
GRIDLOCK

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INTRODUCTION

Two of the biggest cases at the Supreme Court this past term ended as they began: gridlocked. In *Zubik v. Burwell*,¹ the Justices declined to decide the validity of the accommodation to the Affordable Care Act² (ACA) contraceptive mandate.³ In *United States v. Texas*,⁴ the Court divided 4–4 on whether Deferred Action for Parents of Americans⁵ (DAPA) was lawful.⁶

Both cases involved extremely delicate line drawing. In the former, the Justices had to determine whether compliance with the accommodation to the contraceptive mandate imposed a substantial burden on the free exercise of religious organizations.⁷ In the latter, the Court was called on to resolve the scope of the President’s prosecutorial discretion to shield from removal and grant lawful presence to nearly four million aliens.⁸ During oral argument — our only source of insights because neither case generated a decision on the merits — the Justices seemed divided on how to balance powerful competing concerns.⁹ In the end, the Court resolved neither case — at least for now.

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¹ 136 S. Ct. 1557 (2016).

² Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

³ See *Zubik*, 136 S. Ct. at 1561 (mem.) (per curiam).

⁴ 136 S. Ct. 2271 (2016).

⁵ Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 4–5 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<https://perma.cc/93PG-JHG5>] [hereinafter Johnson, DAPA Memorandum] (creating the program that would become the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)).

⁶ See *Texas*, 136 S. Ct. at 2272 (per curiam).

⁷ See *Zubik*, 136 S. Ct. at 1559–60.

⁸ RANDY CAPPS ET AL., DEFERRED ACTION FOR UNAUTHORIZED IMMIGRANT PARENTS: ANALYSIS OF DAPA’S POTENTIAL EFFECTS ON FAMILIES AND CHILDREN 3 (2016), <http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families> [<https://perma.cc/KD7Q-AKCX>].

⁹ See Transcript of Oral Argument, *Zubik*, 136 S. Ct. 1557 (No. 14-1418), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1418_j4ek.pdf [<https://perma.cc>

The eight Justices can be forgiven for not being able to reach a clear decision. Congress, and not the courts, should lead the debates over such profound questions about religious liberty and the separation of powers. Indeed, critics allege that both suits are actually policy disputes masquerading as legal controversies.¹⁰ But these suits arose precisely because Congress did not grapple with these foundational issues. Congress was entirely silent about religious accommodations for the contraceptive mandate,¹¹ and Congress affirmatively rejected a change to the immigration status quo.¹² Consequently, the Administration seized on this inaction to justify executive actions that advanced an expansive change in policy.

To establish an elaborate scheme that picks and chooses which religious groups are exempted from the contraception mandate, the U.S. Department of Health and Human Services (HHS) cited its authority to define what should constitute “preventive care.”¹³ To effect a fundamental change in immigration policy, DAPA relied on two statutes that authorize the Secretary of Homeland Security to “[e]stablish[] national immigration enforcement policies and priorities”¹⁴ and to “perform such other acts as he deems necessary.”¹⁵ In both cases, the executive branch relied on anodyne delegations of authority to resolve profound questions of social, economic, and political significance — questions the legislature would not cryptically assign to the executive branch. Indeed, such polarizing bills could never have been enacted in the first instance in our current political climate. The five-page per curiam decision in *Zubik* and the one-sentence affirmance in *Texas* are the judicial fallout from our gridlocked government.

As Congress becomes more polarized, it becomes less able to resolve major questions affecting social, economic, and political issues.

/HHZ3-CLEX] [hereinafter Transcript of Oral Argument, *Zubik*]; Transcript of Oral Argument, *Texas*, 136 S. Ct. 2271 (No. 15-674), https://www.supremecourt.gov/oral_arguments/argument_transcripts/15-674_b97d.pdf [<https://perma.cc/2PQA-2RZV>] [hereinafter Transcript of Oral Argument, *Texas*].

¹⁰ See, e.g., Editorial, *Immigration Politics at the Court*, N.Y. TIMES (Apr. 16, 2016), <http://www.nytimes.com/2016/04/17/opinion/sunday/immigration-politics-at-the-court.html> [<https://perma.cc/NGM4-JG8Q>] (“On Monday, the Supreme Court will hear oral arguments in *United States v. Texas*, one of the most flagrant examples in recent memory of a naked political dispute masquerading as a legal one.”); *The New Republican War on Religious Freedom*, THINKPROGRESS (Nov. 17, 2015), <https://thinkprogress.org/the-new-republican-war-on-religious-freedom-76c882fd1614#mq3pa0x1c> [<https://perma.cc/VTM3-TX6S>].

¹¹ See JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER, at xix (2016).

¹² See Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO (Dec. 18, 2010, 11:39 AM), <http://www.politico.com/story/2010/12/dream-act-dies-in-senate-046573> [<https://perma.cc/W7NC-C9ZN>].

¹³ 42 U.S.C. § 300gg-13(a)(3) (2012).

¹⁴ 6 U.S.C. § 202(5) (2012).

¹⁵ 8 U.S.C. § 1103(a)(3) (2012).

With his legislative agenda frustrated, the President takes executive action on those questions Congress either ignored or rejected by adding expansive glosses to generic delegations of authority. The courts are then called upon to assess whether the line the executive drew was within his delegated authority. But these disputes can be resolved on the more neutral principle of whether the agency can take such novel actions in the first instance. If the answer is no, there is no need for judges to draw that difficult line. These “major questions” should be returned to the political process — which is where they should have been decided to begin with.

My goal in this Comment is not to explain whether DAPA complies with the Immigration and Nationality Act¹⁶ (INA), or whether the contraception mandate’s accommodation violates the Religious Freedom Restoration Act of 1993¹⁷ (RFRA). In fairness, the Court didn’t either. (*Texas* and *Zubik* — combined, only ten slip pages — are likely the shortest corpus ever for a faculty comment in the *Harvard Law Review*’s annual Supreme Court issue.) Rather, I use these two cases to illustrate the relationship between gridlocked government and the separation of powers. Part I applies this framework to *Zubik v. Burwell* to demonstrate why congressional silence does not vest the executive branch with the awesome authority to make foundational determinations affecting conscience. Part II analyzes *United States v. Texas* to explain how congressional gridlock does not license the expansion of the executive’s authority. I conclude with a preview of how these cases are likely to be resolved on remand.

I. ZUBIK V. BURWELL

Contrary to common misconceptions,¹⁸ the Affordable Care Act does not have a “contraceptive mandate.” Rather, the law requires in-

¹⁶ 8 U.S.C. §§ 1101–1537.

¹⁷ 42 U.S.C. § 2000bb. I have written about both of these questions elsewhere. See Brief for the Cato Institute et al. as Amici Curiae Supporting Respondents at 24–25, *Texas*, 136 S. Ct. 2271 (No. 15-674) [hereinafter Cato Institute Brief, *Texas*] (I served as co-counsel with Ilya Shapiro.); Brief for the Cato Institute & Independent Women’s Forum as Amici Curiae Supporting Petitioners, *Zubik*, 136 S. Ct. 1557 (No. 14-1418) [hereinafter Cato Institute Brief, *Zubik*] (I served as co-counsel with Joshua Hawley, Erin Morrow Hawley, and Ilya Shapiro.); BLACKMAN, *supra* note 11; Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 674–76 (2016); Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 237–67 (2015); Josh Blackman, *Immigration Inside the Law*, 55 WASHBURN L.J. 31 (2015).

¹⁸ See, e.g., Steve Kenny & Robert Pear, *Justice Blocks Contraception Mandate on Insurance in Suit by Nuns*, N.Y. TIMES (Dec. 31, 2013), <http://www.nytimes.com/2014/01/01/us/politics/justice-sotomayor-blocks-contraception-mandate-in-health-law.html> [https://perma.cc/2Q2F-Q4QH] (“The contraception requirement has been one of the most controversial aspects of the health law . . .”).

surers to provide payments, without additional copayments, for “preventive care” for women.¹⁹ Congress delegated the task of interpreting “preventive care” to HHS. HHS in turn determined that the mandate must include all contraceptives approved by the U.S. Food and Drug Administration (FDA).²⁰ This decision raised problems under the First Amendment and RFRA because the “preventive care” mandate included no conscience clause.²¹ Without guidance from Congress about how to protect free exercise, the Administration promulgated a series of exemptions and accommodations, based only on its own sense of propriety.²² There was no sense that Congress intended to cryptically delegate this awesome power to resolve this major question. As a threshold question to whether the accommodation to the mandate violates RFRA, courts should return this important question to Congress and let the most accountable branches make the tough decisions of how to balance conscience and contraception.

