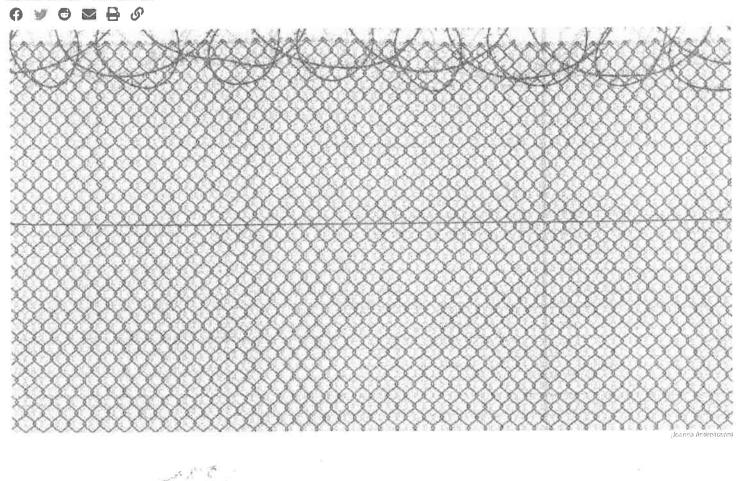
### **Debate: Nations Can and Should Control Their Borders**

Is it right to limit immigration?

**IMMIGRATION** 

JONATHAN H, ADLER AND SHIKHA DALMIA | 8.23.2018 12:01 AM



### AFFIRMATIVE:

## Limiting Who Enters Is a Legitimate Function of the Sovereign State

Jonathan H. Adler

Many people are understandably objecting to the Trump administration's immigration policies. Enforcement of the law has been intrusive, arbitrary, and callous. The economic case for a more liberal immigration regime is strong and more generous policies could benefit U.S. citizens and immigrants alike.

But some go further than that, suggesting that the only immigration policy consistent with individual freedom is one of open borders. These people, who often identify as libertarians, even believe that it is inherently illegitimate for the government of a free society to impose any limit on immigration.

This is an error.

Like any other government power, limits on migration may be misused or abused. But just because specific immigration policies are unwise does not mean that the entire enterprise of policing borders is illegitimate.



It has long been understood that a fundamental aspect of national sovereignty is control over a nation's territory, including control over the border. To ear that a nation is coversion is to ear that the government is responsible for the tarritory over which it eversion its severeignty. This means it has

say mana manon is sovereign is to say man me government is responsible for me territory over which it exercises his sovereignity. This means it has valid authority to exclude outsiders.

As <u>Emer de Vattel</u>, one of the most important natural law theorists of the 18th century and a profound influence on America's founders, explained in <u>The Law of Nations</u>, "the sovereign may forbid the entrance of his territory to foreigners in general, or in particular cases, or to certain person, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the right of domain and sovereignty." Among other reasons for this, once the sovereign admits foreigners into its territory, "he engages to protect them as his own subjects, and to afford them perfect security."

State sovereignty in relation to outsiders may be analogized to property ownership. Most libertarians readily accept that it is reasonable and legitimate for people to deny or limit use of their stuff. This is true whether that stuff is owned individually or collectively. Condominiums, cooperatives, corporations, and the like are forms of collective ownership through which the owners authorize managers to, among other things, constrain the use of the collectively owned property. Accordingly, my homeowners association can prevent nonresidents from using our ponds and traversing our conservation lands, just as it may impose limits upon how association members make use of these common resources.

Like it or not, much of the land, air, and water in this country is collectively owned. These areas are vast, politically managed commons. The use and depletion of our common resources can harm—and, indeed, violate the rights of—individuals within the broader community. Because the resources and spaces are common, none of us may exercise self-help the way we might with our own property. Instead, we are forced to rely upon the

collective management that is provided by the state. Not only is power over the border an inherent aspect of national sovereignty, control of access to common resources necessarily requires controlling entry, and that will sometimes justify placing limits on immigration.

Many things done by the state to manage and protect common resources and spaces are unwise, foolish, counterproductive, or problematic in other ways. But there is nothing inherently illegitimate about the state taking actions to, for instance, ensure that our public roads are safe and our

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watersheds are clean so as to avoid poisoning someone's person or property by transmission through common mediums. And this is true even though many of us will have different ideas about how clean the air or water should be, how "safe" or uncongested the roads should be, and so on.

Immigrants aren't simply teleported into Galt's Gulch, where they remain for the rest of their lives. Entering the country involves crossing a border, which demarcates the boundaries of the state's inherent defense obligations. The state has the legitimate authority to protect "our stuff" and "our spaces" from outsiders, just as I have a right to protect "my stuff," even when I do so for reasons beyond my material self-interest or self-preservation.

Collective management of common spaces may be less than ideal. Much of <u>my own scholarship</u> explores how and why to allow private and nongovernmental ownership of ecological resources. Yet in the absence of such reforms, collective management is necessary and legitimate.

To say that it is legitimate for the government to impose limits on immigration is not to say that any and all such limits are justified. Valid state powers may be misused or abused.

Take national defense. Few would deny that this is a legitimate function of the government. Yet to admit the legitimacy of national defense is not to endorse any and all defense policies. Many are unwise and even oppressive, but that is a problem of the specific policies, not a problem with the entire endeavor.

Likewise, in thinking about immigration, it is important to differentiate the question of whether the state *may* limit entry into the country from the separate question of the extent to which the state *should* pursue that interest (and the question what means of doing so are just and proportional).

Some argue that limits on immigration infringe upon the associational rights of citizens. Not really. I have the right to associate with those who will associate with me. I don't have the right to impose those associational preferences on others or make them bear the costs of that choice. In a wholly privatized world, it might be sufficient to let the owners of each space determine who does or does not enter, but that is not the world we inhabit.

If I refuse to let someone onto my property, I might be a jerk, but I have not violated anyone's rights. The same is true when the state prohibits entry into the nation or restricts egress through common spaces under the state's control. While I want the United States to be an open and welcoming place and a refuge for oppressed people from other lands, that doesn't mean aliens have a "right" to come here.

There are many powerful arguments to be made against current immigration policy, and many have been made in *Reason*'s pages. Among other things, the system is economically wasteful and inhumane. By all means, libertarians should criticize current law and the ways in which it is being enforced. What they should not do is argue that immigration is no concern of the state.

#### **NEGATIVE:**

### Let's Err on the Side of a Presumption of Liberty in Our Immigration Policies

Shikha Dalmia

Jonathan Adler is among the country's sharpest legal minds—but unfortunately his understanding of what open borders means is flawed and, therefore, his critique is flawed too.

Adder says that "open borders" libertarians believe that it is "inherently illegitimate" for the government of a free society to impose "any" limits on immigration. But the most thoughtful open border theoreticians don't say the government may never place limits on any foreigner. Rather, we argue that in a liberal polity that is serious about protecting individual freedom, the government's powers to limit immigration should be severely constrained, just as they are when it comes to speech, gun ownership, and the other liberties.

Take speech: Even ardent First Amendment absolutists don't dispute that the government can sometimes impose viewpoint-neutral time, place, and manner restrictions. They would, however, demand that anytime the government engages in content-based restrictions, it demonstrate a "compelling state interest" and submit to strict scrutiny. They would oppose the use of mere "community standards" to censor obscene or hurtful speech. They sure as hell wouldn't accept the government banning speech for national security reasons without meeting a very high bar.

Open border libertarians advocate something analogous. They believe that there should be a presumption for liberty built into a nation's immigration laws if it wants to stay (classically) liberal. The default condition should not be a blanket ban on entry that is relaxed for this or that category—low-skilled, high-skilled, family-based, diversity visas—in response to some political whim. The default should be openness. If the government can show a "compelling" interest to keep some particular person out—because she or he poses a national security, law and order, or a public health threat—fine, it can close the border to that individual. Not otherwise.

This is essentially what University of Colorado's Michael Huemer, one of the boldest libertarian open border theorists and author of <u>The Problem of Political Authority</u>, proposes. He claims that immigrants have a prima facie right to be free from coercive state harm—but it's not like this right can never be overridden. "Harmful coercion is not always wrong," he notes. "In positing only a 'prima facie' right, I leave it open that the right may in some cases be outweighed or otherwise defeated by competing moral considerations."

In the classical liberal understanding, the state has "powers" and individuals have "rights" that constrain these powers. It's not very libertarian to frame an issue in terms of the sovereign's "right" to control the borders.

Such a starting point must inevitably end in illiberalism. Why? As the London School of Economics political theorist Chandran Kukathas argues in his forthcoming book, Immigration and Freedom (Princeton University Press), given that people have a natural desire to travel, explore, barter, love, and marry across artificial squiggle lines on a map, the state cannot control "outsiders" without also controlling "insiders," Indeed, if literally no one in a country wanted immigrants, newcomers couldn't survive and wouldn't come. "Yet the propensity to truck and barter and to collaborate in various... ways is a deep feature of our nature, and foreigners will rarely find themselves welcome nowhere," Kukathas notes. Hence, as the Trump administration's crackdown on immigrants reaches unprecedented levels of cruelty, his crackdown on domestic employers, sanctuary cities, and humanitarian outfits, ramps up as well.

Yes, condo owners have a right to restrict entry to their gated communities. But unlike my homeowners association, the state has a monopoly on coercive force. At condo meetings, when majorities override the interests of individual owners in the name of some common good, the owners can leave and form another association. But the state governs everyone. There is no escaping its tentacles short of quitting the country—and a state with sweeping powers can restrict that, too. If it's not "inherently illegitimate" for a government to limit the number of people coming into a country to prevent congestion and pollution, why is it not also "inherently illegitimate" for it to prevent, say, rich citizens from leaving because it needs their taxes to improve the country's common spaces?

If a state has the same powers that homeowners and condo boards have over their property, couldn't it also suppress speech and religion that it believes are antithetical to the common good? Adler's rationale for the right to limit immigration—overstraining the commons—would also apply to children. Should the government have the power to control fertility rates? How about foreign goods-should the government have unconstrained powers to restrict trade? Imports are transported on publicly funded roads and could end up using scarce landfill space, after all. Adler ignores that the state is a fundamentally different animal from a condo association and to give it the same powers is to give up on a government with enumerated and limited powers.

Adler denies that restricting the right to entry of immigrants violates the rights of citizens, but his own condo association analogy shows otherwise. Citizens, in his scheme, are co-owners of the condo's common spaces and sole owners of their homes and businesses. Yet if the government could control their guest list, wouldn't it be a violation of their property and associational rights?

At best, one can say that the rights of those who don't want foreigners here and those who do are in tension. Even then, however, the tension isn't equal. Under an open border default, those who oppose immigration still have control over their private property. Don't like foreigners? Don't invite them to your home. But when laws keep foreigners out, the only remedy for those who have personal or economic relationships with people born elsewhere is to move to where their loved ones and workers are. They even lose control over their alleged private property.

Libertarian restrictionists think that forcing natives to cough up taxes for the public schooling of immigrants is "forced integration" that violates free association (as if immigrants don't pay taxes!). But again, that logic would apply not just to people entering the country from abroad but also those entering from the womb. The taxation argument can in fact be used to justify a limitless government that controls one's fellow citizens' every move. It turns the libertarian project on its head by becoming a justification for a leviathan.

Even in a mixed economy with an incomplete articulation of property rights, such hyper-protectiveness is antithetical to the fundamental live-and-letlive ethos of libertarianism. A liberal immigration regime is good policy, yes. But it is also good on principle.

#### NEXT: Debate: Libertarianism is About More Than the State

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IMMIGRATION BORDERS











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Declined to Extend by MediNatura, Inc. v. Food and Drug Administration, D.D.C., October 23, 2020

140 S.Ct. 1891 Supreme Court of the United States.

DEPARTMENT OF HOMELAND SECURITY, et al., Petitioners

V.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.; Donald J. Trump, President of the United States, et al., Petitioners National Association for the Advancement of Colored People, et al.; and Chad Wolf, Acting Secretary of Homeland Security, et al., Petitioners

Martin Jonathan Batalla Vidal, et al.

No. 18-587, No. 18-588, No. 18-589

Argued November 12, 2019

Decided June 18, 2020

**Synopsis** 

Background: In first case, states, state university, county, city, union, and individuals brought action for declaratory and injunctive relief against Department of Homeland Security (DHS) and federal officials, challenging on constitutional grounds, and under the Administrative Procedure Act (APA), the rescission of Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children. The United States District Court for the Northern District of California, William H. Alsup, J., 279 F.Supp.3d 1011, entered preliminary injunction requiring DHS to adjudicate renewal applications for existing DACA recipients and, 298 F.Supp.3d 1304, partially granted government's motion to dismiss for failure to state a claim. Parties appealed. The United States Court of Appeals for the Ninth Circuit, Wardlaw, Circuit Judge, \$\bigsep=908\ F.3d 476, affirmed. In second case, similar claims were brought by a civil rights organization and individuals. The United States District Court for the District of Columbia, John D. Bates, J., 298 F.Supp.3d 209, granted in part and denied in part plaintiffs' motion for partial summary judgment and defendants' motion to dismiss, and vacated the rescission, and later denied reconsideration, 315 F.Supp.3d 457, but granted in part a stay of the vacatur pending appeal, 321 F.Supp.3d 143. In third case, similar claims were brought by states, individuals, and nonprofit organization. The United States District Court for the Eastern District of New York, Nicholas G. Garaufis, J., 279 F.Supp.3d 401, granted preliminary injunction, and

granted in part and denied in part defendants' motions to dismiss, 291 F.Supp.3d 260 and 295 F.Supp.3d 127. Certiorari was granted in first case, and certiorari before judgment was granted in second and third cases.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

- [1] rescission of DACA program was arbitrary and capricious, and
- [2] plaintiffs failed to state a claim for an equal protection violation.

Judgment in first case vacated in part and reversed in part; judgment in second case affirmed; orders in third case affirmed in part, reversed in part, and vacated in part; all cases remanded.

Justice Sotomayor filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part.

Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part, in which Justices Alito and Gorsuch joined.

Justice Alito filed an opinion concurring in the judgment in part and dissenting in part.

Justice Kavanaugh filed an opinion concurring in the judgment in part and dissenting in part.

West Headnotes (25)

[1] Administrative Law and Procedure Statutory basis and limitation Administrative Law and Procedure Nature and Form of Remedy

15A Administrative Law and Procedure

15AIII Administrative Powers and Proceedings

15AIII(A) In General

15Ak1114 Procedure in General

15Ak1116 Statutory basis and limitation

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(A) In General

15Ak1606 Nature and Form of Remedy

15Ak1607 In general

The Administrative Procedure Act (APA) sets forth the procedures by which federal agencies are accountable to the public and their actions are subject to review by the courts. 5 U.S.C.A. § 551 et seq.

- 9 Cases that cite this headnote
- [2] Administrative Law and Procedure Report or opinion; reasons for decision

  Administrative Law and Procedure Review for arbitrary, capricious, unreasonable, or illegal actions in general

15A Administrative Law and Procedure

15AIII Administrative Powers and Proceedings

15AIII(D) Adjudications

15AIII(D)6 Decision

15Ak1453 Report or opinion; reasons for decision

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(G) Review

15AIV(G)3 Scope and Extent of Review in General

15Ak1743 Review for arbitrary, capricious, unreasonable, or illegal actions in general

The Administrative Procedure Act (APA) requires agencies to engage in reasoned decisionmaking and directs that agency actions be set aside if they are arbitrary or capricious. \$\frac{1}{2}5\text{ U.S.C.A. } \cdot \frac{706(2)(A)}{2}.

- 16 Cases that cite this headnote
- [3] Administrative Law and Procedure Review for arbitrary, capricious, unreasonable, or illegal actions in general

Administrative Law and Procedure Review for correctness or error

Administrative Law and Procedure Wisdom, judgment, or opinion in general

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(G) Review

15AIV(G)3 Scope and Extent of Review in General

15Ak1743 Review for arbitrary, capricious, unreasonable, or illegal actions in general

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(G) Review

15AIV(G)3 Scope and Extent of Review in General

15Ak1748 Review for correctness or error

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(G) Review

15AIV(G)3 Scope and Extent of Review in General

15Ak1749 Wisdom, judgment, or opinion in general

Under the Administrative Procedure Act's (APA) narrow standard of review for determining whether agency actions are arbitrary or capricious, a court is not to substitute its judgment for that of the agency, and a court assesses only whether the action was based on a consideration of the relevant factors and whether there has been a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

19 Cases that cite this headnote

# [4] Administrative Law and Procedure Presumptions as to Reviewability Administrative Law and Procedure Rebuttal of presumptions

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(C) Reviewability

15Ak1654 Presumptions as to Reviewability

15Ak1655 In general

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(C) Reviewability

15Ak1654 Presumptions as to Reviewability

15Ak1656 Rebuttal of presumptions

The Administrative Procedure Act (APA) establishes a basic presumption of judicial review for one suffering a legal wrong because of agency action, but the presumption can be rebutted by a showing that a relevant statute precludes judicial review or that the agency action is committed to agency discretion by law. 5 U.S.C.A. §§ 701(a)(1, 2), 702.

10 Cases that cite this headnote

# [5] Administrative Law and Procedure Presumptions as to Reviewability Administrative Law and Procedure Actions Committed to Agency Discretion in General

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(C) Reviewability

15Ak1654 Presumptions as to Reviewability

15Ak1655 In general

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(C) Reviewability

15Ak1662 Nature, Scope, or Effect of Agency Action

15Ak1664 Actions Committed to Agency Discretion in General

15Ak1664(1) In general

To honor the Administrative Procedure Act's (APA) presumption of judicial review of agency action, the APA's exception to judicial review for agency action that is committed

to agency discretion by law is read quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion. 5 U.S.C.A. §§ 701(a)(2), 702.

12 Cases that cite this headnote

### [6] Administrative Law and Procedure - Particular Agency Actions or Failures to Act

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(C) Reviewability

15Ak1662 Nature, Scope, or Effect of Agency Action

15Ak1666 Particular Agency Actions or Failures to Act

15Ak1666(1) In general

The limited category of agency actions that are not subject to judicial review under the Administrative Procedure Act (APA), because they are committed to agency discretion by law includes an agency's decision not to institute enforcement proceedings. § 5 U.S.C.A. § 701(a)(2).

5 Cases that cite this headnote

## [7] Aliens, Immigration, and Citizenship - Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship

24111 Immigration Agencies and Officers

24k152 Rules and Regulations

24k155 Proceedings for adoption and review

Memorandum from Department of Homeland Security (DHS), announcing Deferred Action for Childhood Arrivals (DACA) program, which provided protections from removal for certain unauthorized aliens who had entered United States as children, did not involve a non-enforcement policy traditionally left to agency discretion, as would provide exception to Administrative Procedure Act's (APA) presumption of judicial review of agency actions, with respect to subsequent administrative action by DHS rescinding the program; memorandum created program for conferring affirmative immigration relief, which involved soliciting applications from eligible aliens, instituting a standardized review process, and sending formal notices indicating whether an alien would receive forbearance from removal, such proceedings were effectively adjudications, and resulting decisions to grant deferred action were affirmative acts of approval rather than refusals to act. 5 U.S.C.A. §§ 701(a)(2), 702; 8 C.F.R. § 274a.12(c)(14).

6 Cases that cite this headnote

### [8] Aliens, Immigration, and Citizenship - Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship

24III Immigration Agencies and Officers

24k152 Rules and Regulations

24k155 Proceedings for adoption and review

INA provision, barring judicial review of claims arising from actions or proceedings brought to remove an alien, did not present a jurisdictional bar to judicial review of decision by Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided protections from removal for certain unauthorized aliens who had entered United States as children; suits seeking injunctive relief with respect to rescission of the program did not challenge any removal proceedings. Immigration and Nationality Act § 242(b)(9), 8 U.S.C.A. § 1252(b)(9).

1 Cases that cite this headnote

### [9] Aliens, Immigration, and Citizenship - Decisions reviewable

24 Aliens, Immigration, and Citizenship

24V Denial of Admission and Removal

24V(G) Judicial Review or Intervention

24k392 Decisions reviewable

INA provision, barring judicial review of claims arising from actions or proceedings brought to remove an alien, does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, or the decision to seek removal, or the process by which removability will be determined. Immigration and Nationality Act § 242(b)(9), 8 U.S.C.A. § 1252(b)(9).

11 Cases that cite this headnote

# [10] Aliens, Immigration, and Citizenship - Jurisdiction and venue Aliens, Immigration, and Citizenship - Decisions reviewable

24 Aliens, Immigration, and Citizenship

24V Denial of Admission and Removal

24V(G) Judicial Review or Intervention

24k385 Jurisdiction and venue

24 Aliens, Immigration, and Citizenship

24V Denial of Admission and Removal

24V(G) Judicial Review or Intervention

24k392 Decisions reviewable

INA provision, limiting judicial review of cases arising from decisions to commence removal proceedings, adjudicate removal cases, or execute removal orders, does not cover all claims arising from removal proceedings or impose a general jurisdictional limitation. Immigration and Nationality Act § 242(g), 8 U.S.C.A. § 1252(g).

15 Cases that cite this headnote

### [11] Aliens, Immigration, and Citizenship - Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship

24III Immigration Agencies and Officers

24k152 Rules and Regulations

24k155 Proceedings for adoption and review

INA provision, limiting judicial review of cases arising from decisions to commence removal proceedings, adjudicate removal cases, or execute removal orders, did not present a jurisdictional bar to judicial review of decision by Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided protections from removal for certain unauthorized aliens who had entered United States as children; the rescission was not a decision to commence removal proceedings, or to adjudicate a case, or to execute a removal order. Immigration and Nationality Act § 242(g),

8 U.S.C.A. § 1252(g).

16 Cases that cite this headnote

### [12] Administrative Law and Procedure - Timing of theory and grounds asserted

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(I) Theory and Grounds of Decision on Review

15Ak1935 Timing of theory and grounds asserted

It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.

24 Cases that cite this headnote

# [13] Administrative Law and Procedure Particular Errors and Defects Warranting Remand

Administrative Law and Procedure Making or supplementing reasons for decision

Administrative Law and Procedure Conducting Proceedings or Further

Proceedings

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition

15Ak2018 Remand

15Ak2020 Particular Errors and Defects Warranting Remand

15Ak2020(1) In general

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition

15Ak2021 Directions on Remand

15Ak2025 Making or supplementing reasons for decision

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition

15Ak2021 Directions on Remand

15Ak2026 Conducting Proceedings or Further Proceedings

15Ak2026(1) In general

If the grounds that the agency invoked when it took the action are inadequate, a court may remand for the agency to do one of two things: first, the agency can offer a fuller explanation of the agency's reasoning at the time of the agency action, and second, the agency can deal with the problem afresh by taking new agency action.

9 Cases that cite this headnote

# [14] Administrative Law and Procedure — Course and conduct of further administrative proceedings

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition

15Ak2027 Further Administrative Proceedings

15Ak2031 Course and conduct of further administrative proceedings

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, and the agency's initial explanation indicates the determinative reason or reasons for the final action taken, the agency may elaborate later on those reasons, but may not provide new ones.

10 Cases that cite this headnote

# [15] Administrative Law and Procedure Course and conduct of further administrative proceedings

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition

15Ak2027 Further Administrative Proceedings

15Ak2031 Course and conduct of further administrative proceedings

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, and the agency chooses to deal with the problem afresh by taking new agency action, the agency is not limited to its prior reasons, but must comply with the procedural requirements for new agency action.

27 Cases that cite this headnote

# [16] Administrative Law and Procedure - Further judicial review; subsequent review

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition

15Ak2033 Further judicial review; subsequent review

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, and the agency chooses to provide a fuller explanation of the agency's reasoning at the time of the agency action, the fuller explanation must be viewed critically to ensure that the action is not upheld by the court on the basis of impermissible post hoc rationalization.

16 Cases that cite this headnote

# [17] Aliens, Immigration, and Citizenship - Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship

24III Immigration Agencies and Officers

24k152 Rules and Regulations

24k155 Proceedings for adoption and review

Secretary of Department of Homeland Security (DHS), having chosen, on remand from the court, to provide a fuller explanation for initial decision of DHS to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children, engaged in impermissible post hoc rationalizations, which were not properly before the court on judicial review after remand; rescission decision had rested solely on conclusion that DACA program was unlawful, but Secretary offered what she characterized as three separate and independently sufficient reasons for rescission, only one of which was the conclusion that DACA program was illegal.

1 Cases that cite this headnote

# [18] Administrative Law and Procedure Further judicial review; subsequent review

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(I) Theory and Grounds of Decision on Review

15Ak1935 Timing of theory and grounds asserted

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition

15Ak2033 Further judicial review; subsequent review

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, the rule requiring a new decision from the agency, before a court can consider new reasons, promotes agency accountability by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of

authority and instills confidence that the reasons given are not simply convenient litigating positions; in contrast, permitting agencies to invoke belated justifications can upset the orderly functioning of the judicial review process, forcing both litigants and courts to chase a moving target.

9 Cases that cite this headnote

### [19] Administrative Law and Procedure - Timing of theory and grounds asserted

15A Administrative Law and Procedure

15AIV Judicial Remedies and Review

15AIV(1) Theory and Grounds of Decision on Review

15Ak1935 Timing of theory and grounds asserted

The functional reasons for requiring contemporaneous explanations for agency action apply with equal force regardless whether improper post hoc justifications are raised in court by those appearing on behalf of the agency, or by agency officials themselves.

