

DACA’S MAJOR QUESTIONS EXCEPTION

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ABSTRACT

The Supreme Court has extracted a new role as the gatekeeper of administrative action under the major questions doctrine. Underlying the doctrine is an understanding that agencies cannot act to address policy issues implicating questions of great political and economic significance unless specifically authorized by Congress. However, DACA presents a different question that should be exempted from the major questions doctrine. This is because DACA relies on two levels of executive authority: statutory—under the Immigration and Nationality Act and the Homeland Security Act—and constitutional—under the Take Care Clause. Because, as this Article explains, the two authorities cannot be disentangled, courts should not use the major questions doctrine as a form of constitutional avoidance and instead should determine whether the Take Care Clause authorizes the executive branch to institute deferred action programs like DACA.

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I. INTRODUCTION

In 2012, with a stroke of a pen, Secretary of Homeland Security Janet Napolitano created Deferred Action for Childhood Arrivals (“DACA”).¹ The program is the summation of American political dysfunction regarding immigration.² After Congress failed to pass comprehensive immigration reform, the Obama Administration took the peculiar step of creating a system for a class of undocumented immigrants based exclusively on executive power.³ The Napolitano Memo is peculiar because it states no statutory authority on which the Department of Homeland Security (“DHS”) relied for its issuance of DACA.⁴ And the later 2022 DHS rule seeking to codify the Napolitano Memo does not point to any particular authority. Instead, the rule points to broad statutory authority under the Immigration and Nationality Act (“INA”) and the Homeland Security Act of 2002 (“HSA”), backstopped by implied constitutional authority—prosecutorial discretion—stemming from the Take

1. See Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs.; and John Morton, Dir., U.S. Immigr. & Customs Enf’t (June 15, 2012) [hereinafter DACA Memorandum], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [https://perma.cc/YYYY8-95FQ]; see also Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901-02 (2020) (explaining the DACA Memorandum).

2. See, e.g., Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 106 (2013) (providing a background on the political environment leading to DACA after legislative efforts at immigration reform failed in 2011); Katharina Natter et al., *Political Party Ideology and Immigration Policy Reform: An Empirical Enquiry*, 2 POL. RSCH. EXCH. 1, 3-5 (2020); Roberto Suro, *Congress Has Killed Immigration Reform. It’ll Regret That.*, WASH. POST (Dec. 19, 2022, 5:26 PM), <https://www.washingtonpost.com/opinions/2022/12/19/congress-immigration-reform-dead-end> [https://perma.cc/739V-BLUP].

3. See Gillian Beth Miller, Blog, *Separation of Powers, Checks and Balances, and the Future of DACA*, CAL. L. REV. BLOG (July 2020), <https://www.californialawreview.org/online/separation-of-powers-checks-and-balances-and-the-future-of-daca> [https://perma.cc/5N86-AA6G] (explaining the legal basis for Secretary Napolitano’s DACA Memorandum).

4. See DACA Memorandum, *supra* note 1, at 1-3.

Care Clause under *Heckler v. Chaney*,⁵ as the agency's legal authority to promulgate the DACA rule.⁶

As scholars have noted, the executive branch wields tremendous power over immigration, especially through its prosecutorial discretion under the Take Care Clause.⁷ DACA's statutory and constitutional foundation differentiates the program from other high-profile executive administrative actions that have recently come under judicial review—like the Environmental Protection Agency's ("EPA") Clean Power Plan.⁸ That program relied solely on statutory authority.⁹

Recently, the Supreme Court has played the role of gatekeeper against administrative agency policies that implicate questions of "economic and political significance."¹⁰ The Court has implemented this under the major questions doctrine.¹¹ The major questions chapter in the Court's role as mediator between "law" and "administration"¹² sparks what could be the effective end of judicial deference toward agency interpretations of ambiguous congressional authorizations.¹³ In a typical

5. 470 U.S. 821 (1985).

6. See Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736, 53753-55 (Sept. 28, 2021) [hereinafter Biden DACA Notice of Proposed Rulemaking] (to be codified at 8 C.F.R. pts. 106, 236, 274(a)) (citing the INA, the HSA, and prosecutorial discretion under *Heckler v. Chaney*); Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53185-87 (Aug. 30, 2022) [hereinafter Biden DACA Final Rule] (codified at 8 C.F.R. pts. 106, 236, 274(a)); The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 3-6 (2014) [hereinafter OLC DACA Opinion]; see also Kevin J. Fandl, *Presidential Power to Protect Dreamers: Abusive or Proper?*, YALE L. & POL'Y REV. (Jan. 29, 2018, 9:00 PM), https://ylpr.yale.edu/inter_alia/presidential-power-protect-dreamers-abusive-or-proper [https://perma.cc/5EES-SUWR] (arguing "DACA is a legitimate exercise of that presidential power" under the INA and Take Care Clause). *But see* Order at 1, *Texas v. United States*, No. 1:18-CV-00068 (S.D. Tex. Oct. 14, 2022) (extending an injunction barring DHS from granting DACA status to any new application under the Biden DACA Final Rule).

7. See Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 129 (2014) (explaining the executive branch's broad powers over immigration and arguing that DACA is constitutional under the President's stewardship power under the Take Care Clause).

8. See *West Virginia v. EPA*, 597 U.S. 697, 708-12 (2022) (summarizing the EPA's explanation of its authority to promulgate the Clean Power Plan under section 111(d) of the Clean Air Act).

9. See *id.*

10. *Id.* at 721 (internal quotation marks and citation omitted).

11. *Id.* at 740-43 (Gorsuch, J., concurring).

12. Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2191 (2016).

13. See *id.*; Transcript of Oral Argument at 4-5, *Loper Bright Enters. v. Raimondo*, No. 22-451 (argued Jan. 17, 2024); Transcript of Oral Argument at 3-4, *Relentless, Inc. v. Dep't of Com.*, No. 22-1219 (argued Jan. 17, 2024); *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari) ("*Chevron* compels judges to abdicate the judicial power without constitutional sanction."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (explaining that *Chevron* deference is "a judicially orchestrated shift of power from Congress to the Executive Branch"); *Buffington v. McDonough*,

major questions case, a reviewing court does not consider whether the text of a statute could authorize a preferred agency action but instead asks whether the statutory authority is sufficiently clear enough to allow the agency to act in an area of major economic and political significance.¹⁴ For example, in *West Virginia v. EPA*,¹⁵ the Court did not hold that the Clean Air Act barred the Clean Power Plan; it instead held that the Clean Air Act's delegation of authority was not sufficiently clear enough to allow the agency to act over an area of such economic and political significance.¹⁶

But DACA presents a different question in relation to the major questions doctrine, whether the doctrine applies to an area where the Constitution vests the executive branch with at least some independent authority once Congress delegates its enforcement powers.

DACA relies on two levels of executive power: first, under direct and implied statutory delegations to create immigration policies and priorities under the INA and HSA,¹⁷ and second, under the Take Care Clause—which allows the executive branch to maintain prosecutorial discretion in the enforcement of the law.¹⁸ This Article argues that these two authorities act in tandem and that the exercise of constitutional power fundamentally alters the major questions analysis.¹⁹ Before the Fifth Circuit, Texas argued that DACA presents a major question.²⁰ However, as this Article explains, Texas's argument is fundamentally flawed because it would create an unworkable clear statement rule for interpreting constitutional powers.²¹

The primary purpose of this Article is to explain how courts should review the legality of DACA. This Article argues that courts should not

143 S. Ct. 14, 14 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (“*Chevron* deference[]’ bypasse[s] any independent review of the relevant statutes . . .”).

14. See, e.g., *West Virginia*, 597 U.S. at 721-24; *id.* at 735 (Gorsuch, J., concurring) (“Under [the major questions doctrine’s] terms, administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance.”) (internal quotation marks and citations omitted).

15. 597 U.S. 697 (2022).

16. See *id.* at 733-35.

17. See 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(1)–(3).

18. See OLC DACA Opinion, *supra* note 6, at 9-10; Letter from Shoba Sivaprasad Wadhia, Dir., Ctr. for Immigrants’ Rts. Clinic, Penn State L. et al., to Donald Trump, President of the U.S. (Aug. 14, 2017) [hereinafter Letter from Wadhia et al.], <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/LawProfLetterDACAfinal8.13.pdf> [<https://perma.cc/ED75-B325>] (discussing prosecutorial discretion in the area of immigration enforcement and deferred action).

19. See *infra* Part II.B.

20. Letter from Judd E. Stone II, Solicitor Gen., Tex., to Lyle W. Cayce, Clerk of Ct., U.S. Ct. of Appeals for the Fifth Cir. (July 5, 2022) (on file with author).