A. *Self-Insurance and State Contraceptive Mandates*

Before the ACA was implemented, at least twenty-eight states enacted laws requiring insurance policies to cover contraception.²³ The laws varied regarding what types of plans covered what types of contraceptives,²⁴ but the differences are immaterial for our purposes. Of those states, more than half specifically included a religious exemption.²⁵ Some, like that of Texas, were quite broad: any “religious or-

¹⁹ 42 U.S.C. § 300gg-13(a)(4).

²⁰ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

²¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²² See *infra* section I.E, pp. 251–54.

²³ See *Insurance Coverage for Contraception Laws*, NAT’L CONF. ST. LEGISLATURES (Feb. 2012), <http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx> [<https://perma.cc/5LA2-FDW7>]; *Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Sept. 1, 2016), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives> [<https://perma.cc/A5VJ-H6ZS>].

²⁴ See sources cited *infra* note 25.

²⁵ See, e.g., ARK. CODE ANN. § 23-79-1104(b) (2016) (“This subchapter shall not be construed to . . . [r]equire any religious employer to comply”); CAL. HEALTH & SAFETY CODE § 1367.25(c) (West 2008) (“Notwithstanding any other provision of this section, a religious employer may request a health care service plan contract without coverage for [FDA]-approved contraceptive methods that are contrary to the religious employer’s religious tenets.”); CONN. GEN. STAT. § 38a-530e(b) (2015); DEL. CODE ANN. tit. 18, § 3559(d) (2015); HAW. REV. STAT. § 431:10A-116.7 (Supp. 1999); ME. STAT. tit. 24, § 2332-J (1999); *id.* tit. 24a, § 4247; MD. CODE ANN., INS. § 15-826 (LexisNexis 2002); MASS. GEN. LAWS ch. 175, § 47W (2010); *id.* ch. 176A, § 8W(c); *id.* ch. 176B, § 4W(c); *id.* ch. 176G, § 4O(c); MO. REV. STAT. § 376.1199.4 (2006); NEV. REV. STAT. §§ 689A.0417.5, 689B.0377.5, 695B.1918.5, 695C.1695.5 (2015); N.J. STAT. ANN. §§ 17:48-6ee, :48A-7bb, :48E-35.29, :48F-13.2 (West 2005); *id.* §§ 17B:26-2.1y, :27-46.1ee, :27A-7.12, :27A-19.15, 26:2J-4.30; N.M. STAT. ANN. §§ 59A-22-42.D, -46-44.C (2015); N.Y. INS. LAW § 4303(cc) (McKinney 2002); N.C. GEN. STAT. § 58-3-178(e) (1999); OR. REV. STAT. § 743A.066(4)

ganization” is exempted if the coverage “violates [its] religious convictions.”²⁶ Others were fairly narrow: California, for example, defined a “religious employer” as an entity whose only “purpose” is “the inculcation of religious values,” which “primarily employs persons who share the religious tenets of the entity,” and which “serves primarily persons who share the religious tenets of the entity.”²⁷

The California Supreme Court found that the Golden State’s mandate did not offend the Free Exercise Clause of the First Amendment,²⁸ citing *Employment Division, Department of Human Resources v. Smith*.²⁹ Under *Smith*, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”³⁰ The mandate, the California Supreme Court concluded, “appl[ies] neutrally and generally to all employers, regardless of religious affiliation, except to those few who satisfy the statute’s strict requirements for exemption on religious grounds.”³¹ Further, the mandate, designed to “eliminate[] a form of gender discrimination in health benefits,” conflicts with free exercise of religious beliefs “only incidentally, because those beliefs happen to make prescription contraceptives sinful.”³²

Despite the court’s decision, nonexempt religious organizations in California were not out of luck. As then-Justice Janice Rogers Brown noted in her dissent, objecting “employers have the option of self-insuring” because the Employee Retirement Income Security Act of 1974³³ (ERISA) “preempts state regulation of self-insured companies.”³⁴ Through a *self-insured* plan, the employer acts as its own insurer and assumes financial responsibility for its employees’ health care claims. In contrast, under an *insured* plan, the employer hires another firm as its insurer. (A church plan, a special arrangement available for houses of worship and certain affiliates, is exempted from ERISA altogether.³⁵) The Supreme Court has recognized that while

(2015); 27 R.I. GEN. LAWS § 27-18-57, -19-48, -20-43, -41-59 (2000); TEX. INS. CODE ANN. § 1369.108 (West 2009); W. VA. CODE § 33-16E-7 (Supp. 2006); GUTTMACHER INST., *supra* note 23 (noting that Arizona and Maryland have an “‘expansive’ refusal clause that allows religious organizations . . . to refuse to provide [contraceptive] coverage”).

²⁶ TEX. INS. CODE ANN. § 1369.108(a).

²⁷ CAL. HEALTH & SAFETY CODE § 1367.25(c)(1).

²⁸ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81–89 (Cal. 2004).

²⁹ 494 U.S. 872 (1990).

³⁰ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

³¹ *Catholic Charities*, 85 P.3d at 82.

³² *Id.*

³³ 29 U.S.C. §§ 1001–1461 (2012).

³⁴ *Catholic Charities*, 85 P.3d at 106 (Brown, J., dissenting).

³⁵ 29 U.S.C. § 1003(b)(2).

states can regulate insured plans, ERISA preempts all state regulation of self-insured plans.³⁶

As a result, Justice Brown noted, California is prohibited from “mandating benefits or defining discrimination in self-insured employee benefit plans more broadly than federal law.”³⁷ Before the ACA, federal law was silent about coverage requirements. Religious entities of all stripes “would not only not be subject to mandatory prescription coverage,” she wrote, but also “not be subject to *any* of California’s more restrictive insurance regulations.”³⁸ For example, one of the plaintiffs in the *Zubik* consolidated appeal was Thomas Aquinas College, in Santa Paula, California.³⁹ The school did not use a church plan — instead, it self-insured through an ERISA-covered plan “set up by the Catholic bishops of California and run by a third-party administrator.”⁴⁰ The *Zubik* plaintiffs noted that self-insurance “is often the only way to avoid the many state-law mandates that violate their religious beliefs, such as those requiring coverage of surgical abortions.”⁴¹ The Archdiocese of Washington explained in a comment during the rulemaking process that Catholic organizations rely on a self-insured plan in order to evade the state-law mandates.⁴²

This approach was not limited to religious nonprofits. For-profit employers like *Hobby Lobby*, which do not qualify for religious exemptions in California and most other states,⁴³ were able to bypass local contraceptive mandates through self-insurance.⁴⁴ Whatever objections may have existed to these state-law mandates could be avoided by

³⁶ *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985); see also *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016).

³⁷ *Catholic Charities*, 85 P.3d at 106 (Brown, J., dissenting) (quoting Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 395 (1998)).

³⁸ *Id.*

³⁹ See *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 240 (D.C. Cir. 2014).

⁴⁰ *Id.*

⁴¹ Supplemental Reply Brief for Petitioners at 8–9, *Zubik*, 136 S. Ct. 1557 (No. 14-1418).

⁴² The Archdiocese of Washington, Comment Letter on Proposed Rule on Preventive Services 10 (April 4, 2013), <http://www.becketfund.org/wp-content/uploads/2013/04/Comments-4-4-13-Archdiocese-of-Washington.pdf> [<https://perma.cc/4KPV-HQBY>] (“[S]elf-insuring allows the Archdiocese to avoid the conflicting state health insurance regulations and mandates of D.C. and Maryland.”). This letter was included in the joint appendix file with the Supreme Court in *Zubik*. Joint Appendix, Volume I at 504–38, *Zubik*, 136 S. Ct. 1557 (No. 14-1418).

⁴³ See, e.g., COLO. REV. STAT. § 10-16-104 (2010); GA. CODE § 33-24-59.6 (2005); 215 ILL. COMP. STAT. ANN. 5/356z.4 (West 2016); *id.* 125/5–3; *id.* 165/10; IOWA CODE § 514C.19 (2016); N.H. REV. STAT. ANN. §§ 415:18-i, 420-A:17-c, 420-B:8-gg (2015); OHIO REV. CODE ANN. § 1751.01 (West 2009); VT. STAT. ANN. tit. 8, § 4099c (2015); VA. CODE ANN. § 38.2-3407.5:1 (2016); WASH. REV. CODE ANN. § 48.41.110 (West 2008); WIS. STAT. ANN. §§ 609.805, 632.895(17) (West 2010).

⁴⁴ See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013).

changing insurance plans. However, the ACA's "preventive care" mandate eliminated that federal safe harbor.