4 Cases that cite this headnote

### [20] Aliens, Immigration, and Citizenship 🧼 Validity

24 Aliens, Immigration, and Citizenship

24III Immigration Agencies and Officers

24k152 Rules and Regulations

24k154 Validity

Acting Secretary of Department of Homeland Security (DHS) acted arbitrarily and capriciously in deciding to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children, where important aspects of the problem were not considered; while Acting Secretary recognized that a Court of Appeals decision called into question the legality of DACA program's work authorization and benefits eligibility, she did not address the forbearance policy at heart of DACA and did not recognize her discretion to remove benefits eligibility and work authorization while continuing forbearance, and Acting Secretary did not address whether there was legitimate reliance on DACA program.

5 U.S.C.A. § 706(2)(A).

### [21] Administrative Law and Procedure & Requirements in General

15A Administrative Law and Procedure
15AIII Administrative Powers and Proceedings
15AIII(C) Rules, Regulations, and Other Policymaking
15AIII(C)6 Amendment, Repeal, Expiration, or Change of Policy
15Ak1283 Requirements in General

15Ak1284 In general

When an agency rescinds a prior policy, its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.

5 Cases that cite this headnote

### [22] Administrative Law and Procedure - Change of policy; reason or explanation

15A Administrative Law and Procedure

15AIII Administrative Powers and Proceedings

15AIII(C) Rules, Regulations, and Other Policymaking

15AIII(C)6 Amendment, Repeal, Expiration, or Change of Policy

15Ak1287 Change of policy; reason or explanation

When an agency changes course, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account, and it would be arbitrary and capricious to ignore such matters.

6 Cases that cite this headnote

### [23] Aliens, Immigration, and Citizenship - Validity

### Constitutional Law Discrimination Between Classes of Aliens

24 Aliens, Immigration, and Citizenship

24III Immigration Agencies and Officers

24k152 Rules and Regulations

24k154 Validity

92 Constitutional Law

92XXVI Equal Protection

92XXVI(B) Particular Classes

92XXVI(B)2 Aliens

92k3111 Immigration and Naturalization

92k3113 Discrimination Between Classes of Aliens

92k3113(1) In general

Assuming that equal protection claim by aliens, alleging that the Executive, motivated by animus, ended a program that disproportionately benefited certain ethnic groups, was cognizable, aliens failed to plausibly allege that an invidious discriminatory purpose was a motivating factor in decision to rescind Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children; even if Latinos from Mexico represented 78% of DACA recipients, Latinos made up a large share of unauthorized alien population, history leading up to rescission was not irregular, and President's statements allegedly criticizing Latinos were remote in time and were made in unrelated contexts. (Per Chief Justice Roberts, with three justices concurring and four justices concurring in the judgment.) U.S. Const. Amend. 5.

#### 8 Cases that cite this headnote

### [24] Constitutional Law - Intentional or purposeful action requirement

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)5 Scope of Doctrine in General

92k3038 Discrimination and Classification

92k3040 Intentional or purposeful action requirement

To plead animus, a plaintiff asserting an equal protection claim must raise a plausible inference that an invidious discriminatory purpose was a motivating factor in the relevant decision. (Per Chief Justice Roberts, with three justices concurring and four justices concurring in the judgment.) U.S. Const. Amend. 5.

6 Cases that cite this headnote

### [25] Constitutional Law - Intentional or purposeful action requirement

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)5 Scope of Doctrine in General

92k3038 Discrimination and Classification

92k3040 Intentional or purposeful action requirement

Possible evidence of discriminatory animus, in an action asserting an equal protection claim, includes disparate impact on a particular group, departures from the normal procedural sequence, and contemporary statements by members of the decisionmaking body. (Per Chief Justice Roberts, with three justices concurring and four justices concurring in the judgment.) U.S. Const. Amend. 5.

5 Cases that cite this headnote

### \*1896 Syllabus\*

In 2012, the Department of Homeland Security (DHS) issued a memorandum announcing an immigration relief program known as Deferred Action for Childhood Arrivals (DACA), which allows certain unauthorized aliens who arrived in the United States as children to apply for a two-year forbearance of removal. Those granted such relief become eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Two years later, DHS expanded DACA eligibility and created a related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). If implemented, that program would have made 4.3 million parents of U.S. citizens or lawful permanent residents eligible for the same forbearance from removal, work eligibility, and other benefits as DACA recipients. Texas, joined by 25 other States, secured a nationwide preliminary injunction barring implementation of both the DACA expansion and DAPA. The Fifth Circuit upheld the injunction, concluding that the program violated the Immigration and Nationality Act (INA), which carefully defines eligibility for benefits. This Court affirmed by an equally divided vote, and the litigation then continued in the District Court.

In June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum, citing, among other reasons, the ongoing suit by Texas and new policy priorities. That September, the Attorney General advised Acting Secretary of Homeland Security Elaine C. Duke that DACA shared DAPA's legal flaws and should also be rescinded. The next day, Duke acted on that advice. Taking into consideration the Fifth Circuit and Supreme Court rulings and the Attorney General's letter, Duke decided to terminate the program. She explained that DHS would no longer accept new applications, but that existing DACA recipients whose benefits were set to expire within six months could apply for a two-year renewal. For all other DACA recipients, previously issued grants of relief would expire on their own terms, with no prospect for renewal.

Several groups of plaintiffs challenged Duke's decision to rescind DACA, claiming that it was arbitrary and capricious in violation of the Administrative Procedure Act (APA) and infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. District Courts in California (Regents, No. 18-587), New York (Batalla Vidal, No. 18-589), and the District of Columbia (NAACP, No. 18-588) all ruled for the plaintiffs. Each court rejected the Government's arguments that the claims were unreviewable under the APA and that the INA deprived the courts of jurisdiction. In PRegents and Batalla Vidal, the District Courts further held that the equal protection claims were adequately alleged, and they entered coextensive nationwide preliminary injunctions based on the conclusion that the plaintiffs were likely to succeed on their APA claims. The District Court in NAACP took a different approach. It deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, finding that the rescission was inadequately explained. The court then stayed its order for 90 days to permit DHS to reissue a memorandum rescinding DACA, this time with a fuller explanation of the conclusion that DACA was unlawful. Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded to the court's order. She declined to disturb or replace Duke's rescission decision and instead explained why she thought her predecessor's decision was sound. In addition to reiterating the illegality conclusion, she offered several new justifications for the rescission. The Government moved for the District Court to reconsider in light of this additional explanation,

but the court concluded that the new reasoning failed to elaborate meaningfully on the illegality rationale.

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. While those appeals were pending, the Government filed three petitions for certiorari before judgment. Following the Ninth Circuit affirmance in Regents, this Court granted certiorari.

Held: The judgment in No. 18–587 is vacated in part and reversed in part; the judgment in No. 18–588 is affirmed; the February 13, 2018 order in No. 18–589 is vacated, the November 9, 2017 order is affirmed in part, and the March 29, 2018 order is reversed in part; and all of the cases are remanded.

₱908 F. 3d 476, vacated in part and reversed in part; No. 18–588, affirmed; and No. 18–589, February 13, 2018 order vacated, November 9, 2017 order affirmed in part, and March 29, 2018 order reversed in part; all cases remanded.

THE CHIEF JUSTICE delivered the opinion of the Court, except as to Part IV, concluding:

- 1. DHS's rescission decision is reviewable under the APA and is within this Court's jurisdiction. Pp. 1905 1908.
- (a) The APA's "basic presumption of judicial review" of agency action, Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681, can be rebutted by showing that the "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2). In Heckler v. Chaney, the Court held that this narrow exception includes an agency's decision not to institute an enforcement action. 470 U.S. 821, 831–832, 105 S.Ct. 1649, 84 L.Ed.2d 714. The Government contends that DACA is a general non-enforcement policy equivalent to the individual non-enforcement decision in Chaney. But the DACA Memorandum did not merely decline to institute enforcement proceedings; it created a program for conferring affirmative immigration relief. Therefore, unlike the non-enforcement decision in Chaney, DACA's creation—and its rescission—is an "action [that] provides a focus for judicial review." Id., at 832, 105 S.Ct. 1649. In addition, by virtue of receiving deferred action, 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. Access to such benefits is an interest "courts often are called upon to protect." Ibid. DACA's rescission is thus subject to review under the APA. Pp. 1905 1907.

- 2. DHS's decision to rescind DACA was arbitrary and capricious under the APA. Pp. 1907 1915.
- (a) In assessing the rescission, the Government urges the Court to consider not just the contemporaneous explanation offered by Acting Secretary Duke but also the additional reasons supplied by Secretary Nielsen nine months later. Judicial review of agency action, however, is limited to "the grounds that the agency invoked when it took the action." Michigan v. EPA, 576 U.S. 743, 758, 135 S.Ct. 2699, 192 L.Ed.2d 674. If those grounds are inadequate, a court may remand for the agency to offer "a fuller explanation of the agency's reasoning at the time of the agency action," Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 654, 110 S.Ct. 2668, 110 L.Ed.2d 579 (emphasis added), or to "deal with the problem afresh" by taking new agency action, SEC v. Chenery Corp., 332 U.S. 194, 201, 67 S.Ct. 1760, 91 L.Ed. 1995. Because Secretary Nielsen chose not to take new action, she was limited to elaborating on the agency's original reasons. But her reasoning bears little relationship to that of her predecessor and consists primarily of impermissible "post hoc rationalization." Ecitizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136. The rule requiring a new decision before considering new reasons is not merely a formality. It serves important administrative law values by promoting agency accountability to the public, instilling confidence that the reasons given are not simply convenient litigating positions, and facilitating orderly review. Each of these values would be markedly undermined if this Court allowed DHS to rely on reasons offered nine months after the rescission and after three different courts had identified flaws in the original explanation. Pp. 1907 – 1910.
- (b) Acting Secretary Duke's rescission memorandum failed to consider important aspects of the problem before the agency. Although Duke was bound by the Attorney General's determination that DACA is illegal, see 8 U.S.C. § 1103(a)(1), deciding how best to address that determination involved important policy choices reserved for DHS. Acting Secretary Duke plainly exercised such discretionary authority in winding down the program, but she did not appreciate the full scope of her discretion. The Attorney General concluded that the legal defects in DACA mirrored those that the courts had recognized in DAPA. The Fifth Circuit, the highest court to offer a reasoned opinion on DAPA's legality, found that DAPA violated the INA because it extended eligibility for benefits to a class of unauthorized aliens. But the defining feature of DAPA (and DACA) is DHS's decision to defer removal, and the Fifth Circuit carefully distinguished that forbearance component from the associated benefits eligibility. Eliminating benefits eligibility while continuing forbearance

thus remained squarely within Duke's discretion. Yet, rather than addressing forbearance in her decision, Duke treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation. That reasoning repeated the error in \*\*Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm—treating a rationale that applied to only part of a policy as sufficient to rescind the entire policy. 463 U.S. 29, 51, 103 S.Ct. 2856, 77 L.Ed.2d 443. While DHS was not required to "consider all policy alternatives," \*\*ibid.\*, deferred action was "within the ambit of the existing" policy, \*\*ibid.\*; indeed, it was the centerpiece of the policy. In failing to consider the option to retain deferred action, Duke "failed to supply the requisite 'reasoned analysis.' \*\*\*\* Id., at 57, 103 S.Ct. 2856.

That omission alone renders Duke's decision arbitrary and capricious, but it was not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. "Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25. Certain features of the DACA policy may affect the strength of any reliance interests, but those features are for the agency to consider in the first instance. DHS has flexibility in addressing any reliance interests and could have considered various accommodations. While the agency was not required to pursue these accommodations, it was required to assess the existence and strength of any reliance interests, and weigh them against competing policy concerns. Its failure to do so was arbitrary and capricious. Pp. 1909 – 1915.

THE CHIEF JUSTICE, joined by Justice GINSBURG, Justice Breyer, and Justice KAGAN, concluded in Part IV that respondents' claims fail to establish a plausible inference that the rescission was motivated by animus in violation of the equal protection guarantee of the Fifth Amendment. Pp. 1915 – 1916.

ROBERTS, C.J., delivered the opinion of the Court, except as to Part IV. GINSBURG, BREYER, and KAGAN, JJ., joined that opinion in full, and SOTOMAYOR, J., joined as to all but Part IV. SOTOMAYOR, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ALITO and GORSUCH, JJ., joined. ALITO, J., and KAVANAUGH, J., filed opinions concurring in the judgment in part and dissenting in part.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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### **Opinion**

Chief Justice ROBERTS delivered the opinion of the Court, except as to Part IV.

\*1901 In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act (APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.

I

#### Α

In June 2012, the Secretary of Homeland Security issued a memorandum announcing an immigration relief program for "certain young people who were brought to this country as children." App. to Pet. for Cert. in No. 18–587, p. 97a (App. to Pet. for Cert.). Known as DACA, the program applies to childhood arrivals who were under age 31 in 2012; have continuously resided here since 2007; are current students, have completed high school, or are honorably discharged veterans; have not been convicted of any serious crimes; and do not threaten national security or public safety. *Id.*, at 98a. DHS concluded that individuals who meet these criteria warrant favorable treatment under the immigration laws because they "lacked the intent to violate the law," are "productive" contributors to our society, and "know only this country as home." *Id.*, at 98a–99a.

"[T]o prevent [these] low priority individuals from being removed from the \*1902 United States," the DACA Memorandum instructs Immigration and Customs Enforcement to "exercise prosecutorial discretion[] on an individual basis ... by deferring action for a period of two years, subject to renewal." *Id.*, at 100a. In addition, it directs U.S. Citizenship and Immigration Services (USCIS) to "accept applications to determine whether these individuals qualify for work authorization during this period of deferred action," *id.*, at 101a, as permitted under regulations long predating DACA's creation, see 8 CFR § 274a.12(c)(14) (2012) (permitting work authorization for deferred action recipients who establish "economic necessity"); 46 Fed. Reg. 25080–25081 (1981) (similar). Pursuant to other regulations, deferred action recipients are

considered "lawfully present" for purposes of, and therefore eligible to receive, Social Security and Medicare benefits. See 8 CFR  $\S$  1.3(a)(4)(vi); 42 CFR  $\S$  417.422(h) (2012).

In November 2014, two years after DACA was promulgated, DHS issued a memorandum announcing that it would expand DACA eligibility by removing the age cap, shifting the date-of-entry requirement from 2007 to 2010, and extending the deferred action and work authorization period to three years. App. to Pet. for Cert. 106a–107a. In the same memorandum, DHS created a new, related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. That program would have authorized deferred action for up to 4.3 million parents whose children were U.S. citizens or lawful permanent residents. These parents were to enjoy the same forbearance, work eligibility, and other benefits as DACA recipients.

Before the DAPA Memorandum was implemented, 26 States, led by Texas, filed suit in the Southern District of Texas. The States contended that DAPA and the DACA expansion violated the APA's notice and comment requirement, the Immigration and Nationality Act (INA), and the Executive's duty under the Take Care Clause of the Constitution. The District Court found that the States were likely to succeed on the merits of at least one of their claims and entered a nationwide preliminary injunction barring implementation of both DAPA and the DACA expansion. See Texas v. United States, 86 F.Supp.3d 591, 677–678 (2015).

A divided panel of the Court of Appeals for the Fifth Circuit affirmed the preliminary injunction. Texas v. United States, 809 F.3d 134, 188 (2015). In opposing the injunction, the Government argued that the DAPA Memorandum reflected an unreviewable exercise of the Government's enforcement discretion. The Fifth Circuit majority disagreed. It reasoned that the deferred action described in the DAPA Memorandum was "much more than nonenforcement: It would affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens." Id., at 166. From this, the majority concluded that the creation of the DAPA program was not an unreviewable action "committed to agency discretion by law." Id., at 169 (quoting 5 U.S.C. § 701(a)(2)).

The majority then upheld the injunction on two grounds. It first concluded the States were likely to succeed on their procedural claim that the DAPA Memorandum was a substantive rule that was required to undergo notice and comment. It then held that the APA required DAPA to be set aside because the program was "manifestly contrary" to the INA, which "expressly and carefully provides legal designations allowing defined classes" to "receive the benefits" associated with "lawful presence" and to qualify for work authorization, \$\bigsim 809\ F.3d at 179-181, 186 (internal \*1903 quotation marks omitted). Judge King dissented.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote, which meant that no opinion was issued. \*\*United States v. Texas, 579 U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (per curiam). For the next year, litigation over DAPA and the DACA expansion continued in the Southern District of Texas, while implementation of those policies remained enjoined.

Then, in June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration's immigration enforcement priorities.

Three months later, in September 2017, Attorney General Jefferson B. Sessions III sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, "advis[ing]" that DHS "should rescind" DACA as well. App. 877. Citing the Fifth Circuit's opinion and this Court's equally divided affirmance, the Attorney General concluded that DACA shared the "same legal ... defects that the courts recognized as to DAPA" and was "likely" to meet a similar fate. *Id.*, at 878. "In light of the costs and burdens" that a rescission would "impose[] on DHS," the Attorney General urged DHS to "consider an orderly and efficient wind-down process." *Ibid.* 

The next day, Duke acted on the Attorney General's advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General's letter. App. to Pet. for Cert. 111a–117a. "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the "letter from the Attorney General," she concluded that the "DACA program should be terminated." *Id.*, at 117a.

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal. *Id.*, at 117a–118a.

В

Within days of Acting Secretary Duke's rescission announcement, multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People challenged her decision in the U.S. District Courts for the Northern District of California (*Regents*, No. 18–587), the Eastern District of New York (*Batalla Vidal*, No. 18–589), and the District of Columbia (*NAACP*, No. 18–588). The relevant claims are that the rescission was arbitrary and capricious in violation of the

APA and that it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. 1

All three District Courts ruled for the plaintiffs, albeit at different stages of the proceedings.<sup>2</sup> In doing so, each court rejected \*1904 the Government's threshold arguments that the claims were unreviewable under the APA and that the INA deprived the court of jurisdiction. 298 F.Supp.3d 209, 223–224, 234–235 (DDC 2018); 279 F.Supp.3d 1011, 1029–1033 (ND Cal. 2018); 295 F.Supp.3d 127, 150, 153–154 (EDNY 2017).

In Regents and Batalla Vidal, the District Courts held that the equal protection claims were adequately alleged. 298 F.Supp.3d 1304, 1315 (ND Cal. 2018); 291 F.Supp.3d 260, 279 (EDNY 2018). Those courts also entered coextensive nationwide preliminary injunctions, based on the conclusion that the plaintiffs were likely to succeed on the merits of their claims that the rescission was arbitrary and capricious. These injunctions did not require DHS to accept new applications, but did order the agency to allow DACA recipients to "renew their enrollments."

In NAACP, the D. C. District Court took a different course. In April 2018, it deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, holding that Acting Secretary Duke's "conclusory statements were insufficient to explain the change in [the agency's] view of DACA's lawfulness." 298 F.Supp.3d at 243. The District Court stayed its order for 90 days to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." Id., at 245.

Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded via memorandum. App. to Pet. for Cert. 120a–126a. She explained that, "[h]aving considered the Duke memorandum," she "decline[d] to disturb" the rescission. *Id.*, at 121a. Secretary Nielsen went on to articulate her "understanding" of Duke's memorandum, identifying three reasons why, in Nielsen's estimation, "the decision to rescind the DACA policy was, and remains, sound." *Ibid.* First, she reiterated that, "as the Attorney General concluded, the DACA policy was contrary to law." *Id.*, at 122a. Second, she added that, regardless, the agency had "serious doubts about [DACA's] legality" and, for law enforcement reasons, wanted to avoid "legally questionable" policies. *Id.*, at 123a. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of "project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens. *Id.*, at 123a–

124a. In her final paragraph, Secretary Nielsen acknowledged the "asserted reliance interests" in DACA's continuation but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum. *Id.*, at 125a.

The Government asked the D. C. District Court to revise its prior order in light of the reasons provided by Secretary Nielsen, but the court declined. In the court's view, the new memorandum, which \*1905 "fail[ed] to elaborate meaningfully" on the agency's illegality rationale, still did not provide an adequate explanation for the September 2017 rescission. 315 F.Supp.3d 457, 460, 473–474 (2018).

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. In November 2018, while those appeals were pending, the Government simultaneously filed three petitions for certiorari before judgment. After the Ninth Circuit affirmed the nationwide injunction in *Regents*, see 908 F.3d 476 (2018), but before rulings from the other two Circuits, we granted the petitions and consolidated the cases for argument. 588 U.S. —, 139 S.Ct. 2779, 204 L.Ed.2d 1156 (2019). The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

#### $\Pi$

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

[1] [2] [3] The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." Franklin v. Massachusetts, 505 U.S. 788, 796, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). It requires agencies to engage in "reasoned decisionmaking," Michigan v. EPA, 576 U.S. 743, 750, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) (internal quotation marks omitted), and directs that agency actions be "set aside" if they are "arbitrary" or "capricious," 5 U.S.C. § 706(2)(A). Under this "narrow standard of review, ... a court is not to substitute its judgment for that of the agency," FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (internal quotation marks omitted), but instead to assess only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

But before determining whether the rescission was arbitrary and capricious, we must first address the Government's contentions that DHS's decision is unreviewable under the APA and outside this Court's jurisdiction.

#### A

- [4] The APA establishes a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (quoting § 702). That presumption can be rebutted by a showing that the relevant statute "preclude[s]" review, § 701(a)(1), or that the "agency action is committed to agency discretion by law," § 701(a)(2). The latter exception is at issue here.
- [5] [6] To "honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly," Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 586 U.S. ——, ——, 139 S.Ct. 361, 370, 202 L.Ed.2d 269 (2018), confining it to those rare "administrative decision[s] traditionally left to agency discretion," Lincoln v. Vigil, 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993). This limited category of unreviewable actions includes an agency's decision not to institute enforcement proceedings, Heckler v. Chaney, 470 U.S. 821, 831–832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), and it is on that exception that the Government primarily relies.
- \*1906 In \*\*Chaney\*, several death-row inmates petitioned the Food and Drug Administration (FDA) to take enforcement action against two States to prevent their use of certain drugs for lethal injection. The Court held that the FDA's denial of that petition was presumptively unreviewable in light of the well-established "tradition" that "an agency's decision not to prosecute or enforce" is "generally committed to an agency's absolute discretion." \*\*Id.\*, at 831, 105 S.Ct. 1649. We identified a constellation of reasons that underpin this tradition. To start, a non-enforcement decision "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," such as "whether the particular enforcement action requested best fits the agency's overall policies." \*\*Ibid.\*\* The decision also mirrors, "to some extent," a prosecutor's decision not to indict, which has "long been regarded as the special province of the Executive Branch." \*\*Id.\*, at 832, 105 S.Ct. 1649. And, as a practical matter, "when an agency refuses to act" there is no action to "provide[] a focus for judicial review." \*\*Ibid.

The Government contends that a general non-enforcement policy is equivalent to the individual non-enforcement decision at issue in \*\*Chaney\*. In each case, the Government argues, the agency must balance factors peculiarly within its expertise, and does so in a manner akin to a criminal

prosecutor. Building on that premise, the Government argues that the rescission of a non-enforcement policy is no different—for purposes of reviewability—from the adoption of that policy. While the rescission may lead to increased enforcement, it does not, by itself, constitute a particular enforcement action. Applying this logic to the facts here, the Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.

[7] But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely "refus[e] to institute proceedings" against a particular entity or even a particular class. \*\*Ibid.\*\* Instead, it directed USCIS to "establish a clear and efficient process" for identifying individuals who met the enumerated criteria. App. to Pet. for Cert. 100a. Based on this directive, USCIS solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. These proceedings are effectively "adjudicat[ions]." \*\*Id.\*\*, at 117a.\*\* And the result of these adjudications—DHS's decision to "grant deferred action," Brief for Petitioners 45—is an "affirmative act of approval," the very opposite of a "refus[al] to act," \*\*Chaney\*, 470 U.S. at 831–832, 105 S.Ct. 1649. In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an "action [that] provides a focus for judicial review." \*\*\*Id.\*\*, at 832, 105 S.Ct. 1649.

The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. See *supra*, at 1901. Unlike an agency's refusal to take requested enforcement action, access to these types of benefits is an interest "courts often are called upon to protect." *Chaney*, 470 U.S. at 832, 105 S.Ct. 1649. See also *Barnhart v. Thomas*, 540 U.S. 20, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003) (reviewing \*1907 eligibility determination for Social Security benefits).

Because the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA.

B

The Government also invokes two jurisdictional provisions of the INA as independent bars to review. Neither applies.

[8] [9] Section 1252(b)(9) bars review of claims arising from "action[s]" or "proceeding[s] brought to remove an alien." 66 Stat. 209, as amended, 8 U.S.C. § 1252(b)(9). That targeted language is not aimed at this sort of case. As we have said before, § 1252(b)(9) "does not present a jurisdictional bar" where those bringing suit "are not asking for review of an order of removal," "the decision ... to seek removal," or "the process by which ... removability will be determined."

\*\*Jennings v. Rodriguez, 583 U.S. ——, ————, 138 S.Ct. 830, 841, 200 L.Ed.2d 122 (2018) (plurality opinion); \*\*id., at ——, 138 S.Ct., at 875–876 (BREYER, J., dissenting). And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings.