21. See *infra* Part III.B.

avoid the constitutional question of whether the Take Care Clause authorizes DACA. First, this Article examines the origins of the nondelegation doctrine, major questions doctrine, and DACA.²² Second, it explains why the *Chevron*²³ and *Skidmore*²⁴ deference regimes and a possible *Loper Bright/Relentless*-based “best reading of the statute” analysis are impractical for a DACA analysis.²⁵ Third, it describes why DACA is a major questions exception because the agency’s constitutional power cannot be completely separated from its statutory authority.²⁶ This Article concludes that an ambiguous delegation of statutory power backstopped by a grant of constitutional power is excepted from the major questions doctrine.²⁷

II. DACA, MAJOR QUESTIONS, AND EXECUTIVE AUTHORITY

For over a century, courts have implemented various deference regimes when interpreting the lawfulness of an agency action—most famously, *Chevron*²⁸ and *Skidmore*.²⁹ But, since 2000, in the Supreme Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.*,³⁰ the Court announced a new era of judicial oversight of agency actions—the major questions doctrine.³¹ This doctrine provides no deference toward an agency’s interpretation of an ambiguous authority but instead requires a court to ask whether Congress has spoken clearly enough to authorize an agency to act over an area of major economic or political significance.³²

Secretary Napolitano created DACA without citing any legal authority,³³ and the Biden Administration’s DACA rule points only to broad statutory authority and implied constitutional power under an enforcement agency’s prosecutorial discretion.³⁴ Supporters of DACA

22. See *infra* Part II.A–B.

23. 467 U.S. 837 (1984).

24. 323 U.S. 134 (1944).

25. See *infra* Part III.A.

26. See *infra* Part III.B.

27. See *infra* Part III.B.

28. *Chevron*, 467 U.S. at 843 n.9.

29. *Skidmore*, 323 U.S. at 140.

30. 529 U.S. 120 (2000).

31. See *id.* at 159.

32. See, e.g., *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489–90 (2021) (per curiam) (holding that the Centers for Disease Control and Prevention (“CDC”) exceeded its authority by issuing an eviction moratorium and noting “[i]f a federally imposed eviction moratorium is to continue, Congress must specifically authorize it”).

33. See DACA Memorandum, *supra* note 1, at 1–3.

34. While the Biden Administration cited various statutory authorities in response to commenters, the DACA rule does not specifically invoke any particular statutory provision for the prop-

point to the INA and Take Care Clause as the primary sources of statutory and constitutional authority supporting the legality of DACA.³⁵ This Article argues that the Obama and Biden Administrations' DACA policies rely both on statutory powers and the executive branch's constitutional discretion over the faithful enforcement of the law.³⁶

This Part provides a background on the major questions doctrine, explaining its historical origins and relation to the nondelegation doctrine and recent judicial application to agency actions.³⁷ This Part then describes the political and legal timeline of DACA and explains the basics of the program.³⁸

A. Agency Delegation

As the Supreme Court has explained, “an agency literally has no power to act . . . unless and until Congress confers power upon it.”³⁹ However, even agency actions based on statutory authority can run afoul of the law.⁴⁰ Two doctrines explain this phenomenon: the nondelegation doctrine and the major questions doctrine.

The nondelegation doctrine prescribes the limits of legislative powers. Because legislative powers are exclusive to the legislative branch,⁴¹ Congress may not delegate those powers via legislation to the executive branch or a non-governmental party.⁴² On the other hand, the major questions doctrine acts as a constitutional avoidance canon that requires a clear statutory statement to support congressional delegation for issues of vast economic and political significance.⁴³ The two doctrines are interrelated because the Court has justified the major questions doctrine as an offshoot of the nondelegation doctrine to ensure that courts determine

osition that DHS is authorized to promulgate the rule. *See* Biden DACA Final Rule, *supra* note 6, at 53185-86. For a contrast, when DHS issued a public charge in 2022, it directly cited the specific statutory provisions it was invoking. Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472, 55485-86 (Sept. 9, 2022) (codified at 8 C.F.R. pts. 103, 212, 213, 245).

35. *See, e.g.*, Letter from Wadhia et al., *supra* note 18, at 2 (“Inherent in the function of the ‘Take Care Clause’ is the ability of the President to target some immigration cases for removal and to use prosecutorial discretion favorably in others.”).

36. *See infra* Part II.B.

37. *See infra* Part II.A.

38. *See infra* Part II.B.

39. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

40. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 722-23, 735 (2022); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022) (*per curiam*).

41. *See* U.S. CONST. art. I, § 1.

42. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 344, 353 (2002).

43. *See West Virginia*, 597 U.S. at 735 (Gorsuch, J., concurring) (claiming the major questions doctrine’s clear statement rule “protect[s] foundational constitutional guarantees”).

important legal questions about the separation of powers without deferring to determinations made by administrative agencies.⁴⁴

1. The Nondelegation Doctrine

The root of the nondelegation doctrine resides within the separation of powers. In theory, our system of government works as such: Congress, as the legislative branch, filled with elected representatives, uses its collective judgment to pass laws that announce rules and regulations that are binding on the people; and the President—by himself or through administrative agencies—faithfully executes these laws.⁴⁵ But rarely does Congress answer all policy questions. Instead, Congress speaks broadly of its goals, leaving the executive branch to fill the gaps.⁴⁶

Nondelegationists read the Constitution as strictly laying out distinct spheres of power. The nondelegation doctrine requires a reading of the Constitution that “forbids Congress from delegating legislative power[.]”⁴⁷ This theory is based on Article I, Section 1’s text that “[a]ll legislative powers herein granted shall be vested in a Congress[.]”⁴⁸ On the other hand, Article II, Section 1 provides that the “executive power shall be vested in a President of the United States of America.”⁴⁹ Thus, for nondelegationists, the executive branch can only act pursuant to executive power, and the Constitution bars Congress from delegating its legislative power to the executive branch through legislation.

In a series of New Deal administrative law cases, the Court outlined the limits of delegated power. First, the Court explained that statutes delegating quasi-legislative power to the executive branch are “not a forbidden delegation of legislative power” when Congress provides an “intelligible principle” to which the executive branch “is directed to conform.”⁵⁰ For example, in 1928, in *J.W. Hampton, Jr., & Co. v. United States*,⁵¹ the Court ruled that delegating to the President the authority to adjust tariff rates was a permissible form of gap-filling because Congress expressed its intention to have tariffs that protected American industry

44. See *id.* at 742 (Gorsuch, J., concurring).

45. Lawson, *supra* note 42, at 337.

46. For example, under the Clean Water Act, Congress boldly proclaimed that it was a national goal to “provide[] for recreation in and on the water [to] be achieved by July 1, 1983[.]” within a decade of passing the Act. 33 U.S.C. § 1251(a)(2).

47. Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2103 (2004).

48. U.S. CONST. art. I, § 1.

49. *Id.* art. II, § 1.

50. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

51. 276 U.S. 394 (1928).

and presidential adjustments could only be made according to a set of statutory criteria that furthered this goal.⁵²

Less than a decade later, in 1935, the Court applied *J.W. Hampton's* holding to strike down delegations to the executive branch because they lacked intelligible principles.⁵³ In *Panama Refining Co. v. Ryan*,⁵⁴ the Court examined whether Congress had the power to delegate to the President the authority to establish a "Code of Fair Competition for the Petroleum Industry" under the New Deal-era National Industrial Recovery Act ("NIRA").⁵⁵ The Court explained that the statute's lack of "criterion to govern the President's course" amounted to committing "to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy."⁵⁶ The Court announced that "Congress has declared no policy, has established no standard, has laid down no rule[;]" it instead merely left these choices to the executive branch.⁵⁷ Thus, for the Court, constitutional legislative power encompasses "declar[ing] a policy with respect to [a] subject" and constitutional executive power includes acting in accordance to that policy within "a standard" Congress has statutorily announced.⁵⁸

Just months later, in *A.L.A. Schechter Poultry Corp. v. United States*,⁵⁹ the Court further explained that Congress cannot delegate to private industry or the President the legislative authority to exercise independent lawmaking discretion over binding policy.⁶⁰ Again, under the NIRA, Congress delegated to the President the authority to convene industry groups to write poultry codes and provided the President the power to approve the codes and draft additional codes where he saw fit.⁶¹ The Court struck down this delegation, explaining that it amounted to an "essential legislative function."⁶² The Court clarified that if Congress had "itself established" the poultry codes, it would be "performing its essential legislative function."⁶³ Again, the Court's holding signified its understanding of the separation of powers, that independent policy

52. See Tariff Act of 1922, ch. 356, 1922 Stat. 858; *J.W. Hampton, Jr., & Co.*, 276 U.S. at 400, 409 (explaining the Tariff Act of 1922).