B. The Institute of Medicine's Recommendation

The ACA requires that insurance plans provide, without additional cost sharing, "with respect to women, such additional *preventive care and screenings*."⁴⁵ The statute did not define which services the mandate covered but instead delegated that task to the Health Resources and Services Administration (HRSA),⁴⁶ a division of HHS. The Institute of Medicine (IOM), "an arm of the National Academy of Sciences, an organization Congress established 'for the explicit purpose of furnishing advice to the Government,'"⁴⁷ was asked by HHS to perform "a review of effective preventive services to ensure women's health and well-being."⁴⁸ The organization's goal was to advise HHS on what should be covered under the ACA's "preventive care" mandate.⁴⁹ After the review, IOM concluded that the mandate should cover uncontroversial services including cervical cancer screenings and mammograms.⁵⁰ However, the most controversial proposal concerned contraception: "The committee recommends for consideration as a preventive service for women: the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."⁵¹ That recommendation covered emergency contraceptives, dubbed "abortifacients" by religious groups,⁵² such as Plan B and Ella, which "can function by preventing the implantation of a fertilized egg."⁵³

The IOM viewed the contraceptive mandate as unproblematic in light of the fact that "[t]wenty-eight states now have regulations re-

⁴⁵ 42 U.S.C. § 300gg-13 (2012) (emphasis added).

⁴⁶ *See id.*

⁴⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2788 n.3 (2014) (Ginsburg, J., dissenting) (quoting *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 460 n.11 (1989)).

⁴⁸ INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 1 (2011), <http://www.nap.edu/read/13181/chapter/2> [<https://perma.cc/4C2Q-3QRJ>].

⁴⁹ *Id.*

⁵⁰ *Id.* at 3, 9.

⁵¹ *Id.* at 10.

⁵² For example, Hobby Lobby President Steve Green explained, "[w]e believe life begins at conception." He viewed any drug or procedure that prevents the implantation of a fertilized egg as an abortion. Cathy Lynn Grossman, *What's Abortifacient? Disputes over Birth Control Fuel Obamacare Fight*, WASH. POST. (Jan. 28, 2014), https://www.washingtonpost.com/national/religion/whats-abortifacient-disputes-over-birth-control-fuel-obamacareofight/2014/01/28/61fo8obe-886a-11e3-a760-a86415d0944d_story.html [<https://perma.cc/N2E9-HNG7>].

⁵³ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123 (10th Cir. 2013); *see also* Brief for the Petitioners at 9 n.4, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

quiring private insurers to cover contraceptives.”⁵⁴ Additionally, the group observed that the federal government already provides such coverage for its civil servants, and through Medicaid and Medicare.⁵⁵ However, IOM failed to account for the fact that religious employers in many states could avoid the mandate through statutory exemptions or self-insurance. As I have argued elsewhere, the IOM’s 250-page report made no reference to “religion,” “faith,” or “conscience,” but rather focused solely on public health issues within their areas of competency.⁵⁶

HHS promptly adopted the IOM report in its entirety.⁵⁷ The mandate would now require that employers pay for “[a]ll Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁵⁸ I will return to the rulemaking process in section I.E, but first a detour back to the debates over the ACA’s other controversial mandate.

C. *The ACA’s Religious Exemptions*

Congress exempted three classes of people from the ACA’s individual mandate to maintain insurance. As Chief Justice Roberts observed in *NFIB v. Sebelius*,⁵⁹ “[t]he mandate does not apply to some individuals, such as prisoners and undocumented aliens.”⁶⁰ The joint dissent noted the third category that the Chief omitted: “Those with religious objections or who participate in a ‘health care sharing ministry.’”⁶¹

Congress established a fairly elaborate set of rules for who would and would not receive a conscience-based exemption from the requirement to carry insurance. First, to qualify for a religious exemption, an individual must be “a member of a recognized religious sect” and “an adherent of established tenets or teachings of such sect,” as defined through a detailed test set out elsewhere in the tax code.⁶² Under this test, an applicant who “is conscientiously opposed to acceptance of the benefits of any private or public insurance” must provide “evi-

⁵⁴ INST. OF MED., *supra* note 48, at 108.

⁵⁵ *See id.*

⁵⁶ BLACKMAN, *supra* note 11, at 54–55.

⁵⁷ *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, HEALTH RESOURCES & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> [<https://perma.cc/PD8Y-Z25B>] [hereinafter *Women’s Preventive Services*].

⁵⁸ *Id.*

⁵⁹ 132 S. Ct. 2566 (2012).

⁶⁰ *Id.* at 2580 (citing 26 U.S.C. § 5000A(d) (2012)).

⁶¹ *Id.* at 2653 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (quoting 26 U.S.C. § 5000A(d)(2)).

⁶² 26 U.S.C. § 5000A(d)(2)(A) (referring to 26 U.S.C. § 1402(g)(1) for a description of how a recognized religious sect is defined).

dence” of her “membership in, and adherence to the tenets . . . of, the sect” as well as her “waiver of all benefits and other payments under . . . the Social Security Act.”⁶³ The exemption is granted only if the Commissioner of Social Security finds (1) the sect actually has those “established tenets,” (2) members of the sect “make provision for their dependent members” that is “reasonable in view of their general level of living” and have had the practice of doing so for a “substantial” period of time, and (3) the sect was “in existence at all times since December 31, 1950.”⁶⁴

Second, Congress created a new exemption for members of a “health care sharing ministry,” a term not previously used in the U.S. Code.⁶⁵ Among other requirements, the ministry must be tax-exempt and its members must “share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs.”⁶⁶ Further, individuals must be allowed to “retain membership even after they develop a medical condition.”⁶⁷

On December 22, 2009 — two days before the Senate would vote on the ACA — Senator Bob Casey (D-PA) asked Senator Tom Harkin (D-IA) about the religious exemption to the individual mandate.⁶⁸ Would “an Amish person” who “meet[s] the” statutory “requirements” and “work[s] in a factory or store for a non-Amish employer,” Casey asked, be “required to obtain insurance coverage against his or her religious convictions?”⁶⁹ Senator Harkin answered that he or she would be exempted because the law “creates a clear bright line exemption for individuals described” in the statute.⁷⁰ Note that there is a categorical exemption for conscientious objectors: Congress did not craft some sort of accommodation that applied a less onerous form of the mandate on the religionists.

Through the exemption, Congress reinforced its long-standing recognition that requiring certain religionists to participate in an insurance system burdens their free exercise.⁷¹ This awareness was so profound that it is the only meaningful exemption from the individual mandate — prisoners and those who are not lawfully present in the

⁶³ *Id.* § 1402(g)(1).

⁶⁴ *Id.*

⁶⁵ *Id.* § 5000A(d)(2)(B). The Fourth Circuit has upheld the constitutionality of the “health care sharing ministry” provision. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 102–03 (4th Cir. 2013).

⁶⁶ 26 U.S.C. § 5000A(d)(2)(B)(II).

⁶⁷ *Id.* § 5000A(d)(2)(B)(III).

⁶⁸ 155 CONG. REC. 33,050 (2009) (remarks of Sen. Casey).

⁶⁹ *Id.*

⁷⁰ *Id.* (statement of Sen. Harkin).

⁷¹ *Cf.* *Overall v. Ascension*, 23 F. Supp. 3d 816, 826 (E.D. Mich. 2014) (discussing exemption of “church plan[s]” from ERISA).

United States simply cannot participate in the healthcare market.⁷² The history of the individual mandate is a study in contrast with the “preventive care” mandate. The “preventive care” mandate’s text and history exhibit absolutely no awareness on the part of Congress that it was about to radically alter well-established religious accommodations nationwide, and impose a new contraceptive mandate on employers without any conscience clause.

D. The Women’s Health Amendment and “Preventive Care”

During the Health, Education, Labor & Pensions (HELP) Committee’s markup of the ACA in July 2009, Senator Barbara Mikulski (D-MD) introduced the Women’s Health Amendment.⁷³ The proposed amendment mandated that all insurers provide coverage for “preventive care and screenings” for women, without additional costs.⁷⁴ The amendment did not detail exactly what those services were, and Senator Mikulski declined a request to specifically exclude “abortion services.”⁷⁵ She did, however, insist that the provision would not “expand [or] mandate an abortion service.”⁷⁶ Four months after its passage in the HELP Committee by a vote of 12–11, Senator Mikulski introduced the Women’s Health Amendment for full Senate consideration. The provision required most large employers to cover, without any additional copayments, “with respect to women, [certain] additional *preventive care and screenings*.”⁷⁷ The amendment was silent as to what those “preventive care and screenings” were. Instead, the “comprehensive guidelines” would be established by HRSA.⁷⁸

Republican senators continued to have concerns about the ACA requiring payments for abortions. Once again, Senator Mikulski rejected this claim:

This amendment does not cover abortion. Abortion has never been defined as a preventive service. This amendment is strictly concerned with ensuring that women get the kind of preventive screenings and treatments

⁷² Cf. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2653 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

⁷³ See Susan Ferrechio, *Senate Health Bill Would Mandate Abortion Coverage*, WASH. EXAMINER (Jul. 8, 2009, 12:00 AM), <http://www.washingtonexaminer.com/senate-health-bill-would-mandate-abortion-coverage/article/94854> [<https://perma.cc/4ND4-2XUV>]; David M. Herszenhorn & Robert Pear, *Senate Passes Women’s Health Amendment*, N.Y. TIMES: PRESCRIPTIONS (Dec. 3, 2009, 12:32 PM), <http://prescriptions.blogs.nytimes.com/2009/12/03/senate-passes-womens-health-amendment/> [<https://perma.cc/J9M7-P35A>].

