA (2017); *see also*, Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) ("This Court, for the reasons discussed above, hereby grants the Plaintiff States' request for a preliminary injunction. It hereby finds that at least Texas has satisfied the necessary standing requirements that the Defendants have clearly legislated a substantive rule without complying with the procedural requirements under the Administration Procedure Act.").

The decision to rescind DACA sparked the litigation of *Department of Homeland Security v. Regents of the University of California (Regents)*, where the Supreme Court held the Trump administration's effort to rescind DACA was arbitrary and capricious in violation of the Administrative Procedure Act (APA).[9]

The holding in *Regents* has rendered the Supreme Court the battleground between two administrations when a subsequent administration attempts to uphold its constitutional obligation to "take [c]are that the [l]aws be faithfully executed" by discontinuing a previous administration's unlawful conduct;[10] because of *Regents*, the only way for a subsequent administration to win the battle is to satisfy the APA.[11] It was not enough that DACA may be unconstitutional as asserted in the Duke memorandum or that DACA was adopted contrary to the APA itself. DHS's reason to uphold its constitutional obligation under the Take Care Clause was found not to be rational enough to overcome the interests of the 600,000 individuals who relied on the continued implementation of DACA.[12]

A previous administration's unlawful action will be continued by subsequent administrations that wish to rescind the previous action if they inadequately address those people who rely on the unlawful action. This cannot be said to be the purpose of the APA, yet the Supreme Court has deemed this so. No doubt, the holding of *Regents* will encourage future administrations to adopt unlawful executive actions, especially when their political opponents in the legislative branch gridlock negotiations for lawful policies.[13]

I. BACKGROUND: *REGENTS*

DHS relied heavily on the ongoing suit in *Texas v. United States* to rescind DACA.[14] The Attorney General, Jeff Sessions, counseled acting Secretary Duke

9. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) ("Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients . . . . The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.").

10. U.S. CONST. art. II, § 3, cl. 4; *see also Regents*, 140 S. Ct. at 1901–02.

11. *Id.* at 1919 (Thomas, J., concurring in the judgment in part and dissenting in part) (explaining that the Court has created a "perverse incentive[]" by making the Supreme Court the place for "political battles").

12. *Id.* at 1915 (majority opinion) (determining that an agency must "weigh any [reliance] interests against competing policy concerns" when acting).

13. John Yoo, *How the Supreme Court's DACA Decision Harms the Constitution, the Presidency, Congress and the Country*, NAT'L REV., (June 22, 2020, 12:40PM), https://www.nationalreview.com/2020/06/how-the-supreme-courts-daca-decision-harms-the-constitution-the-presidency-congress-and-the-country/ (explaining how an executive agency could force a subsequent administration to continue an illegal action for several years until reversed by the courts).

14. U.S. DEP'T JUST., OFF. OF THE ATT'Y GEN., LETTER FROM ATTORNEY GENERAL SESSIONS TO ACTING SECRETARY DUKE ON THE RESCISSION OF DACA (2017).

on the illegality of DACA and the need to rescind it because it shared many of the "legal and constitutional defects" of DAPA.[15] In *Texas*, the Fifth Circuit held that the state of Texas could prevail on the illegality of DAPA on at least one of its claims.[16] Texas claimed DAPA violated the Immigration and Nationality Act (INA), the APA's notice and comment requirement, and the Take Care Clause.[17] Upon notice of the possible illegality of DACA, acting Secretary Duke rescinded the June 15, 2012, DACA memorandum and commenced a winding down of the program.[18]

Shortly after acting Secretary Duke announced that she would rescind DACA, an array of plaintiffs sued DHS, arguing "that the rescission [of DACA] was arbitrary and capricious in violation of the APA."[19] All the courts ruled in favor of the plaintiffs.[20] The government filed a petition for *certiorari*.[21] The Supreme Court granted the petition and merged the cases.[22]

Avoiding deciding whether DACA was illegal, the Supreme Court held that the rescission of DACA was reviewable and that the reason stated for the rescission of DACA through the promulgation of acting Secretary Duke's memorandum was arbitrary and capricious in violation of the APA.[23]

This note will discuss the *Regents* holding's importance concerning subsequent executive administrations' attempts to rescind preceding administrations' unlawful actions. There are many elements of the *Regents* holding that will be reviewed in order to understand why DACA is unconstitutional, in particular, that it contravenes the Take Care Clause and the

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15. *Id.*

16. Texas v. United States, 809 F.3d 134, 178 (5th Cir. 2015).

17. *Id.* at 149 ("First, they asserted that DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking. Second, the states claimed that DHS lacked the authority to implement the program even if it followed the correct rulemaking process, such that DAPA was substantively unlawful under the APA. Third, the states urged that DAPA was an abrogation of the President's constitutional duty to 'take Care that the Laws be faithfully executed.'")(first citing 5 U.S.C. § 553; then citing 5 U.S.C. § 706(2)(A)–(C); then quoting U.S. CONST. art. II, §3).

18. U.S. DEP'T OF HOMELAND SEC., *supra* note 8 (acknowledging the reliance interest of DACA recipients, Duke's memorandum provides procedures for DACA recipients to renew their status from the date of the memorandum until October 5, 2017, if their status is to expire between the date of the memorandum and March 5, 2018).

19. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020); Brief for Respondents at 13–19, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587) (detailing the procedural posture and parties who brought actions against DHS's decision to rescind DACA in California, New York, Maryland, and District of Columbia).