53. See *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 429-30 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935).

54. 293 U.S. 388 (1935).

55. See *id.* at 408-09.

56. *Id.* at 415, 418-19.

57. *Id.* at 430.

58. See *id.* at 415.

59. 295 U.S. 495 (1935).

60. See *id.* at 537, 539.

61. *Id.* at 521-23.

62. *Id.* at 529.

63. *Id.* at 530.

judgment is a legislative function. Thus, after *A.L.A. Schechter Poultry* and *Panama Refining*, the test for nondelegation centered on whether Congress had sufficiently constrained the executive branch to a gap-filling role or if the executive's function consisted of independent judgment in the creation of binding rules without constraining principles.⁶⁴

While the Court has not invalidated a statute under the nondelegation doctrine since 1935, the doctrine remains, as one scholar put it, the “Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going.”⁶⁵ *Panama Refining* and *A.L.A. Schechter Poultry* stand for the proposition that legislative and executive power are incompatible. Under these cases, executive and legislative powers stand in distinctive silos and Congress cannot cure this problem by simply delegating the power via legislation.⁶⁶

Recently, the conservative wing of the Supreme Court has signaled their willingness to revitalize the nondelegation doctrine. In *Gundy v. United States*,⁶⁷ Justice Gorsuch's dissent—joined by Justice Thomas and Chief Justice Roberts—would have struck down Congress's delegation allowing the Attorney General to set mandatory registration requirements for sex offenders under the Sex Offender Registration and Notification Act (“SORNA”).⁶⁸ The dissent rearticulated *Panama Refining* and *A.L.A. Schechter Poultry* and would have held SORNA violated the nondelegation doctrine because it allowed the Attorney General to exercise independent judgment in the creation of policy—a legislative function.⁶⁹ Thus, the current understanding of the nondelegation doctrine can be understood to mean that lawful executive functions that create binding rules or programs must either stem from statutory grants that provide intelligible principles consistent with Congress's policy judgments or independent constitutional power.

64. See *id.* at 541-42; *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 418-19 (1935).

65. Lawson, *supra* note 42, at 328, 330.

66. See *Pan. Refin. Co.*, 292 U.S. at 418; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541-42. Some scholars have pushed back on this point suggesting that so long as an executive authority is delegated via a statute it can never be considered a legislative power. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002). However, this idea has never been adopted by the courts.

67. 139 S. Ct. 2116 (2019).

68. *Id.* at 2144 (Gorsuch, J., dissenting); see also Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari and noting his willingness to revive the nondelegation doctrine).

69. *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

2. The Major Questions Doctrine

Frequently, agencies are required to interpret statutes that grant them authority.⁷⁰ When an agency's interpretation of a statutory grant is challenged, courts determine whether the agency has exceeded its authority.⁷¹ Throughout modern jurisprudence, courts have resolved these questions under various deference regimes. Most famously, since 1984, courts have utilized *Chevron* deference to determine whether an agency's statutory interpretation is lawful under the famous two-step process:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁷²

Chevron step one is familiar to courts because it requires judges to interpret the meaning of a statute in accordance with the "traditional tools of statutory construction."⁷³ But as Professor Michael Herz explained, step two makes *Chevron*'s deference regime "revolutionary" because "step two seems to take courts out of the statutory-interpretation game, compelling them to accept the agency's view of statutory meaning."⁷⁴

Recently, as of the time of writing this Article, the Court is on the cusp of revolutionary change toward how federal courts adjudicate agency interpretations of their own statutory authority.⁷⁵ In *Loper Bright Enterprises v. Raimondo*⁷⁶ and *Relentless, Inc. v. Department of Commerce*,⁷⁷ the Court will answer whether it will overrule *Chevron*—thus

70. See, e.g., Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1001 (2015) ("In 2013 alone, federal agencies filled about 80,000 pages of the Federal Register with adopted rules, proposed rules, and notices.").

71. *Id.* at 1049.

72. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

73. See Michael Herz, *Chevron Is Dead: Long Live Chevron*, 115 COLUM. L. REV. 1867, 1872 (2015).

74. *Id.* at 1873.

75. See, e.g., Jack M. Beermann, *Loper Bright and the Future of Chevron Deference*, 65 WM. & MARY L. REV. ONLINE (forthcoming 2024).

76. *Loper Bright Enters. v. Raimondo*, No. 22-451 (argued Jan. 17, 2024).

77. *Relentless, Inc. v. Dep't of Com.*, No. 22-1219 (argued Jan. 17, 2024).

allowing federal courts to make interpretations of their best reading of ambiguous statutory authority⁷⁸—or greatly reduce *Chevron's* effect by disallowing courts to consider “that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.”⁷⁹ A new test may look similar to Justice Gorsuch’s concurrence in *Kisor v. Wilkie*,⁸⁰ that judges should not have “to accept an executive agency’s interpretation . . . when that interpretation doesn’t represent the best and fairest reading.”⁸¹

In any case, the major questions doctrine is an exception to *Chevron's* reasonability standard or any post-*Loper Bright/Relentless*-based interpretative test. In “extraordinary cases” where the “history and the breadth of the authority” or the “economic and political significance” of the proposed agency action is at issue, the Supreme Court has stated that it will be “‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.”⁸² Instead, agencies must show that their interpretation of a statute is more than reasonable or even plausible; it must point to “clear congressional authorization.”⁸³ This means whether an agency can claim a delegation of authority over a particular area of major political or economic significance is based not on whether the statute supports regulatory authority but whether the statute *clearly* states the precise authority the agency claims to have.⁸⁴

Since 1994, in ten cases, the Court has declined to defer to agency interpretations under *Chevron* and instead ruled on agency authority under versions of the major questions doctrine.⁸⁵ And, as scholars have observed, recent major questions cases seemingly “fram[e] the entire case

78. See Transcript of Oral Argument at 3, *Relentless, Inc. v. Dep’t of Com.*, No. 22-1219 (argued Jan. 17, 2024) (“*Chevron* undermines that duty. It reallocates interpretive authority from courts to agencies, and it forces courts to adopt inferior agency constructions that are issued for political or policy reasons.”) (statement of Roman Martinez, counsel for petitioners).

79. Brief for Petitioners at i, *Loper Bright Enters. v. Raimondo*, No. 22-451 (July 17, 2023) (question presented).

80. 139 S. Ct. 2400 (2019).

81. *Id.* at 2425 (Gorsuch, J., concurring).

82. *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

83. *Id.* at 723.

84. See *id.* at 742 (Gorsuch, J., concurring).

85. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000); *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 484 (2001); *Gonzales v. Oregon*, 546 U.S. 243, 265 (2006); *Util. Air Regul. Grp.*, 573 U.S. at 321; *King v. Burwell*, 576 U.S. 473, 494-95 (2015); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 669 (2022); *West Virginia*, 597 U.S. at 766-70 (Kagan, J., dissenting); *Biden v. Nebraska*, 143 S. Ct. 2355, 2372-73 (2023).

around the major questions doctrine.”⁸⁶ For example, in the eviction moratorium case (*Alabama Association of Realtors v. HHS*⁸⁷), the CDC sought to enforce a nationwide eviction suspension under the Public Health Service Act to slow the spread of COVID-19.⁸⁸ The Court’s analysis primarily focused on the majorness of the policy rather than whether the text and meaning of the statute could support the agency’s action. The Court explained that “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority . . . would counsel against the Government’s interpretation.”⁸⁹ The Court then identified the vast economic significance and the “financial burden[s] on landlords,” and stated that if the Court were to accept the CDC’s authority here, then “[i]t is hard to see what measures this interpretation would place outside the CDC’s reach,” because “the Government has identified no limit in section 361(a) beyond the requirement that the CDC deem a measure necessary.”⁹⁰ Similarly, in *West Virginia v. EPA*,⁹¹ the vaccine mandate case (*National Federation of Independent Business v. OSHA*⁹²), and the student loan forgiveness case (*Biden v. Nebraska*⁹³), the Court raised both the broadness of the claimed delegated power and the economic and political significance before striking down the agency action as unsupported by clear statutory language.⁹⁴

The major questions doctrine works in tandem with the nondelegation doctrine because it requires courts to “presume that Congress does not delegate its authority to settle or amend major social and economic

86. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1032 (2023).

87. 141 S. Ct. 2485 (2021).