[10] [11] Section 1252(g) is similarly narrow. That provision limits review of cases "arising from" decisions "to commence proceedings, adjudicate cases, or execute removal orders." \$ 1252(g). We have previously rejected as "implausible" the Government's suggestion that \$ 1252(g) covers "all claims arising from deportation proceedings" or imposes "a general jurisdictional limitation." \*\*Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). The rescission, which revokes a deferred action program with associated benefits, is not a decision to "commence proceedings," much less to "adjudicate" a case or "execute" a removal order.

With these preliminary arguments out of the way, we proceed to the merits.

Ш

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. The natural starting point here is the explanation provided by Acting Secretary Duke when she announced the rescission in September 2017. But the Government urges us to go on and consider the June 2018 memorandum submitted by Secretary Nielsen as well. That memo was prepared after the D. C. District Court vacated the Duke rescission and gave DHS an opportunity to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." 298 F.Supp.3d at 245. According to the Government, the Nielsen Memorandum is properly before us because it was invited by the District Court and reflects the views of the Secretary of Homeland Security—the official responsible for immigration policy. Respondents disagree, arguing that the Nielsen Memorandum, issued nine months after the rescission, impermissibly asserts prudential and policy reasons not relied upon by Duke.

[15] It is a "foundational principle of administrative law" that judicial review [12] [13] [14] of agency action is limited to "the grounds that the agency invoked when it took the action." Michigan, 576 U.S. at 758, 135 S.Ct. 2699. If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning at the time of the agency action." \*1908 Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 654, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (emphasis added). See also Alpharma, Inc. v. Leavitt, 460 F.3d 1, 5-6 (CADC 2006) (Garland, J.) (permitting an agency to provide an "amplified articulation" of a prior "conclusory" observation (internal quotation marks omitted)). This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. Camp v. Pitts, 411 U.S. 138, 143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (per curiam). Alternatively, the agency can "deal with the problem afresh" by taking new agency action. SEC v. Chenery Corp., 332 U.S. 194, 201, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) (\*\* Chenery II). An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

The District Court's remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum. Secretary Nielsen took the first path. Rather than making a new decision, she "decline[d] to disturb the Duke memorandum's rescission" and instead "provide[d] further explanation" for that action. App. to Pet. for Cert. 121a. Indeed, the Government's subsequent request for reconsideration described the Nielsen Memorandum as "additional explanation for [Duke's] decision" and asked the District Court to "leave in place [Duke's] September 5, 2017 decision to rescind the DACA policy." Motion to Revise Order in No. 17–cv–1907 etc. (D DC), pp. 2, 19. Contrary to the position of the Government before this Court, and of Justice KAVANAUGH in dissent, post, at 1933 (opinion concurring in judgment in part and dissenting in part), the Nielsen Memorandum was by its own terms not a new rule implementing a new policy.

[16] [17] Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency's original reasons, and her explanation "must be viewed critically" to ensure that the rescission is not upheld on the basis of impermissible "post hoc rationalization." Overton Park, 401 U.S. at 420, 91 S.Ct. 814. But despite purporting to explain the Duke Memorandum, Secretary Nielsen's reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. See App. to Pet. for Cert. 117a. By contrast, Secretary Nielsen's new memorandum offered three "separate and independently sufficient reasons" for the rescission, id., at 122a, only the first of which is the conclusion that DACA is illegal.

Her second reason is that DACA is, at minimum, legally *questionable* and should be terminated to maintain public confidence in the rule of law and avoid burdensome litigation. No such justification can be found in the Duke Memorandum. Legal uncertainty is, of course, related to illegality. But the two justifications are meaningfully distinct, especially in this context. While an agency might, for one reason or another, choose to do nothing in the face of uncertainty, illegality presumably requires remedial action of some sort.

The policy reasons that Secretary Nielsen cites as a third basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points \*1909 included in the legal analysis from the Fifth Circuit and the Attorney General. They can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us.

[18] The Government, echoed by Justice KAVANAUGH, protests that requiring a new decision before considering Nielsen's new justifications would be "an idle and useless formality." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766, n. 6, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) (plurality opinion). See also post, at 1934. Procedural requirements can often seem such. But here the rule serves important values of administrative law. Requiring a new decision before considering new reasons promotes "agency accountability," Bowen v. American Hospital Assn., 476 U.S. 610, 643, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986), by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012) (internal quotation marks omitted). Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly functioning of the process of review," SEC v. Chenery Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943), forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.

[19] Justice KAVANAUGH asserts that this "foundational principle of administrative law," *Michigan*, 576 U.S. at 758, 135 S.Ct. 2699, actually limits only what lawyers may argue, not what agencies may do. *Post*, at 1934. While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether

post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves. See \*\*American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490, 539, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) ("[T]he post hoc rationalizations of the agency ... cannot serve as a sufficient predicate for agency action."); \*\*Overton Park, 401 U.S. at 419, 91 S.Ct. 814 (rejecting "litigation affidavits" from agency officials as "merely 'post hoc' rationalizations"). \*\*Overton Park, 401 U.S. at 419, 91 S.Ct. 814 (rejecting "litigation affidavits" from agency officials as "merely 'post hoc' rationalizations").

Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." Rock Island, A. & L. R. Co. v. United States, 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188 (1920). But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." St. Regis Paper Co. v. United States, 368 U.S. 208, 229, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961) (Black, J., dissenting). The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This \*1910 is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

В

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the "DACA program should be terminated." App. to Pet. for Cert. 117a.<sup>4</sup>

Respondents maintain that this explanation is deficient for three reasons. Their first and second arguments work in tandem, claiming that the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong. While those arguments carried the day in the lower courts, in our view they overlook an important constraint on Acting Secretary Duke's decisionmaking authority—she was *bound* by the Attorney General's legal determination.

The same statutory provision that establishes the Secretary of Homeland Security's authority to administer and enforce immigration laws limits that authority, specifying that, with respect to "all questions of law," the determinations of the Attorney General "shall be controlling." 8 U.S.C. § 1103(a)(1). Respondents are aware of this constraint. Indeed they emphasized the point in the reviewability sections of their briefs. But in their merits arguments, respondents never addressed whether or how this unique statutory provision might affect our review. They did not discuss whether Duke was required to explain a legal conclusion that was not hers to make. Nor did

they discuss whether the current suits challenging Duke's rescission decision, which everyone agrees was within her legal authority under the INA, are proper vehicles for attacking the Attorney General's legal conclusion.

[20] Because of these gaps in respondents' briefing, we do not evaluate the claims challenging the explanation and correctness of the illegality conclusion. Instead we focus our attention on respondents' third argument—that Acting Secretary Duke "failed to consider ... important aspect[s] of the problem" before her. \*\*Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. See App. to Pet. for Cert. 117a–118a (listing the Acting Secretary's decisions on eight transition issues). \*1911 Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals. *Ibid*.

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off. The Attorney General concluded that "the DACA policy has the same legal ... defects that the courts recognized as to DAPA." App. 878. So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the "core" issue before it as the "Secretary's decision" to grant "eligibility for benefits"—including work authorization, Social Security, and Medicare—to unauthorized aliens on "a class-wide basis." \*\*Texas\*, 809 F.3d at 170; see \*\*id.\*, at 148, 184. The Fifth Circuit's focus on these benefits was central to every stage of its analysis. See \*\*id.\*, at 155 (standing); \*\*id.\*, at 163 (zone of interest); \*\*id.\*, at 164 (applicability of \*\*§ 1252(g)); \*\*id.\*, at 166 (reviewability); \*\*id.\*, at 176–177 (notice and comment); \*\*id.\*, at 184 (substantive APA). And the Court ultimately held that DAPA was "manifestly contrary to the INA" precisely because it "would make 4.3 million otherwise removable aliens" eligible for work authorization and public benefits. \*\*Id.\*, at 181–182 (internal quotation marks omitted).5

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). See App. to Pet. for Cert. 99a. And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the "challenged portion of DAPA's deferred-action program" was the decision to make DAPA recipients eligible for benefits. See \*\*Texas\*, 809 F.3d at

168, and n. 108. The other "[p]art of DAPA," the court noted, "involve[d] the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deem[ed] to be low-priority illegal aliens." Id., at 166. Borrowing from this Court's prior description of deferred action, the Fifth Circuit observed that "the states do not challenge the Secretary's decision to 'decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.' Id., at 168 (quoting Reno, 525 U.S. at 484, 119 S.Ct. 936). And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction "requires the Secretary to remove any alien or to alter" the Secretary's class-based "enforcement priorities." Texas, 809 F.3d at 166, 169. In other words, the Secretary's forbearance authority was unimpaired.

Acting Secretary Duke recognized that the Fifth Circuit's holding addressed the benefits associated with DAPA. In her memorandum she explained that the Fifth Circuit concluded that DAPA "conflicted with the discretion authorized by Congress" because the INA "'flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby \*1912 make them newly eligible for a host of federal and state benefits, including work authorization.' "App. to Pet. for Cert. 114a (quoting \*Texas, 809 F.3d at 184). Duke did not characterize the opinion as one about forbearance.

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 116 Stat. 2178, 6 U.S.C. § 202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co. There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. 463 U.S. at 37–38, 46, 103 S.Ct. 2856. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full. 1d., at 38, 103 S.Ct. 2856.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only "disallow[ing] compliance by means of" automatic seatbelts. Id., at 47, 103 S.Ct. 2856. It did "not cast doubt" on the "efficacy of airbag technology" or upon

"the need for a passive restraint standard." *Ibid.* Given NHTSA's prior judgment that "airbags are an effective and cost-beneficial lifesaving technology," we held that "the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement." *Id.*, at 51, 103 S.Ct. 2856.

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits. Id., at 47, 103 S.Ct. 2856. It did "not cast doubt" on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. Ibid. Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," App. to Pet. for Cert. 98a–99a, the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy, "State Farm, 463 U.S. at 51, 103 S.Ct. 2856.

\*1913 The Government acknowledges that "[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands." Reply Brief 21. It insists, however, that "DHS was not required to consider whether DACA's illegality could be addressed by separating" the two. *Ibid.* According to the Government, "It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked." *Ibid.* Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

[21] The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled. Post, at 1929 – 1930, n. 14 (opinion of THOMAS, J). It contends, however, that we should not "dissect" agency action "piece by piece." Post, at 1929. The dissent instead rests on the Attorney General's legal determination—which considered only benefits—"to supply the 'reasoned analysis'" to support rescission of both benefits and forbearance. Post, at 1930 (quoting State Farm, 463 U.S. at 42, 103 S.Ct. 2856). But State Farm teaches that when an agency rescinds a prior policy its reasoned analysis must consider the "alternative[s]" that are "within the ambit of the existing [policy]." Id., at 51, 103 S.Ct. 2856. Here forbearance was not simply "within the ambit of the existing [policy]," it was the centerpiece of the policy: DACA, after all, stands for "Deferred Action for Childhood Arrivals." App. to Pet. for Cert. 111a (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke "entirely failed to consider [that] important aspect of the problem." State Farm, 463 U.S. at 43, 103 S.Ct. 2856.

[22] That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. \*\*Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.' \*\*\* Encino Motorcars, LLC v. Navarro, 579 U.S. ——, 136 S.Ct. 2117, 2126, 195 L.Ed.2d 382 (2016) (quoting \*\*Fox Television, 556 U.S. at 515, 129 S.Ct. 1800). "It would be arbitrary and capricious to ignore such matters." \*\*Id., at 515, 129 S.Ct. 1800. Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. Reply Brief 16–17; App. to Pet. for Cert. 125a. See also *post*, at 1930 – 1931 (opinion of THOMAS, J). But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to \*1914 normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their *amici* assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program. Brief for Respondent Regents of Univ. of California et al. in No. 18–587, p. 41 (Brief for Regents). The consequences of the rescission, respondents emphasize, would "radiate outward" to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. See *id.*, at 41–42; Brief for Respondent State of New York et al. in No. 18–589, p. 42 (Brief for New York). See also Brief for 143 Businesses as *Amici Curiae* 17 (estimating that hiring and training replacements would cost employers \$6.3 billion). In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of \$215 billion in economic activity and an associated \$60 billion in federal tax revenue over the next ten years. Brief for Regents 6. Meanwhile, States and local governments could lose \$1.25 billion in tax revenue each year. *Ibid.* 

These are certainly noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude

that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke's consideration was solely for the purpose of assisting the agency in dealing with "administrative complexities." App. to Pet. for Cert. 116a–118a. She should have considered whether she had similar flexibility in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be "another exercise of unlawful power," post, at 1930 (opinion of THOMAS, J.), but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General. App. to Pet. for Cert. 116a.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to "consider all policy alternatives in reaching [its] decision." \*1915 State Farm, 463 U.S. at 51, 103 S.Ct. 2856. Agencies are not compelled to explore "every alternative device and thought conceivable by the mind of man." \*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). But, because DHS was "not writing on a blank slate," post, at 1929, n. 14 (opinion of THOMAS, J.), it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The lead dissent sees all the foregoing differently. In its view, DACA is illegal, so any actions under DACA are themselves illegal. Such actions, it argues, must cease immediately and the APA should not be construed to impede that result. See *post*, at 1928 – 1930 (opinion of THOMAS, J.).

The dissent is correct that DACA was rescinded because of the Attorney General's illegality determination. See *post*, at 1928. But nothing about that determination foreclosed or even

addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

#### IV

Lastly, we turn to respondents' claim that the rescission violates the equal protection guarantee of the Fifth Amendment.

[23] The parties dispute the proper framing of this claim. The Government contends that the allegation that the Executive, motivated by animus, ended a program that disproportionately benefits certain ethnic groups is a selective enforcement claim. Such a claim, the Government asserts, is barred by our decision in \*\*Reno v. American-Arab Anti-Discrimination Committee.\*\* See \*\*525 U.S. at 488, 119 S.Ct. 936 (holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation"). Respondents counter that their claim falls outside the scope of that precedent because they are not challenging individual enforcement proceedings. We need not resolve this debate because, even if the claim is cognizable, the allegations here are insufficient.

[24] [25] To plead animus, a plaintiff must raise a plausible inference that an "invidious discriminatory purpose was a motivating factor" in the relevant decision. \*\*Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Possible evidence includes disparate impact on a particular group, "[d]epartures from the normal procedural sequence," and "contemporary statements by members of the decisionmaking body." \*\*Id., at 266–268, 97 S.Ct. 555. Tracking these factors, respondents allege that animus is evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) pre- and post-election statements by President Trump. Brief for New York 54–55.

None of these points, either singly or in concert, establishes a plausible equal protection claim. First, because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. See B. Baker, DHS, Office of Immigration Statistics, Population Estimates, Illegal Alien Population Residing in the United States: January 2015, Table 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18\_1214\_PLCY\_pops-est-report.pdf. \*1916 Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.

Second, there is nothing irregular about the history leading up to the September 2017 rescission. The lower courts concluded that "DACA received reaffirmation by [DHS] as recently as three months before the rescission," 908 F.3d at 519 (quoting 298 F.Supp.3d at 1315), referring to the June 2017 DAPA rescission memo, which stated that DACA would "remain in effect," App. 870. But this reasoning confuses abstention with reaffirmation. The DAPA memo did not address the merits of the DACA policy or its legality. Thus, when the Attorney General later determined that DACA shared DAPA's legal defects, DHS's decision to reevaluate DACA was not a "strange about-face." 908 F.3d at 519. It was a natural response to a newly identified problem.

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the \*\*Batalla Vidal\* court acknowledged, respondents did not "identif[y] statements by [either] that would give rise to an inference of discriminatory motive." \*\*291 F.Supp.3d at 278. Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as "contemporary statements" probative of the decision at issue. \*\*Arlington Heights, 429 U.S. at 268, 97 S.Ct. 555. Thus, like respondents' other points, the statements fail to raise a plausible inference that the rescission was motivated by animus.

\* \* \*

We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our concern." \*\*Chenery II, 332 U.S. at 207, 67 S.Ct. 1760. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. 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. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.

The judgment in *NAACP*, No. 18–588, is affirmed.<sup>7</sup> The judgment in *Regents*, No. 18–587, is vacated in part and reversed in part. And in *Batalla Vidal*, No. 18–589, the February 13, 2018 order granting respondents' motion for a preliminary injunction is vacated, the November 9, 2017 order partially denying the Government's motion to dismiss is affirmed in part, and the March 29, 2018 order partially denying the balance of the Government's motion to dismiss is reversed in part. All three cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, concurring in part, concurring in the judgment in part, and dissenting in part.

The majority rightly holds that the Department of Homeland Security (DHS) violated the Administrative Procedure Act in rescinding the Deferred Action for Childhood \*1917 Arrivals (DACA) program. But the Court forecloses any challenge to the rescission under the Equal Protection Clause. I believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.

Respondents' equal protection challenges come to us in a preliminary posture. All that respondents needed to do at this stage of the litigation was state sufficient facts that would "allo[w a] court to draw the reasonable inference that [a] defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The three courts to evaluate respondents' pleadings below held that they cleared this modest threshold. 908 F.3d 476, 518–520 (CA9 2018) (affirming the District Court's denial of the Government's motion to dismiss); see also Batalla Vidal v. Nielsen, 291 F.Supp.3d 260, 274 (EDNY 2018).

I too would permit respondents' claims to proceed on remand. The complaints each set forth particularized facts that plausibly allege discriminatory animus. The plurality disagrees, reasoning that "[n]one of these points, either singly or in concert, establishes a plausible equal protection claim." *Ante*, at 1915. But it reaches that conclusion by discounting some allegations altogether and by narrowly viewing the rest.

First, the plurality dismisses the statements that President Trump made both before and after he assumed office. The \*\*Batalla Vidal\*\* complaints catalog then-candidate Trump's declarations that Mexican immigrants are "people that have lots of problems," "the bad ones," and "criminals, drug dealers, [and] rapists." \*\*291 F.Supp.3d at 276 (internal quotation marks omitted). The \*\*Regents\* complaints additionally quote President Trump's 2017 statement comparing undocumented immigrants to "animals" responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS13." \*\*\*298 F.Supp.3d 1304, 1314 (ND Cal. 2018) (internal quotation marks omitted). The plurality brushes these aside as "unilluminating," "remote in time," and having been "made in unrelated contexts." \*\*Ante\*, at 1916.

But "nothing in our precedent supports [the] blinkered approach" of disregarding any of the campaign statements as remote in time from later-enacted policies. \*\*Trump v. Hawaii, 585 U.S. ——, ——, n. 3, 138 S.Ct. 2392, 2438, n.3, 201 L.Ed.2d 775 (2018) (SOTOMAYOR, J., dissenting). Nor did any of the statements arise in unrelated contexts. They bear on unlawful

migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA. Cf. \*\*ibid.\*\* (noting that Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017), which barred entry of individuals from several Muslim-majority countries, was an outgrowth of the President's campaign statements about Muslims). Taken together, "the words of the President" help to "create the strong perception" that the rescission decision was "contaminated by impermissible discriminatory animus." 585 U.S., at ——, 138 S.Ct., at 2440 (opinion of SOTOMAYOR, J.). This perception provides respondents with grounds to litigate their equal protection claims further.

Next, the plurality minimizes the disproportionate impact of the rescission decision on Latinos after considering this point in isolation. *Ante*, at 1916 ("Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection \*1918 grounds"). But the impact of the policy decision must be viewed in the context of the President's public statements on and off the campaign trail. At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.

Finally, the plurality finds nothing untoward in the "specific sequence of events leading up to the challenged decision." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). I disagree. As late as June 2017, DHS insisted it remained committed to DACA, even while rescinding a related program, the Deferred Action for Parents of Americans and Lawful Permanent Residents. App. 718–720. But a mere three months later, DHS terminated DACA without, as the plurality acknowledges, considering important aspects of the termination. The abrupt change in position plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision. Accordingly, it raises the possibility of a "significant mismatch between the decision ... made and the rationale ... provided." Department of Commerce v. New York, 588 U.S. ——, ——, 139 S.Ct. 2551, 2575, 204 L.Ed.2d 978 (2019). Only by bypassing context does the plurality conclude otherwise.

\* \* \*

The facts in respondents' complaints create more than a "sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678, 129 S.Ct. 1937. Whether they ultimately amount to actionable discrimination should be determined only after factual development on remand. Because the Court prematurely disposes of respondents' equal protection claims by overlooking the strength of their complaints, I join all but Part IV of the opinion and do not concur in the corresponding part of the judgment.

Justice THOMAS, with whom Justice ALITO and Justice GORSUCH join, concurring in the judgment in part and dissenting in part.

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, the Department of Homeland Security (DHS) under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to qualify for temporary lawful presence and certain federal and state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

DHS created DACA during the Obama administration without any statutory authorization and without going through the \*1919 requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.

Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS' initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court's duty to apply the law according to neutral principles, and the ripple effects of the majority's error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind their

successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration. I respectfully dissent in part.<sup>1</sup>

Ι

#### A

In 2012, after more than two dozen attempts by Congress to grant lawful status to aliens who were brought to this country as children,<sup>2</sup> the then-Secretary of Homeland Security Janet Napolitano announced, by memorandum, a new "prosecutorial discretion" policy known as DACA. App. to Pet. for Cert. in No. 18–587, p. 97a. The memorandum directed immigration enforcement officers not to remove "certain \*1920 young people who were brought to this country as children" that met delineated criteria. *Id.*, at 97a–98a. In the Secretary's view, the program was consistent with "the framework of the existing law." *Id.*, at 101a.

DACA granted a renewable 2-year period of "deferred action" that made approximately 1.7 million otherwise removable aliens eligible to remain in this country temporarily. By granting deferred action, the memorandum also made recipients eligible for certain state and federal benefits, including Medicare and Social Security. See 8 U.S.C. §§ 1611(b)(2)–(4); 8 CFR § 1.3(a)(4) (vi) (2020); 45 CFR § 152.2(4)(vi) (2019). In addition, deferred action enabled the recipients to seek work authorization. 8 U.S.C. § 1324a(h)(3)(B); 8 CFR § 274a.12(c)(14). Despite these changes, the memorandum contradictorily claimed that it "confer[red] no substantive right [or] immigration status," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." App. to Pet. for Cert. in No. 18–587, at 101a.

In 2014, then-Secretary of Homeland Security Jeh Johnson broadened the deferred-action program in yet another brief memorandum. This 2014 memorandum expanded DACA eligibility by extending the deferred-action period to three years and by relaxing other criteria. It also implemented a related program, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA allowed unlawfully present parents to obtain deferred action derivatively through their children who were either citizens or lawful permanent residents. Approximately 4.3 million aliens qualified for DAPA and, as with DACA, these individuals would have become eligible for certain federal and state benefits upon the approval of their DAPA

applications. See \*\*Texas v. United States\*, 809 F.3d 134, 181 (CA5 2015). Nevertheless, the 2014 memorandum repeated the incongruous assertion that these programs "d[id] not confer any form of legal status in this country" and added that deferred action "may be terminated at any time at the agency's discretion." App. to Pet. for Cert. in No. 18–587, at 104a.

В

Twenty-six States filed suit to enjoin the implementation of these new programs, DAPA and "expanded DACA," maintaining that they violated the Constitution, the Administrative Procedure Act (APA), and the Immigration and Naturalization Act (INA). The States contended that, because the 2014 memorandum allowed aliens to receive deferred action and other benefits, it amounted to a legislative rule that had to comply with the APA's notice and comment procedures. The States also argued that DHS' decision to recategorize an entire class of aliens from "unlawfully present" to "lawfully present" exceeded its statutory authority under the federal immigration laws. According to the States, these defects rendered the 2014 memorandum arbitrary, capricious, or otherwise not in accordance with law.

The District Court preliminarily enjoined DAPA and expanded DACA. The Fifth Circuit affirmed, rejecting DHS' claim that the programs were an exercise of prosecutorial discretion. Texas, 809 F.3d at 167, 188. The court concluded that the States were likely to succeed on their claim that the 2014 memorandum was a legislative rule that had to be adopted through notice and comment rulemaking. \*1921 Id., at 171–178. The court further concluded that the 2014 memorandum was "substantively contrary to law" because the INA did not grant DHS the statutory authority to implement either program. Id., at 170, 178–186.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote. \*\* United States v. Texas, 579 U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (per curiam).

C

The 2014 memorandum was rescinded on June 15, 2017, before taking effect. Shortly after that rescission, several of the plaintiff States sent a letter to then-Attorney General Jefferson Sessions III. They contended that the 2012 DACA memorandum was also legally defective because, "just like DAPA, DACA unilaterally confers eligibility for ... lawful presence without any statutory authorization from Congress." App. 873. The States wrote that they would amend their complaint to challenge DACA if the administration did not rescind the 2012 memorandum creating DACA by September 5, 2017.

On September 4, then-Attorney General Sessions wrote to then-Acting Secretary of Homeland Security Elaine Duke, advising her to rescind DACA. Sessions stated that, in his legal opinion, DACA took effect "through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." *Id.*, at 877. The letter also stated that DACA was infected with the "same legal ... defects that the courts recognized as to DAPA," *id.*, at 878, and thus DACA would likely be enjoined as well.