20. *Regents*, 140 S. Ct. at 1903; Brief for Respondents at 15–19, *Regents*, 140 S. Ct. 1891 (2020) (No. 18-587) (detailing that in the California litigation the district court granted respondent's motion for preliminary injunction, while the courts for District of Columbia and Maryland granted partial summary judgment against the government and vacated the rescission of DACA).

21. *Regents*, 140 S. Ct. at 1905.

22. *Id.*

23. *Id.* at 1916 ("We do not decide whether DACA or its rescission are sound policies. 'The wisdom' of those decisions 'is none of our concern.'").

procedures set out by the APA. Moreover, this note will show why DHS actions were not arbitrary and capricious and that DHS had unreviewable discretion to rescind DACA. The note will first review the legal foundation for the arguments laid out by the parties in *Regents*. Next, the note will analyze the similarities between *Texas* and *Regents*, providing insight into the legality of DACA. Then, the note will extract from *Regents* the precedent established by the Supreme Court when subsequent administrations try to rescind unlawful actions. Lastly, the note will express the concern of abuse by post *Regents* administrations that will rely on the *Regents* holding to shackle subsequent administrations' attempts to rescind unlawful actions.

II. PRIOR LAW

A. How the Constitution Checks the President: The Take Care Clause

Article II, Section 3 provides in relevant part, "[the President] shall take Care that the Laws be faithfully executed."[24] Jack L. Goldsmith and John F. Manning, both Professors of Law at Harvard Law School, conveniently organize the Take Care Clause into five categories.[25] First, the Take Care Clause helps to determine the President's removal power.[26] Case law articulates this power as a presidential duty to guarantee "competence, observance of law, and prevention of misconduct."[27]

Second, the Take Care Clause influences aspects of the standing doctrine.[28] The courts, referring to the Take Care Clause, have denied standing on the basis that granting standing would intrude on exclusive executive authority to ensure the faithful execution of the law.[29]

Third, in cases where executive agencies had invoked the Take Care Clause when their non-enforcement actions were challenged, courts have held executive agencies can exercise broad prosecutorial discretion.[30] The Supreme Court reasons that non-enforcement by an agency is analogous to prosecutorial discretion not to indict and such discretion is not reviewable by the courts because "such a decision has traditionally been 'committed to agency discretion,' and . . . Congress enacting the APA did not intend to alter that tradition."[31] Similarly, in *United States v. Armstrong*, the Supreme Court held that officers delegated by statute to serve the President have broad discretion to

24. U.S. CONST. art. II, § 3, cl. 4.

25. Jack Goldsmith & John F. Manning, The Protean Take Care Clause, 164 U. PA. L. REV. 1835, 1839–53 (2016).

26. *Id.* at 1839.

27. *Id.* at 1842.

28. *Id.* at 1844.

29. *Id.* at 1845–47.

30. *Id.* at 1847.

31. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

enforce the federal criminal law because they help "[T]ake Care that the Laws be faithfully executed."[32]

Fourth, it has been determined that the Take Care Clause prohibits the Executive Branch from making laws and deciding not to enforce the laws made by Congress.[33] This limitation granted by the Take Care Clause was recognized in the *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, rejecting President Truman's ability to seize steel mills for continued war efforts.[34] The Supreme Court ruled that the President's obligation to see "the laws are faithfully executed" does not mean he is to be a lawmaker.[35] The *Steel Seizure Case* majority has been interpreted to mean that the Take Care Clause obliges the President to abide by the "means and ends of statutory policy power specified by Congress."[36] This idea is encapsulated in Justice Jackson's famous observation in his concurrence in the *Steel Seizure Case* that, "a governmental authority that reaches so far as there is law . . . . signif[ies] . . . that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."[37]

Fifth, the Take Care Clause allows the President "to take 'incidental' measures that may be necessary to effectuate statutory commands."[38] This principle is articulated in *In re Neagle*, and Goldsmith and Manning describe it as the President's "completion power."[39] What was at issue in *Neagle* was whether the Attorney General was able to assign U.S. Marshall Neagle to protect Supreme Court Justice Field while riding circuit when there was no law passed by Congress allowing such an assignment.[40] The *Neagle* case interpreted the Take Care Clause as inferring duties beyond those contained in acts of Congress but also to "include the rights, duties and obligations growing out of the

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32. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting U.S. CONST. art II, § 3); *see also* Goldsmith & Manning, *supra* note 25, at 1848.

33. Goldsmith & Manning, *supra* note 25, at 1848–49.

34. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 589 (1952) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.").

35. Goldsmith & Manning, *supra* note 25, at 1849 (citing to *Youngstown* 343 U.S. at 587–88).

36. *Id.* at 1849–50; *Sawyer*, 343 U.S. at 587 ("President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.").

37. *Sawyer*, 343 U.S. at 646 (Jackson J. concurring in the judgment and opinion of the court).

38. Goldsmith & Manning, *supra* note 25, at 1851.

39. *Id.* at 1851, 1853 ("President's authority to ensure the faithful execution of the laws surely provided authority for the executive, acting through the Attorney General, to provide protection for a federal officer in the performance of official duties, even in the absence of express statutory authority to do so.").

40. *Id.* at 1851–52 (citing In re Neagle, 135 U.S. 1, 5, 58 (1890)).

Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution[.]"[41]

B. Playing by the Rules: Administrative Procedure Act

1. Judicial Review and the Exceptions

The APA provides that judicial review is precluded if the relevant statute precludes it or when "agency action is committed to agency discretion by law."[42] The APA also clarifies that "agency action" consists of agency "rule[s]," meaning a statement made by the agency with the effect of implementing law or describing procedures.[43] The scope of judicial review is limited to "all relevant questions of law, interpret[ing] [the meaning of] constitutional and statutory provisions, and determining the meaning or applicability of terms of an agency action."[44] The court shall hold unlawful and terminate agency action when it is "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[45]

Except when judicial review of agency action is precluded by a relevant statute or precluded by a grant of agency discretion by law, there is a basic presumption of judicial review if any person suffered a legal wrong or is adversely affected or aggrieved by such action.[46] The exceptions to the presumption of judicial review are to be narrowly constrained, limited to traditional decisions left to agency discretion.[47] Non-enforcement agency action fits within the limited category exempt from the presumption of judicial review.[48]

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41. In re Neagle, 135 U.S. 1, 64–65 (1890) (holding that the Take Care Clause allows the executive in the absence of a statute, "make an order for the protection of the mail and of the persons and lives of its carriers").

42. 5 U.S.C. § 701(a).

43. 5 U.S.C. §§ 551(4), (13).

44. 5 U.S.C. § 706.

45. 5 U.S.C. § 706(2)(a).

46. 5 U.S.C. § 702.

47. *See* Lincoln v. Vigil, 508 U.S. 182, 191 (1993) ("An agency's 'decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise,' and for this and other good reasons, we concluded, 'such a decision has traditionally been committed to agency discretion.'").

48. *See* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) ("This recognition of the existence of discretion is attributable . . . to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all . . . . The agency is far better equipped than the courts to deal with the many

2. Rule making: Notice and Comment

The APA also sets a notice and comment process when agencies engage in rule making. The APA states, "[g]eneral notice of proposed rule making shall be published in the Federal Register."[49] This notice must include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[50] After the agency has provided notice, it must allow concerned parties to submit a comment.[51] "Only after complet[ion] [of the notice-and-comment] process is the legislative rule a valid law."[52]

The notice and comment process has two exceptions: "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," and if an agency finds for good cause "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[53] The first exception has been interpreted to mean that the notice and comment process applies if a rule is substantive.[54]

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variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute. In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect . . . . Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"). The creation of DACA, like DAPA, does not fit within this narrow exception because it is not only non-enforcement agency action, but also confers "lawful presence," which is something Congress did not grant them the power to do. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1922 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part). To discontinue DACA would be simply to revert back to the default federal laws of immigration, and the reason why the recission of DACA falls within the "non-enforcement" exception. Therefore, if DACA was a lawful action that did not require reviewability by the APA, then it follows that it carries the same non-reviewability upon recission. *See id.*

49. 5 U.S.C. § 553(b). According to the APA, "'rule making' means agency process for formulating, amending, or repealing a rule." 5 U.S.C § 551(5).

50. 5 U.S.C. § 553(b)(1)–(3).

51. 5 U.S.C. §§ 553(c), (e).

52. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1927–28 (describing how the creation of DACA, like DAPA, did not go through the requisite notice and comment procedures because the rule that created DACA carries legal force).

53. 5 U.S.C. § 553(b)(A)–(B).

54. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1927 (quoting Chrysler Corp. v. Brown 441 U.S. 281, 295 (1979)) (describing how DACA created a new category of lawfully present individuals contravening statutory limits and therefore is a substantive rule).

C. Discretion Granted by Congress: INA and HSA

1. INA

The Immigration and Nationality Act (INA) grants the executive branch of the federal government broad discretion to enforce the immigration laws of the United States.[55] The INA states, the Secretary of Homeland Security "shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."[56] Yet, case law has not interpreted this to mean unlimited discretion. Courts have concluded that if Congress has closely tailored provisions and allowed limited access to benefits to specified groups of individuals, an agency cannot act substantively contrary to law and create policy granting access to a new class of individuals not previously contemplated by Congress.[57] The Secretary of Homeland Security is also obligated to administer and enforce "all other laws relating to the immigration and naturalization of aliens," except when

> such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *provided, however*, [t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling.[58]

Because Congress has closely tailored its immigration laws concerning the eligibility of benefits, it follows that any group not mentioned is excluded from such benefits and cannot receive a free pass from the Secretary of Homeland Security.[59]

2. HSA

Another broad grant of discretion authorized by Congress can be found in the Homeland Security Act (HSA). The HSA provides in relevant part:

> The Secretary shall be responsible for the following:
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> (1) Preventing the entry of terrorists and the instruments of terrorism into the United States.
>
> (2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of

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55. Immigration and Nationality Act, 8 U.S.C. § 1103.

56. 8 U.S.C § 1103(a)(3).

57. *See* Texas v. United States, 328 F. Supp. 3d 662, 715–16 (S.D. Tex. 2018) (recognizing that the statutory scheme of the INA did not encompass individuals described under DACA); *see also* Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy, 706 F.3d 499, 507 (D.C. Cir. 2013) (indicating that when Congress provides straightforward statutory schematics, an agency cannot ignore and escape the limit of the scheme with "linguistic jujitsu" to extend its regulatory authority).

58. 8 U.S.C. § 1103(a)(1) (emphasis in original).

59. *See supra* note 50 and accompanying text.

> the United States, including managing and coordinating those functions transferred to the Department at ports of entry.
>
> (3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.
>
> (4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.
>
> (5) Establishing national immigration enforcement policies and priorities.[60]

This provision of the HSA, similar to the INA, does not provide the Secretary of the Department of Homeland Security with the authority to ignore and create policy contrary to the complex statutory scheme formulated by Congress granting lawful presence *and* work authorization.[61]

III. THE SUPREME COURT'S BLUNDER

A. Texas v. United States

After DACA was created, Secretary Jeh Charles Johnson wrote a memorandum to DHS to expand DACA and create DAPA on November 20, 2014.[62] The DAPA memorandum targeted parents of U.S. citizens or lawful permanent residents and granted the parents deferment from deportation.[63] The parents must have "continuously resided in the United States since before January 1, 2010;" be present during the date of the DAPA memorandum and when making a request for deferred action; are not a "threat[] to national security, border security, and public safety;" or are not violators of certain

60. 6 U.S.C. § 202.