⁷⁴ Herszenhorn & Pear, *supra* note 73.

⁷⁵ Steven Ertelt, *Bob Casey Claims No Abortion Funding in Senate Health Care Bill, Draws Rebuke*, LIFENEWS (Sept. 3, 2009), <http://archive.lifenews.com/state4397.html> [<https://perma.cc/V7Q5-FPKB>]; Ferrechio, *supra* note 73.

⁷⁶ Ferrechio, *supra* note 73.

⁷⁷ 155 CONG. REC. 33,175 (2009) (emphasis added).

⁷⁸ See *id.*; Coverage of Preventive Services, 45 C.F.R. § 147.130 (2015).

they may need to prevent diseases particular to women such as breast cancer and cervical cancer. There is neither legislative intent nor legislative language that would cover abortion under this amendment, nor would abortion coverage be mandated in any way by the Secretary of Health and Human Services.⁷⁹

In response, Senator Brownback of Kansas explained, “I have trouble, however, because I believe a future bureaucracy could interpret it differently.”⁸⁰ He asked for an amendment to make clear that abortions were not covered. “But, as we all know as legislators,” Senator Brownback said, “it is one thing to say something on the Senate floor, and it is one thing to have a colloquy, but it is far different to have it written in the base law.”⁸¹ Senator Mikulski, however, refused to make any clarifying amendments to the text of the statute. The amendment defeated a filibuster with a 61–39 vote.⁸²

E. The Executive Branch’s Accommodation

There was a really, really easy way to avoid the *Zubik* controversy in the first place. The executive branch could have simply rejected the Institute of Medicine’s determination and excluded contraceptives from the definition of “preventive care.” Even if the California Supreme Court were correct that such a requirement does not run afoul of *Employment Division, Department of Human Resources v. Smith*, a blanket mandate with no exemptions — even for houses of worship — would certainly violate RFRA. The Justices divided in *Burwell v. Hobby Lobby Stores, Inc.*⁸³ on whether the mandate burdened the religious liberty of for-profit corporations, but all of the Justices recognized the “special solicitude” of houses of worship, which were not even exempted under the statute.⁸⁴ Declining to include contraceptives under the umbrella of “preventive care” would have avoided a construction that could violate the Free Exercise Clause, as well as a RFRA violation, to say nothing of the bitter culture war the mandate ignited.

The executive branch would likely respond that requiring insurers to cover contraceptives serves a “compelling interest.” This argument has superficial resonance — in light of the “fundamental” rights at

issue in *Griswold v. Connecticut*⁸⁵ and *Eisenstadt v. Baird*⁸⁶ — but

⁷⁹ 155 CONG. REC. 29,308 (2009).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Herszenhorn & Pear, *supra* note 73.

⁸³ 134 S. Ct. 2751 (2014).

⁸⁴ *Id.* at 2794–95 (Ginsburg, J., dissenting) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012)).

⁸⁵ 381 U.S. 479 (1965).

crumbles on closer inspection. Congress can't provide an ambiguous, blank check empowering an agency to define what constitutes a state interest of the highest order. Through the Women's Health Amendment, Congress couldn't even be bothered to define what "preventive care" is — indeed, its sponsor refused to amend the provision to clarify what is and is not covered.⁸⁷ "Family planning" was only mentioned in stray comments throughout the legislative history.⁸⁸ It strains credulity to conclude that an agency interpreting an ambiguous term, aided by *Chevron* deference, can independently elevate its determination to the majestic level of *compelling*, without even a hint from the statute of what's covered.⁸⁹

However, this easy fix didn't happen. Without specific guidance from the statute, HHS proceeded to adopt IOM's recommendations in their entirety, transforming the "preventive care" mandate into the "contraceptive mandate."⁹⁰ Once the Administration made this decision, it was faced with extremely difficult policy choices. The unvarnished "preventive care" mandate — as interpreted by HHS to include contraceptives — required, without exception, that *all* employers with more than fifty employees either pay for their employees' contraceptive coverage, or pay a penalty.⁹¹ All religious organizations were subject to this mandate.

In August 2011, the Departments of HHS, Treasury, and Labor announced what would become the first in a series of executive actions designed to accommodate both conscience and contraception.⁹² The Women's Health Amendment applied equally to all houses of worship, which were mandated to provide "preventive care" for their employees. But the Administration determined that subjecting houses of worship to the choice of complying with the mandate or paying severe fines would violate the First Amendment's Free Exercise Clause.⁹³ As

⁸⁶ 405 U.S. 438 (1972). See *Hobby Lobby*, 134 S. Ct. at 2779–80 ("Under our cases, women (and men) have a constitutional right to obtain contraceptives, . . . and HHS tells us that '[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services.'" (last alteration in original) (citation omitted)).

⁸⁷ Herszenhorn & Pear, *supra* note 73.

⁸⁸ BLACKMAN, *supra* note 11, at 47–48.

⁸⁹ The Court avoided resolving whether the government has a compelling interest in ensuring access to contraception in both *Hobby Lobby*, 134 S. Ct. at 2780, and *Zubik*, 136 S. Ct. at 1560. But on remand, this question could be an alternate ground to resolve *Zubik* — not whether "seamless" contraceptive coverage is compelling, but whether an agency can make that determination in the first instance.

⁹⁰ See *Women's Preventive Services*, *supra* note 57.

⁹¹ See 26 U.S.C. § 4980H(a) (2012).

⁹² BLACKMAN, *supra* note 11, at 57–58.

⁹³ Transcript of Oral Argument at 57–58, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), https://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf [<https://perma.cc/F7Y7-ZTDU>] [hereinafter Transcript of Oral Argument, *Hobby Lobby*] (acknowledging "the spe-

a result, HHS felt compelled to provide an exemption to a narrow sliver of houses of worship.⁹⁴ The proposal, announced in a press release, would “allow[] religious institutions that offer insurance to their employees the choice of whether or not to cover contraception services.”⁹⁵ Employing what I’ve referred to elsewhere as government by blog post,⁹⁶ HHS posted a footnote on its website explaining that a religious employer was exempt from the mandate if it “(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization”⁹⁷ This rule, announced without a notice-and-comment period, was almost identical to the exemption used in California.

This framework excluded a wide swath of incontrovertibly religious institutions. Consider, for example, a church that operates a hypothermia shelter.⁹⁸ First, its singular “purpose” is not the “inculcation of religious values,” but also includes helping the poor in the community, without proselytizing. Second, the church employs people outside the faith to work at the shelter. Third, the church does not require communion for those trying to get help. This church would not be considered a “religious employer” and would not be exempt.

After 100,000 comments were submitted to HHS objecting to the narrow scope of the rule that was published, the government changed course.⁹⁹ The Departments of Treasury, Labor, and HHS acknowledged that certain nonprofits should not be denied an exemption because “for example, they provide charitable social services to persons of different religious faiths or employ persons of different religious faiths when running a parochial school.”¹⁰⁰ The Administration revised the rule so that a religious organization would be exempted from the mandate, regardless of whether it “primarily employs persons who share its religious tenets” or “primarily serves persons who share its re-

cial solicitude that churches receive under our Constitution under the First Amendment,” *id.* at 58).

⁹⁴ *Id.*

⁹⁵ Press Release, U.S. Dep’t of Health & Human Servs., Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), <http://www.hhs.gov/news/press/2011pres/08/20110801b.html> [<https://perma.cc/YV7N-C55Z>].

⁹⁶ Josh Blackman, *Government by Blog Post*, 11 FLA. INT’L U. L. REV. 389 (2016).

⁹⁷ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) [hereinafter Certain Preventive Services] (codified in scattered parts of 26, 29 & 45 C.F.R.).

⁹⁸ See BLACKMAN, *supra* note 11, at 57–58.