Then-Acting Secretary Duke rescinded DACA the next day, also through a memorandum. Her memorandum began by noting that DACA "purported to use deferred action ... to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law." App. to Pet. for Cert. in No. 18–587, at 112a. It described the history of the Fifth Circuit litigation, noting that the court had concluded that DAPA "conflicted with the discretion authorized by Congress" because "the [INA] flatly does not permit the reclassification of millions of illegal aliens as lawfully present." *Id.*, at 114a (internal quotation marks omitted). Finally, the memorandum accepted then-Attorney General Sessions' legal determination that DACA was unlawful for the same reasons as DAPA. See \$ 1103(a)(1). In light of the legal conclusions reached by the Fifth Circuit and the Attorney General, then-Acting Secretary Duke set forth the procedures for winding down DACA.

These three cases soon followed. In each, respondents claimed, among other things, that DACA's rescission was arbitrary and capricious under the APA. Two District Courts granted a preliminary nationwide injunction, while the third vacated the rescission.

 $\Pi$ 

"'[A]n agency literally has no power to act ... unless and until Congress confers power upon it.'"

\*\*Arlington v. FCC, 569 U.S. 290, 317, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (ROBERTS, C.J., dissenting) (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986)). When an agency exercises power beyond the bounds of its authority, it acts unlawfully. See, e.g., \*\*SAS Institute Inc. v. Iancu, 584 U.S. ——, ——, n., 138 S.Ct. 1348, 1358, n., 200 L.Ed.2d 695 (2018). The 2012 memorandum \*1922 creating DACA provides a poignant illustration of ultra vires agency action.

DACA alters how the immigration laws apply to a certain class of aliens. "DACA [recipients] primarily entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removable." *Texas v. United States*, 328 F.Supp.3d

662, 713 (SD Tex. 2018) (footnote omitted). But DACA granted its recipients deferred action, i.e., a decision to "decline to institute [removal] proceedings, terminate [removal] proceedings, or decline to institute a final order of [removal]." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (internal quotation marks omitted). Under other regulations, recipients of deferred action are deemed lawfully present for purposes of certain federal benefits. See supra, at 1919. Thus, DACA in effect created a new exception to the statutory provisions governing removability and, in the process, conferred lawful presence on an entire class of aliens.

To lawfully implement such changes, DHS needed a grant of authority from Congress to either reclassify removable DACA recipients as lawfully present, or to exempt the entire class of aliens covered by DACA from statutory removal procedures. No party disputes that the immigration statutes lack an express delegation to accomplish either result. And, an examination of the highly reticulated immigration regime makes clear that DHS has no implicit discretion to create new classes of lawful presence or to grant relief from removal out of whole cloth. Accordingly, DACA is substantively unlawful.

This conclusion should begin and end our review. 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.

#### A

Congress has not authorized DHS to reclassify an entire class of removable aliens as lawfully present or to categorically exempt aliens from statutory removal provisions.

1

I begin with lawful presence. As just stated, nothing in the federal immigration laws expressly delegates to DHS the unfettered discretion to create new categories of lawfully present aliens. And, there is no basis for concluding that Congress implicitly delegated to DHS the power to reclassify categories of aliens as lawfully present. The immigration statutes provide numerous ways to obtain lawful presence, both temporary and permanent. The highly detailed nature of these provisions indicates that Congress has exhaustively provided for all of the ways that it thought lawful presence should be obtainable, leaving no discretion to DHS to add new pathways.

For example, federal immigration laws provide over 60 temporary nonimmigrant visa options, including visas for ambassadors, full-time students and their spouses and children, those engaged to marry a United States citizen within 90 days of arrival, athletes and performers, and aliens with specialized knowledge related to their employers. See §§ 1101(a)(15)(A)–(V), 1184; 8 CFR § 214.1; see also Congressional Research Service, J. Wilson, Nonimmigrant and Immigrant Visa Categories: Data Brief 1–6 (2019) (Table 1). In addition, the statutes permit the Attorney General to grant temporary "parole" into the United States "for urgent humanitarian reasons or [a] significant public benefit," \*1923 8 U.S.C. § 1182(d)(5)(A); provide for temporary protected status when the Attorney General finds that removal to a country with an ongoing armed conflict "would pose a serious threat to [an alien's] personal safety," § 1254a(b)(1)(A); and allow the Secretary of Homeland Security (in consultation with the Secretary of State) to waive visa requirements for certain aliens for up to 90 days, §§ 1187(a)–(d).

The immigration laws are equally complex and detailed when it comes to obtaining lawful permanent residence. Congress has expressly specified numerous avenues for obtaining an immigrant visa, which aliens may then use to become lawful permanent residents. §§ 1201, 1255(a). Among other categories, immigrant visas are available to specified family-sponsored aliens, aliens with advanced degrees or exceptional abilities, certain types of skilled and unskilled workers, "special immigrants," and those entering the country to "engag[e] in a new commercial enterprise." §§ 1153(a)–(b), 1154; see also Congressional Research Service, Nonimmigrant and Immigrant Visa Categories, at 6–7 (Table 2). Refugees and asylees also may receive lawful permanent residence under certain conditions, § 1159; 8 CFR §§ 209.1, 209.2. As with temporary lawful presence, each avenue to lawful permanent residence status has its own set of rules and exceptions.

As the Fifth Circuit held in the DAPA litigation, a conclusion with which then-Attorney General Sessions agreed, "specific and detailed provisions[ of] the INA expressly and carefully provid[e] legal designations allowing defined classes of aliens to be lawfully present." Texas, 809 F.3d at 179. In light of this elaborate statutory scheme, the lack of any similar provision for DACA recipients convincingly establishes that Congress left DHS with no discretion to create an additional class of aliens eligible for lawful presence. Congress knows well how to provide broad discretion, and it has provided open-ended delegations of authority in statutes too numerous to name. But when it comes to lawful presence, Congress did something strikingly different. Instead of enacting a statute with "broad general directives" and leaving it to the agency to fill in the lion's share of the details, Mistretta v. United States, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), Congress put in place intricate specifications governing eligibility for lawful presence. This comprehensive scheme indicates that DHS has no discretion to supplement or amend the statutory provisions in any manner, least of all by memorandum. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (An

agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted" (internal quotation marks omitted)); see also *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 509–510, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988).

2

The relief that Congress has extended to removable aliens likewise confirms that DACA exceeds DHS' delegated authority. \*1924 Through deferred action, DACA grants temporary relief to removable aliens on a programmatic scale. See *Texas*, 328 F.Supp.3d at 714. But as with lawful presence, Congress did not expressly grant DHS the authority to create categorical exceptions to the statute's removal requirements. And again, as with lawful presence, the intricate level of detail in the federal immigration laws regarding relief from removal indicates that DHS has no discretionary authority to supplement that relief with an entirely new programmatic exemption.

At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action. See § 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV) (certain individuals covered under the Violence Against Women Act are "eligible for deferred action"); Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1522 (" 'Any individual described in subclause (I) is eligible for deferred action'"); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, § 423(b), 115 Stat. 361 ("Such spouse, child, son, or daughter may be eligible for deferred action"); National Defense Authorization Act for Fiscal Year 2004, §§ 1703(c)(1)(A), (2), 117 Stat. 1694–1695 ("Such spouse or child shall be eligible for deferred action"). <sup>6</sup> Congress has failed to provide similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.

Other provisions pertaining to relief from removal further demonstrate that DHS lacked the delegated authority to create DACA. As with lawful presence, Congress has provided a plethora of methods by which aliens may seek relief from removal. For instance, both permanent and temporary residents can seek cancellation of removal if they meet certain residency requirements and have not committed certain crimes. §§ 1229b(a)–(b). And certain nonpermanent residents may have their status adjusted to permanent residence during these proceedings. § 1229b(b)(2). Aliens can apply for asylum or withholding of removal during removal proceedings unless they have committed certain crimes. §§ 1158, 1231(b)(3). Applicants for certain nonimmigrant visas may be granted a stay of removal until the visa application is adjudicated. § 1227(d). And, aliens may voluntarily depart rather than be subject to an order of removal. § 1229c.

In sum, like lawful presence, Congress has provided for relief from removal in specific and complex ways. This nuanced detail indicates that Congress has provided the full panoply of methods it thinks should be available for an alien to seek relief from removal, leaving no discretion \*1925 to DHS to provide additional programmatic forms of relief.<sup>7</sup>

3

Finally, DHS could not appeal to general grants of authority, such as the Secretary's ability to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter," \$ 1103(a)(3), or to "[e]stablis[h] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5). See also 8 U.S.C. § 1103(g)(2). Because we must interpret the statutes "as a symmetrical and coherent regulatory scheme," Gustafson v. Alloyd Co., 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995), these grants of authority must be read alongside the express limits contained within the statute. Basing the Secretary's ability to completely overhaul immigration law on these general grants of authority would eviscerate that deliberate statutory scheme by "allow[ing the Secretary of DHS] to grant lawful presence ... to any illegal alien in the United States." Texas, 809 F.3d at 184. Not only is this "an untenable position in light of the INA's intricate system," but it would also render many of those provisions wholly superfluous due to DHS' authority to disregard them at will, \*\*Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). And in addition to these fatal problems, adopting a broad interpretation of these general grants of authority would run afoul of the presumption that "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). And it would also conflict with the major questions doctrine, which is based on the expectation that Congress speaks clearly when it delegates the power to make "decisions of vast economic and political significance." Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) ( UARG) (internal quotation marks omitted); see also Texas, 787 F.3d at 760-761.

Read together, the detailed statutory provisions governing temporary and lawful permanent resident status, relief from removal, and classwide deferred-action programs lead ineluctably to the conclusion that DACA is "inconsisten[t] with the design and structure of the statute as a whole." \*\*University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. 338, 353, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013). As the District Court stated in the DAPA litigation and as then-Attorney General Sessions agreed, "[i]nstead of merely refusing to enforce the INA's removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence ...

to individuals Congress has deemed deportable or removable." Texas v. United States, 86 F.Supp.3d 591, 654 (SD Tex. 2015). The immigration statutes contain a level of granular specificity that is exceedingly rare in the modern administrative state. It defies all logic and common sense to conclude that a statutory scheme detailed enough to provide conditional lawful presence to groups as narrowly defined as "alien entrepreneurs," § 1186b, is simultaneously capacious enough for DHS to \*1926 grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary's pen.

В

Then-Attorney General Sessions concluded that the initial DACA program suffered from the "same legal ... defects" as DAPA and expanded DACA, finding that, like those programs, DACA was implemented without statutory authority. App. 877–878. Not only was this determination correct, but it is also dispositive for purposes of our review. "It is axiomatic that an administrative agency's power ... is limited to the authority granted by Congress." Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). DHS had no authority here to create DACA, and the unlawfulness of that program is a sufficient justification for its rescission.

The majority opts for a different path, all but ignoring DACA's substantive legal defect. See *ante*, at 1910 – 1911. On the majority's understanding of APA review, DHS was required to provide additional policy justifications in order to rescind an action that it had no authority to take. This rule "has no basis in our jurisprudence, and support for [it] is conspicuously absent from the Court's opinion." Massachusetts v. EPA, 549 U.S. 497, 536, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (ROBERTS, C.J., dissenting).

The lack of support for the majority's position is hardly surprising in light of our Constitution's separation of powers. No court can compel Executive Branch officials to exceed their congressionally delegated powers by continuing a program that was void *ab initio*. Cf. \*\*Clinton v. City of New York, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); \*\*INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); see also \*\*EPA v. EME Homer City Generation, L. P., 572 U.S. 489, 542, n. 5, 134 S.Ct. 1584, 188 L.Ed.2d 775 (2014) (Scalia, J., dissenting); \*\*Public Citizen v. Department of Justice, 491 U.S. 440, 487, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring in judgment). In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority, \*\*Arlington, 569 U.S. at 327, 133 S.Ct. 1863 (ROBERTS, C.J., dissenting), not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute's clear limits, see \*\*UARG\*,

573 U.S. at 327–328, 134 S.Ct. 2427; \*\*Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002).

Under our precedents, DHS can only exercise the authority that Congress has chosen to delegate to it. See \*\*UARG\*, 573 U.S. at 327, 134 S.Ct. 2427. In implementing DACA, DHS under the Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward.

#### III

The majority's demanding review of DHS' decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA's procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking. The fact that DHS did not engage in this process likely provides an independent basis for rescinding DACA. But at the very least, this \*1927 procedural defect compounds the absurdity of the majority's position in these cases.

As described above, DACA fundamentally altered the immigration laws. It created a new category of aliens who, as a class, became exempt from statutory removal procedures, and it gave those aliens temporary lawful presence. Both changes contravened statutory limits. DACA is thus what is commonly called a substantive or legislative rule. As the name implies, our precedents state that legislative rules are those that "have the force and effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 295, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979) (internal quotation marks omitted).

Our precedents allow the vast majority of legislative rules to proceed through so-called "informal" notice and comment rulemaking. See \*\*United States v. Florida East Coast R. Co., 410 U.S. 224, 237–238, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973). But under our precedents, an agency must engage in certain procedures mandated by the APA before its rule carries legal force. Kisor v. Wilkie, 588 U.S. ——, ——, 139 S.Ct. 2400, 2420, 204 L.Ed.2d 841 (2019) (plurality opinion) ("[A] legislative rule, ... to be valid[,] must go through notice and comment"); id., at ——, 139 S.Ct., at 2434 (GORSUCH, J., concurring in judgment) (same); Perez v. Mortgage Bankers Assn., 575 U.S. 92, 96, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015); cf. \*\*Azar v. Allina Health Services, 587 U.S. ——, ——, 139 S.Ct. 1804, 1808, 204 L.Ed.2d 139 (2019) (same with respect to materially identical procedures under the Medicare Act). These procedures specify that the agency "shall"

publish a notice of proposed rulemaking in the Federal Register, justify the rule by reference to legal authority, describe "the subjects and issues involved" in the rule, and allow interested parties to submit comments. 5 U.S.C. §§ 553(b)— (c); see also Kisor, 588 U.S., at ——, 139 S.Ct., at 2434 (opinion of GORSUCH, J.). As we have recognized recently, use of the word "shall" indicates that these procedures impose mandatory obligations on the agency before it can adopt a valid binding regulation. See Maine Community Health Options v. United States, 590 U.S. ——, ——, 140 S.Ct. 1308, 1320, —— L.Ed.2d —— (2020). After undergoing notice and comment, the agency then publishes the final rule, which must "articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted). Only after completing this process is the legislative rule a valid law. See Kisor, 588 U.S., at ——, 139 S.Ct., at 2434 (opinion of GORSUCH, J.). 10

Because DACA has the force and effect of law, DHS was required to observe the \*1928 procedures set out in the APA if it wanted to promulgate a legislative rule. It is undisputed, however, that DHS did not do so. It provided no opportunity for interested parties to submit comments regarding the effect that the program's dramatic and very significant change in immigration law would have on various aspects of society. It provided no discussion of economic considerations or national security interests. Nor did it provide any substantial policy justifications for treating young people brought to this country differently from other classes of aliens who have lived in the country without incident for many years. And, it did not invoke any law authorizing DHS to create such a program beyond its inexplicable assertion that DACA was consistent with existing law. Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties. See id., at —, 139 S.Ct., at 2420 (plurality opinion); id., at —, 139 S.Ct., at 2434 (opinion of GORSUCH, J.).

Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill any ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply unlawful from the beginning. And, it is well established that we do not remand for an agency to correct its reasoning when it was required by law to take or abstain from an action. See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 544–545, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008). Here, remand would be futile, because no amount of policy explanation could cure the fact that DHS lacked statutory authority to enact DACA in the first place.

Instead of recognizing this, the majority now requires the rescinding Department to treat the invalid rule as though it were legitimate. As just explained, such a requirement is not supported by the APA. It is also absurd, as evidenced by its application to DACA in these cases. The majority insists that DHS was obligated to discuss its choices regarding benefits and forbearance in great detail, even though no such detailed discussion accompanied DACA's issuance. And, the majority also requires DHS to discuss reliance interests at length, even though deferred action traditionally does not take reliance interests into account and DHS was not forced to explain its treatment of reliance interests in the first instance by going through notice and comment. See *infra*, at 1930 – 1931. The majority's demand for such an explanation here simply makes little sense.

At bottom, of course, none of this matters, because DHS *did* provide a sufficient explanation for its action. DHS' statement that DACA was ultra vires was more than sufficient to justify its rescission. <sup>12</sup> By requiring more, the majority has distorted the APA review process beyond recognition, further burdening all future attempts to rescind unlawful programs. Plaintiffs frequently bring successful challenges to agency actions by arguing that the agency has impermissibly dressed up a legislative rule as a policy statement and must comply \*1929 with the relevant procedures before functionally binding regulated parties. See, *e.g.*, *Mendoza v. Perez*, 754 F.3d 1002 (CADC 2014); *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (CADC 2011); *National Family Planning & Reproductive Health Assn., Inc. v. Sullivan*, 979 F.2d 227 (CADC 1992). But going 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 it were legitimate. <sup>13</sup>

#### IV

Even if I were to accept the majority's premise that DACA's rescission required additional policy justifications, the majority's reasons for setting aside the agency's decision still fail.

#### A

First, the majority claims that the Fifth Circuit discussed only the legality of the 2014 memorandum's conferral of benefits, not its "forbearance component"—i.e., the decision not to place DACA recipients into removal proceedings. *Ante*, at 1911. The majority, therefore, claims that, notwithstanding the then-Attorney General's legal conclusion, then-Acting Secretary Duke

was required to consider revoking DACA recipients' lawful presence and other attendant benefits while continuing to defer their removal. *Ante*, at 1912–1913. Even assuming the majority correctly characterizes the Fifth Circuit's opinion, it 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.<sup>14</sup>

\*1930 The then-Attorney General reviewed the thorough decisions of the District Court and the Fifth Circuit. Those courts exhaustively examined the INA's text and structure, the relevant provisions of other federal immigration statutes, the historical practice of deferred action, and the general grants of statutory authority to set immigration policy. Both decisions concluded that DAPA and expanded DACA violated the carefully crafted federal immigration scheme, that such violations could not be justified through reference to past exercises of deferred action, and that the general grants of statutory authority did not give DHS the power to enact such a sweeping nonenforcement program. Based on the reasoning of those decisions, then-Attorney General Sessions concluded that DACA was likewise implemented without statutory authority. He directed DHS to restore the rule of law. DHS followed the then-Attorney General's legal analysis and rescinded the program. This legal conclusion more than suffices to supply the "reasoned analysis" necessary to rescind an unlawful program. \*\*State Farm\*, 463 U.S. at 42, 103 S.Ct. 2856.

The majority has no answer except to suggest that this approach is inconsistent with \*\*State Farm. See ante, at 1911 – 1913. 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. Neither \*\*State Farm nor any other decision cited by the majority addresses what an agency must do when it has inherited an unlawful program. It is perhaps for this reason that, rather than responding with authority of its own, the majority simply opts to excise the "unlawful policy" aspect from its discussion.

В

Second, the majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. Ante, at 1913 – 1915. 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. Any such decision would be "not in accordance with law" or "in excess of statutory ... authority." 5 U.S.C. §§ 706(2)(A), (C). Accordingly, DHS would simply be engaging in yet another exercise of unlawful power if it used reliance interests to justify continuing the initially unlawful program, and a court would be obligated to set aside that action. <sup>15</sup>

Even if reliance interests were sometimes relevant when rescinding an ultra vires action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights-it exists at the Government's discretion and can be revoked at any time. See App. to Pet. for Cert. in No. 18-587, at 104a (DACA and expanded DACA); 8 CFR § 214.11(j)(3) (T visas); § 214.14(d)(2) (U visas); 62 Fed. Reg. 63249, 63253 (1997) (discussing Exec. Order No. 12711 for certain citizens of the People's Republic of China). The Government has made clear time and again that, because "deferred action is not an immigration status, no alien has the right to deferred action. It is \*1931 used solely in the discretion of the [Government] and confers no protection or benefit upon an alien." DHS Immigration and Customs Enforcement Office of Detention and Removal, Detention and Deportation Officers' Field Manual § 20.8 (Mar. 27, 2006); see also Memorandum from D. Meissner, Comm'r, INS, to Regional Directors et al., pp. 11-12 (Nov. 17, 2000); Memorandum from W. Yates, Assoc. Director of Operations, DHS, Citizenship and Immigration Servs., to Director, Vt. Serv. Center, p. 5 (2003). Thus, contrary to the majority's unsupported assertion, ante, at 1913, this longstanding administrative treatment of deferred action provides strong evidence and authority for the proposition that an agency need not consider reliance interests in this context. 16

Finally, it is inconceivable to require DHS to study reliance interests before rescinding DACA considering how the program was previously defended. DHS has made clear since DACA's inception that it would not consider such reliance interests. Contemporaneous with the DACA memo, DHS stated that "DHS can terminate or renew deferred action at any time at the agency's discretion." Consideration of Deferred Action for Childhood Arrivals Process, 89 Interpreter Releases 1557, App. 4, p. 2 (Aug. 20, 2012). In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part *because* deferred action created no rights on which recipients could rely. Before the Fifth Circuit, DHS stated that "DHS may revoke or terminate deferred action and begin removal proceedings at any time at its discretion." Brief for Appellants in *Texas v. United States*, No. 1540238, p. 7; see also *id.*, at 45–46. And before this Court, in that same litigation, DHS reiterated that "DHS has absolute discretion to revoke deferred action unilaterally, without notice or process." Brief for United States in *United States v. Texas*, O.T. 2015, No. 15–674, p. 5; see also *id.*, at 37. If that treatment of reliance interests was incorrect, it provides yet one more example of a deficiency in DACA's issuance, not its rescission.

\* \* \*

President Trump's Acting Secretary of Homeland Security inherited a program created by President Obama's Secretary that was implemented without statutory authority and without following the APA's required procedures. Then-Attorney General Sessions correctly concluded that this

ultra vires program should be rescinded. These cases could—and should—have ended with a determination that his legal conclusion was correct.

Instead, the majority today concludes that DHS was required to do far more. Without grounding its position in either the APA or precedent, the majority declares that DHS was required to overlook DACA's obvious legal deficiencies and provide additional policy reasons and justifications before restoring the rule of law. This holding is incorrect, and it will hamstring all future agency attempts to undo actions that exceed statutory authority. I would therefore reverse the judgments below and remand with instructions to dissolve the nationwide injunctions.

Justice ALITO, concurring in the judgment in part and dissenting in part.

\*1932 Anyone interested in the role that the Federal Judiciary now plays in our constitutional system should consider what has happened in these cases. 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.

I join Justice THOMAS's opinion. DACA presents a delicate political issue, but that is not our business. As Justice THOMAS explains, DACA was unlawful from the start, and that alone is sufficient to justify its termination. But even if DACA were lawful, we would still have no basis for overturning its rescission. First, to the extent DACA represented a lawful exercise of prosecutorial discretion, its rescission represented an exercise of that same discretion, and it would therefore be unreviewable under the Administrative Procedure Act. 5 U.S.C. § 701(a)(2); see \*\*Heckler v. Chaney, 470 U.S. 821, 831–832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Second, to the extent we could review the rescission, it was not arbitrary and capricious for essentially the reasons explained by Justice KAVANAUGH. See post, at 1933 – 1936 (opinion concurring in the judgment in part and dissenting in part).

Justice KAVANAUGH, concurring in the judgment in part and dissenting in part.

For the last 20 years, the country has engaged in consequential policy, religious, and moral debates about the legal status of millions of young immigrants who, as children, were brought to the United States and have lived here ever since. Those young immigrants do not have legal status in the

United States under current statutory law. They live, go to school, and work here with uncertainty about their futures. Despite many attempts over the last two decades, Congress has not yet enacted legislation to afford legal status to those immigrants.

In 2012, exercising its view of the Executive's prosecutorial discretion under Article II and the immigration laws, President Obama's administration unilaterally instituted a program known as Deferred Action for Childhood Arrivals, or DACA. Under DACA, eligible young immigrants may apply for and receive deferred action. They must renew their DACA status every two years. Under the program, the Executive Branch broadly forbears from enforcing certain immigration removal laws against DACA recipients. And by virtue of the forbearance, DACA recipients also become eligible for work authorization and other benefits.

Since 2017, President Trump's administration has sought to rescind DACA based on its different and narrower understanding of the Executive's prosecutorial discretion under Article II and the immigration laws. In its view, the Executive Branch legally may not, and as a policy matter should not, *unilaterally* forbear from enforcing the immigration laws against such a large class of individuals. The current \*1933 administration has stated that it instead wants to work with Congress to enact comprehensive legislation that would address the legal status of those immigrants together with other significant immigration issues.

The question before the Court is whether the Executive Branch acted lawfully in ordering rescission of the ongoing DACA program. To begin with, all nine Members of the Court accept, as do the DACA plaintiffs themselves, that the Executive Branch possesses the legal authority to rescind DACA and to resume pre-DACA enforcement of the immigration laws enacted by Congress. Having previously adopted a policy of prosecutorial discretion and nonenforcement with respect to a particular class of offenses or individuals, the Executive Branch has the legal authority to rescind such a policy and resume enforcing the law enacted by Congress. The Executive Branch's exercise of that rescission authority is subject to constitutional constraints and may also be subject to statutory constraints. The narrow legal dispute here concerns a statutory constraint—namely, whether the Executive Branch's action to rescind DACA satisfied the general arbitrary-and-capricious standard of the Administrative Procedure Act, or APA.