61. *Texas*, 328 F. Supp. 3d at 714–15 (rejecting defendants' argument that the creation of DAPA and DACA were in accordance with discretion granting provisions of the INA and HSA and deciding instead that the programs violated the substantive provisions of the APA because the Secretary acted without Congressional authority).

62. U.S. DEP'T OF HOMELAND SEC., *supra* note 5, at 1 ("This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*.").

63. *Id.* at 4.

immigration laws or convicted of specific misdemeanors.[64] The Secretary recognized that parents of children who are American citizens or lawful permanent residents were mostly "hard-working people who have become integrated members of American society."[65] The November 20th memorandum greatly expanded DACA, and an estimated four million individuals were eligible to participate in the new DAPA program and could be considered lawfully present and eligible for work authorization.[66]

When twenty-six states challenged the expansion of DACA, leading to a preliminary injunction, it was a devastation that woke DAPA recipients up from their American dream into an American nightmare.[67] Local governments, former representatives, and over 200 organizations that provide services to immigrants defended the new DAPA program, alluding to the economic turmoil and safety concerns that would arise from the preliminary injunction.[68]

On November 9, 2015, in *Texas*, the United States Court of Appeals for the Fifth Circuit affirmed for the twenty-six states, holding that the states will likely succeed on their procedural and substantive APA claims.[69] On appeal, Texas challenged DAPA's loophole through Texas laws prohibiting the issuing of driver licenses and unemployment insurance without first verifying proof of lawful presence.[70] At the heart of the issue was the DAPA memorandum's

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64. U.S. DEP'T OF HOMELAND SEC., *supra* note 5, at 4; U.S. DEP'T OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS at 3 (2014).

65. *Id.* at 3.

66. Texas v. United States, 809 F.3d 134, 148 (5th Cir. 2015) (explaining how out "[o]f the 11.3 million illegal aliens in the United States, 4.3 million would be eligible" to apply for DAPA); *see also* U.S. DEP'T OF HOMELAND SEC., *supra* note 5, at 1, 3–4 (detailing that the memorandum amends *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (DACA)* by allowing those who have been in the country since January 1, 2010, who are parents of U.S. citizens or lawful permanent residents, and who are otherwise not an enforcement priority, regardless of their age, to apply for lawful presence and accompanying work authorization in three year increments).

67. *See id.*; *Texas*, 809 F.3d at 146; Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children,* MPI (2016), https://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families.

68. *Amicus Briefs Filed with the Supreme Court Make the Case for Lifting the Injunction Against DAPA and Expanded DACA*, NILC (Dec. 8, 2015), https://www.nilc.org/issues/immigration-reform-and-executive-actions/united-states-v-state-of-texas/usavtxamicuspoints/.

69. *Texas*, 809 F.3d at 146; Texas v. United States, 86 F. Supp. 3d 591, 677 (2015) ("This Court, for the reasons discussed above, hereby grants the Plaintiff States' request for a preliminary injunction. It hereby finds that at least Texas has satisfied the necessary standing requirements that the Defendants have clearly legislated a substantive rule without complying with the procedural requirements under the Administration Procedure Act.").

70. *Texas*, 809 F.3d at 149 ("Texas maintains that documentation confirming lawful presence pursuant to DAPA would allow otherwise ineligible aliens to become eligible for state-subsidized driver's licenses. Likewise, certain unemployment compensation '[b]enefits are not payable based

creation of a new category of millions of lawfully present individuals with accompanying work authorization.[71] According to the DAPA memorandum, lawful presence granted no substantive right and could be terminated at any time.[72] Yet, DAPA's "lawful presence" allowed otherwise unlawfully present aliens access to federal and state benefits, which they would otherwise be barred from receiving.[73] DHS was not allowed to authorize such access without a statutory grant by Congress, or without going through the necessary notice and comment procedures of the APA, which it did not.[74] The DAPA memorandum allowed deferred persons to apply for work authorization and, consequently, social security numbers, allowing individuals to receive benefits payable under the Social Security Act contrary to federal law.[75]

States sued the United States to prevent DAPA's implementation, alleging first DAPA did not comply with the required procedures of notice and comment

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on services performed by an alien unless the alien . . . was lawfully present for purposes of performing the services.' Texas contends that DAPA recipients would also become eligible for unemployment insurance.") (omissions and alterations in original).

71. *Id.* at 148–49 ("[T]he government admits in its opening brief, persons granted lawful presence pursuant to DAPA [and DACA] are no longer 'bar[red] . . . from receiving social security retirement benefits, social security disability benefits, or health insurance under Part A of the Medicare program.") (omissions and alterations in original).

72. U.S. DEP'T OF HOMELAND SEC., *supra* note 5, at 2, 5.

73. *Texas*, 809 F.3d at 148; Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1920 (2020) ("By granting deferred action, the memorandum also made recipients eligible for certain state and federal benefits, including Medicare and Social Security. In addition, deferred action enabled the recipients to seek work authorization.").

74. *See supra* note 50 and accompanying text; Reply Brief for the Petitioners at 19, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587) (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014) (insisting that although the benefits triggered by DACA were granted by longstanding regulations, 8 U.S.C 1324a(h)(3), which allowed for work authorization to extend to deferred individuals, it still "cannot reasonably be interpreted to have 'br[ought] about [the] enormous and transformative expansion' in the Secretary's authority that would be required to support conferring work authorization in conjunction with a deferred-action policy like DACA.") (alterations in original).