88. The statute provides:

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

42 U.S.C. § 264(a); see also 42 C.F.R. § 70.2 (2020) (delegating this authority to the CDC).

89. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

90. *Id.* (internal citations and quotation marks omitted).

91. 597 U.S. 697 (2022).

92. 142 S. Ct. 661 (2022).

93. 143 S. Ct. 2355 (2023).

94. See *West Virginia*, 597 U.S. at 721-22; *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665-67; *Biden*, 143 S. Ct. at 2374-75.

policy decisions.”⁹⁵ While the current Court has never stated that a statute actually violates the nondelegation doctrine, the Court’s major questions jurisprudence suggests that agencies should hesitate when taking action over issues of vast economic and political importance because the Court may be seeking to limit agency power in our constitutional system.⁹⁶ Justice Gorsuch connected the doctrines by observing that agency regulations cannot act as “substitutes for laws passed by the people’s representatives.”⁹⁷ Thus, under the major questions doctrine, it could be argued that Congress’s exclusive legislative power may extend to the power to create binding rules relating to major economic and political issues. However, the major questions doctrine has only been applied to cases where the claimed agency power is based solely on statutory authority.

B. DACA

Approximately one-fifth of the world’s immigrants live in the United States—over forty million as of 2015.⁹⁸ While difficult to track, researchers estimate that there are about ten and a half to twelve million undocumented immigrants residing in the U.S.⁹⁹ Because the federal government lacks the resources to engage in immigration enforcement proceedings against every unlawful immigrant, the federal government has long utilized deferred action, “a form of prosecutorial discretion whereby [DHS] declines to pursue the removal of a person unlawfully present in the United States.”¹⁰⁰ Deferred action is the legal basis for DACA.¹⁰¹

DACA is the result of President Obama’s immigration enforcement policies and congressional inaction on comprehensive immigration

95. WILLIAM N. ESKRIDGE, *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 288 (2016).

96. See Beau J. Baumann, *Americana Administrative Law*, 111 *GEO. L.J.* 465, 492-94 (2023).

97. *West Virginia*, 597 U.S. at 753 (Gorsuch, J., concurring).

98. See Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants> [<https://perma.cc/4XPT-Q9TL>].

99. See Elaine Kamarck & Christine Stenglein, *How Many Undocumented Immigrants Are in the United States and Who Are They?*, BROOKINGS INST. (Nov. 12, 2019), <https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they> [<https://perma.cc/YY8A-BVJX>] (estimating the undocumented population and explaining the difficulty in tracking them); Jeffrey S. Passel, *Measuring Illegal Immigration: How Pew Research Center Counts Unauthorized Immigrants in the U.S.*, PEW RSCH. CTR. (July 12, 2019), <https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us> [<https://perma.cc/7QL9-WQC7>].

100. *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 909 (9th Cir. 2016).

101. *Id.* at 909-10.

reform.¹⁰² As Dean Kevin Johnson summarized, the Obama Administration “sought to demonstrate a firm commitment to immigration enforcement” in the hopes “that a demonstrated commitment to enforcement would improve the likelihood that Republicans in Congress would agree to a compromise immigration reform package.”¹⁰³ President Obama removed more unlawful immigrants than any other President in U.S. history.¹⁰⁴ While the strategy led to a political backlash within President Obama’s supportive base,¹⁰⁵ the plan led to serious political debate on comprehensive immigration reform legislation.¹⁰⁶ A group of eight bipartisan senators—the Gang of Eight—led efforts to revamp America’s complicated immigration structure.¹⁰⁷ However, despite hard-earned efforts in the Senate,¹⁰⁸ the Republican-led House blocked the measure from becoming law.¹⁰⁹

With congressional action out of reach and on the eve of the 2012 election, the Obama Administration felt compelled to act on immigration.¹¹⁰ Just six months before the 2012 election, President Obama announced the creation of DACA.¹¹¹ Formally created through a memo from Secretary Napolitano, DACA amounted to a promise, that if undocumented immigrants from a particular class registered with DHS, then the government would grant them renewable two-year deferred

102. Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 349-50 (2018).

103. *Id.* at 350.

104. See Table 39. *Aliens Removed or Returned: Fiscal Years 1892 to 2019*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/ohss/topics/immigration/yearbook/2019/table39> [<https://perma.cc/P7M2-8WYT>] (last visited Feb. 21, 2024).

105. See, e.g., Michael D. Shear, *Seeing Citizenship Path Near, Activists Push Obama to Slow Deportations*, N.Y. TIMES (Feb. 22, 2013), <https://www.nytimes.com/2013/02/23/us/advocates-push-obama-to-halt-aggressive-deportation-efforts.html> [<https://perma.cc/8722-2X52>].

106. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

107. See Julia Preston, *Beside a Path to Citizenship, a New Path on Immigration*, N.Y. TIMES (Apr. 16, 2013), <https://www.nytimes.com/2013/04/17/us/senators-set-to-unveil-immigration-bill.html> [<https://perma.cc/4Q94-73XG>].

108. See Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES (June 27, 2013), <https://www.nytimes.com/2013/06/28/us/politics/immigration-bill-clears-final-hurdle-to-senate-approval.html> [<https://perma.cc/7MKF-2BRP>].

109. See Liz Halloran, *House GOP: We Won’t Consider Senate Immigration Bill*, NAT’L PUB. RADIO (July 10, 2013, 7:13 PM), <https://www.npr.org/sections/itsallpolitics/2013/07/10/200860744/house-gop-we-wont-consider-senate-immigration-bill> [<https://perma.cc/8G6S-QZUX>].

110. See Johnson, *supra* note 102, at 361-62; Bianca Figueroa-Santana, Note, *Divided We Stand: Constitutionalizing Executive Immigration Reform Through Subfederal Regulation*, 115 COLUM. L. REV. 2219, 2220 (2015).

111. Barack Obama, President of the U.S., Remarks by the President on Immigration (June 12, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/Z6HD-VYSE>].

action determinations,¹¹² a discretionary decision by DHS not to deport an otherwise removable immigrant.¹¹³ DACA status also allowed recipients to apply for a work permit,¹¹⁴ thus bringing them out of shadows and into “the above-ground economy.”¹¹⁵ The class of undocumented immigrants targeted “DREAMers,” those who were brought to the U.S. as children, went to school here, and were otherwise law-abiding.¹¹⁶ At the time, approximately 900,000 immigrants were thought to be eligible for deferred action under DACA.¹¹⁷ Hundreds of thousands of eligible young people “who know no home but the United States” flooded DHS with applications.¹¹⁸ And, by 2021, over 800,000 immigrants received deferred action determinations under DACA.¹¹⁹

The concept of DACA is simple yet novel. The American immigration system is built on executive discretion. The Napolitano Memo cites no statutory authority¹²⁰ and the Biden DACA Final Rule cites both implied statutory and constitutional discretion.¹²¹ The Office of Legal Counsel (“OLC”) argued that DACA is both authorized under the INA’s broad authority¹²² and constitutionally permissible under

112. See DACA Memorandum, *supra* note 1, at 1-2.

113. *Regents of the Univ. of Cal. v. Dep’t of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018), *rev’d in part, vacated in part*, 140 S. Ct. 1891 (2020).

114. 8 C.F.R. § 274a.12(a)(11) (2023).

115. *Regents of the Univ. of Cal.*, 908 F.3d at 486.

116. Compare DACA Memorandum, *supra* note 1, at 1-2, with Dream Act of 2021, S. 264, 117th Cong. § 3(a)–(b) (2021). Specifically, DACA laid out five preconditions for DACA eligibility: the immigrant must (1) have come “to the United States under the age of sixteen;” (2) have “continuously resided in the United States for a[t] least five years preceding the date” of the DACA Memo; (3) currently be in school, have graduated from high school or obtained a general education development certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) have “not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose[] a threat to national security or public safety;” and (5) not be above the age of thirty. DACA Memorandum, *supra* note 1, at 1.

117. Nicole Prchal Svajlenka & Audrey Singer, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, BROOKINGS INST. (Aug. 14, 2013), <https://www.brookings.edu/articles/immigration-facts-deferred-action-for-childhood-arrivals-daca> [<https://perma.cc/F8VC-QTTP>].

118. Miller, *supra* note 3.

119. *Texas v. United States*, 50 F.4th 498, 523 (5th Cir. 2022).

120. See DACA Memorandum, *supra* note 1, at 1-3.

121. See Biden DACA Notice of Proposed Rulemaking, *supra* note 6, at 53753-54; Biden DACA Final Rule, *supra* note 6, at 53184-86.