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. As the Court has long stated, judicial review under that standard is deferential to the agency. The Court may not substitute its policy judgment for that of the agency. The Court simply ensures that the agency has acted within a broad zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. See \*\*FCC v. Fox Television Stations, Inc., 556 U.S. 502, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009); \*\*Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

The Executive Branch explained its decision to rescind DACA in two sequential memorandums by successive Secretaries of Homeland Security: the 2017 Duke Memorandum and the 2018 Nielsen Memorandum. The Duke Memorandum focused on DACA's perceived legal flaws. The Court today finds the Duke Memorandum insufficient under the APA's arbitrary-and-capricious standard.

But regardless of whether the Court is correct about the Duke Memorandum, the Nielsen Memorandum more fully explained the Department's legal reasons for rescinding DACA, and clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons. The Nielsen Memorandum also expressly addressed the reliance interests of DACA recipients. The question under the APA's deferential arbitrary-and-capricious standard is not whether we agree with the Department's decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA. Under ordinary application of the arbitrary-and-capricious standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch's action.

The Nielsen Memorandum was issued nine months after the Duke Memorandum. Under the Administrative Procedure Act, the Nielsen Memorandum is itself a "rule" setting forth "an agency statement of general ... applicability and future effect designed to implement ... policy." 5 U.S.C. § 551(4). Because it is a rule, the Nielsen Memorandum constitutes "agency action." § 551(13). As the Secretary of Homeland \*1934 Security, Secretary Nielsen had the authority to decide whether to stick with Secretary Duke's decision to rescind DACA, or to make a different decision. Like Secretary Duke, Secretary Nielsen chose to rescind DACA, and she provided additional explanation. Her memorandum was akin to common forms of agency action that follow earlier agency action on the same subject—for example, a supplemental or new agency statement of policy, or an agency order with respect to a motion for rehearing or reconsideration. Courts often consider an agency's additional explanations of policy or additional explanations made, for example, on agency rehearing or reconsideration, or on remand from a court, even if the agency's bottom-line decision itself does not change.

Yet the Court today jettisons the Nielsen Memorandum by classifying it as a post hoc justification for rescinding DACA. Ante, at 1908 – 1909. Under our precedents, however, the post hoc justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced by agency lawyers during litigation (or by judges). See, e.g., State Farm, 463 U.S. at 50, 103 S.Ct. 2856 ("courts may not accept appellate counsel's post hoc rationalizations for agency action"); FPC v. Texaco Inc., 417 U.S. 380, 397, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974) (same); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443–444, 85 S.Ct. 1061, 13 L.Ed.2d 951

(1965) (same); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962) (same). As the D. C. Circuit has explained, the post hoc justification doctrine "is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers." Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (2006) (Garland, J.) (internal quotation marks omitted).

Indeed, the ordinary judicial remedy for an agency's insufficient explanation is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly *post hoc*, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court's application of the *post hoc* justification doctrine today. The Court's refusal to look at the Nielsen Memorandum seems particularly mistaken, moreover, because the Nielsen Memorandum shows that the Department, back in 2018, considered the policy issues that the Court today says the Department did not consider. *Ante*, at 1911 – 1915.

To be sure, cases such as Overton Park and Camp v. Pitts suggest that courts reviewing certain agency adjudications may in some circumstances decline to examine an after-the-fact agency explanation. See Camp v. Pitts, 411 U.S. 138, 142–143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (per curiam); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419–421, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). But agency adjudications are "concerned with the determination of past and present rights and liabilities," Attorney General's Manual on the Administrative Procedure Act 14 (1947), and implicate the due process interests of the individual parties to the adjudication. Judicial review of an adjudication therefore ordinarily focuses on what happened during the agency's adjudication \*1935 process of deciding that individual case.

Even if certain agency adjudications have a slightly more stringent restriction on *post hoc* explanations, the APA is "based upon a dichotomy between rule making and adjudication," *ibid.*, and this case involves an ongoing agency rule that has future effect—the rescission of DACA. The Nielsen Memorandum implements and explains the rescission of DACA. I am aware of no case from this Court, and the Court today cites none, that has employed the *post hoc* justification doctrine to exclude an agency's official explanation of an agency rule. For purposes of arbitrary-and-capricious review, it does not matter whether the latest official explanation was two years ago or three years ago. What matters is whether the explanation was reasonable and followed the requisite procedures. In my view, the Court should consider the Nielsen Memorandum in deciding whether the Department's rescission of DACA satisfies the APA's arbitrary-and-capricious standard.

Because the Court excludes the Nielsen Memorandum, the Court sends the case back to the Department of Homeland Security for further explanation. Although I disagree with the Court's decision to remand, the only practical consequence of the Court's decision to remand appears to be some delay. The Court's decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court's opinion. *Ante*, at 1913 – 1915.<sup>1</sup>

\* \* \*

The Court's resolution of this narrow APA issue of course cannot eliminate the broader uncertainty over the status of the DACA recipients. That uncertainty is a result of Congress's inability thus far to agree on legislation, which in turn has forced successive administrations to improvise, thereby triggering many rounds of relentless litigation with the prospect of more litigation to come. In contrast to those necessarily short-lived and stopgap administrative measures, the Article I legislative process could produce a sturdy and enduring solution to this issue, one way or the other, and thereby remove the uncertainty that has persisted for years for these young immigrants and the Nation's immigration system. In the meantime, as to the narrow APA question presented here, I appreciate the Court's careful analysis, \*1936 but I ultimately disagree with its treatment of the Nielsen Memorandum. I therefore respectfully dissent from the Court's judgment on plaintiffs' APA claim, and I concur in the judgment insofar as the Court rejects plaintiffs' equal protection claim.

#### All Citations

140 S.Ct. 1891, 207 L.Ed.2d 353, 20 Cal. Daily Op. Serv. 5524, 2020 Daily Journal D.A.R. 5909, 28 Fla. L. Weekly Fed. S 345

#### Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See \*\* United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- Plaintiffs also raised notice and comment claims, which uniformly failed below, and assorted due process challenges, some of which survived motions to dismiss. Those claims are not before us.
- In a related challenge not at issue here, the District Court for the District of Maryland granted partial summary judgment in favor of the Government. Casa de Maryland v. United States Dept. of Homeland Security, 284 F.Supp.3d 758 (2018). After the Government filed petitions for certiorari in the instant cases, the Fourth Circuit reversed that decision and vacated Acting Secretary Duke's rescission as arbitrary and capricious. Casa de Maryland v. United States Dept. of Homeland Security, 924 F.3d 684 (2019), cert. pending. No. 18–1469. The Fourth Circuit has since stayed its mandate.
- Justice KAVANAUGH further argues that the contemporaneous explanation requirement applies only to agency adjudications, not rulemakings. *Post*, at 1934 1936 (opinion concurring in judgment in part and dissenting in part). But he cites no authority limiting

- this basic principle—which the Court regularly articulates in the context of rulemakings—to adjudications. The Government does not even raise this unheralded argument.
- The Government contends that Acting Secretary Duke also focused on litigation risk. Although the background section of her memo references a letter from the Texas Attorney General threatening to challenge DACA, the memo never asserts that the rescission was intended to avert litigation. And, given the Attorney General's conclusion that the policy was unlawful—and thus presumably could not be maintained or defended in its current form—it is difficult to see how the risk of litigation carried any independent weight.
- As the Fifth Circuit noted, DAPA recipients were eligible for Social Security and Medicare benefits because they had been designated "lawfully present." Texas, 809 F.3d at 168. Lawful presence is a statutory prerequisite for receipt of certain benefits. See id., at 148 (citing 8 U.S.C. § 1611). It is not the same as forbearance nor does it flow inexorably from forbearance. Thus, while deferred action recipients have been designated lawfully present for purposes of Social Security and Medicare eligibility, see 8 CFR § 1.3; 42 CFR § 417.422(h), agencies can also exclude them from this designation, see 45 CFR § 152.2(8) (2019) (specifying that DACA recipients are not considered lawfully present for purposes of coverage under the Affordable Care Act).
- The three-page memorandum that established DACA is devoted entirely to forbearance, save for one sentence directing USCIS to "determine whether [DACA recipients] qualify for work authorization." App. to Pet. for Cert. 101a. The benefits associated with DACA flow from a separate regulation. See 8 CFR § 1.3(a)(4)(vi); see also 42 CFR § 417.422(h) (cross-referencing 8 CFR § 1.3). Thus, DHS could have addressed the Attorney General's determination that such benefits were impermissible under the INA by amending 8 CFR § 1.3 to exclude DACA recipients from those benefits without rescinding the DACA Memorandum and the forbearance policy it established. But Duke's rescission memo shows no cognizance of this possibility.
- Our affirmance of the NAACP order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions issued by the District Courts in Regents and Batalla Vidal.
- I concur in the judgment insofar as the majority rejects respondents' equal protection claim.
- See Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001, H. R. 1582, 107th Cong., 1st Sess.; Student Adjustment Act of 2001, H. R. 1918, 107th Cong., 1st Sess.; DREAM Act, S. 1291, 107th Cong., 1st Sess. (2001); DREAM Act, S. 1545, 108th Cong., 1st Sess. (2003); Student Adjustment Act of 2003, H. R. 1684, 108th Cong., 1st Sess.; DREAM Act, S. 2863, 108th Cong., 2d Sess., Tit. XVIII (2003); DREAM Act of 2005, S. 2075, 109th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess., Tit. VI, Subtitle C; American Dream Act, H. R. 5131, 109th Cong., 2d Sess. (2006); DREAM Act of 2007, S. 774, 110th Cong., 1st Sess.; DREAM Act of 2007, S. 2205, 110th Cong., 1st Sess.; STRIVE Act of 2007, H. R. 1645, 110th Cong., 1st Sess., Tit. VI, Subtitle B; Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong., 1st Sess., Tit. VI, Subtitle C; DREAM Act of 2009, S. 729. 111th Cong., 1st Sess.; American Dream Act, H. R. 1751, 111th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong., 2d Sess., Tit. V, Subtitle D; DREAM Act of 2010, S. 3827, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3992, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3963, 111th Cong., 2d Sess.; DREAM Act of 2011, S. 952, 112th Cong., 1st Sess.
- 3 See J. Passel & M. Lopez, Pew Research Center, Up to 1.7 Million Unauthorized Immigrant Youth May Benefit From New Deportation Rules (Aug. 14, 2012).
- The immigration statutes also provide for conditional lawful permanent residence status. See § 1186a(b)(1)(A)(i) (two years for spouses to demonstrate that the marriage "was [not] entered into for the purpose of procuring an alien's admission as an immigrant"); § 1186b (qualifying business entrepreneurs).
- For instance, Congress has carved out rules for aliens who served in the Armed Forces, §§ 1438–1440, and alien spouses who have been subject to domestic abuse, §§ 1186a(c)(4)(C)–(D).
- In the DAPA litigation, DHS noted that some deferred-action programs have been implemented by the Executive Branch without explicit legislation. But "'past practice does not, by itself, create [executive] power.' " Medellin v. Texas, 552 U.S. 491, 532, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) (quoting Dames & Moore v. Regan, 453 U.S. 654, 686, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981)). If any of these programs had been challenged, it would seem that they would be legally infirm for the same reasons as DACA. Moreover, if DHS had the authority to create new categories of aliens eligible for deferred action, then all of Congress' deferred-action legislation was but a superfluous exercise. Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). Finally, whereas some deferred-action programs were followed by legislation, DACA has existed for eight years, and Congress is no closer to a legislative solution than it was in 2012. See, e.g., American Dream and Promise Act of 2019, H. R. 6, 116th Cong., 1st Sess.
- 7 It is uncontested that deferred action frequently occurs on a case-by-case basis, often justified on the grounds that the agency lacks resources to remove all removable aliens. Even assuming that these ad hoc exercises of discretion are permissible, however, we have

- stated that "[a]n agency confronting resource constraints may change its own conduct, but it cannot change the law." Utility Air Regulatory Group v. EPA, 573 U.S. 302, 327, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014).
- The majority tacitly acknowledges as much, as it must. See *ante*, at 1906 1907. Otherwise, the majority would have to accept that DACA was nothing more than a policy of prosecutorial discretion, which would make its rescission unreviewable. See \*\*Heckler v. Chaney, 470 U.S. 821, 831, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).
- As I have previously pointed out, "the APA actually contemplated a much more formal process for most rulemaking." Perez v. Mortgage Bankers Assn., 575 U.S. 92, 128, n. 5, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015) (opinion concurring in judgment).
- The APA also provides certain exceptions from notice and comment rulemaking. For example, an agency may promulgate a legally binding rule without notice and comment if good cause exists to do so. 5 U.S.C. § 553(b)(B). This text would become a nullity if the agency could achieve the same effect by simply dispensing with notice and comment procedures altogether.
- Thus, it is not that the APA "should not" be construed to support the majority's result, ante, at 1914 (emphasis added), it is that the APA does not and cannot support that result.
- I express no view on what other reasons would justify an agency's decision to rescind a procedurally unlawful action. I merely point out that correctly concluding that the program was illegal is sufficient.
- In my view, even if DACA were permitted under the federal immigration laws and had complied with the APA, it would still violate the Constitution as an impermissible delegation of legislative power. See \*\*Department of Transportation v. Association of American Railroads, 575 U.S. 43, 77, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015) (THOMAS, J., concurring in judgment). Putting aside this constitutional concern, however, the notice and comment process at least attempts to provide a "surrogate political process" that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process. Asimow, Interim-Final Rules: Making Haste Slowly, 51 Admin. L. Rev. 703, 708 (1999).
- The majority's interpretation of the Fifth Circuit's opinion is highly questionable. Because a grant of deferred action renders DACA recipients eligible for certain benefits and work authorization, it is far from clear that the Department could separate DACA's "forbearance component" from the major benefits it conferred without running into yet another APA problem. The majority points to the fact that, under the Patient Protection and Affordable Care Act of 2010, relevant regulations exclude those receiving deferred action through DACA from coverage. *Ante*, at 1911, n. 5. But that misses the point. Those regulations were promulgated before "anyone with deferred action under the DACA process applie[d]" for those benefits. See 77 Fed. Reg. 52616 (2012). By contrast, DACA recipients have been eligible for and have received Medicare, Social Security, and work authorization for years. DHS therefore is not writing on a blank slate. Under the majority's rule, DHS would need to amend all relevant regulations and explain why *all* recipients of deferred action who have previously received such benefits may no longer receive them. Alternatively and perhaps more problematically, it would need to provide a reason why other recipients of deferred action should continue to qualify, while DACA recipients should not. It thus seems highly likely that the majority's proposed course of action would be subject to serious arbitrary and capricious challenges.
- The majority contends that this argument does not carry force because the rescission implemented a winddown period during which recipients would continue to receive benefits. But whether DHS' decision to wind down DACA was lawful is a separate question from whether DHS was required to consider reliance interests before discontinuing an unlawful program.
- The majority's approach will make it far more difficult to change deferred-action programs going forward, which is hardly in keeping with this Court's own understanding that deferred action is an "exercise in administrative discretion" used for administrative "convenience." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). Agencies will likely be less willing to grant deferred action knowing that any attempts to undo it will require years of litigation and time-consuming rulemakings.
- Because I conclude that the Executive Branch satisfied the APA's arbitrary-and-capricious standard, I need not consider whether its prosecutorial enforcement policy was "committed to agency discretion by law" and therefore not subject to APA arbitrary-and-capricious review in the first place. 5 U.S.C. § 701(a)(2). Several judges have advanced arguments suggesting that DACA—at least to the extent it was simply an exercise of forbearance authority—and the repeal of DACA are decisions about whether and to what extent to exercise prosecutorial discretion against a class of offenses or individuals, and are therefore unreviewable under the APA as "committed to agency discretion by law." *Ibid.*; see *Casa De Maryland v. United States Dept. of Homeland Security*, 924 F.3d 684, 709–715 (CA4 2019) (Richardson, J., concurring in part and dissenting in part); Regents of Univ. Cal. v. United States Dept. of Homeland Security, 908 F.3d 476, 521–523 (CA9 2018) (Owens, J., concurring in judgment); see also

809 F.3d 134, 196–202 (CA5 2015) (King, J., dissenting); Texas v. United States, 787 F.3d 733, 770–776 (CA5 2015) (Higginson, J., dissenting); cf. Heckler v. Chaney, 470 U.S. 821, 831–835, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985); ICC v. Locomotive Engineers, 482 U.S. 270, 277–284, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987); United States v. Nixon, 418 U.S. 683, 693, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); In re Aiken County, 725 F.3d 255, 262–264 (CADC 2013).

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THE CORNER

**IMMIGRATION** 

# Did the DACA Ruling Bury Constitutionalism?

By MARK KRIKORIAN | August 10, 2020 6:39 PM



DACA recipients celebrate outside the Supreme Court in Washington, D.C., June 18, 2020. (Jonathan Ernst/Reuters)

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In response to Do Americans Even Care If There's a Constitution?

In reacting to President Trump's recent executive orders, Jim Geraghty asks "Do Americans Even Care If There's a Constitution?" He reluctantly suggests that the

answer is "no."

This didn't happen all at once — Woodrow Wilson was probably the first notable to explicitly express the progressive frustration with the Constitution's system of limited powers. Decades of preposterous Supreme Court rulings, such as *Roe*, *Obergefell*, and *Bostock*, have made plain the Left's contempt for constitutional governance. And to Jim's question, "Did the education system fail them so thoroughly that they can't even begin to grasp why concentrated government power would be a bad thing?" the answer, of course, is yes; Exhibit A is Ezra Klein (a college graduate, mind you) burbling that "the Constitution is not a clear document. Written 100 years ago, when America had thirteen states and very different problems, it rarely speaks directly to the questions we ask it."

Obama's pen-and-phone activity, most notably his administration's decree unilaterally rewriting immigration law by creating the DACA amnesty (and attempting to create the even larger DAPA), is very much in this vein. But the Left's contempt for both the actual Constitution and the very idea of constitutionalism has, in recent decades, been matched by a vigorous defense of it on the Right. Sometimes this has bled into fetishization of the document, but more important has been the Right's defense of a political culture of constitutionalism, as Yuval Levin and Adam White noted over the weekend.

So the real question is whether the *Right* has given up on constitutionalism. Unlike with Obama, Trump's Caesarist impulses have mostly been talk. But these recent orders, however modest their scope, have been rationalized as necessary responses to congressional inaction — thus presenting an Obamastyle usurpation of the legislative power.

But, Levin and White note, "so far, most Republicans in Congress seem reticent to say so."

This wavering commitment to constitutionalism on the Right isn't just a matter of rooting for your own team; it's clearly a response to the Supreme Court's DACA ruling in June. The president campaigned on repealing Obama's illegal DACA decree "on Day One," though it took sustained pressure from conservatives to get the administration to finally do it on Day 228.

Three years of fierce lawfare followed, as the Left turned to the courts to defend its policy gains, however illegitimately acquired. But conservatives were confident that, eventually, they would succeed in the rescission of a policy memo that was unmoored in law.

So when the Supreme Court proclaimed that this illegal program *had* to continue because the administration hadn't jumped through the right hoops — hoops the prior administration ignored entirely in concocting it in the first place — something broke on the Right. Many in the administration, in Congress, and among the citizenry simply concluded that this is now the only way it's possible to govern, and that fastidious avoidance of pen-and-phone governance by Republicans would represent unilateral disarmament. Even if the administration makes another go at rescission of DACA (assuming there's a second term) and this time leaves no pretext for our weather-vane chief justice to latch onto, the damage may be irreversible. If these are the new rules, we play by them or surrender.

I wish this weren't so. And maybe it's not permanent; maybe we can wade back across the Rubicon. But I fear that those of us insisting on adherence to constitutional governance are like the aging Roman Emperor Claudius, as channeled by Robert Graves, who hatches a plan for his son Britannicus to restore the Republic. The young man is appalled, and answers his father: "I don't believe in the Republic. No one believes in the Republic anymore. No one does except you. You're old, Father, and out of touch."

Are we constitutionalists equally out of touch?



#### RETURN TO THE CORNER



MARK KRIKORIAN is the executive director of the Center for Immigration Studies. @markskrikorian

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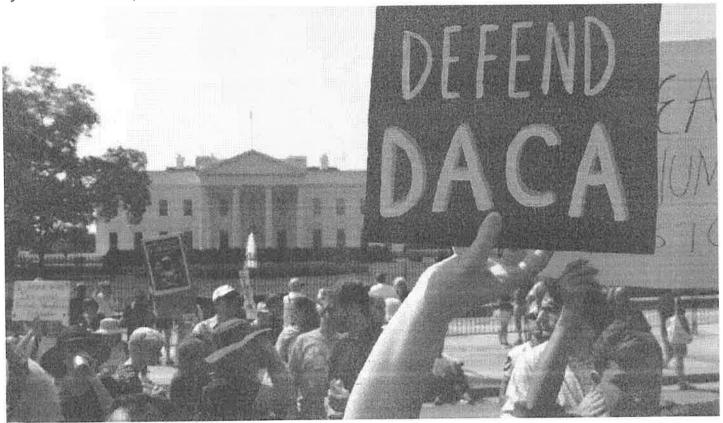
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THE CORNER

LAW & THE COURTS

# It Doesn't Matter Whether DACA Is Popular

By DAVID HARSANYI | June 18, 2020 4:05 PM



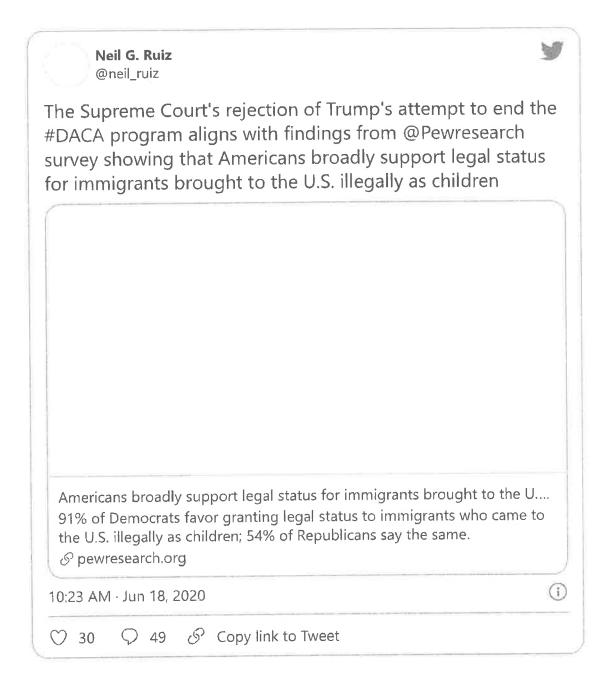
DACA supporters outside the White House, September 2017 (Kevin Lamarque/Reuters)

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I understand that procedural arguments are boring, ineffective, and passe, and that fewer and fewer American are moved by them. But we might want pollsters

and media outlets to understand the difference between policy outcomes and constitutional process.

Take a look at this non sequitur:



As with the Supreme Court's recent re-imagining of Title VII protections, the media are acting as if the recent decision preventing Trump from immediately ending DACA was a referendum on values, empathy, and the intrinsic value of "Dreamers," rather than on the ability of the president to simply fabricate laws by fiat.

There are a number of persuasive economic and moral arguments for legalizing the children of illegal immigrants. Indeed, as it happens, I support the *goals* of DACA. But, if they are to become law, they need to . . . well, become law. I also support dropping the corporate income tax to zero. That doesn't mean I would approve of Donald Trump asking the IRS to stop collecting certain revenue streams by decree.

If you don't believe that DACA circumvents the proper constitutional process, just hear out Barack Obama, who, on numerous occasions, admitted as much.

## In October of 2010:

"... I am president, I am not king. I can't do these things just by myself. We have a system of government that requires the Congress to work with the executive branch to make it happen.

# In March of 2011:

"With respect to the notion that I can just suspend deportations through executive order, that's just not the case . . . . for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as president."

# In July of 2011:

"Now, I know some people want me to bypass Congress and change the laws on my own. And believe me, right now dealing with Congress, believe me, believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written."

# In Sept of 2011:

"And I think there's been a great disservice done to the cause of getting the DREAM Act passed and getting comprehensive immigration passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true . . . . We live in a democracy. You have to pass bills through the legislature, and then I can sign it."

Obama didn't lie about all the small things, only about all the big ones. And after signing the executive directive on DACA, Obama claimed it was just "a temporary stopgap measure."

Should presidents be able to "bypass Congress" and "change the laws" using "a temporary stopgap measure," and simply wait a few decades until his party has enough votes to pass it through the prescribed constitutional manner? Seems to me that undermines the entire purpose of having a Congress.

For years Democrats argued that Obama was impelled to act because Congress wouldn't do its "job." I'm sorry, but if you can't elect enough people to pass your priorities, or you're unable to find a compromise, that's your problem. Congress is under no edict to pass liberal priorities. And Dreamers are not predestined for protection.

Anyway, if SCOTUS is going to endorse executive abuse, it should, at the very least, have the decency to allow both sides to engage in it equally.

"Eight years ago this week," Obama wrote today, "we protected young people who were raised as part of our American family from deportation." We didn't do anything. You did, by yourself, without any congressional authorization, and against your own stated positions.