75. *See* 8 U.S.C. § 1611; *Texas*, 809 F.3d at 148–49 ("[T]he government admits . . . persons granted lawful presence pursuant to DAPA are no longer bar[red] . . . from receiving social security retirement benefits, social security disability benefits, or health insurance under Part A of the Medicare program. That follows from § 1611(b)(2)-(3), which provides that the exclusion of benefits in § 1611(a) 'shall not apply to any benefit[s] payable under title[s] II [and XVIII] of the Social Security Act . . . to an alien who is *lawfully present* in the United States as determined by the Attorney General . . . .' A lawfully present alien is still required to satisfy independent qualification criteria before receiving those benefits, but the grant of lawful presence removes the categorical bar and thereby makes otherwise ineligible persons eligible to qualify. 'Each person who applies for deferred action pursuant to the [DAPA] criteria . . . shall also be eligible to apply for work authorization for the [renewable three-year] period of deferred action.' The United States concedes that '[a]n alien with work authorization may obtain a Social Security Number,' . . . . The district court determined—and the government does not dispute—'that DAPA recipients would be eligible for earned income tax credits once they received a Social Security number.'") (alterations in original) (emphasis added) (internal citations omitted); U.S. DEP'T OF HOMELAND SEC., *supra* note 5, at 4–5 (detailing that work authorization accompanies "lawful presence").

in violation of the APA.[76] Second, even if DAPA fulfilled the notice and comment requirement, it was still substantively unlawful according to the APA.[77] Third, DAPA was unconstitutional under the Take Care Clause.[78]

The court concluded that DAPA was not exempt from the notice and comment requirement of the APA. For DAPA to be exempt from notice and comment, it must be recognized as an "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice."[79] Otherwise, if the rule is found to be substantive, the notice and comment requirement applies.[80] The court utilized two tests to determine if a rule is merely a general statement of policy or a substantive rule: "whether the rule (1) 'impose[s] any rights and obligations' and (2) 'genuinely leaves the agency and its decisionmakers free to exercise discretion.'"[81] Firstly, the court did not rule that DAPA was a general statement of policy because the "rule [] modifies substantive rights and interests" forcing Texas "to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes."[82] Secondly, although the DAPA memorandum—like the DACA memorandum—had discretionary language in the text, the language was found to be pretext because the rule was "applied by the agency in a way that indicates it is binding."[83]

The APA also exempts "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" from the note and comment requirement.[84] Although DAPA recipients get "public benefits," this type of benefit did not fit into the meaning of "benefits" under the APA. The

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76. *Texas*, 809 F.3d at 149–50; *see supra* Part I.

77. *Id.* at 186 (explaining that DACA is substantively unlawful because there is no statutory right given by Congress to the Secretary of Homeland Security to create a new class of lawfully present individuals); 5 U.S.C. § 706(2)(c).

78. *Texas*, 809 F.3d at 149 (ignoring the question of whether the DAPA/DACA is unconstitutional); *supra* Part I.

79. *Id.* at 170–71 (quoting 5 U.S.C. § 553(b)(A)) (alterations in original).

80. *Id.* at 171 (quoting Pro. & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995) ("In contrast, if a rule is 'substantive,' the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously. The 'APA's notice and comment exemptions must be narrowly construed.'").

81. *Id.* (quoting *Shalala*, 56 F.3d at 595).

82. *Id.* at 176; Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1920 (2020) (Thomas J., concurring in judgment in part and dissenting in part) (describing how DACA gave substantive rights despite the memorandum that prescribed DACA insisting that they were not).

83. *Texas*, 809 F.3d at 173–76 (quoting Gen. Elec. Co. v. Env't Prot. Agency, 290 F.3d 377, 383 (D.C. Cir. 2002)) (reasoning that DAPA's discretionary language was pretext because as with DACA, "DAPA application process itself would preclude discretion: '[R]outing DAPA applications through service centers instead of field offices . . . created an application process that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers' and 'prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped.'").

84. 5 U.S.C. § 553(a)(2).

court in *Baylor University Medical Center v. Heckler* narrowed the meaning of benefits to "clearly and directly relate[s] to 'benefits' as that word is used in section 553(a)(2)."[85] The courts further guided the analysis by insisting that the agency that manages the "benefits" also voluntarily imposes the requirement.[86] The court determined that "USCIS—the agency tasked with evaluating DAPA applications—is not an agency managing benefit programs. Persons who meet the DAPA criteria do not directly receive the kind of public benefit that has been recognized, or was likely to have been included, under this exception," therefore, the rule did not fall under section 553(a)(2) "benefits exception."[87]

The court held that DAPA was also substantively against the APA because it was "in excess of statutory jurisdiction, authority, or limitation, or short of statutory right."[88] It was substantively against the APA to award a class of individuals work authorization and lawful presence because of Congress's comprehensive scheme for granting work authorization and lawful presence and DHS's attempts, contrary to any statutory right, with DAPA and expanded DACA.[89]

In *Texas*, the Supreme Court affirmed the Fifth Circuit's judgment, by an equally divided vote with no opinion, that DAPA and the expanded DACA were instituted contrary to the proper procedures set forth in the APA.[90]

B. Department of Homeland Security v. Regents of the University of California

People from outside the United States, who have mostly entered the U.S. involuntarily and under the age of majority, were recognized as an asset to the American economy and deferred from deportation.[91] Over 600,000 of these "Americans-[at]-heart" depend on the DACA program as a step closer to

85. Baylor Univ. Med. Ctr. v. Heckler, 758 F.2d 1052, 1061 (5th Cir. 1985) (explaining that since the Secretary of Health and Human Services (HHS) is left with the task of deciding what is reasonable reimbursement for hospital services to beneficiaries of the Medicare Program and, because regulations proscribing the amount and method of reimbursements are "benefits," HHS met the "benefits" exception to the notice and comment requirements).