⁹⁹ Sarah Kliff, *Congress Picks Up Birth Control Battle*, WASH. POST (Nov. 2, 2011), https://www.washingtonpost.com/blogs/wonkblog/post/congress-picks-up-birth-control-battle/2011/11/01/gIQANd6QdM_blog.html [<https://perma.cc/GT65-Y4X4>].

¹⁰⁰ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013).

ligious tenets.”¹⁰¹ However, certain “religious orders” that provide services other than “exclusively religious activities” were not exempted.¹⁰² Instead of being exempted from the mandate, they would receive only an accommodation. Again, these were policy-laden judgments, made entirely without any guidance from Congress.

After several court orders, the accommodation went through at least six iterations.¹⁰³ For simplicity’s sake, I will refer to them simply as *the accommodation*. Under the accommodation, eligible religious nonprofits would not have to pay for contraceptive coverage. After the nonprofit notified the government of its faith-based objection, the insurer would pay for the contraceptives directly. As I noted in the introduction, a discussion of whether the accommodation violates RFRA is beyond the scope of this Comment. Instead, a threshold question obviates the inquiry under RFRA: did the executive branch have the authority to pick which religious groups have all burdens on free exercise eliminated (with an exemption) and which groups have the burdens minimized (through an accommodation)?

F. No Delegated Interpretive Authority

1. *The Free Exercise Clause and RFRA Do Not Delegate the Requisite Interpretive Authority.* — The executive branch does not have the inherent authority to suspend the enforcement of disfavored laws.¹⁰⁴ Rather, agencies must rely on specific provisions of statutory or constitutional law to authorize them to abstain from enforcement or exercise discretion. Two sources of authority that could support the accommodation to the contraceptive mandate are the Free Exercise Clause¹⁰⁵ and RFRA.¹⁰⁶ Executive branch officials — separate and apart from a judicial declaration — must decline to enforce a law they determine would violate the Free Exercise Clause.¹⁰⁷ Similarly, the

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See, e.g., *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014) (codified at 45 C.F.R. pt. 147); Ctr. for Consumer Info. & Ins. Oversight, *Women’s Preventive Services Coverage and Non-Profit Religious Organizations*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> [<http://perma.cc/2ALF-W93K>]; see also BLACKMAN, *supra* note 11, at 526 (“For those still keeping track, this would be Accommodation 6.o.”).

¹⁰⁴ I have written elsewhere that the Obama Administration has done just this with respect to various provisions of the Affordable Care Act and immigration law. See *supra* note 17; see also BLACKMAN, *supra* note 11, at 203–26.

¹⁰⁵ U.S. CONST. amend. I, cl. 1.

¹⁰⁶ 42 U.S.C. § 200cobb (2012).

¹⁰⁷ This point is worth repeating because lawyers — and even more so, law students — all too often think that the judiciary is the only branch of government that can interpret the Constitu-

executive branch is prohibited from enforcing a law in a manner that violates RFRA. What agencies cannot do — absent guidance from Congress — is to pick and choose which religious organizations are privileged. The only available administrative remedy for those whose free exercise is substantially burdened by the enforcement of the statute is an exemption. Congress, of course, remains free to take a far more hands-on approach.

And the Executive's power to unilaterally suspend a law is limited for a reason. Consider *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.¹⁰⁸ In that case, the Court considered the Controlled Substances Act, which prohibits the transportation of the hallucinogenic plant *hoasca*, and does not contain a religious carve-out.¹⁰⁹ União do Vegetal (UDV), a Christian sect, used *hoasca* in a sacramental tea. Though the law was generally applicable under *Smith*,¹¹⁰ the Court unanimously found that as applied to UDV, it violated the more stringent standard set by RFRA.¹¹¹ The Court's remedy in *Gonzales* was not to invalidate the Controlled Substances Act — which served other legitimate state interests — but to “prohibit[] the Government from enforcing the Controlled Substances Act with respect to the UDV's importation and use of *hoasca*.”¹¹² In other words, the executive branch had to exempt UDV from the enforcement of the Controlled Substances Act to avoid a violation of RFRA.

Contrast this blunt remedy with the textured accommodation scheme Congress developed to legalize, under certain circumstances, “the use, possession, or transportation of peyote . . .”¹¹³ (This statute was a direct response to *Smith*.) First, unlike the Court's blanket injunction for UDV in *Gonzales*, the peyote carveout applied only to “an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.”¹¹⁴ These are important constraints that the Court did not consider. Second, the statute did not stop at decriminalizing the use of peyote, but also stated that “[n]o Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance pro-

tion. See generally Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008); Memorandum for the Honorable Abner J. Mikva, Counsel to the President (Nov. 2, 1994), <http://fas.org/irp/agency/doj/olc110294.html> [<https://perma.cc/PE7T-EBCP>].

¹⁰⁸ 546 U.S. 418 (2006).

¹⁰⁹ *Id.* at 423.

¹¹⁰ See *Emp't Div. v. Smith*, 494 U.S. 872, 889 (1990).

¹¹¹ *Gonzales*, 546 U.S. at 439.

¹¹² *Id.* at 427 (describing, before ultimately upholding, the district court's ruling).

¹¹³ 42 U.S.C. § 1996a (2012).

¹¹⁴ *Id.*

grams.”¹¹⁵ Under the Court’s holding in *Gonzales*, a state could still deny unemployment compensation to a member of UDV who was terminated for use of *hoasca*. Congress, however, resolved this problem for peyote.

This simple example contrasts the level of precision between when Congress handles a question of religious liberty, and when the courts and executive branch do it. The former employs a scalpel, while the latter can wield only a bludgeon. Once the agencies determine that their enforcement of the ACA would violate RFRA, they can exempt only those whose free exercise is burdened. Without any delegation from Congress, this exemption is all that RFRA allows.

In any event, a delegation from RFRA does not help the government in this case. The executive branch has maintained throughout the entire course of the *Zubik* litigation that the accommodation does not impose a substantial burden on free exercise in violation of RFRA. During oral argument, Solicitor General Verrilli suggested he was willing for the Court to “assume [arguendo] a substantial burden,” but was promptly interrupted by Justice Ginsburg.¹¹⁶ “Now, you aren’t giving up on the substantial burden?” she asked.¹¹⁷ The Solicitor General replied, “No, we are not giving up on it”¹¹⁸ By the government’s own admission, it cannot rely on RFRA for the interpretive authority to craft the accommodation. Given its decision to include contraceptives under the umbrella of “preventive care,” the only remedy under RFRA would be to grant true exemptions. RFRA does not vest the agency with the authority to pick and choose which people of faith are protected.

2. *The ACA Does Not Delegate the Requisite Interpretive Authority.* — Beyond RFRA and the Free Exercise Clause, the ACA itself could have also provided the interpretive authority necessary to craft the accommodation. It didn’t. The rulemaking process¹¹⁹ could not identify a single statutory source of authority to accommodate religious liberty, despite citing to dozens of explicit statutory delegations to the Departments of Treasury,¹²⁰ Labor,¹²¹ and HHS.¹²² But as noted in a brief I coauthored, “in their combined

¹¹⁵ *Id.*

¹¹⁶ Transcript of Oral Argument, *Zubik*, *supra* note 9, at 61.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Certain Preventive Services, *supra* note 97, at 39,892.

¹²⁰ See Cato Institute Brief, *Zubik*, *supra* note 17, at 13; see also 26 U.S.C. §§ 7805, 9833 (2012).

¹²¹ 29 U.S.C. §§ 1002(16), 1027, 1059, 1135, 1161–1169, 1181, 1181 note, 1182–1183, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, 1191c (2012).

¹²² 42 U.S.C. §§ 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082 (2012); 26 U.S.C. § 36B (2012); 31 U.S.C. § 9701 (2012).

nearly 90,000 words, these four-score provisions make absolutely no reference to religion.”¹²³ The Administration cannot point to *any* express or implicit “legislative delegation to [the Departments] on a particular question” of how to balance conscience and contraception.¹²⁴ On a superficial level, the Administration deserves credit for showing an awareness of how the contraceptive mandate would impact people of faith. The awareness of this problem by itself, however, does not manifest an unlimited power to fix it. Stated differently, the ACA does not provide the interpretive authority to pick and choose who would be burdened and who would be burdened less.

“During oral arguments in *Hobby Lobby*, Justice Kennedy was perplexed that the Department of Health and Human Services had exempted certain corporations from the contraceptive mandate — totally apart from any religious objection — but refused to excuse the religiously-inspired craft store.”¹²⁵ “[W]hat kind of constitutional structure do we have,” Justice Kennedy asked the Solicitor General, “if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined?”¹²⁶ He recognized that the nondelegation doctrine was “somewhat moribund insofar as [its] enforcement in this Court.”¹²⁷ But with a “First Amendment issue of this consequence,” he continued, “shouldn’t we indicate that it’s for the Congress, not the agency, to determine” who receives religious exemptions?¹²⁸ Pardon the cliché, but Justice Kennedy is correct.