122. See OLC DACA Opinion, *supra* note 6, at 4 (explaining that “[t]he principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration” because “the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to ‘establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority’ under the statute”) (quoting 8 U.S.C. § 1103(a)(3)).

principles of the Take Care Clause.¹²³ Before the Fifth Circuit, the DOJ argued that the INA authorizes DACA by granting DHS the authority to “[e]stablish[] national immigration enforcement policies and priorities,”¹²⁴ and to “‘establish such regulations,’ ‘issue such instructions,’ and ‘perform such other acts as [the secretary] deems necessary for carrying out his authority under the [INA].’”¹²⁵ However, in the next paragraph the DOJ argued that the constitutional power of prosecutorial discretion also authorizes DACA.¹²⁶ The Department’s analysis invoked *Heckler v. Chaney*’s reasoning that “[w]hen a statute like the INA gives an agency discretion ‘to decide how and when’ its enforcement provisions ‘should be exercised,’ the statute generally empowers the agency not ‘to institute . . . enforcement proceedings.’”¹²⁷

This Article takes the position that DACA’s statutory and constitutional bases are intertwined. As OLC explained, “when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action.”¹²⁸ This power is known as prosecutorial discretion stemming from Article II, Section 3 (the Take Care Clause), which in part directs that the President “shall take Care that the Laws be faithfully executed.”¹²⁹ As the Supreme Court explained in *Heckler v. Chaney*,¹³⁰ agencies cannot be forced to bring enforcement proceedings against individuals.¹³¹ Instead, an agency’s enforcement power shares “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” under the Take Care Clause.¹³² Thus, as a general matter, citizens cannot sue an agency to make the agency bring a particular enforcement action.¹³³ Justice Scalia explained that prosecuting an individual legal offense requires “the balancing of various legal, practical, and political

123. *Id.*

124. Brief for Federal Appellants at 27-28, *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022) (No. 21-40680) (quoting 6 U.S.C. § 202(5)).

125. *Id.* at 28 (quoting 8 U.S.C. § 1103(a)(3)).

126. *Id.*

127. *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 835, 838 (1985)).

128. OLC DACA Opinion, *supra* note 6, at 4.

129. U.S. CONST. art. II, § 3; see *Chaney*, 470 U.S. at 832; see also Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 62-64 (2013) [hereinafter Wadhia, *In Defense of DACA*] (defending the constitutionality of DACA under the Take Care Clause).

130. 470 U.S. 821 (1985).

131. See *id.* at 831-32.

132. *Id.* at 832.

133. See *id.*

considerations” which is “the very essence of prosecutorial discretion.”¹³⁴ As the OLC DACA opinion illuminated, the Supreme Court has hinted but has never “squarely addressed [the Take Care Clause’s] constitutional bounds” but instead left “the political branches . . . [to] address[] the proper allocation of enforcement authority through the political process.”¹³⁵ This Article does not seek to answer the power limits of agency discretion under the Take Care Clause. But it does argue that under current law, when Congress delegates enforcement powers to an agency, the agency does maintain at least some powers under the Take Care Clause in relation to how it wishes to exercise its enforcement power.¹³⁶

Nevertheless, deferred action has long been publicly and privately used by immigration officials. As previously noted, Congress delegated broad authority to DHS to “[e]stablish[] national immigration enforcement policies and priorities”¹³⁷ and charges the agency with “the administration and enforcement of . . . all other laws relating to the immigration and naturalization of aliens.”¹³⁸ For decades, federal immigration officials have utilized deferred action to administer immigration priorities and policies. For example, in the 1970s, immigration officials would refuse to bring deportation actions against removable immigrants in cases that presented “appealing humanitarian factors” where an “adverse action would be unconscionable[.]”¹³⁹ However, as Professor Shoba Sivaprasad Wadhia explained, deferred action did not become a “public policy” of INS until 1975 as a result of a Freedom of Information Act (“FOIA”) lawsuit which—as a consequence—moved the agency to publicly acknowledge the existence of the policy in publicly released agency operating instructions.¹⁴⁰

Although deferred action is executed without explicit statutory authorization, Congress and the courts have acknowledged and consented to the Act in the U.S. immigration system.¹⁴¹ Deferred action does not

134. *Morrison v. Olson*, 487 U.S. 654, 707-08 (1988) (Scalia, J., dissenting).

135. OLC DACA Opinion, *supra* note 6, at 6.

136. As Professor Jack Goldsmith and Dean John Manning have argued, *Heckler v. Chaney* comprises the Supreme Court’s “understanding of prosecutorial discretion under the Take Care Clause” in the context of an “open-ended” enforcement statute. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1848 (2016).

137. 6 U.S.C. § 202(5).

138. 8 U.S.C. § 1103(a)(1).

139. OLC DACA Opinion, *supra* note 6, at 13.

140. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246-48 (2010).

141. See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (explaining that Congress’s broad statutory scheme seeks to protect executive discretion in immigration determinations from judicial intervention); *Arizona v. United States*, 567 U.S. 387, 396 (2012)

establish an enforceable right for the immigrant because a deferred action determination is revocable at any time by DHS.¹⁴² In this way, DACA's design is to be an enforcement tool rather than a bundle of enforceable rights.

Over the years, DACA has been subject to numerous policy challenges, political attacks, and litigation. Most prominently, after President Trump took office, his administration sought to end DACA by declaring it unlawful through a policy memorandum.¹⁴³ In a letter from Attorney General Jeff Sessions to Acting Homeland Security Secretary Elaine Duke, Sessions asserted that the Obama Administration issued DACA "without proper statutory authority and with no established end-date, after Congress'[s] repeated rejection of proposed legislation that would have accomplished a similar result."¹⁴⁴ With nothing more than a couple of sentences, DHS "terminated" DACA under its INA authority to "establish[] national immigration policies and priorities."¹⁴⁵

Judicial challenges to the Trump Administration's decision inevitably commenced. In *DHS v. Regents of the University of California*,¹⁴⁶ the Supreme Court rebranded DACA as more than just a non-enforcement policy but instead "a program for conferring affirmative immigration relief."¹⁴⁷ Because the Court ruled DACA was "a program," courts could review DACA under the Administrative Procedure Act's ("APA") arbitrary and capricious review.¹⁴⁸ Application to the APA meant that the Court could examine and take a hard look at the process by which the Trump Administration withdrew the Napolitano Memo, holding that the process was arbitrary and capricious because it did not adequately explain the agency's reasoning for withdrawing the program.¹⁴⁹ Nonetheless, ruling DACA is subject to APA review is

("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.").

142. See DACA Memorandum, *supra* note 1.

143. Letter from Jefferson B. Sessions III, Att'y Gen., to Elaine Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf [<https://perma.cc/LF87-JNQD>].

144. *Id.*

145. Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs. et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/85CG-CX8R>].

146. 140 S. Ct. 1891 (2020).

147. *Id.* at 1906.

148. See *id.* at 1905-06.

149. See *id.* at 1910-15.

unusual because, as argued by DHS, DACA is not authorized under a particular statute, but instead by a series of discretionary statutory schemes backstopped by constitutional prosecutorial discretion.¹⁵⁰

III. MAJOR QUESTIONS EXCEPTION

The results and timeline of the 2020 election ended the Trump Administration's quest to end DACA.¹⁵¹ After the election of President Biden, the Biden Administration sought to codify DACA through a notice and comment rulemaking.¹⁵² However, that rule has never been in effect due to sustained legal challenges led by the State of Texas.¹⁵³

At the same time, the Supreme Court is in the midst of a radical transformation in its administrative law jurisprudence—through the major questions doctrine. In the last three years, the Court has struck down the Biden Administration's agency actions targeted at mitigating COVID-19 and climate change under the guise that the agencies' statutory authorizations were not clear enough to allow for such expansive intrusion into questions of major economic and political significance.¹⁵⁴ Recently, Texas argued that DACA should be struck down under the major questions doctrine.¹⁵⁵ It argued that the statutory scheme under the INA is not sufficiently clear enough to authorize a program of major economic and political significance.¹⁵⁶ But DACA's constitutional foundation complicates Texas's argument. This Part argues that applying the major questions doctrine to a constitutional question would violate the separation of powers because it would demand a clear statement rule from a constitutional clause.

This Part starts from the proposition that this Article believes if DACA was purely an exercise of statutory authority it would likely be struck down under the major questions doctrine. However, as explained in Part II, because DACA relies on at least some level of constitutional

150. See, e.g., Biden DACA Notice of Proposed Rulemaking, *supra* note 6, at 53753-55.

151. See, e.g., Elizabeth Redden, 'They Are Americans Now,' INSIDE HIGHER ED (Nov. 9, 2020), <https://www.insidehighered.com/news/2020/11/10/president-elect-biden-has-pledged-reinstate-daca> [<https://perma.cc/Z2MU-VP9E>] ("Biden's victory gives a reprieve for DACA recipients, but advocates for Dreamers say congressional action is what's really needed.")