86. Alcaraz v. Block, 746 F.2d 593, 611 (9th Cir. 1984) ("[R]ulemaking requirements for agencies managing benefit programs are still voluntarily imposed—i.e., agency-created statutory exceptions. Thus, it is *only the Department's own statement of policy* that applies the notice and comment provisions to rulemaking in these programs.") (emphasis added).

87. *Texas*, 809 F.3d at 177. USCIS stands for U.S. Citizenship and Immigration Services

88. *Id.* at 178 (quoting 5 U.S.C. § 706(2)).

89. *Id.* at 180–82 ("The INA's careful employment-authorization scheme 'protect[s] against the displacement of workers in the United States,' and a 'primary purpose in restricting immigration is to preserve jobs for American workers.' DAPA would dramatically increase the number of aliens eligible for work authorization, thereby undermining Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country.").

90. United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam) (affirming Texas v. United States, 86 F. Supp. 3d 591 (2015)) (granting a preliminary injunction because the States properly showed DAPA and the expanded DACA violated the procedural requirements of the APA).

91. *See* OFF. OF THE PRESS SEC'Y, REMARKS BY THE PRESIDENT ON IMMIGRATION (2012).

citizenship.[92] Many of them started families, went to college to start a career, and served in the armed forces.[93] Organizations were formed to help these individuals cope and integrate into American life.[94]

After the *Texas* cases, Texas wrote to Attorney General Sessions, insisting that he rescind DACA because it shared many of the flaws as DAPA, and, if Attorney General Sessions did not rescind DACA, Texas would revise its claim and add DACA so that the courts would rule on its constitutionality.[95] After he analyzed the illegality of DACA, the Attorney General wrote a memorandum to then-acting Secretary Duke, advising her to rescind DACA.[96] Acting Secretary Duke, upon the advice of the Attorney General, rescinded DACA and cited the Attorney General's concerns of its illegality and the *Texas* cases.[97]

Individual recipients, a civil rights organization, educational institutions, and five States sued the government after acting Secretary Duke announced the rescission of DACA.[98] They alleged "that the rescission [of DACA] was arbitrary and capricious in violation of the APA" and contravened "the equal protection guarantee of the Fifth Amendment[]."[99] Regents sued in California, Batalla Vidal sued in New York, and the NAACP sued in Washington D.C.; "[a]ll three District Courts ruled [in favor of the] plaintiffs."[100] All three courts rejected DHS's claim that its actions "were unreviewable under the APA and [] INA."[101] The New York and California courts further held that there was standing for the Equal Protection claims and issued a nationwide preliminary injunction after concluding that plaintiffs would most likely succeed on their APA claim.[102] The District of Columbia District Court issued "partial summary judgment to the plaintiffs' on their APA claim" but did not rule on their Equal Protection claim.[103]

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92. *See id.*

93. Brief for Respondents at 53, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587); OFF. OF THE PRESS SEC'Y, *supra* note 91 ("I've got a young person who is serving in our military, protecting us and our freedom. The notion that in some ways we would treat them as expendable makes no sense. If there is a young person here who has grown up here and wants to contribute to this society, wants to maybe start a business that will create jobs for other folks who are looking for work, that's the right thing to do. Giving certainty to our farmers and our ranchers; making sure that in addition to border security, we're creating a comprehensive framework for legal immigration—these are all the right things to do.").

94. Martha Ramirez, *These are the Top Organizations that Support DACA*, BLUE TENT (2020), https://bluetent.us/articles/policy-advocacy/top-organizations-that-support-DACA/.

95. U.S. DEP'T OF HOMELAND SEC., *supra* note 8.

96. *Id.*

97. *Id.*

98. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020).

99. *Id.*

100. *Id.*

101. *Id.* at 1903–04.

102. *Id.* at 1904.

103. *Id.*

The Supreme Court granted the Government's petition for *certiorari*.[104] The Supreme Court held that DHS's decision to rescind DACA was reviewable, arbitrary, and capricious under the APA.[105]

1. Reviewability: Heckler v. Chaney

In *Heckler v. Chaney*, the Supreme Court held that there was an exception to the presumption of judicial review under the APA.[106] The Supreme Court articulated the exception as applying to "agency actions 'committed to agency discretion,'" which includes the "exercise[] of 'prosecutorial discretion'" in a decision to "not [] institute an enforcement action."[107]

The Supreme Court said that the reviewability of DACA did not fall under the exception because it was not merely a non-enforcement decision; rather, it "created a program for conferring affirmative immigration relief."[108] This ruling by the Supreme Court is contrary to *Heckler* and the memorandum which created DACA.[109] *Heckler* made a distinction between non-enforcement decisions and affirmative actions by stating that an agency's non-enforcement action is presumed unreviewable; however, an agency's non-enforcement decision may be considered an affirmative action, and thus reviewable, when there is already a statute which sets the procedures for exercising agency enforcement powers.[110] Here, there are no clearly defined factors that provide guidelines to the Secretary of Homeland Security on how to exercise their prosecutorial discretion.[111] Neither can the DACA memorandum, a rule promulgated contrary to the APA, be said to have produced binding law setting the procedures for enforcement action.[112] So, the rescission of DACA resembles non-enforcement agency action.