In the rulemaking process, the Departments conceded that “even if the accommodations were found to impose some minimal burden on eligible organizations,” they were willing to tolerate “such [a] burden” because it “would not be substantial for the purposes of RFRA”¹²⁹ But as the brief I coauthored explained,¹³⁰ the government distinguished between the exemption and the accommodation based on the government’s determination that “houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are *more likely* than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contracep-

¹²³ See Cato Institute Brief, *Zubik*, *supra* note 17, at 13.

¹²⁴ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹²⁵ BLACKMAN, *supra* note 11, at 540; see also Adam J. White, *Kennedy’s Question: How Will the Court Decide Hobby Lobby?*, THE WKLY. STANDARD (Apr. 28, 2014), <http://www.weeklystandard.com/kennedys-question/article/787038> [<https://perma.cc/LEK2-2MCF>].

¹²⁶ White, *supra* note 125.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Certain Preventive Services*, *supra* note 97, at 39,887.

¹³⁰ Cato Institute Brief, *Zubik*, *supra* note 17, at 10.

tive services even if such services were covered under their plan.”¹³¹ In the rulemaking, the Departments explained that employees of these other religious organizations “are *less likely* than individuals in plans of religious employers to share their employer’s . . . faith and objection to contraceptive coverage on religious grounds . . .”¹³² But “[t]his conclusory assertion — the *only* contemporaneous justification for this policy — serves as a testament to how out-of-their-league the Departments [were].”¹³³

Congress has the full wherewithal to draft a statute with an intricate conscience clause, above and beyond what is required by the RFRA and the Free Exercise Clause, though bounded by the Establishment Clause. Critically, Congress can even choose to burden some religionists more than others. If Congress so chose, it could have drafted a conscience clause that treated differently houses of worship, religious charities, and religious universities. Congress could have exempted employees of religious charities — which are legally permitted to hire only their coreligionists¹³⁴ — but not students at religious universities, who are admitted regardless of their faith.¹³⁵ As discussed in the previous section, Congress considered, weighed, and made similarly intricate decisions when crafting a limited peyote exemption. These are difficult line-drawing questions, best reserved for the wisdom of the crowds in Congress — not the homogeneous executive branch, or even worse, the cloistered courts.

To borrow an example used in our amicus brief in *Zubik*, “[i]t would be unthinkable . . . for the Bureau of Prisons to provide kosher meals to Orthodox Jewish prisoners because they are ‘more likely’ to find these meals religiously necessary, but deny them to Reform Jewish prisoners who are ‘less likely’ to adhere to these stringent dietary restrictions.”¹³⁶ An agency does not have “the authority to favor true be-

¹³¹ Certain Preventive Services, *supra* note 97, at 39,887.

¹³² *Id.* (emphasis added).

¹³³ Cato Institute Brief, *Zubik*, *supra* note 17, at 10–11.

¹³⁴ 42 U.S.C. § 2000e-1(a) (2012) (“This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”).

¹³⁵ *Cf.* Transcript of Oral Argument, *Zubik*, *supra* note 9, at 28–29 (“JUSTICE KENNEDY: It’s going to be very difficult for this Court to write an opinion which says that once you have a church organization, you have to treat a religious university the same. I just find that very difficult to write.”).

¹³⁶ Cato Institute Brief, *Zubik*, *supra* note 17, at 15; *see also* United States v. Sec’y, Fla. Dep’t of Corr., No. 12-22958, 2015 WL 1977795, at *14 (S.D. Fla. Apr. 30, 2015), *aff’d*, No. 15-14117, 2016 WL 3770521 (11th Cir. July 14, 2016) (“RLUIPA [the Religious Land Use and Institutionalized Persons Act of 2000] requires consideration of the sincerity of the prisoner’s belief, not whether a particular belief is supported by specific religious law or doctrine.”).

lievers over casual observers — to determine the particular kinds of religiosity which warrants an exemption — but that is exactly what [they have] done here.”¹³⁷ As our *Zubik* amicus brief concluded, “[i]t cannot be the rule of law that houses of worship receive the ‘full’ exemption, while profoundly religious nonprofits . . . receive ‘this sort of skim milk’ accommodation.”¹³⁸

Congress can even provide agencies with bounded authority to make decisions affecting faith. For example, through the individual mandate exemption, Congress delegated to the executive branch the responsibility to determine whether a religious sect actually possesses certain “established tenets” that gave rise to the religious objection.¹³⁹ This inquiry is quite subjective, but Congress spelled out guidelines for an agency to follow.¹⁴⁰ There’s no doubt the agency has such interpretive authority. This did not happen with the “preventive care” mandate.

As our amicus brief in *Zubik* pointed out, several of the lower courts “erred by conflating Congress and the Departments.”¹⁴¹ According to the Tenth Circuit, the regulations in cases like *Zubik* “draw on the tax code’s distinction between houses of worship and religious non-profits, a ‘longstanding and familiar’ distinction in federal law.”¹⁴² Judge Matheson, writing for the court, noted that “*the Government* enjoys some discretion in fashioning religious accommodations.”¹⁴³ “But who is ‘the Government’?”¹⁴⁴ Congress, and not the Treasury Department, wrote the tax exemptions.¹⁴⁵

The tax example also bolsters *Zubik*’s case because Congress provided the exact same tax-exempt status to houses of worship and religious nonprofits. The only distinction is that the former are not required to apply for it, and the latter must submit a simple form.¹⁴⁶ In

¹³⁷ Cato Institute Brief, *Zubik*, *supra* note 17, at 15.

¹³⁸ *Id.* (quoting Transcript of Oral Argument at 71, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), https://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_c18e.pdf [<https://perma.cc/9M2T-XHBD>]).

¹³⁹ 26 U.S.C. § 5000A(d)(2)(A) (2012).

¹⁴⁰ *See id.* (referring to guidelines in 26 U.S.C. § 1402(g)(1)).

¹⁴¹ Cato Institute Brief, *Zubik*, *supra* note 17, at 15.

¹⁴² *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1199 (10th Cir. 2015) (quoting *Priests for Life v. Dep’t Health & Human Servs.*, 772 F.3d 229, 238 (D.C. Cir. 2014)).

¹⁴³ *Id.* at 1200 (emphasis added).

¹⁴⁴ Cato Institute Brief, *Zubik*, *supra* note 17, at 16.

¹⁴⁵ *See Little Sisters*, 794 F.3d at 1200; *see also* Cato Institute Brief, *Zubik*, *supra* note 17, at 16–17.

¹⁴⁶ 26 U.S.C. § 508(a) (2012) (applying to any organization not specified elsewhere in the statute). Compare *Application for Recognition of Exemption*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/application-for-recognition-of-exemption> [<https://perma.cc/ME3F-3YGB>], with INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 3 (2015), <https://www.irs.gov/pub/irs-pdf/p1828.pdf> [<https://perma.cc/ME3F-3YGB>].

the end, Congress treated all religious employers virtually identically for tax-exempt purposes.¹⁴⁷ As our amicus brief noted, “[t]his was not a decision the Treasury Department reached based on its own judgment about the nature of religious organizations and whether they must seek tax-exempt status.”¹⁴⁸ Rather, “it was the elected members of Congress who deliberated and determined that ‘churches, their integrated auxiliaries, and conventions or associations of churches’ would receive an automatic ‘mandatory exception.’”¹⁴⁹ In any event, the Departments here cannot co-opt a regime Congress created for tax exemptions and extend it to the accommodation, without any evidence of congressional intent.

At bottom, the accommodation is *ultra vires*. Neither the ACA, nor RFRA, nor the First Amendment, provides the Executive with the interpretive authority to erect this elaborate regime, wherein some religionists are excused from the mandate, while others are only burdened less. Imagine if Congress had included in the Women’s Health Amendment a provision stating that “the Secretary shall establish religious accommodations he deems necessary for carrying out his authority under the provisions of this chapter.”¹⁵⁰ Such a statute would be politically unthinkable and constitutionally reckless — Congress cannot give a blank check to an agency to make the delicate judgments about balancing religious liberty and public health. Of course, Congress did not include such a sweeping clause in the ACA. But the Administration acted as if it did, and went rogue to unilaterally resolve one of the most “major questions” facing our society.

G. *The Major Question Doctrine*

Under the familiar rule established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁵¹ courts will defer to an agency’s

/Y5S5-FF8J] (“Although churches are not required by law to file an application for exemption, if they choose to do so voluntarily, they’re required to pay the fee for determination.”).