The question pollsters should be asking isn't whether the Supreme Court's rejection of Trump's attempt to end the DACA "aligns" with Americans support for legal status of illegal immigrants, but rather if it aligns with the idea presidents can "bypass Congress and change the laws."

## Well, some presidents.





#### RETURN TO THE CORNER

**DAVID HARSANYI** is a senior writer for National Review and the author of *First Freedom:* A Ride through America's Enduring History with the Gun. @davidharsanyi

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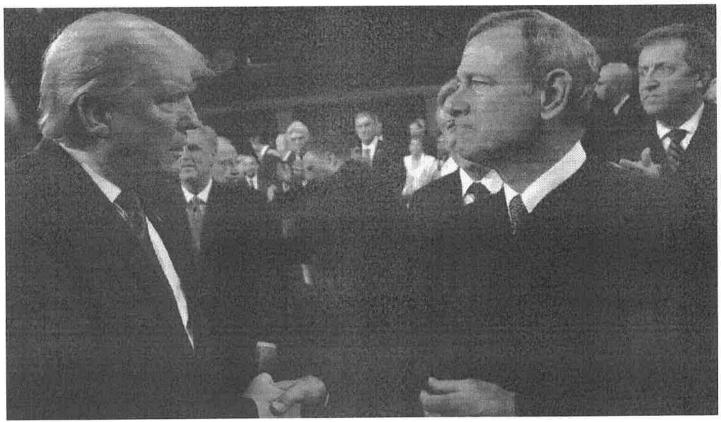
Sign Language RICHARD BROOKHISER

THE CORNER

LAW & THE COURTS

# Roberts' DACA Trick Blocks Disfavored Policy without Substantive Law Precedent

By WESLEY J. SMITH | June 18, 2020 4:32 PM



President Donald Trump greets Supreme Court Chief Justice John Roberts as he arrives to deliver his State of the Union address in the House Chamber in Washington, D.C., February 4, 2020. (Leah Millis/Routers)

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When I heard about the reasoning in Chief Justice John Roberts's decision concerning the DACA case, I had a real deja vu experience. Roberts applied arcane administrative law jurisprudence to obtain a particular policy result he favored — and without creating a policy precedent that would bind future court rulings on the substance of the issue.

Here's the deja vu part: During the George W. Bush administration, Attorney General John Ashcroft issued a guidance that prohibited federally controlled substances from being used in assisted suicide. The lawsuits flew predictably, and the case ended up in the Supreme Court.

Just as Roberts did today, in 2006 Justice Anthony Kennedy, writing for a 6–3 majority in *Gonzales v Oregon*, ruled that the government *could indeed* prohibit controlled substances from use in assisted suicide. But *awww*, *gosh darn*, *too bad* — Ashcroft *went about it the wrong way*. From my analysis published here back then:

The general media spin about the case has been that, as Reuters put it, the Supremes issued a "stinging rebuke" to the administration and endorsed the assisted suicide as a legitimate public policy. But this isn't true. Justice Anthony Kennedy's majority decision even acknowledged that the Justice Department was "reasonable" in its assertion that "medicine's boundaries" preclude assisted suicide. The majority also explicitly agreed that the federal government possesses the inherent power to prevent narcotics from being prescribed for assisted suicide, for example, by amending the federal Controlled Substances Act. The case provided neither a sweeping assertion of the validity of assisted suicide nor a ringing endorsement of its legality being strictly a matter of state's rights.

So if the federal government can, in theory, preclude controlled substances from being used in assisted suicide, why did it lose? The majority believed that former Attorney General John Ashcroft went about that task in the wrong way. Specifically, it ruled that Ashcroft exceeded his authority when he determined that assisted suicide was not a "legitimate medical use" of controlled substances without obtaining any information about the practice

of medicine, assisted suicide, or other relevant matters necessary to come to that conclusion from outside the Department of Justice. Consequently, the Court found, Ashcroft's interpretation, while reasonable, was not persuasive because it exceeded his "expertise."

See how that works?

You have to admire the elegance. Administrative law offers a great sleight of hand opportunity for "conservative" judges and justices to block policies with which they disapprove — and without leaving any incriminating ideological fingerprints.





#### RETURN TO THE CORNER

**WESLEY J. SMITH** is an author and a senior fellow at the Discovery Institute's Center on Human Exceptionalism. **@forcedexit** 

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**ALEXANDRA DESANCTIS** 

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THE CORNER

**IMMIGRATION** 

# DACA Drags On

By MARK KRIKORIAN | July 30, 2020 6:58 PM



DACA supporters outside the White House, September 2017 (Kevin Lamarque/Reuters)

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DACA is shaping up to be like the Spanish-American War tax or Jim Geraghty's USDA Agency of Invasive Species — an almost unkillable absurdity.

Since the first days of this administration, I've been trying to hold the president to his unequivocal promise to terminate the unlawful Deferred Action for

Childhood Arrivals (DACA) program "on Day One." The White House was afraid to follow through, but eventually, on Day 228, DHS rescinded (with a winddown period) the Obama-era memo that granted work permits to roughly three-quarters of a million illegal immigrants who came here before age 16.

What no one anticipated at the time were the lengths to which our lawless courts would go to keep DACA in place; my colleague Andrew Arthur includes a DACA timeline in a piece today. The Supreme Court ruled 5–4 last month (guess who was number five) that DACA — a program pulled out of thin air, with no basis in statute or regulation — could only be rescinded by jumping through the hoops of the Administrative Procedure Act (APA), which is supposed to be for promulgating and changing formal regulations, not ephemeral (not to mention illegal) policy directives.

This week, the administration finally responded to the absurd SCOTUS ruling with a plan for coming up with a rescission order that won't give John Roberts any pretext for continuing to delay the termination of the program. In the meantime, the new DHS directive allows DACA to continue, though with no new applications, with a renewable duration of only one year from the current two years, and ending the practice of granting "advance parole" to DACAs (which facilitates the conversion of DACA's amnesty-lite to the amnesty-premium of a green card). In addition, DHS has proposed charging a fee for DACA renewals; currently there is no fee for DACA itself, only for the work permit and fingerprinting. This would raise the total cost of renewing DACA from \$495 to \$765 (which is still only about half of what it actually costs to process the package of DACA applications, meaning the rest is poached from fees paid by legal immigrants).

Some immigration hawks were disappointed that DHS isn't just pulling the plug on DACA immediately. The Heritage Foundation, for instance, said that "conservatives are right to be disappointed that DACA continues to live on." But as the OG Squeaky Wheel for ending DACA, I actually think the administration

is approaching this the only way it can. Since any new rescission order will receive a judicial colonoscopy, DHS needs to make sure to polish its every emanation and penumbra. None of that should be necessary for the simple rescission of a memo, but that's the hand that's been dealt.

Even if the new belt-and-suspenders rescission memo is issued before January 20, if Biden wins, his DHS secretary (Ilhan Omar may be looking for a job!) will simply rescind the rescission — and, needless to say, the #Resistance judiciary won't hold a Democratic administration to the same bogus APA standard as they have Trump.

Of course, Congress could rouse itself to do some legislating and give the DACAs green cards (something the president has supported, with conditions, for years), but I'm not holding my breath.





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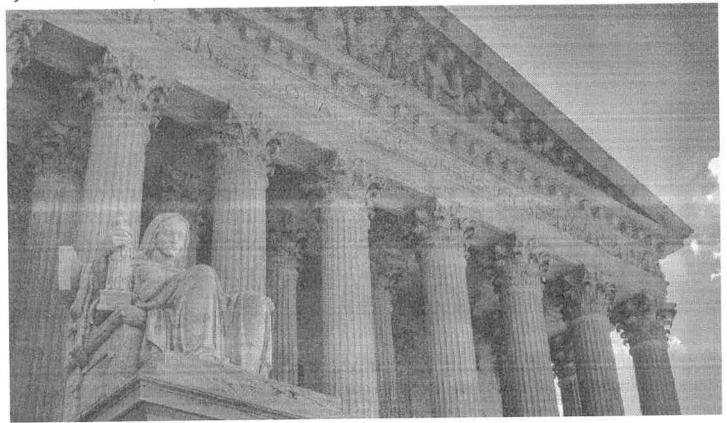
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**NEWS** 

LAW & THE COURTS

# SCOTUS Blocks Trump's Attempt to End DACA

**By TOBIAS HOONHOUT** | June 18, 2020 10:35 AM



(Bill Chizek/iStock/Getty Images Plus)

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The Supreme Court ruled Thursday that the Trump administration's attempt to end the Deferred Action for Childhood Arrivals program is "arbitrary and capricious" and cannot proceed.

Chief Justice John Roberts, joined by the four liberal judges, ruled that Trump's decision to rescind DACA violated the Administrative Procedure Act. DACA, which was instituted in 2012 by President Obama, allowed 700,000 illegal aliens who were brought to the United States as children to apply for a two-year deportation deferral. The deferral, which comes with work eligibility, may be renewed, but does not provide a path to citizenship.

"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 court wrote, declining to rule on the legality of DACA itself. "That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew."

In dissent, Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, wrote that DACA was illegal from its inception.

"Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda," Thomas wrote. "Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration un-less the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration."

In his own dissent, Justice Brett Kavanaugh argued that the court was misapplying the APA's "arbitrary-and-capricious standard" by focusing only on a memorandum issued in 2017 by then-acting DHS secretary Elaine Duke,

rather than also analyzing a follow-up issued in 2018 by former DHS secretary Kirstjen Nielsen.

"The question under the APA's deferential arbitrary-and-capricious standard is not whether we agree with the Department's decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA," Kavanaugh explained. "Under ordinary application of the arbitrary-and-capricious standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch's action."



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TOBIAS HOONHOUT is a media reporter for National Review Online. @tjhoonhout

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**IMMIGRATION** 

# Federal Judge Orders Trump Admin to Fully Reinstate DACA

By ZACHARY EVANS | December 5, 2020 9:37 AM



DACA recipients and their supporters celebrate outside the U.S. Supreme Court in Washington, D.C. June 18, 2020. (Jonathan Ernst/Reuters)

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A federal judge ordered the Trump administration on Friday to accept new applications to the Deferred Action for Childhood Arrivals program.

Originally implemented by President Obama, DACA authorizes employment for illegal immigrants brought to the U.S. as children, and shields them from deportation provided they continue to renew their status every two years. The program has allowed roughly 700,000 immigrants to remain in the U.S. but does not provide a path to citizenship.

The Trump administration attempted to end DACA, however the effort was stopped in July by the Supreme Court, which ruled 5–4 that the administration violated the Administrative Procedure Act in attempting to halt the program. The Court did not rule on the legality of DACA itself.

Shortly following the decision, the Department of Homeland Security ceased new applications to the program and mandated that all DACA participants (known as "dreamers") renew their status every year instead of two years.

On Friday, Judge Nicholas Garaufis of the Eastern District of New York ordered the Trump administration to accept new applicants and increase the renewal period to the original two years, vacating a DHS order by acting Homeland Security secretary Chad Wolf. Around 300,000 people could now be eligible to apply to DACA, according to lawyers working on the case.

"Dreamers have fought so hard for justice. For the second time, a court has ordered the administration to resume processing DACA applications. It's time to do the right thing," Jennifer Molina, a spokesperson for incoming president Joe Biden's transition team, told the Associated Press. "On day one, President-elect Biden will ensure Dreamers and their families have the opportunity to live their lives free of fear and continue to contribute to our country."

The order follows a November ruling by Garaufis in which he deemed Wolf's appointment as acting head of DHS illegal.

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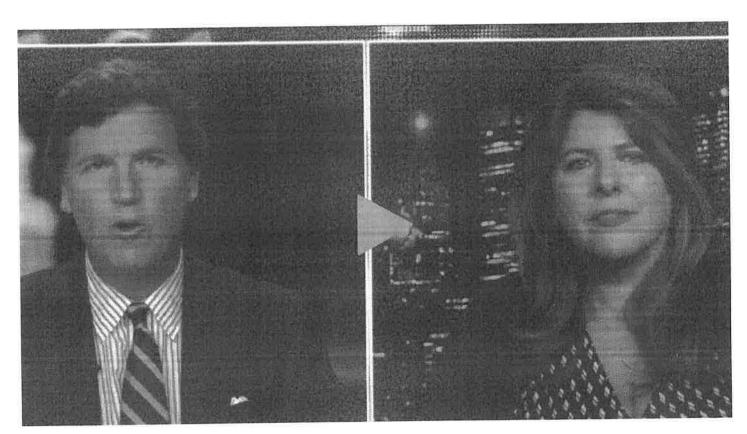
Fauci's mixed message inconsistencies about (19 masks, vaccines and

FOX NEWS FLASH · Published 14 hours ago

## Ex-Clinton adviser Naomi Wolf warns US becoming 'totalitarian state before our eyes' under Biden

Author tells 'Tucker Carlson Tonight' Americans must wake up before it is 'too dangerous to fight back'

By Yael Halon | Fox News



Naomi Wolf sounds alarm at growing power of 'autocratic tyrants'

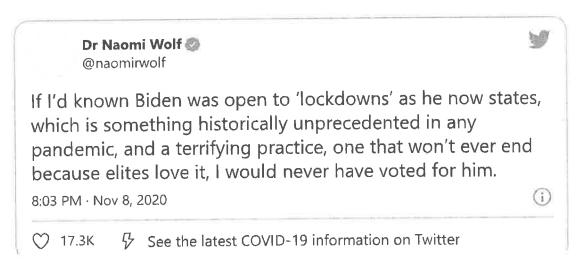
Author and former Clinton adviser warns U.S. about to become 'police state' on 'Tucker'

America is becoming a "totalitarian state before our eyes" under <u>President Biden</u>'s leadership, feminist author and former Democratic adviser Naomi Wolf told "<u>Tucker Carlson Tonight</u>" Monday.

Wolf, who served as an adviser on Bill <u>Clinton's reelection campaign in 1996</u>, told host Tucker Carlson that in her view, the United States is swiftly "moving into a coup situation, a police state" as a result of Biden's ongoing <u>coronavirus</u>-related economic shutdowns. Wolf added that she believes the orders are being improperly extended under the "guise of a real medical pandemic."

"That is not a partisan thing," Wolf told Carlson. "That transcends everything that you and I might disagree or agree on. That should bring together left and right to protect our Constitution."

Wolf has ramped up her warnings against extended lockdowns on Twitter in recent months. In November, the author <u>wrote</u> on Twitter that Biden's openness to reinstating additional shutdowns made her <u>question her decision to vote for him.</u>



"The state has now crushed businesses, kept us from gathering in free assembly to worship as the First Amendment provides, is invading our bodies ... which is a violation of the Fourth Amendment, restricting movement, fining us in New York state ... the violations go on and on," she said.

The outspoken liberal, who previously authored a book outlining the ten steps that "would-be tyrants always take when they want to close down a democracy," believes the United States is heading toward what she refers to as "step 10."

"Whether they are on the left or the right, they do these same ten things," Wolf explained, "and now we're at something I never thought I would see in my lifetime ... it is step 10 and that is the suspension of the rule of law and that is when you start to be a police state, and we're here. There is no way around it."

Wolf said she has interviewed U.S. citizens of various backgrounds and political affiliations who are in a state of "shock and horror" as "autocratic tyrants at the state and now the national level are

creating this kind of merger of corporate power and government power, which is really characteristic of totalism fascism in the '20's," she told Carlson.

Or Naomi Wolf (2)  @naomirwolf	39
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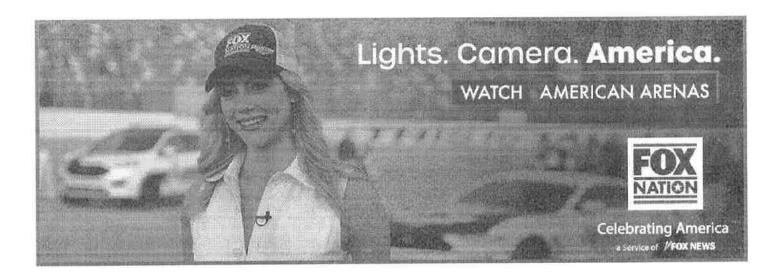
"They are using that to engage in emergency orders that simply strip us of our rights; rights to property, rights to assembly, rights to worship, all the rights the Constitution guarantees."

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Wolf called the United State's overall response to the coronavirus pandemic "completely unprecedented," arguing that "lockdowns have never been done in society and really, we are turning into a of totalitarian state before everyone's eyes."

"I really hope we wake up quickly," she said, "because history also shows that it's a small window in which people can fight back before it is too dangerous to fight back."

Yael Halon is a reporter for Fox News.





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Elections

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Celebrity News

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#### **Business**

Personal Finance

Economy

Markets

Watchlist

Lifestyle

Real Estate

Tech

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Faith

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Planet Earth

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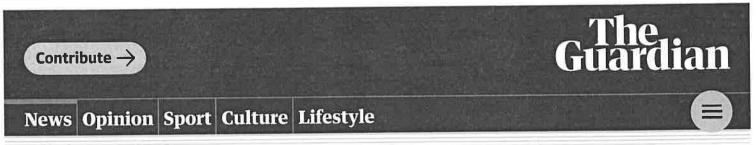
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#### **Opinion**

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## Fascist America, in 10 easy steps Naomi Wolf



Tue 24 Apr 2007 15.02 EDT

ast autumn, there was a military coup in Thailand. The leaders of the coup took a number of steps, rather systematically, as if they had a shopping list. In a sense, they did. Within a matter of days, democracy had been closed down: the coup leaders declared martial law, sent armed soldiers into residential areas, took over radio and TV stations, issued restrictions on the press, tightened some limits on travel, and took certain activists into custody.

They were not figuring these things out as they went along. If you look at history, you can see that there is essentially a blueprint for turning an open society into a dictatorship. That blueprint has been used again and again in more and less bloody, more and less terrifying ways. But it is always effective. It is very difficult and arduous to create and sustain a democracy - but history shows that closing one down is much simpler. You simply have to be willing to take the 10 steps.

As difficult as this is to contemplate, it is clear, if you are willing to look, that each of these 10 steps has already been initiated today in the United States by the Bush administration.

Because Americans like me were born in freedom, we have a hard time even considering that it is possible for us to become as unfree - domestically - as many other nations. Because we no longer learn much about our rights or our system of government - the task of being aware of the constitution has been outsourced from

citizens' ownership to being the domain of professionals such as lawyers and professors - we scarcely recognise the checks and balances that the founders put in place, even as they are being systematically dismantled. Because we don't learn much about European history, the setting up of a department of "homeland" security - remember who else was keen on the word "homeland" - didn't raise the alarm bells it might have.

It is my argument that, beneath our very noses, George Bush and his administration are using time-tested tactics to close down an open society. It is time for us to be willing to think the unthinkable - as the author and political journalist Joe Conason, has put it, that it can happen here. And that we are further along than we realise.

Conason eloquently warned of the danger of American authoritarianism. I am arguing that we need also to look at the lessons of European and other kinds of fascism to understand the potential seriousness of the events we see unfolding in the US.

#### 1. Invoke a terrifying internal and external enemy

After we were hit on September 11 2001, we were in a state of national shock. Less than six weeks later, on October 26 2001, the USA Patriot Act was passed by a Congress that had little chance to debate it; many said that they scarcely had time to read it. We were told we were now on a "war footing"; we were in a "global war" against a "global caliphate" intending to "wipe out civilisation". There have been other times of crisis in which the US accepted limits on civil liberties, such as during the civil war, when Lincoln declared martial law, and the second world war, when thousands of Japanese-American citizens were interned. But this situation, as Bruce Fein of the American Freedom Agenda notes, is unprecedented: all our other wars had an endpoint, so the pendulum was able to swing back toward freedom; this war is defined as open-ended in time and without national boundaries in space - the globe itself is the battlefield. "This time," Fein says, "there will be no defined end."

Creating a terrifying threat - hydra-like, secretive, evil - is an old trick. It can, like Hitler's invocation of a communist threat to the nation's security, be based on actual events (one Wisconsin academic has faced calls for his dismissal because he noted, among other things, that the alleged communist arson, the Reichstag fire of February 1933, was swiftly followed in Nazi Germany by passage of the Enabling Act, which replaced constitutional law with an open-ended state of emergency). Or the terrifying threat can be based, like the National Socialist evocation of the "global conspiracy of world Jewry", on myth.

It is not that global Islamist terrorism is not a severe danger; of course it is. I am arguing rather that the language used to convey the nature of the threat is different in a country such as Spain - which has also suffered violent terrorist attacks - than it is in America. Spanish citizens know that they face a grave security threat; what we as American citizens believe is that we are potentially threatened with the end of civilisation as we know it. Of course, this makes us more willing to accept restrictions on our freedoms.

## 2. Create a gulag

Once you have got everyone scared, the next step is to create a prison system outside the rule of law (as Bush put it, he wanted the American detention centre at Guantánamo Bay to be situated in legal "outer space") - where torture takes place.

At first, the people who are sent there are seen by citizens as outsiders: troublemakers, spies, "enemies of the people" or "criminals". Initially, citizens tend to support the secret prison system; it makes them feel safer and they do not identify with the prisoners. But soon enough, civil society leaders - opposition members, labour activists, clergy and journalists - are arrested and sent there as well.

This process took place in fascist shifts or anti-democracy crackdowns ranging from Italy and Germany in the 1920s and 1930s to the Latin American coups of the 1970s and beyond. It is standard practice for closing down an open society or crushing a prodemocracy uprising.

With its jails in Iraq and Afghanistan, and, of course, Guantánamo in Cuba, where detainees are abused, and kept indefinitely without trial and without access to the due process of the law, America certainly has its gulag now. Bush and his allies in Congress recently announced they would issue no information about the secret CIA "black site" prisons throughout the world, which are used to incarcerate people who have been seized off the street.

Gulags in history tend to metastasise, becoming ever larger and more secretive, ever more deadly and formalised. We know from first-hand accounts, photographs, videos and government documents that people, innocent and guilty, have been tortured in the US-run prisons we are aware of and those we can't investigate adequately.

But Americans still assume this system and detainee abuses involve only scary brown people with whom they don't generally identify. It was brave of the conservative pundit William Safire to quote the anti-Nazi pastor Martin Niemöller, who had been seized as a political prisoner: "First they came for the Jews." Most Americans don't understand yet that the destruction of the rule of law at Guantánamo set a dangerous

precedent for them, too.

By the way, the establishment of military tribunals that deny prisoners due process tends to come early on in a fascist shift. Mussolini and Stalin set up such tribunals. On April 24 1934, the Nazis, too, set up the People's Court, which also bypassed the judicial system: prisoners were held indefinitely, often in isolation, and tortured, without being charged with offences, and were subjected to show trials. Eventually, the Special Courts became a parallel system that put pressure on the regular courts to abandon the rule of law in favour of Nazi ideology when making decisions.

### 3. Develop a thug caste

When leaders who seek what I call a "fascist shift" want to close down an open society, they send paramilitary groups of scary young men out to terrorise citizens. The Blackshirts roamed the Italian countryside beating up communists; the Brownshirts staged violent rallies throughout Germany. This paramilitary force is especially important in a democracy: you need citizens to fear thug violence and so you need thugs who are free from prosecution.

The years following 9/11 have proved a bonanza for America's security contractors, with the Bush administration outsourcing areas of work that traditionally fell to the US military. In the process, contracts worth hundreds of millions of dollars have been issued for security work by mercenaries at home and abroad. In Iraq, some of these contract operatives have been accused of involvement in torturing prisoners, harassing journalists and firing on Iraqi civilians. Under Order 17, issued to regulate contractors in Iraq by the one-time US administrator in Baghdad, Paul Bremer, these contractors are immune from prosecution

Yes, but that is in Iraq, you could argue; however, after Hurricane Katrina, the Department of Homeland Security hired and deployed hundreds of armed private security guards in New Orleans. The investigative journalist Jeremy Scahill interviewed one unnamed guard who reported having fired on unarmed civilians in the city. It was a natural disaster that underlay that episode - but the administration's endless war on terror means ongoing scope for what are in effect privately contracted armies to take on crisis and emergency management at home in US cities.

Thugs in America? Groups of angry young Republican men, dressed in identical shirts and trousers, menaced poll workers counting the votes in Florida in 2000. If you are reading history, you can imagine that there can be a need for "public order" on the next

not rule out the presence of a private security firm at a polling station "to restore public order".

#### 4. Set up an internal surveillance system

In Mussolini's Italy, in Nazi Germany, in communist East Germany, in communist China - in every closed society - secret police spy on ordinary people and encourage neighbours to spy on neighbours. The Stasi needed to keep only a minority of East Germans under surveillance to convince a majority that they themselves were being watched.

In 2005 and 2006, when James Risen and Eric Lichtblau wrote in the New York Times about a secret state programme to wiretap citizens' phones, read their emails and follow international financial transactions, it became clear to ordinary Americans that they, too, could be under state scrutiny.

In closed societies, this surveillance is cast as being about "national security"; the true function is to keep citizens docile and inhibit their activism and dissent.

#### 5. Harass citizens' groups

The fifth thing you do is related to step four - you infiltrate and harass citizens' groups. It can be trivial: a church in Pasadena, whose minister preached that Jesus was in favour of peace, found itself being investigated by the Internal Revenue Service, while churches that got Republicans out to vote, which is equally illegal under US tax law, have been left alone.