104. *Id.* at 1905.

105. *Id.* at 1907, 1915.

106. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

107. *Id.* at 827 (citing to 5 U.S.C. § 701(a)(2)).

108. *Regents*, 140 S. Ct. at 1906.

109. *Contra id. See* U.S. DEP'T OF HOMELAND SEC., *supra* note 1, at 3 (stating that the "memorandum confers no substantive right.").

110. *Heckler*, 470 U.S. at 832–33.

111. *Id.* (suggesting that a "presumptively unreviewable" action "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement power"). *See also* 6 U.S.C. 202(5) (stating merely that "[t]he Secretary shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities.").

112. *Regents*, 140 S. Ct. at 1928 (Thomas, J., concurring in judgment in part and dissenting in part) ("Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation . . . .").

2. Reviewability: Protected Benefits

The Court also stated that the benefits granted to DACA recipients were benefits the courts often protected.[113] In the DACA memorandum, the Secretary of Homeland Security stated:

> For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action. This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.[114]

DACA recipients' "benefits" are incurred because the DACA memorandum created a new group of lawfully present individuals who may apply for work authorization.[115] The style in which these "benefits" are granted is unique to DACA, and the authority granted to the Secretary by 8 U.S.C. 1324a(h)(3) to proffer such benefits cannot reasonably be interpreted to have "'br[ought] about [the] enormous and transformative expansion' in the Secretary's authority that would be required to support conferring work authorization in conjunction with a deferred-action policy like DACA."[116]

3. Arbitrary and Capricious: Reasoned Analysis

The holding of *Regents* also concluded because acting Secretary Duke wholly relied on the Attorney General Sessions' illegality determination "to rescind both the benefit and forbearance" —which the Fifth Circuit distinguished in the DAPA case—this error failed "to supply the requisite 'reasoned analysis,'" similar to the mistake made in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automotive Ins. Co.*[117] The Court held that this error alone was arbitrary and capricious against the APA.[118]

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113. *Id.* at 1906 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)) (majority opinion).

114. U.S. DEP'T OF HOMELAND SEC., *supra* note 1, at 3.

115. *Id.*

116. Reply Brief for Petitioners at 28, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587) (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)) (alterations in original).

117. *Regents*, 140 S. Ct. at 1912–13; *see also*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983). *Cf. Regents*, 140 S. Ct. at 1930 (Thomas, J., concurring in judgment in part and dissenting in part) ("The majority has no answer except to suggest that this approach is inconsistent with *State Farm*. But in doing so, the majority ignores the fact that, unlike the typical 'prior policy' contemplated by the Court in *State Farm*, DACA is unlawful.") (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983)).

118. *Regents*, 140 S. Ct. at 1912 (majority opinion).

There is a distinction between *State Farm* and this case. *State Farm* did not involve a rescission of an administrative act that was implemented contrary to the APA.[119] DACA created a new group of lawfully present individuals who qualified for work authorization.[120] As with DAPA, this is not within the authority of the Secretary without first going through the notice and comment requirements of administrative rule making because lawful presence modified substantive rights, and such rules are not exempt from APA's procedures.[121] The majority in *Regents* did not cite any case in which agency actions to rescind a rule promulgated contrary to the APA were reviewable or required a reasoned analysis for rescission.[122]

4. Arbitrary and Capricious: Legitimate Reliance

Another reason why DACA was held to be arbitrary and capricious was that the Duke memorandum failed to consider if "there was 'legitimate reliance' on the DACA Memorandum."[123] The Court reasoned that DHS should have considered other accommodations to remedy reliance interest.[124] DHS's failure to weigh the reliance interest against competing policy concerns was found to be arbitrary and capricious.[125] So, the reliance on the DACA policy by 600,000 aliens outweighed the reasons given by DHS to rescind, which were because the DACA policy itself was contrary to statutory right, contrary to the rule making procedures of the APA, and disturbed the balance of powers between the three branches of government.[126]

However, the memorandum for recission of DACA does consider other accommodations to remedy reliance.[127] Acting Secretary Duke stated in the Rescission of the June 15, 2012 Memorandum:

> [I]n light of the administrative complexities associated with ending the program, [the Attorney General] recommended that the Department wind [DACA] down in an efficient and orderly fashion, and his office has reviewed the terms on which our Department will do so . . . . [T]he Department: Will adjudicate—on an individual, case-by-case basis—

119. *Id.* at 1930 (Thomas, J., concurring in judgment in part and dissenting in part).

120. U.S. DEP'T OF HOMELAND SEC., *supra* note 1, at 3.

121. Texas v. United States, 809 F.3d 134, 171 (5th Cir. 2015) (quoting Pro. & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995)).

122. *Regents*, 140 S. Ct. at 1929.

123. *Id.* at 1913 (majority opinion).

124. *Id.*; *see* also *id.* at 1930 (Thomas, J., concurring in judgment in part and dissenting in part) ("[T]he majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it.").

125. *Id.* at 1913 (majority opinion).

126. *Id.* at 1930 (Thomas, J., concurring in judgment in part and dissenting in part).