¹⁴⁷ See 26 U.S.C. §§ 508(a), (c)(1)(A) (providing automatic tax exemption for churches and their auxiliaries and stating that any other organization can apply for recognition as a tax-exempt nonprofit).

¹⁴⁸ Cato Institute Brief, *Zubik*, *supra* note 17, at 17.

¹⁴⁹ *Id.* (quoting 26 U.S.C. § 508(c)(1)(A)); see also *United States v. Lee*, 455 U.S. 252, 260 (1982) (“Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system.”).

¹⁵⁰ This is a paraphrase of 8 U.S.C. § 1103(a), which the government relied on to justify DAPA. 8 U.S.C. § 1103(a)(3) (2012) (“He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.”); see also Brief for the Petitioners at 2, *Texas*, 136 S. Ct. 2271 (No. 15-674) [hereinafter Brief for the Petitioners, *Texas*].

¹⁵¹ 467 U.S. 837 (1984).

interpretation of an ambiguous statute, so long as the interpretation is reasonable.¹⁵² In a series of somewhat disjointed cases over the past two decades, the Supreme Court has carved out an important but under-theorized exception to *Chevron*. When a regulation implicates a “major question” the agency is owed no deference.

The Court dialed in the first permutation of the major question doctrine in *MCI Telecommunications Corp. v. AT&T Co.*¹⁵³ This 1994 decision held that the Federal Communications Act did not provide the Federal Communications Commission (FCC) with the authority to make certain “fundamental” changes to a tariff policy.¹⁵⁴ The Court — stressing “the enormous importance to the statutory scheme of the tariff-filing provision” at issue — found that the agency’s interpretation was “much too extensive to be considered a ‘modification.’”¹⁵⁵ Rather, “in reality,” it was “a fundamental revision of the statute.”¹⁵⁶ The change “may be a good idea,” Justice Scalia wrote for the majority, “but it was not the idea Congress enacted into law in 1934.”¹⁵⁷

The Court returned to this *Chevron* carve-out six years later in *FDA v. Brown & Williamson Tobacco Corp.*¹⁵⁸ Here, the Court found that the FDA could not expand its jurisdiction to regulate tobacco as a “drug.”¹⁵⁹ Justice O’Connor’s majority opinion was based on an interpretation of the Food, Drug, and Cosmetic Act “as a whole,”¹⁶⁰ as well as the history of “tobacco-specific legislation.”¹⁶¹ The final portion of her analysis, however, rejected *Chevron*’s normal presumption that “a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”¹⁶² This was “hardly an ordinary case,” Justice O’Connor observed.¹⁶³ Her analysis relied on tobacco’s “unique political history,” combined with the FDA’s longstanding “representations to Congress” that it could not regulate the product.¹⁶⁴

¹⁵² *Id.* at 845.

¹⁵³ 512 U.S. 218 (1994).

¹⁵⁴ *Id.* at 228–29.

¹⁵⁵ *Id.* at 231.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 232.

¹⁵⁸ 529 U.S. 120 (2000).

¹⁵⁹ *See id.* at 131–33.

¹⁶⁰ *Id.* at 133.

¹⁶¹ *Id.* at 149.

¹⁶² *Id.* at 159 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

¹⁶³ *Id.*

¹⁶⁴ *Id.*; *see also id.* at 144 (“In adopting each statute, Congress has acted against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer.”).

The Court also cited a 1986 article authored by then-Judge Stephen Breyer. “Congress is more likely to have focused upon, and answered, *major questions*,” the former administrative law professor wrote, “while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”¹⁶⁵ Regulations that resolve *major questions* in “extraordinary cases,” Justice O’Connor explained, should give courts “reason to hesitate before concluding that Congress has intended such an implicit delegation.”¹⁶⁶ As a result, the Court was “obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.”¹⁶⁷ Recalling the Court’s decision six years earlier in *MCI*, Justice O’Connor was “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹⁶⁸

One year later, the Court elaborated on *MCI* and *Brown & Williamson* in *Whitman v. American Trucking Ass’ns*.¹⁶⁹ The case considered whether the Clean Air Act delegated to the EPA the authority to revise air quality standards at a level “requisite to protect the public health.”¹⁷⁰ Writing for the majority, Justice Scalia found that for the EPA to take such a far-reaching action, the “textual commitment must be a clear one.”¹⁷¹ Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions,” the Court concluded.¹⁷² “[I]t does not, one might say, hide elephants in mouseholes.”¹⁷³ Though not explicitly an application of the major question exception, the elephants-in-mouseholes doctrine added another layer to the *MCI/Brown & Williamson* framework.¹⁷⁴

In 2003, the EPA relied on the major question doctrine to conclude that it lacked the authority to regulate greenhouse gas emissions under the Clean Air Act.¹⁷⁵ In *Massachusetts v. EPA*,¹⁷⁶ the Court disagreed,

¹⁶⁵ *Id.* at 159 (emphasis added) (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 160.

¹⁶⁸ *Id.*

¹⁶⁹ 531 U.S. 457 (2001).

¹⁷⁰ *See id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2012)).

¹⁷¹ *Id.* at 468.

¹⁷² *Id.*

¹⁷³ *Id.* (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); *Brown & Williamson*, 529 U.S. at 159–60).

¹⁷⁴ Jacob Loshin and Aaron Nielson have referred to the elephants-in-mouseholes test as an “*intermediate doctrine*” for a “particular subset of nondelegation cases” to ascertain if “the proffered interpretation greatly expands agency authority on the basis of minor statutory authorization.” Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 61–62 (2010).

¹⁷⁵ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003) (“[T]he [Clean Air Act] cannot be interpreted to authorize such regulation in the

finding that the agency's reliance on *Brown & Williamson* was "misplaced."¹⁷⁷ However, the Court's "strained" efforts to distinguish the two cases suggest that the majority in *Massachusetts* simply disregarded the doctrine.¹⁷⁸ Professor Abigail Moncrieff wrote that *Massachusetts* "unceremoniously killed" off the major question doctrine.¹⁷⁹ The reports of the exception's death, however, were greatly exaggerated.

In the 2014 decision in *Utility Air Regulatory Group v. EPA*¹⁸⁰ (*UARG*), the Court breathed new life into the major question doctrine. This follow-up case to *Massachusetts* considered if the agency could regulate stationary sources that emit greenhouse gases in addition to mobile sources.¹⁸¹ Justice Scalia, writing for the majority, found that the EPA's interpretation that it could regulate stationary sources that emit greenhouse gases was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."¹⁸² The Court added a skeptical gloss to its holding in *Brown & Williamson* when a new power is allegedly found in an old statute: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."¹⁸³ Further, the Court noted the background expectation — established in *MCI*, among other cases — that Congress will "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"¹⁸⁴ The EPA's proposed rule, which would regulate "millions" of stationary sources, "falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."¹⁸⁵

One year later, the Court revisited the major question doctrine in *King v. Burwell*.¹⁸⁶ This case resolved the question of whether Section 36B, which provides subsidies on "an Exchange established by the

absence of any direct or even indirect indication of congressional intent to provide such authority. EPA is urged on in this view by the Supreme Court's decision in *Brown & Williamson . . .*" (emphasis added)).

¹⁷⁶ 549 U.S. 497 (2007).

¹⁷⁷ *Id.* at 530.

¹⁷⁸ See Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2199 (2016).

¹⁷⁹ Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 598 (2008). *But see* Loshin & Nielson, *supra* note 174, at 63 n.266 ("This is not necessarily true, if *Massachusetts* is seen as a non-mousehole case and thus distinguishable from *Brown & Williamson*.").

¹⁸⁰ 134 S. Ct. 2427 (2014).

¹⁸¹ See *id.* at 2438.

¹⁸² *Id.* at 2444.

¹⁸³ *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹⁸⁴ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 161).

¹⁸⁵ *Id.*

¹⁸⁶ 135 S. Ct. 2480 (2015).