Other harassment is more serious: the American Civil Liberties Union reports that thousands of ordinary American anti-war, environmental and other groups have been infiltrated by agents: a secret Pentagon database includes more than four dozen peaceful anti-war meetings, rallies or marches by American citizens in its category of 1,500 "suspicious incidents". The equally secret Counterintelligence Field Activity (Cifa) agency of the Department of Defense has been gathering information about domestic organisations engaged in peaceful political activities: Cifa is supposed to track "potential terrorist threats" as it watches ordinary US citizen activists. A little-noticed new law has redefined activism such as animal rights protests as "terrorism". So the definition of "terrorist" slowly expands to include the opposition.

## 6. Engage in arbitrary detention and release

This scares people. It is a kind of cat-and-mouse game. Nicholas D Kristof and Sheryl WilDinn, the investigative reporters who wrote China Wakes: the Struggle for the Soul

of a Rising Power, describe pro-democracy activists in China, such as Wei Jingsheng, being arrested and released many times. In a closing or closed society there is a "list" of dissidents and opposition leaders: you are targeted in this way once you are on the list, and it is hard to get off the list.

In 2004, America's Transportation Security Administration confirmed that it had a list of passengers who were targeted for security searches or worse if they tried to fly. People who have found themselves on the list? Two middle-aged women peace activists in San Francisco; liberal Senator Edward Kennedy; a member of Venezuela's government - after Venezuela's president had criticised Bush; and thousands of ordinary US citizens.

Professor Walter F Murphy is emeritus of Princeton University; he is one of the foremost constitutional scholars in the nation and author of the classic Constitutional Democracy. Murphy is also a decorated former marine, and he is not even especially politically liberal. But on March 1 this year, he was denied a boarding pass at Newark, "because I was on the Terrorist Watch list".

"Have you been in any peace marches? We ban a lot of people from flying because of that," asked the airline employee.

"I explained," said Murphy, "that I had not so marched but had, in September 2006, given a lecture at Princeton, televised and put on the web, highly critical of George Bush for his many violations of the constitution."

"That'll do it," the man said.

Anti-war marcher? Potential terrorist. Support the constitution? Potential terrorist. History shows that the categories of "enemy of the people" tend to expand ever deeper into civil life.

James Yee, a US citizen, was the Muslim chaplain at Guantánamo who was accused of mishandling classified documents. He was harassed by the US military before the charges against him were dropped. Yee has been detained and released several times. He is still of interest.

Brandon Mayfield, a US citizen and lawyer in Oregon, was mistakenly identified as a possible terrorist. His house was secretly broken into and his computer seized. Though he is innocent of the accusation against him, he is still on the list.

It is a standard practice of fascist societies that once you are on the list, you can't get

off.

## 7. Target key individuals

Threaten civil servants, artists and academics with job loss if they don't toe the line. Mussolini went after the rectors of state universities who did not conform to the fascist line; so did Joseph Goebbels, who purged academics who were not pro-Nazi; so did Chile's Augusto Pinochet; so does the Chinese communist Politburo in punishing pro-democracy students and professors.

Academe is a tinderbox of activism, so those seeking a fascist shift punish academics and students with professional loss if they do not "coordinate", in Goebbels' term, ideologically. Since civil servants are the sector of society most vulnerable to being

fired by a given regime, they are also a group that fascists typically "coordinate" early on: the Reich Law for the Re-establishment of a Professional Civil Service was passed on April 7 1933.

Bush supporters in state legislatures in several states put pressure on regents at state universities to penalise or fire academics who have been critical of the administration. As for civil servants, the Bush administration has derailed the career of one military lawyer who spoke up for fair trials for detainees, while an administration official publicly intimidated the law firms that represent detainees pro bono by threatening to call for their major corporate clients to boycott them.

Elsewhere, a CIA contract worker who said in a closed blog that "waterboarding is torture" was stripped of the security clearance she needed in order to do her job.

Most recently, the administration purged eight US attorneys for what looks like insufficient political loyalty. When Goebbels purged the civil service in April 1933, attorneys were "coordinated" too, a step that eased the way of the increasingly brutal laws to follow.

## 8. Control the press

Italy in the 1920s, Germany in the 30s, East Germany in the 50s, Czechoslovakia in the 60s, the Latin American dictatorships in the 70s, China in the 80s and 90s - all dictatorships and would-be dictators target newspapers and journalists. They threaten and harass them in more open societies that they are seeking to close, and they arrest them and worse in societies that have been closed already.

The Committee to Protect Journalists says arrests of US journalists are at an all-time high: Josh Wolf (no relation), a blogger in San Francisco, has been put in iail for a year

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for refusing to turn over video of an anti-war demonstration; Homeland Security brought a criminal complaint against reporter Greg Palast, claiming he threatened "critical infrastructure" when he and a TV producer were filming victims of Hurricane Katrina in Louisiana. Palast had written a bestseller critical of the Bush administration.

Other reporters and writers have been punished in other ways. Joseph C Wilson accused Bush, in a New York Times op-ed, of leading the country to war on the basis of a false charge that Saddam Hussein had acquired yellowcake uranium in Niger. His wife, Valerie Plame, was outed as a CIA spy - a form of retaliation that ended her career.

Prosecution and job loss are nothing, though, compared with how the US is treating journalists seeking to cover the conflict in Iraq in an unbiased way. The Committee to Protect Journalists has documented multiple accounts of the US military in Iraq firing upon or threatening to fire upon unembedded (meaning independent) reporters and camera operators from organisations ranging from al-Jazeera to the BBC. While westerners may question the accounts by al-Jazeera, they should pay attention to the accounts of reporters such as the BBC's Kate Adie. In some cases reporters have been wounded or killed, including ITN's Terry Lloyd in 2003. Both CBS and the Associated Press in Iraq had staff members seized by the US military and taken to violent prisons; the news organisations were unable to see the evidence against their staffers.

Over time in closing societies, real news is supplanted by fake news and false documents. Pinochet showed Chilean citizens falsified documents to back up his claim that terrorists had been about to attack the nation. The yellowcake charge, too, was based on forged papers.

You won't have a shutdown of news in modern America - it is not possible. But you can have, as Frank Rich and Sidney Blumenthal have pointed out, a steady stream of lies polluting the news well. What you already have is a White House directing a stream of false information that is so relentless that it is increasingly hard to sort out truth from untruth. In a fascist system, it's not the lies that count but the muddying. When citizens can't tell real news from fake, they give up their demands for accountability bit by bit.

## 9. Dissent equals treason

Cast dissent as "treason" and criticism as "espionage'. Every closing society does this, just as it elaborates laws that increasingly criminalise certain kinds of speech and expand the definition of "spy" and "traitor". When Bill Keller, the publisher of the New York Times, ran the Lichtblau/Risen stories, Bush called the Times' leaking of classified information "disgraceful", while Republicans in Congress called for Keller to be charged

with treason, and rightwing commentators and news outlets kept up the "treason" drumbeat. Some commentators, as Conason noted, reminded readers smugly that one penalty for violating the Espionage Act is execution.

Conason is right to note how serious a threat that attack represented. It is also important to recall that the 1938 Moscow show trial accused the editor of Izvestia, Nikolai Bukharin, of treason; Bukharin was, in fact, executed. And it is important to remind Americans that when the 1917 Espionage Act was last widely invoked, during the infamous 1919 Palmer Raids, leftist activists were arrested without warrants in sweeping roundups, kept in jail for up to five months, and "beaten, starved, suffocated, tortured and threatened with death", according to the historian Myra MacPherson. After that, dissent was muted in America for a decade.

In Stalin's Soviet Union, dissidents were "enemies of the people". National Socialists called those who supported Weimar democracy "November traitors".

And here is where the circle closes: most Americans do not realise that since September of last year - when Congress wrongly, foolishly, passed the Military Commissions Act of 2006 - the president has the power to call any US citizen an "enemy combatant". He has the power to define what "enemy combatant" means. The president can also delegate to anyone he chooses in the executive branch the right to define "enemy combatant" any way he or she wants and then seize Americans accordingly.

Even if you or I are American citizens, even if we turn out to be completely innocent of what he has accused us of doing, he has the power to have us seized as we are changing planes at Newark tomorrow, or have us taken with a knock on the door; ship you or me to a navy brig; and keep you or me in isolation, possibly for months, while awaiting trial. (Prolonged isolation, as psychiatrists know, triggers psychosis in otherwise mentally healthy prisoners. That is why Stalin's gulag had an isolation cell, like Guantánamo's, in every satellite prison. Camp 6, the newest, most brutal facility at Guantánamo, is all isolation cells.)

We US citizens will get a trial eventually - for now. But legal rights activists at the Center for Constitutional Rights say that the Bush administration is trying increasingly aggressively to find ways to get around giving even US citizens fair trials. "Enemy combatant" is a status offence - it is not even something you have to have done. "We have absolutely moved over into a preventive detention model - you look like you could do something bad, you might do something bad, so we're going to hold you," says a spokeswoman of the CCR.

Most Americans surely do not get this yet. No wonder: it is hard to believe, even though it is true. In every closing society, at a certain point there are some high-profile arrests - usually of opposition leaders, clergy and journalists. Then everything goes quiet. After those arrests, there are still newspapers, courts, TV and radio, and the facades of a civil society. There just isn't real dissent. There just isn't freedom. If you look at history, just before those arrests is where we are now.

## 10. Suspend the rule of law

The John Warner Defense Authorization Act of 2007 gave the president new powers over the national guard. This means that in a national emergency - which the president now has enhanced powers to declare - he can send Michigan's militia to enforce a state

of emergency that he has declared in Oregon, over the objections of the state's governor and its citizens.

Even as Americans were focused on Britney Spears's meltdown and the question of who fathered Anna Nicole's baby, the New York Times editorialised about this shift: "A disturbing recent phenomenon in Washington is that laws that strike to the heart of American democracy have been passed in the dead of night ... Beyond actual insurrection, the president may now use military troops as a domestic police force in response to a natural disaster, a disease outbreak, terrorist attack or any 'other condition'."

Critics see this as a clear violation of the Posse Comitatus Act - which was meant to restrain the federal government from using the military for domestic law enforcement. The Democratic senator Patrick Leahy says the bill encourages a president to declare federal martial law. It also violates the very reason the founders set up our system of government as they did: having seen citizens bullied by a monarch's soldiers, the founders were terrified of exactly this kind of concentration of militias' power over American people in the hands of an oppressive executive or faction.

Of course, the United States is not vulnerable to the violent, total closing-down of the system that followed Mussolini's march on Rome or Hitler's roundup of political prisoners. Our democratic habits are too resilient, and our military and judiciary too independent, for any kind of scenario like that.

Rather, as other critics are noting, our experiment in democracy could be closed down by a process of erosion.

It is a mistake to think that early in a fascist shift you see the profile of barbed wire

against the sky. In the early days, things look normal on the surface; peasants were celebrating harvest festivals in Calabria in 1922; people were shopping and going to the movies in Berlin in 1931. Early on, as WH Auden put it, the horror is always elsewhere - while someone is being tortured, children are skating, ships are sailing: "dogs go on with their doggy life ... How everything turns away/ Quite leisurely from the disaster."

As Americans turn away quite leisurely, keeping tuned to internet shopping and American Idol, the foundations of democracy are being fatally corroded. Something has changed profoundly that weakens us unprecedentedly: our democratic traditions, independent judiciary and free press do their work today in a context in which we are "at war" in a "long war" - a war without end, on a battlefield described as the globe, in a context that gives the president - without US citizens realising it yet - the power over US citizens of freedom or long solitary incarceration, on his say-so alone.

That means a hollowness has been expanding under the foundation of all these still-free-looking institutions - and this foundation can give way under certain kinds of pressure. To prevent such an outcome, we have to think about the "what ifs".

What if, in a year and a half, there is another attack - say, God forbid, a dirty bomb? The executive can declare a state of emergency. History shows that any leader, of any party, will be tempted to maintain emergency powers after the crisis has passed. With the gutting of traditional checks and balances, we are no less endangered by a President Hillary than by a President Giuliani - because any executive will be tempted to enforce his or her will through edict rather than the arduous, uncertain process of democratic negotiation and compromise.

What if the publisher of a major US newspaper were charged with treason or espionage, as a rightwing effort seemed to threaten Keller with last year? What if he or she got 10 years in jail? What would the newspapers look like the next day? Judging from history, they would not cease publishing; but they would suddenly be very polite.

Right now, only a handful of patriots are trying to hold back the tide of tyranny for the rest of us - staff at the Center for Constitutional Rights, who faced death threats for representing the detainees yet persisted all the way to the Supreme Court; activists at the American Civil Liberties Union; and prominent conservatives trying to roll back the corrosive new laws, under the banner of a new group called the American Freedom Agenda. This small, disparate collection of people needs everybody's help, including that of Europeans and others internationally who are willing to put pressure on the administration because they can see what a US unrestrained by real democracy at home can mean for the rest of the world.

We need to look at history and face the "what ifs". For if we keep going down this road,

the "end of America" could come for each of us in a different way, at a different moment; each of us might have a different moment when we feel forced to look back and think: that is how it was before - and this is the way it is now.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... is the definition of tyranny," wrote James Madison. We still have the choice to stop going down this road; we can stand our ground and fight for our nation, and take up the banner the founders asked us to carry.

· Naomi Wolf's The End of America: A Letter of Warning to a Young Patriot will be published by Chelsea Green in September.

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## WikipediA

## Naomi Wolf

Naomi R. Wolf (born November 12, 1962) is an American liberal[5][6] feminist author, journalist and former political advisor to Al Gore and Bill Clinton. Following her first book The Beauty Myth (1991),[7] she became a leading spokeswoman of what has been described as the third wave of the feminist movement. [8] Feminists including Gloria Steinem and Betty Friedan praised the work; others, including Camille Paglia and Christina Hoff Sommers, criticized it. Her later books include the bestseller The End of America in 2007 and Vagina: A New Biography. Critics have challenged the quality and accuracy of the scholarship in her books, including Outrages (2019). In the case of the latter, her serious misreading of court records led to the book's publication in the US being cancelled.[9]

Her career in journalism began in 1995 and has included topics such as abortion and the Occupy Wall Street movement in articles for media outlets such as The Nation, The New Republic, The Guardian and The Huffington Post. She has received criticism for promoting misinformation and conspiracy theories on several topics, such as beheadings carried out by ISIS, Edward Snowden and the Western African Ebola virus epidemic.[10][11][12][13]

## Contents

Childhood and education

Political consultant

Works

The Beauty Myth (1991)

Accuracy

Reception

Fire with Fire (1993)

Promiscuities (1997)

Misconceptions (2001)

The Treehouse (2005)

The End of America (2007)

Give Me Liberty (2008)

Vagina: A New Biography (2012)

Outrages (2019)

#### **Feminist issues**

Abortion

Pornography



Wolf at the 2012 Texas Book Festival, Austin, Texas

November 12, 1962 Born San Francisco. California, US Occupation Author, Journalist,

> Activist. Public Speaker, Business Owner

Alma mater Yale University New College, Oxford

**Notable** The Beauty Myth works The End of America Misconceptions Fire with Fire Outrages

Spouse David Shipley (m. 1993; div. 2005)

> Brian O'Shea (m, 2018)<sup>[1]</sup>

Children 2

Website

dailyclout.jo (https://dailyclout.jo)

Women in Islamic countries

## Other views and promotion of conspiracy theories

Defense of Julian Assange

Occupy Wall Street

Edward Snowden

Islamic State executions and other assertions

COVID-19 pandemic

#### Personal life

Alleged "sexual encroachment" incident at Yale

#### Selected works

Books

Book chapters

#### References

**External links** 

## Childhood and education

Wolf was born in San Francisco, to a Jewish family. [14][15] Her mother is Deborah Goleman Wolf, an anthropologist and the author of *The Lesbian Community*. [8] Her father was Leonard Wolf, a Romanian-born gothic horror scholar at University of California, Berkeley and Yiddish translator. Leonard Wolf died from advanced Parkinson's Disease on March 20, 2019. [16] Wolf has a brother, Aaron, and a half-brother, Julius, from her father's earlier relationship; it remained his secret until his daughter was in her 30s. [17] She attended Lowell High School and debated in regional speech tournaments as a member of the Lowell Forensic Society.

Wolf attended Yale University receiving her Bachelor of Arts in English literature in 1984. From 1985 to 1987, she was a Rhodes Scholar at New College, Oxford. [18] Her initial period at Oxford University was difficult for Wolf as she experienced "raw sexism, overt snobbery and casual antisemitism". Her writing became so personal and subjective that her tutor advised against submitting her doctoral thesis. Wolf told interviewer Rachel Cooke, writing for *The Observer*, in 2019: "My subject didn't exist. I wanted to write feminist theory, and I kept being told by the dons there was no such thing." Her feminist writing at this time formed the basis of her first book, *The Beauty Myth*. [6][19]

Wolf ultimately returned to Oxford, completing her Doctor of Philosophy degree in English literature in 2015. Her thesis, supervised by Dr. Stefano Evangelista of Trinity College, [20] formed the basis for her 2019 book Outrages: Sex, Censorship, and the Criminalization of Love. [21]

## Political consultant

Wolf was involved in Bill Clinton's 1996 re-election bid, brainstorming with the president's team about ways to reach female voters. During Al Gore's bid for the presidency in the 2000 election, Wolf was hired to work as a consultant. Wolf's ideas and participation in the Gore campaign generated considerable media coverage and criticism. According to a report by Michael Duffy in Time, Wolf was paid a salary of \$15,000 (by November 1999, \$5,000) per month in exchange for advice on

everything from how to win the women's vote to shirt-and-tie combinations." This article was the original source of the assertion that Wolf was responsible for Gore's "three-buttoned, earth-toned look." [22][25]

In an interview with Melinda Henneberger in <u>The New York Times</u>, Wolf said she had been appointed in January 1999 and denied having advised Gore on his wardrobe. Wolf said she had mentioned the term "alpha male" only once in passing and that "[it] was just a truism, something the pundits had been saying for months, that the vice president is in a supportive role and the President is in an initiatory role ... I used those terms as shorthand in talking about the difference in their job descriptions". [24]

## Works

## The Beauty Myth (1991)

In 1991, Wolf gained international attention as a spokeswoman of third-wave feminism [26][27] from the publication of her first book *The Beauty Myth*, an international bestseller. It was named "one of the seventy most influential books of the twentieth century" by *The New York Times*. [18][28] She argues that "beauty" as a normative value is entirely socially constructed, and that the patriarchy determines the content of that construction with the objective of maintaining women's subjugation. [29]



Naomi Wolf speaking at Brooklyn Law School, January 29, 2009

Wolf posits the idea of an "iron-maiden", an intrinsically unattainable standard that is then used to punish women physically and psychologically for their failure to achieve and conform to it.

Wolf criticized the fashion and beauty industries as exploitative of women, but added that the beauty myth extended into all areas of human functioning. Wolf writes that women should have "the choice to do whatever we want with our faces and bodies without being punished by an ideology that is using attitudes, economic pressure, and even legal judgments regarding women's appearance to undermine us psychologically and politically". Wolf argues that women were under assault by the "beauty myth" in five areas: work, religion, sex, violence, and hunger. Ultimately, Wolf argues for a relaxation of normative standards of beauty. [30] In her introduction, Wolf positioned her argument against the concerns of second-wave feminists and offered the following analysis:

The more legal and material hindrances women have broken through, the more strictly and heavily and cruelly images of female beauty have come to weigh upon us ... [D]uring the past decade, women breached the power structure; meanwhile, eating disorders rose exponentially and cosmetic surgery became the fastest-growing specialty ... [P]ornography became the main media category, ahead of legitimate films and records combined, and thirty-three thousand American women told researchers that they would rather lose ten to fifteen pounds than achieve any other goal ... More women have more money and power and scope and legal recognition than we have ever had before; but in terms of how we feel about ourselves physically, we may actually be worse off than our unliberated grandmothers. [31]

## Accuracy

Christina Hoff Sommers criticized Wolf for publishing the estimate that 150,000 women were dying every year from anorexia. Sommers states that she tracked down the source to the American Anorexia and Bulimia Association who stated that they were misquoted; the figure refers to sufferers, not fatalities. Wolf's citation for the incorrect figure came from a book by Brumberg, who referred to an American Anorexia and Bulimia Association newsletter and misquoted the newsletter. Wolf accepted the error and changed it in future editions. Sommers gave an estimate for the number of fatalities in 1990 as 100–400. [32][33] The annual anorexia casualties in the US were estimated to be around 50 to 60 per year in the mid-1990s. [34] In 1995, for an article in *The Independent on Sunday*, British journalist Joan Smith recalled asking Wolf to explain her unsourced assertion in *The Beauty Myth* that the UK "has 3.5 million anorexics or bulimics (95 per cent of them female), with 6,000 new cases yearly". Wolf replied, according to Smith, that she had calculated the statistics from patients with eating disorders at one clinic. [35]

Caspar Schoemaker of the Netherlands Trimbos Institute published a paper in the academic journal *Eating disorders* demonstrating that of the 23 statistics cited by Wolf in *Beauth Myth*, 18 were incorrect, with Wolf citing numbers that average out to 8 times the number in the source she was citing. [36] For example, Wolf wrote that 7.5% of girls and women have anexoria, the accurate figure is 0.065%. [37]

#### Reception

Although *The Beauty Myth* was a bestseller, [35] it received mixed responses from feminists and the media. Second-wave feminist Germaine Greer wrote that *The Beauty Myth* was "the most important feminist publication since *The Female Eunuch*", and Gloria Steinem wrote, "*The Beauty Myth* is a smart, angry, insightful book, and a clarion call to freedom. Every woman should read it." British novelist Fay Weldon called the book "essential reading for the New Woman". Betty Friedan wrote in *Allure* magazine that "*The Beauty Myth* and the controversy it is eliciting could be a hopeful sign of a new surge of feminist consciousness."

However, <u>Camille Paglia</u>, whose <u>Sexual Personae</u> was published in the same year as <u>The Beauty Myth</u>, derided Wolf as unable to perform "historical analysis", and called her education "completely removed from reality."

[40] Her comments touched off a series of debates between Wolf and Paglia in the pages of *The New Republic*.

[41][42][43]

In *The New York Times*, Caryn James lambasted the book as a "sloppily researched polemic as dismissible as a hackneyed adventure film ... Even by the standards of pop-cultural feminist studies, *The Beauty Myth* is a mess." She called the statistics Wolf that cited "shamefully secondhand and outdated. In contrast, *The Washington Post* called the book "persuasive" and praised its "accumulated evidence". [45]

Revisiting Beauty Myth in 2019 for The New Republic, literary critic Maris Kreizman recalls that reading it as an undergraduate made her "world burst open." It "remains one of the most formative books in (Kreizman's) life." However, as she matured, Kreizman saw Wolf's books as "poorly argued tracts" that made "wilder and wilder assertions." Kreizman "began to write (Wolf) off as a fringe character" despite the fact that she had "once informed my own feminism so deeply."[11]

## Fire with Fire (1993)

In Fire with Fire (1993), Wolf writes on politics, female empowerment and women's sexual liberation. [46] The New York Times assailed the work for its "dubious oversimplifications and highly debatable assertions" and its "disconcerting penchant for inflationary prose," nonetheless approving of

Wolf's "efforts to articulate an accessible, pragmatic feminism, ... helping to replace strident dogma with common sense." [47] The *Time* magazine reviewer Martha Duffy dismissed the book as "flawed," although she commented that Wolf was "an engaging raconteur" who was also "savvy about the role of TV – especially the Thomas-Hill hearings and daytime talk shows – in radicalizing women, including homemakers." She characterized the book as advocating an inclusive strain of feminism that welcomed abortion opponents. [48] In the UK, feminist author Natasha Walter writing in *The Independent* said that the book "has its faults, but compared with *The Beauty Myth* it has energy and spirit, and generosity too." Walter, however, criticized it for having a "narrow agenda" where "you will look in vain for much discussion of older women, of black women, of women with low incomes, of mothers." Characterizing Wolf as a "media star", Walter wrote: "She is particularly good, naturally, on the role of women in the media." [49]

#### Promiscuities (1997)

Promiscuities (1997) reports on and analyzes the shifting patterns of contemporary adolescent sexuality. Wolf argues that literature is rife with examples of male coming-of-age stories, covered autobiographically by D. H. Lawrence, Tobias Wolff, J. D. Salinger and Ernest Hemingway, and covered misogynistically by Henry Miller, Philip Roth and Norman Mailer. Wolf insists, however, that female accounts of adolescent sexuality have been systematically suppressed. She adduces cross-cultural material to demonstrate that women have, across history, been celebrated as more carnal than men. Wolf also argues that women must reclaim the legitimacy of their own sexuality by shattering the polarization of women between virgin and whore. [50]

Promiscuities generally received negative reviews. In *The New York Times*, Michiko Kakutani called Wolf a "frustratingly inept messenger: a sloppy thinker and incompetent writer. She tries in vain to pass off tired observations as radical *aperçus*, subjective musings as generational truths, sappy suggestions as useful ideas". [51] However, two days earlier in the *Times* Sunday edition, Weaver Courtney praised the book: "Anyone—particularly anyone who, like Ms. Wolf, was born in the 1960s—will have a very hard time putting down *Promiscuities*. Told through a series of confessions, her book is a searing and thoroughly fascinating exploration of the complex wildlife of female sexuality and desire." [52] In contrast, *The Library Journal* excoriated the work, writing, "Overgeneralization abounds as she attempts to apply the microcosmic events of this mostly white, middle-class, liberal milieu to a whole generation. ... There is a desperate defensiveness in the tone of this book which diminishes the force of her argument." [53]

## Misconceptions (2001)

Misconceptions (2001) examines pregnancy and childbirth. Most of the book is told through the prism of Wolf's personal experience of her first pregnancy. [54] She describes the "vacuous impassivity" of the ultrasound technician who gives her the first glimpse of her new baby. Wolf laments her C-section and examines why the procedure is commonplace in the United States, advocating a return to midwifery. The second half of the book is anecdotal, focusing on inequalities between parents to child care. [55] In the section describing being on the operating table having a caesarian, Wolf compares herself to Jesus at his Crucifixion. [56]

In her *New York Times* review, Claire <u>Dederer</u> suggested it was inappropriate to consider "Wolf as a political theorist, and instead call her a memoirist. She does her best writing when she's observing her own life." Her capability as a memoirist is not "self-indulgent. It seems vital, and in a sense radical, in the tradition of 1970's feminists who sought to speak to every aspect of women's lives." [54]

#### The Treehouse (2005)

Wolf's *The Treehouse: Eccentric Wisdom from My Father on How to Live, Love, and See* (2005) is an account of her midlife crisis. She revalues her father's love, and his role as an artist and a teacher during a year living in a house in upper New York state. [57]

In a promotional interview with *The Herald* (Glasgow), Wolf related her experience of a vision of <u>Jesus</u>: "just this figure who was the most perfected human being - full of light and full of love. ...There was light coming out of him holographically, simply because he was unclouded." [58]

#### The End of America (2007)

In *The End of America: Letter of Warning to a Young Patriot* (2007), Wolf takes a historical look at the rise of fascism, outlining 10 steps necessary for a fascist group (or government) to destroy the democratic character of a nation-state. The book details how this pattern was implemented in Nazi Germany, Fascist Italy, and elsewhere, and analyzes its emergence and application of all the 10 steps in American political affairs since the September 11 attacks. Alex Beam wrote in *The New York Times*: "In the book, Wolf insists that she is not equating [George W.] Bush with Hitler, nor the United States with Nazi Germany, then proceeds to do just that."