152. See Biden DACA Notice of Proposed Rulemaking, *supra* note 6, at 53736; Biden DACA Final Rule, *supra* note 6, at 53152.

153. Order, *supra* note 6, at 1 (extending an injunction barring DHS from granting DACA status to any new application under the Biden DACA Final Rule).

154. See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (explaining that agencies "must point to 'clear congressional authorization' for the power [they] claim[.]" (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

155. Letter from Judd E. Stone to Lyle W. Cayce, *supra* note 20, at 1.

156. *Id.*

authority—the faithful execution of the law—then the major questions doctrine should not apply.¹⁵⁷ This Part thus seeks to guide a court on how it should analyze DACA. This Part is organized into two sections. First, this Part explains why *Chevron* and *Skidmore* deference—or a possible post-*Loper Bright/Relentless* best reading statutory analysis—are inapplicable to DACA because DACA’s authority is predicated under no particular statutory authority and backstopped by constitutional power.¹⁵⁸ Second, this Part acknowledges that DACA implicates a major question but argues that DACA is excepted from the doctrine because of the effect of simultaneous constitutional authority.¹⁵⁹ This Part concludes that courts should not avoid the constitutional question of whether DACA is a faithful execution of the law under the Take Care Clause.

A. Statutory Analysis Alone Is an Incomplete Analysis

Agency actions must be authorized by statute or under constitutional authority.¹⁶⁰ As this Article has contended, DHS does not cite a particular statutory authority for the proposition that it has the authority to issue DACA, but instead a host of discretionary powers delegated by Congress to the agency.¹⁶¹ Nonetheless, since the Supreme Court’s decision in *DHS v. Regents of the University of California*,¹⁶² holding that DACA is subject to the APA because it grants benefits to its recipients,¹⁶³ courts have applied a *Chevron* framework when determining if DHS has the authority to administer deferred action under DACA.¹⁶⁴ But this analysis is flawed for two reasons. First, DACA fails *Chevron* step zero because it does not have the force of law. Second, a *Chevron* framework is the wrong way to analyze DHS’s authority because the agency is not relying on a particular statutory authority for its power. Instead, DHS is relying on general discretion across a statutory scheme backstopped by executive constitutional power.

For instance, the district court decision in *Texas v. United States*¹⁶⁵ follows this flawed analysis.¹⁶⁶ There, Judge Hanen, in part, held that

157. See *supra* Part II.B.

158. See *infra* Part III.A.

159. See *infra* Part III.B.

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

161. See Biden DACA Final Rule, *supra* note 6, at 53185-88; Brief for Federal Appellants, *supra* note 124, at 27-28.

162. 140 S. Ct. 1891 (2020).

163. See *id.* at 1906-07.

164. See, e.g., *Texas v. United States*, 50 F.4th 498, 524-25 (5th Cir. 2022).

165. 549 F. Supp. 3d 572 (S.D. Tex. 2021), *aff’d in part, vacated in part, remanded*, 50 F.4th 498.

DHS had exceeded its authority to create DACA from the misleading premise that only “Congress confers power upon [an agency.]”¹⁶⁷ The court then admonished the Biden Administration, declaring that it “cannot just enact its own legislative policy when it disagrees with Congress’s choice to reject proposed legislation.”¹⁶⁸ The court also wrongly combined DACA status with work authorization when the two programs are distinct; work authorization is based on statutory/regulatory grounds separate from whether DHS is authorized to administer deferred action.¹⁶⁹ As amici pointed out in the Fifth Circuit, deferred action recipients are eligible for work authorization under a rule promulgated in 1987 by the Reagan Administration.¹⁷⁰ The rule allows any recipient of deferred action to apply for work authorization “if the alien establishes an economic necessity for employment.”¹⁷¹ Striking down DACA as an excess of its statutory authority and labeling DACA as a legislative power also muddies the water by combining multiple constitutional analyses (nondelegation and the limits of prosecutorial discretion) under a *Chevron* statutory framework. And because the court determined the case under statutory grounds, it declined to answer Texas’s constitutional challenge of whether DACA is a faithful execution of the law.¹⁷² The Fifth Circuit followed this reasoning on appeal and affirmed the district court’s *Chevron* analysis.¹⁷³

166. *Id.* at 614, 616.

167. *Id.* at 603 (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)). The Constitution, in combination with Congress, can grant agency powers. For example, as in *Heckler v. Chaney*, the Court’s holding indicates that Congress’s delegation giving the agency enforcement power led the agency to gain constitutional power, under the Take Care Clause, to choose whether or not to bring enforcement actions. *See Heckler v. Chaney*, 470 U.S. 821, 835, 837-38 (1985).

168. *Texas*, 549 F. Supp. 3d at 607.

169. *Compare id.* at 614 (“DHS may not award lawful presence and work authorization to approximately 1.5 million aliens for whom Congress has made no provision.”), with 8 C.F.R. § 274a.12(a)(11) (2023) (“An alien whose enforced departure from the United States has been deferred in accordance with a directive from the President of the United States to the Secretary. Employment is authorized for the period of time and under the conditions established by the Secretary pursuant to the Presidential directive[.]”).

170. Brief for 69 Local Governments and Local Government Advocacy Organizations as Amici Curiae Supporting Defendants-Appellants at 16-17, *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022) (No. 21-40680) (citing and explaining the regulatory history of 8 C.F.R. § 274a.12(c)(14) during the Reagan and H.W. Bush Administrations).

171. 8 C.F.R. § 274a.12(c)(14) (2023).

172. *Texas*, 549 F. Supp. 3d at 621-22.

173. *See Texas v. United States*, 50 F.4th 498, 526 (5th Cir. 2022) (“We agree with the district court’s reasoning and its conclusions[.]”).

1. *Chevron* Step Zero and *Skidmore*

Chevron step zero should foreclose courts from conducting a *Chevron* analysis when reviewing DACA. Under *United States v. Mead Corp.*,¹⁷⁴ courts must determine what level of deference is owed to an administrative agency's action.¹⁷⁵ The test is whether Congress expected the agency "to speak with the force of law."¹⁷⁶ But DACA is not based on any particular statutory power.¹⁷⁷ It is instead based on enforcement discretion, which courts have described as the "discretion necessitated by the practical fact that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing."¹⁷⁸

Congress empowered DHS with broad discretion under the INA and HSA in the enforcement of U.S. immigration law. While these powers include the authority for DHS to issue regulations that *do* have the force of law, the statutory scheme indicates that Congress did not *always* expect DHS to act with the force of law in all instances. The statutory scheme provides that DHS may "[e]stablish[] national immigration enforcement policies and priorities[,]""¹⁷⁹ including the ability to carry out the "administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,"¹⁸⁰ and "establish such regulations . . . issue such instructions; and perform such other acts as [the secretary] deems necessary for carrying out his authority."¹⁸¹ Because Congress gave the agency multiple avenues for acting, the text indicates that Congress did not expect *all* actions "to speak with the force of law."¹⁸² The scheme's discretionary elements also restate the Constitution's grant of prosecutorial discretion under *Chaney*—an executive power.¹⁸³ Thus, when DHS determines how it will prioritize enforcement resources, it is working under both its statutory and constitutional authority because the agency could choose not to seek an enforcement action in the absence of the specific statutory grants of discretion provided

174. 533 U.S. 218 (2001).

175. *See id.* at 226-29.

176. *Id.* at 229.

177. *See* Biden DACA Final Rule, *supra* note 6, at 53184-85; Brief for Federal Appellants, *supra* note 124, at 27-28; OLC DACA Opinion, *supra* note 6, at 30.

178. *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

179. 6 U.S.C. § 202(5).

180. 8 U.S.C. § 1103(a)(1).

181. *Id.* § 1103(a)(3).

182. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

183. *See Chaney*, 470 U.S. at 832-33 (describing prosecutorial discretion in agency enforcement decisions).

in the INA and HSA.¹⁸⁴ Put otherwise, even without the statutory text granting DHS the authority to create immigration enforcement policies and priorities, DHS would still have the constitutional authority to exercise prosecutorial discretion because Congress authorized the agency to enforce violations of immigration law. As noted by the *Chaney* Court, the main limitation of executive enforcement power falls to Congress “either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”¹⁸⁵ Further, when DHS acts according to its authority to regulate with the force of law, it does so through explicit citation to the authority it is acting under.¹⁸⁶

DACA’s provisional nature further indicates that DACA status is not intended to hold the force of law. DACA status “confers no substantive right.”¹⁸⁷ DHS “may terminate a grant of DACA at any time.”¹⁸⁸ DACA applicants “cannot file a motion to reopen or reconsider and cannot administratively appeal the decision” if DHS denies a DACA request.¹⁸⁹ All DACA does is grant a discretionary determination that an individual who *is* unlawfully present in the U.S. may have their removal deferred to a later date based on the priorities and resource allocations of DHS.¹⁹⁰ In all, *Chevron* deference is unwarranted under step zero.