127. U.S. DEP'T OF HOMELAND SEC., *supra* note 8.

> properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted by the Department as of the date of this memorandum . . . . Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017.[128]

So, the reliance interest of those who initiated their application for DACA or tried to renew their DACA status before the date of the memorandum is more than likely to be granted DACA status for another three years.[129] DACA was not supposed to be a permanent status; even the expanded DACA memorandum acknowledged this fact stating, "it may be terminated at any time at the agency's discretion."[130]

IV. TESTING *REGENTS*: UNDERMINING THE PEACEFUL TRANSFER OF POWER

In *Regents*, four justices concurred with the majority's ruling that the rescission of DACA did not pose an equal protection claim but dissented with the ruling that the rescission of DACA was reviewable, arbitrary, and capricious according to the APA.[131] In his dissenting opinion, Justice Thomas states:

> [G]oing forward, when a rescinding agency inherits an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. Instead of simply terminating the program because it did not go through the requisite process, the agency will be compelled to treat an invalid legislative rule as though it were legitimate.[132]

The Thomas dissenting opinion stressed that the cases the majority cited to analogize DHS's agency actions as being against the APA were not cases involving an unlawful executive action.[133] Even if DHS's prosecutorial discretion was reviewable, the Supreme Court has no precedent which succumbed an agency's action to the APA's arbitrary and capricious standard

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128. *Id.*

129. *Id.*

130. U.S. DEP'T OF HOMELAND SEC., *supra* note 5, at 2.

131. *Regents*, 140 S. Ct. at 1918–19, 1933, 1936 (Thomas, J., concurring in judgment in part and dissenting in part).

132. *Id.* at 1929.

133. *Id.* ("[T]he majority . . . cites no authority for the proposition that arbitrary and capricious review *requires* an agency to dissect an unlawful program piece by piece, scrutinizing each separate element to determine whether it would independently violate the law, rather than just to rescind the entire program.").

when rescinding an unlawful action or a rescission of an action instituted contrary to the APA's notice and comment requirements—until *Regents*.[134]

The Take Care Clause prohibits executive actions contrary to laws passed by Congress. Faithful execution of the laws does not mean that the executive agency can make its own laws when Congress did not give them the discretion to do so. The Take Care Clause also does not mean implementing policy contrary to congressional procedures set within the APA or the INA. However, the Take Care Clause bars acting in accordance with an unlawful policy. Since the DACA policy was instituted contrary to the APA and contrary to any agency discretion granted by Congress, it should not have been treated as a reviewable agency action when being rescinded.[135]

Regents held that an agency decision to rescind a rule promulgated contrary to the APA is nevertheless subject to judicial review under the APA. The recission decision must not violate the APA's arbitrary and capricious standard, no matter the legality of the action being rescinded. That is the new test under *Regents*, and administrations going forward will conjure this new power, especially when Congress fails to pass laws concerning bipartisan issues.

In a separate dissenting opinion, Justice Alito forewarned the new role that the Federal Judiciary plays because of *Regents*' holding stating, "[a]nyone interested in the role that the Federal Judiciary now plays in our constitutional system should consider what has happened in these cases."[136] He hinted at a political undermining and utilizing the Federal Judiciary to hinder subsequent administrations' attempts to regulate politically delicate issues.[137]

During the end of the Trump presidency, between the date of the election and the inauguration, the former President of the United States instituted several rules. Rules made during this short period are called "midnight rules," but the Trump administration delivered a unique twist on these rules using several

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134. *Id.* at 1922 ("The decision to rescind an unlawful agency action is *per se* lawful. No additional policy justifications or considerations are necessary. And, the majority's contrary holding—that an agency is not only permitted, but required, to continue an ultra vires action—has no basis in law.").

135. *Id.* at 1926–27 ("No court can compel Executive Branch officials to exceed their congressionally delegated powers by continuing a program that was void *ab initio* . . . . In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute's clear limits.") (internal citation omitted).

136. *Id.* at 1932 (Alito, J., concurring in judgment in part and dissenting in part).

137. *Id.* ("Early in the term of the current President, his administration took the controversial step of attempting to rescind the Deferred Action for Childhood Arrivals (DACA) program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, this issue has been mired in litigation. In November 2018, the Solicitor General filed petitions for certiorari, and today, the Court still does not resolve the question of DACA's rescission. Instead, it tells the Department of Homeland Security to go back and try again. What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.").

exceptions to rule making.[138] Some of these new immediately effective midnight rules do not go through notice and comment. Just like the Trump administration and DACA, President Biden will have to go through APA notice and comment procedures if he wants to rescind some of Trump's immediately effective midnight rules or rules the Trump administration promulgated contrary to APA rule making requirements.[139]

CONCLUSION

Although more than 700,000 "Americans-at-heart" may have relied on DACA, the act does not pass lawful inspection. It is clear that DACA shares some of the legal flaws as DAPA, and it is also clear that DHS has the power to rescind DACA at any time. What is not clear is the legal precedent upon which the *Regents*' holding rests. The holding in *Regents* is contrary to the Constitution, INA, HSA, and the APA's rule making procedures. Yet it has the capacity to thwart a rescission of an action by an executive agency promulgated pursuant to a constitutional duty to Take Care the laws be faithfully executed. The holding of *Regents* will influence future administrations to act unlawfully, but strategically, in hopes of straining their successors and arguably already has with the Trump administration's unique twist on immediately effective midnight rule making.

138. Suzy Khimm, *Trump Administration Speeds Up Midnight Rule-Making, Creating Hurdles for Biden*, NBC NEWS (Dec 30, 2020, 2:34 PM), https://www.nbcnews.com/politics/white-house/trump-administration-speeds-midnight-rule-making-creating-hurdles-biden-n1252548.

139. Jennifer A. Dlouhy, *Trump Rulemaking Blitz Cuts Waiting Period to Restrict Biden*, BLOOMBERG (Jan 13, 2021, 2:00 AM), https://www.bloomberg.com/news/articles/2021-01-13/trump-rulemaking-flurry-skips-waiting-period-to-hamstring-biden; Khimm, *supra* note 138.