Several years later, Mark Nuckols, argued in *The Atlantic* that Wolf's supposed historical parallels between incidents from the era of the European dictators and modern America are based on a highly selective reading in which Wolf omits significant details and misuses her sources. [63] For *The Daily Beast*, Michael Moynihan, characterized the book as "an astoundingly lazy piece of writing." [64]

The End of America was adapted for the screen as a documentary by filmmakers Annie Sundberg and Ricki Stern, best known for The Devil Came on Horseback and The Trials of Darryl Hunt. It premiered in October 2008, and was favorably reviewed in The New York Times by Stephen Holden by Variety magazine. Nigel Andrews in the Financial Times saw aspects of it positively, but "What isn't plausible or reality-related is the conclusion itself. At the door of the Third Reich, Wolf's credibility collapses."

Wolf returned to this general theme in an article in 2014 considering how modern Western women, born in inclusive, egalitarian liberal democracies, are assuming positions of leadership in <u>neofascist</u> political movements. [68]

### Give Me Liberty (2008)

Give Me Liberty: A Handbook for American Revolutionaries (2008) was written as a sequel to The End of America: Letter of Warning to a Young Patriot. In the book, Wolf looks at times and places in history where citizens were faced with the closing of an open society and successfully fought back. [69]

# Vagina: A New Biography (2012)

Published in 2012 on the topic of the vagina, *Vagina: A New Biography* was much criticized, especially by feminist authors. Katie Roiphe described it as "ludicrous" in *Slate*: "I doubt the most brilliant novelist in the world could have created a more skewering satire of Naomi Wolf's career than her latest book." [56] In *The Nation*, Katha Pollitt considered it a "silly book" containing "much dubious neuroscience and much foolishness." It becomes "loopier as it goes on. We learn that women think and feel through their

vagina, which can 'grieve' and feel insulted." Toni Bentley wrote in The New York Times Book Review that Wolf used "shoddy research methodology", while with "her graceless writing, Wolf opens herself to ridicule on virtually every page." Janice Turner in The Times of London wrote that since Mary Wollstonecraft, female "writers have argued that women should not be defined by biology", yet "Wolf, our self-styled leader, has declared that female consciousness, creativity and destiny all come back" to a woman's genitals. [72]

In *The New York Review of Books*, Zoë Heller wrote that the book "offers an unusually clear insight into the workings of her mystic feminist philosophy". Part of the book concerns the history of the vagina's representation, but is "full of childlike generalizations" and her understanding of science "is pretty shaky too". [73] Los Angeles Times columnist Meghan Daum decried the book's "painful" writing and its "hoary ideas about how women think." [74] In *The New York Observer*, Nina Burleigh suggested that critics of the book were so vehement "because (a) their editors handed the book to them for review because they thought it was an Important Feminist Book when it's actually slight and (b) there's a grain of truth in what she's trying to say." [75]

In response to the criticism, Wolf stated in a television interview:

[A]nything that shows documentation of the brain and vagina connection is going to alarm some feminists... . ..also feminism has kind of retreated into the academy and sort of embraced the idea that all gender is socially constructed and so here is a book that is actually looking at science ... though there has been some criticisms of the book from some feminists ... who say, well you can't look at the science because that means we have to grapple with the science ... to me the feminist task of creating a just world isn't changed at all by this fascinating neuroscience that shows some differences between men and women. [76]

At a party to celebrate the Wolf's publishing deal for this book, recounted in its pages, the male chef and host made pasta pieces shaped like a vulva, with sausages and salmon also on the menu. Perceiving the experience as a slight, Wolf apparently suffered writers' block for the next six-months. [77][78]

#### Outrages (2019)

Wolf's book Outrages: Sex, Censorship, and the Criminalization of Love was published in 2019, a work based on the 2015 doctoral thesis she had completed under the supervision of Trinity College, Oxford, literary scholar Stefano-Maria Evangelista. [21][20] In the book, she studies the repression of homosexuality in relation to attitudes towards divorce and prostitution, and also in relation to the censorship of books. [79]

The book was published in the UK in May 2019 by <u>Virago Press.[80]</u> On June 12, 2019, *Outrages* was named on the <u>O, The Oprah Magazine</u>'s "The 32 Best Books by Women of Summer 2019" list.[81] The following day, the US publisher recalled all copies from US bookstores.[82]

An error in a central tenet of the book — a misunderstanding of the legal term "death recorded", which Wolf had taken to mean that the convict had been executed but which in fact means that the convict was pardoned or the sentence was commuted — was identified in a 2019 BBC radio interview with broadcaster and author Matthew Sweet. [83][84][85] He cited a website for the Old Bailey Criminal Court, the same site which Wolf had referred to as one of her sources earlier in the interview. [86] Reviewers have described other errors of scholarship in the work. [87][88]

Wolf appeared at the <u>Hay Festival</u>, Wales in late May 2019, a few days after her exchange with Matthew Sweet, where she defended her book and said she had already corrected the error, but, as of October 2019, she had yet to do so. She stated at an event in Manhattan in June that she was not embarrassed by the correction, but rather felt grateful towards Sweet for the correction. On October 18, 2019, it became known the release of the book by <u>Houghton Mifflin Harcourt</u> in the United States was being canceled. Wolf expressed the hope that the book would still be published in the US.

A UK paperback edition of the book was published by Virago in November 2020, with the incorrect references to the execution of men for sodomy that were included in the hardback edition removed. Interviewed about the new edition, Matthew Sweet said that the book continues to misread historical sources: "Dr Wolf has misrepresented the experiences of victims of child abuse and violent sexual assault. This is the most profound offence against her discipline, as well as the memories of real people on the historical record". Cultural historian Fern Riddell called the book a "calumny against gay people" in the nineteenth century and said that Wolf "presents child rapists and those taking part in acts of bestiality as being gay men in consensual relationships and that is completely wrong". The Daily Telegraph reported that there had been calls for Wolf's 2015 DPhil to be re-examined, and for Virago to withdraw the book. [95] In a statement to The Guardian, Wolf said the book had been reviewed "by leading scholars in the field", and said "it is clear that I have accurately represented the position". The University of Oxford stated that a "statement of clarification" to Wolf's thesis had been received and approved, and would be "available for consultation in the Bodleian Library in due course". [96]

The book has been used as an example in university teaching about the danger of misreading historical sources. [97]

# **Feminist issues**

#### **Abortion**

In an October 1995 article for *The New Republic* Wolf was critical of contemporary pro-choice positions, arguing that the movement had "developed a lexicon of <u>dehumanization</u>" and urged feminists to accept abortion as a form of homicide and defend the procedure within the ambiguity of this moral conundrum. She continued, "Abortion should be legal; it is sometimes even necessary. Sometimes the mother must be able to decide that the fetus, in its full humanity, must die." [98]

Wolf concluded by speculating that in a world of "real gender equality," passionate feminists "might well hold candlelight vigils at abortion clinics, standing shoulder to shoulder with the doctors who work there, commemorating and saying goodbye to the dead." In an article for New York magazine on the subtle manipulation of George W. Bush's image among women, Wolf wrote in 2005: "Abortion is an issue not of Ms. Magazine-style fanaticism or suicidal Republican religious reaction, but a complex issue." [99]

#### **Pornography**

Wolf suggested in a 2003 article for *New York* magazine that the ubiquity of internet pornography tends to enervate the sexual attraction of men toward typical real women. She writes, "The onslaught of porn is responsible for deadening male <u>libido</u> in relation to real women, and leading men to see fewer and fewer women as 'porn-worthy.' Far from having to fend off porn-crazed young men, according to Wolf, young

women are worrying that as mere flesh and blood, they can scarcely get, let alone hold, their attention." Wolf advocated abstaining from porn not on moral grounds, but because "greater supply of the stimulant equals diminished capacity." [100]

#### Women in Islamic countries

Wolf has commented about the dress required of women living in Muslim countries. In *The Sydney Morning Herald* in August 2008, she wrote:

The West interprets veiling as repression of women and suppression of their sexuality. But when I traveled in Muslim countries and was invited to join a discussion in women-only settings within Muslim homes, I learned that Muslim attitudes toward women's appearance and sexuality are not rooted in repression, but in a strong sense of public versus private, of what is due to God and what is due to one's husband. It is not that Islam suppresses sexuality, but that it embodies a strongly developed sense of its appropriate channeling — toward marriage, the bonds that sustain family life, and the attachment that secures a home. [101]

# Other views and promotion of conspiracy theories

In the January 2013 issue of <u>The Atlantic</u>, law and business professor <u>Mark Nuckols</u> wrote: "In her various books, articles, and public speeches, Wolf has demonstrated recurring disregard for the historical record and consistently mutilated the truth with selective and ultimately deceptive use of her sources." He further stated: "[W]hen she distorts facts to advance her political agenda, she dishonors the victims of history and poisons present-day public discourse about issues of vital importance to a free society." Nuckols argued that Wolf "has for many years now been claiming that a fascist coup in America is imminent. ... [I]n <u>The Guardian</u> she alleged, with no substantiation, that the U.S. government and big American banks are conspiring to impose a 'totally integrated corporate-state repression of dissent'." [63]

<u>Vox</u> journalist Max Fisher urged Wolf's readers "to understand the distinction between her earlier work, which rose on its merits, and her newer conspiracy theories, which are unhinged, damaging, and dangerous."

[10]

Charles C. W. Cooke, writing for National Review Online, commented:

Over the last eight years, Naomi Wolf has written hysterically about coups and about vaginas and about little else besides. She has repeatedly insisted that the country is on the verge of martial law, and transmogrified every threat—both pronounced and overhyped—into a government-led plot to establish a dictatorship. She has made prediction after prediction that has simply not come to pass. Hers are not sober and sensible forecasts of runaway human nature, institutional atrophy, and constitutional decline, but psychedelic fever-dreams that are more typically suited to the *InfoWars* crowd. [102]

Under the headline "Naomi Wolf Went Off the Deep End Long Ago", Aaron Goldstein in *The American Spectator* advised, "Her words must be taken not just with a grain of salt, but a full shaker's worth." [103]

#### Defense of Julian Assange

Shortly after the WikiLeaks founder Julian Assange was arrested in 2010, she wrote in an article for <u>The Huffington Post</u> that the allegations made against him by his two reputed victims amounted to no more than bad manners from a boyfriend. [104] His accusers, she later wrote in several contexts, were working for the CIA and Assange had been falsely incriminated. [105]

On December 20, 2010, <u>Democracy Now!</u> featured a debate between Wolf and <u>Jaclyn Friedman</u> on the Assange case. According to Wolf, the alleged victims should have said no, asserted that they consented to having sex with him, and said the claims were politically motivated and demeaned the cause of legitimate rape victims. [106] In a 2011 Guardian article she objected to Assange's two accusers having their anonymity preserved. [107] In response, <u>Katha Pollitt</u> wrote in *The Nation* that the "point is a little bizarre: doesn't Wolf realize that anonymity applies only to the media? Everyone in the justice system knows who the complainants are." [108]

#### **Occupy Wall Street**

On October 18, 2011, Wolf was arrested and detained in New York during the Occupy Wall Street protests, having ignored a police warning not to remain on the street in front of a building. Wolf spent about 30 minutes in a cell. [109] She disputed the NYPD's interpretation of applicable laws: "I was taken into custody for disobeying an unlawful order. The issue is that I actually know New York City permit law ... I didn't choose to get myself arrested. I chose to obey the law and that didn't protect me." [110]

A month later, Wolf argued in *The Guardian*, citing leaked documents, that attacks on the <u>Occupy movement</u> were a coordinated plot, orchestrated by federal law enforcement agencies. Those leaks, she alleged, showed that the FBI was privately treating OWS as a terrorist threat, rather than the public assertions acknowledging it is a peaceful organization. The response to this article ranged from praise to criticism of Wolf for being overly speculative and creating a "conspiracy theory". Wolf responded that there is ample evidence for her argument, and proceeded to review the information available to her at the time of the article, and what she alleged was new evidence since that time. [113]

Imani Gandy of Balloon Juice, wrote that "nothing substantiates Wolf's claims", that "Wolf's article has no factual basis whatsoever and is, therefore, a journalistic failure of the highest order" and that "it was incumbent upon (Wolf) to fully research her claims and to provide facts to back them up."

[114] Corey Robin, a political theorist, journalist, and associate professor of political science at Brooklyn College and the Graduate Center of the City University of New York, stated on his blog: "The reason Wolf gets her facts wrong is that she's got her theory wrong."

[115]

In early 2012, WikiLeaks began publishing the Global Intelligence Files, a trove of e-mails obtained via a hack by Anonymous and Jeremy Hammond. Among them was an email with an official Department of Homeland Security document from October 2011 attached. It indicated that DHS was closely watching Occupy, and concluded, "While the peaceful nature of the protests has served so far to mitigate their impact, larger numbers and support from groups such as Anonymous substantially increase the risk for potential incidents and enhance the potential security risk to critical infrastructure." In late December 2012, FBI documents released following an FOIA request from the Partnership for Civil Justice Fund revealed that the FBI used counterterrorism agents and other resources to extensively monitor the national Occupy movement. [116] The documents contained no references to agency personnel covertly infiltrating Occupy branches, but did indicate that the FBI gathered information from police departments and other law enforcement agencies relating to planned protests. [117] Additionally, the blog Techdirt reported that the documents disclosed a plot by unnamed parties "to murder OWS leadership in Texas" but that "the FBI never bothered to inform the targets of the threats against their lives." [118]

In a December 2012 article for *The Guardian*, Wolf wrote:

It was more sophisticated than we had imagined: new documents show that the violent crackdown on Occupy last fall [2011]—so mystifying at the time—was not just coordinated at the level of the FBI, the Department of Homeland Security, and local police. The crackdown, which involved, as you may recall, violent arrests, group disruption, canister missiles to the skulls of protesters, people held in handcuffs so tight they were injured, people held in bondage till they were forced to wet or soil themselves—was coordinated with the big banks themselves.

How simple ... just to label an entity a 'terrorist organization' and choke off, disrupt or indict its sources of financing.

[The FBI crackdown on Occupy] was never really about 'the terrorists'. It was not even about civil unrest. It was always about this moment, when vast crimes might be uncovered by citizens—it was always, that is to say, meant to be about you. [119]

Mother Jones claimed that none of the documents revealed efforts by federal law enforcement agencies to disband the Occupy camps, and that the documents did not provide much evidence that federal officials attempted to suppress protesters' free speech rights. It was, said Mother Jones, "a far cry from Wolf's contention." [120]

#### **Edward Snowden**

In June 2013, New York magazine reported Wolf, in a recent Facebook post, had expressed her "creeping concern" that NSA leaker Edward Snowden "is not who he purports to be, and that the motivations involved in the story may be more complex than they appear to be."[12] Wolf was similarly skeptical of Snowden's "very pretty pole-dancing Facebooking girlfriend who appeared for, well, no reason in the media coverage ... and who keeps leaking commentary, so her picture can be recycled in the press."[12] She pondered whether he was planted by "the Police State".[121]

Wolf responded on her website: "I do find a great deal of media/blog discussion about serious questions such as those I raised, questions that relate to querying some sources of news stories, and their potential relationship to intelligence agencies or to other agendas that may not coincide with the overt narrative, to be extraordinarily ill-informed and naive." Specifically regarding Snowden, she wrote, "Why should it be seen as bizarre to wonder, if there are some potential red flags—the key term is 'wonder'—if a former NSA spy turned apparent whistleblower might possibly still be—working for the same people he was working for before?" [122]

She was accused by the  $\underline{Salon}$  website of making factual errors and misreadings. [121]

## Islamic State executions and other assertions

In a series of Facebook postings in October 2014, Wolf questioned the authenticity of videos purporting to show beheadings of two American journalists and two Britons by the Islamic State, implying that they had been staged by the US government and that the victims and their parents were actors. [10][64] Wolf also charged that the US was dispatching military troops not to assist in treating the Ebola virus epidemic in West Africa, but to carry the disease back home to justify a military takeover of

America. [10][13] She further said that the 2014 Scottish independence referendum, in which Scotland voted to remain in the United Kingdom, was faked. [10] Speaking about this at a demonstration in Glasgow on October 12, Wolf said, "I truly believe it was rigged." [123]

Responding to such criticism, Wolf said, "All the people who are attacking me right now for 'conspiracy theories' have no idea what they are talking about ... people who assume the dominant narrative MUST BE TRUE and the dominant reasons MUST BE REAL are not experienced in how that world works." To her nearly 100,000 Facebook followers, Wolf maintained, "I stand by what I wrote." However, in a later Facebook post, Wolf retracted her statement: "I am not asserting that the ISIS videos have been staged", she wrote.

I certainly sincerely apologize if one of my posts was insensitively worded. I have taken that one down. ... I am not saying the ISIS beheading videos are not authentic. I am not saying they are not records of terrible atrocities. I am saying that they are not yet independently confirmed by two sources as authentic, which any Journalism School teaches, and the single source for several of them, <u>SITE</u>, which received half a million dollars in government funding in 2004, and which is the only source cited for several, has conflicts of interest that should be disclosed to readers of news outlets. [124]

Max Fisher commented that "the videos were widely distributed on open-source jihadist online outlets" while the "Maryland-based nonprofit SITE monitors extremist social media." Wolf deleted her original Facebook posts.[10]

#### **COVID-19** pandemic

Following the election of Joe Biden as US president, Wolf tweeted on 9 November 2020: "If I'd known Biden was open to 'lockdowns' as he now states, which is something historically unprecedented in any pandemic, and a terrifying practice, one that won't ever end because elites love it, I would never have voted for him". In February 2021, Wolf appeared on Tucker Carlson Tonight on Fox News, where she said that government COVID restrictions were turning the U.S. "into a totalitarian state before everyone's eyes," and went on to say that "I really hope we wake up quickly, because history also shows that it's a small window in which people can fight back before it is too dangerous to fight back." [126]

## Personal life

Wolf's first marriage was to journalist David Shipley, then an editor at *The New York Times*. The couple had two children, a son and daughter. [17] Wolf and Shipley divorced in 2005. [19]

On November 23, 2018, Wolf married Brian William O'Shea, a disabled US Army veteran, private detective, and owner of Striker Pierce Investigations. According to a *New York Times* article published in November 2018, Wolf and O'Shea met in 2014 due to threats against Wolf after reporting on human rights violations in the Middle East. [1] The couple live in New York City.

# Alleged "sexual encroachment" incident at Yale

In 2004, in an article for *New York* magazine, Wolf accused literary scholar <u>Harold Bloom</u> of a "sexual encroachment" in late Fall 1983 for touching her inner thigh. She said that what she alleged Bloom did was not harassment, either legally or emotionally, and she did not think herself a "victim", but that she had harbored this secret for 21 years. Explaining why she had finally gone public with the charges, Wolf wrote,

I began, nearly a year ago, to try—privately—to start a conversation with my alma mater that would reassure me that steps had been taken in the ensuing years to ensure that unwanted sexual advances of this sort weren't still occurring. I expected Yale to be responsive. After nine months and many calls and e-mails, I was shocked to conclude that the atmosphere of collusion that had helped to keep me quiet twenty years ago was still intact—as secretive as a Masonic lodge. [127] Sexual encroachment in an educational context or a workplace is, most seriously, a corruption of meritocracy; it is in this sense parallel to bribery. I was not traumatized personally, but my educational experience was corrupted. If we rephrase sexual transgression in school and work as a civil-rights and civil-society issue, everything becomes less emotional, less personal. If we see this as a systemic corruption issue, then when people bring allegations, the focus will be on whether the institution has been damaged in its larger mission. [127]

In *Slate* magazine around the time the allegations against Bloom first surfaced, Meghan O'Rourke wrote that Wolf generalized about sexual assault at Yale on the basis of her alleged personal experience. Moreover, O'Rourke commented, that despite Wolf's assertion sexual assault existed at Yale, she did not interview any Yale students for her story. In addition, O'Rourke wrote, "She jumps through verbal hoops to make it clear she was not 'personally traumatized,' yet she spends paragraphs describing the incident in precisely those terms." O'Rourke wrote that, despite Wolf's claim that her educational experience was corrupted, "(s)he neglects to mention that she later was awarded a Rhodes (scholarship)." O'Rourke concluded Wolf's "gaps and imprecision" in the *New York* article "give fodder to skeptics who think sexual harassment charges are often just a form of hysteria." [128]

Separately, a formal complaint was filed with the US Department of Education Office for Civil Rights on March 15, 2011, by 16 current and former Yale students—12 female and 4 male—describing a sexually hostile environment at Yale. A federal investigation of Yale University began in March 2011 in response to the complaints. [129] Wolf stated on CBS's The Early Show in April: "Yale has been systematically covering up much more serious crimes than the ones that can be easily identified." More specifically, she alleged "they use the sexual harassment gricvance procedure in a very cynical way, purporting to be supporting victims, but actually using a process to stonewall victims, to isolate them, and to protect the university. "[130] Yale settled the federal complaint in June 2012, acknowledging "inadequacies" but not facing "disciplinary action with the understanding that it keeps in place policy changes instituted after the complaint was filed. The school (was) required to report on its progress to the Office of Civil Rights until May, 2014."[131]

In January 2018, Wolf accused Yale officials of blocking her from filing a formal grievance against Bloom. She told *The New York Times* that she had attempted to file the complaint in 2015 with Yale's University-Wide Committee on Sexual Misconduct, but that the university had refused to accept it. [132] On January 16, 2018, Wolf said, she determined to see Yale's provost, Ben Polak, in another attempt to present her case. "As she documented on Twitter," the newspaper reported, "she brought a suitcase and a sleeping bag, because she said she did not know how long she would have to stay. When she arrived at the provost's office, she said, security guards prevented her from entering any elevators. Eventually, she said, Aley Menon, the secretary of the sexual misconduct committee, appeared and they met in the committee's offices for an hour, during which she gave Ms. Menon a copy of her complaint." [132] This

was reported and confirmed by Norman Vanamee who apparently met Wolf at Yale on this morning. In <u>Town & Country</u> magazine in January 2018, Vanamee returned to the story and wrote, "Yale University has a 93-person police department, and, after the guard called for backup, three of its armed and uniformed officers appeared and stationed themselves between Wolf and the elevator bank." [133]

During an interview for <u>Time</u> magazine in spring 2015, Bloom denied ever being indoors with "this person" whom he referred to as "Dracula's daughter." [134]

# Selected works

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- Column archive (https://www.theguardian.com/profile/naomiwolf) at The Guardian
- Naomi Wolf's blog (https://www.huffingtonpost.com/naomi-wolf) at The Huffington Post
- Appearances (https://www.c-span.org/person/?naomiwolf) on C-SPAN
- Naomi Wolf (https://charlierose.com/videos/4079) on <u>Charlie Rose</u>
- Naomi Wolf (https://www.imdb.com/name/nm0937890/) at IMDb
- Works by or about Naomi Wolf (https://worldcat.org/identities/lccn-n90-695495) in libraries (WorldCat catalog)
- @naomirwolf on Twitter (https://twitter.com/naomirwolf)
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