Still, *Skidmore* deference—or the power to persuade—is also inapplicable in the area of prosecutorial discretion because it would allow a court to second-guess DHS’s decisions on the administration of resources and priorities. As the Court explained in *Chaney*, agency choices to not proceed with an enforcement proceeding involve “complicated

184. See Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 517-19 (2017) (explaining that it is “clear that the [Take Care] Clause empowers the President to exercise enforcement discretion”).

185. *Chaney*, 470 U.S. at 833.

186. See, e.g., *Wash. All. Tech. Workers v. Dep’t of Homeland Sec.*, 50 F.4th 164, 168 (D.C. Cir. 2022) (“The Secretary of Homeland Security promulgated the challenged OPT Rule pursuant to the Executive’s longstanding authority under the INA[.]”) (citing 8 U.S.C. § 1184(a)(1)).

187. DACA Memorandum, *supra* note 1, at 3; *accord* Biden DACA Final Rule, *supra* note 6, at 53155.

188. *Frequently Asked Questions*, DEP’T OF HOMELAND SEC., <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> [<https://perma.cc/SZ9V-XMDF>] (last visited Feb. 21, 2024).

189. *Id.*

190. See, e.g., *id.*; Jenny Jarvie, *Deportations of ‘Dreamers’ Who’ve Lost Protected Status Have Surged Under Trump*, L.A. TIMES (Apr. 19, 2017, 4:34 PM), <https://www.latimes.com/nation/la-na-daca-deportations-20170419-story.html> [<https://perma.cc/C64G-NRME>] (“According to data released this week by the Department of Homeland Security, [forty-three] immigrants whose protection under the [DACA] program was terminated were deported during the first two months of the Trump presidency, from [January] 20 to March 25.”).

balancing of a number of factors which are peculiarly within its expertise.”¹⁹¹ But *Skidmore* deference weighs an agency’s “power to persuade” by examining the thoroughness of an agency’s determination.¹⁹² Using *Skidmore* to probe an agency’s decision-making cuts directly against the executive branch’s power to “choose how to allocate investigative and prosecutorial resources”¹⁹³ and would move federal courts into an executive power of choosing how an agency should execute the law against individual violators.

As the Court explained in other cases, prosecutorial discretion is exclusive to the executive branch. For example, in *Buckley v. Valeo*,¹⁹⁴ the Court ruled that providing congressionally appointed commissioners the ability “not to seek judicial relief”¹⁹⁵ violated the separation of powers because “it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”¹⁹⁶ While prosecutorial discretion “is not unfettered[.]” the only limitation the Court has announced is that it is subject to individual “statutory and constitutional rights[.]”¹⁹⁷ For example, the government, of course, cannot institute a deferred action plan that would defer the removal of only White immigrants—that would obviously be unconstitutional. However, no court has answered Texas’s argument that DACA exceeds the powers of the Take Care Clause because it amounts to a “dispensing authority” that exempts a DACA recipient from the law.¹⁹⁸ Still, requiring an agency to persuasively explain its decisions not to prosecute individual offenses is antithetical to the separation of powers because not enforcing a policy decision is an executive branch power generally committed to agency discretion.

2. Statutory Interpretation Requires a Statute

Besides the issues with *Chevron* step zero, using a *Chevron* deference framework—or any post-*Loper Bright/Relentless* statutory analysis test—to analyze DHS’s authority to create DACA is puzzling because DHS does not rely on a specific statutory grant of authority to administer

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

192. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

193. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 682-83 (2014).

194. 424 U.S. 1 (1976) (per curiam).

195. *Id.* at 111.

196. *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

197. *Wayte v. United States*, 470 U.S. 598, 608 (1985).

198. Supplemental Complaint at 20-21, *Texas v. United States*, 549 F. Supp. 3d 572 (S.D. Tex. 2021) (No. 1:18-cv-00068).

deferred action, but instead relies on a host of discretionary grants.¹⁹⁹ *Chevron* cases examine whether a statute administered by the agency is ambiguous and, if it is ambiguous, whether the agency's interpretation of the statute is reasonable, thus providing sufficient authority for the agency action, which Congress anticipated would have the force of law.²⁰⁰ *Chevron*'s framework is limited to statutory claims. As the D.C. Circuit explained, "A precondition to deference under *Chevron* is a congressional delegation of administrative authority"²⁰¹ and thus not a delegation of constitutional authority.

While Congress delegated broad statutory authority to DHS to implement, organize, and execute the enforcement of immigration offenses against individual offenders, this Article argues that the authority could be viewed as redundant to the agency's powers under the Take Care Clause.²⁰² APA challenges to an agency's statutory authority to act requires a court to determine "whether Congress has directly spoken to the precise question at issue."²⁰³ However, here, the agency has not claimed that Congress is the only speaker. Instead, the power emanates from both statutory grants and constitutionally based discretion. This position is consistent with OLC's DACA opinion, which noted that "when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action."²⁰⁴ As explained in Part II, this constitutional power is known as prosecutorial discretion stemming from the Take Care Clause.²⁰⁵ As the Supreme Court explained in *Heckler v. Chaney*,²⁰⁶ agencies cannot be forced to bring enforcement proceedings against individuals.²⁰⁷ Instead, executive power must allow agencies to be free to weigh the pros and cons of bringing enforcement actions.²⁰⁸

199. See Biden DACA Notice of Proposed Rulemaking, *supra* note 6, at 53753-55; Biden DACA Final Rule, *supra* note 6, at 53185-86.

200. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

201. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990).

202. See *supra* Part II.B.

203. *Chevron*, 467 U.S. at 842.

204. OLC DACA Opinion, *supra* note 6, at 4.

205. U.S. CONST. art. II, § 3; see *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); see also Wadhia, *In Defense of DACA*, *supra* note 129, at 62-64 (defending the constitutionality of DACA under the Take Care Clause).

206. 470 U.S. 821 (1985).

207. *Id.* at 832.

208. *Id.* at 831 ("[A]genc[ies] 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.").

Even in a possible post-*Loper Bright/Relentless* world where a court deems that the best reading of the INA and HSA does not authorize DACA, that analysis is nonetheless incomplete because the power wielded by DHS is not exclusively cabined to statutory-based powers. They instead extend to constitutional powers under the Take Care Clause.

Thus, this Article favors the position that the INA's and HSA's grants of discretion over the enforcement of immigration laws merely buttress DHS's constitutional authority to take care of how and whether to prosecute offenders of immigration laws.

The Southern District of Texas and the Fifth Circuit-affirmed *Chevron* analysis is flawed.²⁰⁹ From a macro level, using a *Chevron* framework is awkward because the Government pointed to generally broad statutory discretion provided by multiple statutory provisions rather than a singular statutory grant.²¹⁰ Thus, the district court's analysis is left in an abstract posture to determine whether there is statutory authority that could support DHS's action. The exercise becomes highly speculative instead of probative of the agency's understanding of its own authority. And the district court's *Chevron* step two analysis is more troublesome because it broadly states that "DACA is not a reasonable interpretation of any statute" without identifying any interpretation made by the agency.²¹¹

The court also combines DHS's constitutional authority with its statutory authority over immigration law. Specifically, the court held that "the law certainly grants some discretionary authority to the agency" but fails to acknowledge that DHS maintains prosecutorial discretion under the Take Care Clause.²¹² The constitutional question surrounding DACA should not be disentangled from the statutory delegation question because the statutory delegation is intertwined after Congress delegated enforcement powers to the agency.

B. DACA Is a Major Questions Exception

Is DACA a major question? This Article argues yes, but that the doctrine should not be applied to DACA because DHS's authority to issue DACA contains at least some constitutionally based powers rather

209. *Texas v. United States*, 50 F.4th 498, 525-26 (5th Cir. 2022).

210. The district court's opinion analyzed the Napolitano Memo because the Biden DACA Final Rule had not been issued at the time of the court's proceeding. *Texas v. United States*, 549 F. Supp. 3d 572, 605-06 (S.D. Tex. 2021), *aff'd in part, vacated in part, remanded*, 50 F.4th 498 (5th Cir. 2022).

211. *Id.* at 615.

212. *See id.* at 605.

than power solely derived from an ambiguous congressional delegation. The major questions doctrine should be limited to statutory-based claims because requiring a clear statement rule in constitutional interpretation would be unworkable.

The major questions doctrine is a tool of statutory construction and constitutional avoidance.²¹³ It is a doctrine that allows courts to strike down administrative actions based on whether the statute clearly states the specific power the agency claims to have—and not whether the statute could support the agency's position—without needing to reach the question of whether the delegation constitutes an unconstitutional delegation of legislative power.²¹⁴ Professor Mila Sohoni contextualized the major questions doctrine by lamenting that “[r]ather than saying anything of substance about what the law (of nondelegation) is, the Court instead told us that it is emphatically the province of the judicial branch to say what the law must say clearly.”²¹⁵ The Court's applications of the major questions doctrine in the COVID-19 vaccine mandate case,²¹⁶ eviction moratorium case,²¹⁷ and *West Virginia v. EPA*²¹⁸ did not need to address whether Congress could constitutionally delegate the claimed administrative authorities because of the doctrine's clear statement rule.

But unlike other agency delegation doctrine—like *Chevron* or *Skidmore* deference—there is no precise formula for what a major questions analysis should look like.²¹⁹ Recently, scholars have written that the Supreme Court's major questions decisions “fram[e] the entire case around the major questions doctrine” rather than the ambiguity of the statutory phrase the Court is examining.²²⁰ Thus, this Article first assesses whether DACA implicates a question of major economic and political significance before explaining why the clear statement rule should not be applied to DACA.

Currently, there are three broad indicators to identify major questions. As Professor Daniel Deacon and Professor Leah Litman observed, the three indicators are: (1) “the political significance of the policy[;]” (2) “the novelty of a policy—i.e., the fact that the agency had never promulgated a similar policy before—is a reason to conclude that the policy is a major one[;]” and (3) the economic “majorness” of the

213. See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 265-66 (2022).

214. See *id.* at 264.

215. *Id.* at 265.

216. See Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 662-63 (2022) (per curiam).

217. See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489-90 (2021) (per curiam).

218. 597 U.S. 697 (2022).

219. See Deacon & Litman, *supra* note 86, at 1036-37.

220. *Id.* at 1032.

particular agency policy or “theoretically possible agency policies not actually before the Court but that might be supported by the agency’s broader rationale.”²²¹ Recently, after oral argument in the Fifth Circuit, Texas sent a Rule 28(j) letter advising the court that under the Supreme Court’s ruling in *West Virginia v. EPA*,²²² DACA is subject to the major questions doctrine.²²³ Texas claimed that DACA “involves . . . an extraordinary claim, and DHS has identified nothing approaching ‘clear congressional authorization.’”²²⁴

The political and economic “majorness” of DACA is well documented. From a legislative perspective, Justice Thomas pointed out the fierce congressional debate on creating legal status for DREAMers, noting that Congress had failed to pass more than two dozen related bills before Secretary Napolitano issued the DACA memo.²²⁵ And from a political significance perspective, immigration is one of the most divisive topics.²²⁶ Economically, over 800,000 DACA recipients attend U.S. colleges and vocational training programs, hold jobs, receive government benefits, and generally participate in the American economic system.²²⁷ For instance, economists estimate that if DACA ceased, “22,000 jobs would be lost each and every month for two years—about 1,000 jobs each business day”²²⁸ and that “the federal government would lose out on more than \$6 billion a year in tax revenues.”²²⁹ As of 2021, DHS’s Cybersecurity and Infrastructure Security Agency estimated that 343,000 DACA recipients are employed in essential jobs, including healthcare, education, and food supply.²³⁰

221. *See id.* at 1010, 1013.

222. 597 U.S. 697 (2022).

223. Letter from Judd E. Stone to Lyle W. Cayce, *supra* note 20.

224. *Id.* (quoting *West Virginia*, 597 U.S. at 732).

225. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1919 & n.2 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part).

226. *See, e.g.*, Johnson, *supra* note 102, at 361-70 (explaining the legal and political history of DACA and Deferred Action for Parents of Americans); *see also* Lydia Saad, *Americans Showing Increased Concern About Immigration*, GALLUP (Feb. 13, 2023), <https://news.gallup.com/poll/470426/americans-showing-increased-concern-immigration.aspx> [<https://perma.cc/5XQ5-K7TU>] (highlighting the current public divide on immigration).

227. *See DACA and Dreamers: What You Need to Know*, PRESIDENTS’ ALL., <https://www.presidentsalliance.org/wp-content/uploads/2022/11/2022-11-07-DACA-Stats-for-Info-Sheet.pdf> [<https://perma.cc/3TUH-PK94>] (last visited Feb. 21, 2024).

228. *Id.*

229. John Arnold, *Ending DACA Would Come at a High Cost, Economists Warn*, RED (Nov. 29, 2022), <https://red.msudenver.edu/2022/ending-daca-would-come-at-a-high-cost-economists-warn> [<https://perma.cc/P96K-XAAN>].

230. Press Release, Claudia Montecinos, Ctr. for Am. Progress, *New CAP Data Confirm DACA Is a Positive Force for Recipients and Their Families* (Nov. 24, 2021), <https://www.americanprogress.org/press/release-new-cap-data-confirm-daca-is-a-positive-force-for-recipients-and-their-families> [<https://perma.cc/EFE6-LNCX>] (“Over the past year and a half, more

DACA is a highly novel program because it uses deferred actions to allow an otherwise deportable immigrant to remain within the U.S. in perpetuity. While the executive branch has previously administered other deferred action programs, those programs were generally limited in scope and time. For example, President Reagan and President H.W. Bush used deferred actions to protect ineligible spouses and children of eligible recipients under the Immigration Reform and Control Act of 1986 until Congress could finish debate on a “statutory legalization scheme [that] would soon encompass those family members.”²³¹ DACA, on the other hand, has no end point.

Even though DACA implicates a question of major economic and political significance, DACA should not be analyzed under the major questions doctrine. This is because the doctrine should only be applied to agency actions that are *purely* statutory-based. As Professor Deacon and Professor Litman have observed, “the ‘new’ major questions doctrine operates as a clear statement rule . . . [holding that] [e]ven broadly worded, otherwise unambiguous” delegations of authority are not enough to support “major” agency policies.²³² But the trouble with applying the major questions doctrine to DACA is that its DHS authority rests under *both* statutory and constitutional bases.²³³ As this Article has previously argued, congressional delegation for discretion in the administration of immigration law can be read, under current law, as intertwined with constitutional discretion when Congress separately empowered DHS with enforcement authority over individual violations of immigration law.²³⁴ When Congress delegates enforcement authority to an administrative agency, under the separation of powers, the agency automatically gains at least some level of discretion of how to enforce the law against individual offenders.²³⁵ Thus, when a court examines whether DHS has the authority to create a deferred action program, the inquiry necessarily implicates the agency’s constitutional power limits under the Take Care Clause.²³⁶ Applying the major questions doctrine to DHS’s statutory

than three-quarters of DACA recipients in the workforce—343,000—were employed in jobs deemed essential by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency, keeping the country safe at great personal risk.”).

231. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 119-21 (2015).

232. See Deacon & Litman, *supra* note 86, at 1012.

233. See Biden DACA Notice of Proposed Rulemaking, *supra* note 6, at 53753-55.

234. See *supra* Part II.B.

235. See *supra* Part II.B.

236. See *supra* Part II.B.

grant of enforcement discretion would necessarily implicate DHS's authority to "take Care that the Laws be faithfully executed."²³⁷

This Article takes no position on whether DACA amounts to a faithful execution on the law under the Take Care Clause.²³⁸ But, this Article does conclude that a reviewing court should not avoid the constitutional question through a major questions analysis. Therefore, DACA is a major questions exception.

IV. CONCLUSION

The major questions doctrine is an evolving and unclear legal doctrine. It asks Congress to speak clearly and directly to the power it wishes to delegate to an administrative agency. But the major questions doctrine must be limited to pure statutory delegation questions. Expanding it into the realm of constitutional law risks upending the traditional notions of the separation of powers. This Article intends not to determine whether DACA is lawful or constitutional. Instead, this Article hopes to show how courts should analyze DACA's legality when challenged.

237. U.S. CONST. art. II, § 3; *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985).

238. *See* Supplemental Complaint, *supra* note 198, at 20-21 (arguing DACA is not a faithful execution of the law and exceeds DHS's powers under the Take Care Clause).