State under [42 U.S.C. § 18031],” permitted the payment of subsidies on exchanges established by the federal government.¹⁸⁷ Three circuit court judges and two district court judges suggested that the phrase “established by the State” was ambiguous and under the Court’s two-step *Chevron* framework, deferred to the government’s “reasonable” interpretation.¹⁸⁸ (One circuit judge found that the statute unambiguously provided subsidies in the federal exchange;¹⁸⁹ two ruled against the government altogether.¹⁹⁰)

The Chief Justice’s majority opinion quickly dispatched this deference argument because “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”¹⁹¹ *King* was “one of those cases,” the Chief wrote, where the traditional *Chevron* framework would not apply.¹⁹² “The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people.”¹⁹³ The availability of the credits on the federal exchanges was a *major question* of “*deep* ‘economic and political significance’ that was central to this statutory scheme.”¹⁹⁴ The modifier “*deep*” was grafted onto the test from *Brown & Williamson*.¹⁹⁵ If Congress had intended for the IRS to have this authority to grant tax credits, “it surely would have done so expressly.”¹⁹⁶

The Court then added yet another layer to the major question doctrine, finding that “it is especially unlikely that Congress would have delegated this decision to the IRS, which has no *expertise* in crafting health insurance policy of this sort.”¹⁹⁷ The Chief Justice stated simply, “[t]his is not a case for the IRS.”¹⁹⁸ This analysis of the agency’s expertise was based on an earlier decision that perhaps warrants inclusion in the major question canon.¹⁹⁹ In *Gonzales v. Oregon*,²⁰⁰ the Justices rejected the Attorney General’s decision to regulate the drugs

¹⁸⁷ See *id.* at 2488 (citing 26 U.S.C. §§ 36B(b)(2)(A), (c)(2)(A)(i) (2012)).

¹⁸⁸ See *King v. Burwell*, 759 F.3d 358, 363 (4th Cir. 2014); *Halbig v. Burwell*, 758 F.3d 390, 412 (D.C. Cir. 2014) (Edwards, J., dissenting).

¹⁸⁹ See *King*, 759 F.3d at 376–77 (Davis, J., concurring); *King v. Sebelius*, 997 F. Supp. 2d 415, 431–32 (E.D. Va. 2014); *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 25 (D.D.C. 2014).

¹⁹⁰ See *Halbig*, 758 F.3d at 394.

¹⁹¹ *King*, 135 S. Ct. at 2488–89 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹⁹² *Id.* at 2489.

¹⁹³ *Id.*

¹⁹⁴ *Id.* (emphasis added) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 2427, 2444 (2014)).

¹⁹⁵ See *id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (second emphasis added) (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)).

¹⁹⁸ *Id.*

¹⁹⁹ See Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 763–64 (2007) (treating *Gonzales* and *Brown & Williamson* as alike in this respect).

²⁰⁰ 546 U.S. 243 (2006).

used by physicians under Oregon’s assisted-suicide law.²⁰¹ The Court rebuffed the Attorney General’s assertion of “authority to make quintessentially medical judgments.”²⁰² Justice Kennedy, writing for the majority, concluded that the Controlled Substances Act “conveys [an] unwillingness to cede medical judgments to” the Attorney General, “who lacks medical expertise.”²⁰³ The delegation was “all the more suspect,” Justice Kennedy observed,²⁰⁴ because of the “earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”²⁰⁵ (Justice Kennedy has been in the majority of each major question doctrine case.²⁰⁶)

H. Major Questions of Faith

The Court’s major question jurisprudence “has never been justified by any coherent rationale.”²⁰⁷ The Supreme Court’s staggered approach to this doctrine has yielded three leading scholarly critiques. First, drawing the line between major and minor questions — whatever those are — gives rise to administrability problems.²⁰⁸ Second, Congress may willingly acquiesce to a cryptic delegation of transformative powers, perhaps to shirk responsibility.²⁰⁹ Third, courts rejecting the judgments of expert administrative agencies undermine political accountability.²¹⁰ However, the history of the religious accommodation in *Zubik* provides a powerful rejoinder to these criticisms. The justifications for this exception become even stronger in our gridlocked political environment, as the Executive takes action Congress would not.

1. Administrability. — The Supreme Court has never fully clarified when the major question doctrine applies.²¹¹ Or to be more precise, the Justices have never given guidance about how to administer

²⁰¹ See *id.* at 274–75.

²⁰² *Id.* at 267.

²⁰³ *Id.* at 266.

²⁰⁴ *Id.* at 267–68.

²⁰⁵ *Id.* at 249 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

²⁰⁶ See *King v. Burwell*, 135 S. Ct. 2480, 2484 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2432 (2014); *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007); *Gonzalez*, 546 U.S. at 247; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 219 (1994).

²⁰⁷ Note, *supra* note 178, at 2197.

²⁰⁸ See Moncrieff, *supra* note 179, at 611–13.

²⁰⁹ See Loshin & Nielson, *supra* note 174, at 63.

²¹⁰ See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223.

²¹¹ See Moncrieff, *supra* note 179, at 612 (“[A] bare majorness line does not provide an administrable rule of decision for future cases because there is no principled difference between a major question and a minor one.”); Manning, *supra* note 210, at 258 (“The administrability problem arises because there is no reliable metric for identifying a constitutionally excessive delegation.”).

the “line between rodent and pachyderm.”²¹² The case law suggests at least nine factors, none dispositive, to determine if a decision is major: when an agency, lacking the requisite “expertise,”²¹³ relies on an “unheralded power”²¹⁴ that was “cryptic[ally]”²¹⁵ delegated through “vague terms or ancillary provisions,”²¹⁶ to effect a “transformative expansion”²¹⁷ and “fundamental revision”²¹⁸ of a law with a “unique political history”²¹⁹ that is of “enormous importance”²²⁰ and “deep ‘economic and political significance.’”²²¹ Not exactly a model of clarity.

Despite these uncertainties, the *majorness* of the question at issue in *Zubik* is entirely beyond question. Long before *MCI* and *Brown & Williamson*, the Court recognized that Congress does not cryptically delegate to agencies unbounded discretion to burden constitutional rights. *Kent v. Dulles*²²² from 1958 is instructive. In this Cold War-era case, the Secretary of State promulgated regulations that would deny passports to suspected Communists.²²³ This interpretation was premised on a fairly anodyne statutory authority to “grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States.”²²⁴ The Court invalidated the regulation. “Since we start with an exercise by an American citizen of an activity included in constitutional protection,” that is, the right to travel, Justice Douglas observed, “we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it.”²²⁵ This “liberty” interest can be regulated only “pursuant to the law-making functions of the Congress,”²²⁶ through a delegation that “must be adequate to pass scrutiny by the accepted tests.”²²⁷ The Court was “hesita[nt] to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.”²²⁸

I concede there are reasonable doubts about the *majorness* of questions concerning tariffs in *MCI*, tobacco in *Brown & Williamson*, mo-

²¹² Loshin & Nielson, *supra* note 174, at 65.

²¹³ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

²¹⁴ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

²¹⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

²¹⁶ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

²¹⁷ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

²¹⁸ *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

²¹⁹ *Brown & Williamson*, 529 U.S. at 159.

²²⁰ *MCI*, 512 U.S. at 231.

²²¹ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444).

²²² 357 U.S. 116 (1958).

²²³ *Id.* at 117 & n.1, 118.

²²⁴ *Id.* at 123 (quoting Passport Act, ch. 772, 44 Stat. 887 (1926)).

²²⁵ *Id.* at 129.

²²⁶ *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

²²⁷ *Id.* (citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420–30 (1935)).

²²⁸ *Id.*

bile emission sources in *UARG*, and tax credits in *King*. But the principles of free exercise, enshrined in the First Amendment and RFRA, are of the highest order of magnitude. In *Brown & Williamson*, the Court recognized that “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation.”²²⁹ This is such a case. Surely religious freedom is more important to Congress — and to the nation as a whole — than the regulation of snuff. If an exception to *Chevron* exists for major questions, the accommodation must qualify.

2. *Acquiescence*. — The major question doctrine has also been criticized for political naïveté. It isn’t self-evident that Congress would not “alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions” in order to empower agencies.²³⁰ Jacob Loshin and Aaron Nielson countered that this principle “is premised more in normative aspiration than legislative reality,” as “the legislative process is complicated.”²³¹ In “the rough-and-tumble of democratic politics,” they write, “it is not at all unthinkable” for Congress to hide an elephant in a mousehole, “if only the Court will let it.”²³² Indeed, tacit delegations could be a deliberate decision to effect a massive change without shouldering the electoral blame for any negative consequences. That is, members of Congress may willingly acquiesce to passing open-ended statutes, knowing full well the agency will take a specific action.²³³

Descriptively, Loshin and Nielson are correct that certain members of Congress do want to “alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”²³⁴ Arguably, this is what happened with the Women’s Health Amendment. Senator Mikulski steadfastly refused to clarify in the text of the statute what would, and would not, be covered by “preventive care.” Senator Mikulski and the other members of her caucus were content to write the Obama Administration a blank check to make the difficult and unpopular decisions Congress could not. This approach shirks responsibility and has only upside for the senators: they can take credit when the agency does what they like, and blame the agency if there is political fallout.

²²⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

²³⁰ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

²³¹ Loshin & Nielson, *supra* note 174, at 63.

²³² *Id.*

²³³ Manning, *supra* note 210, at 250–51 (“Statutory breadth may mean that the legislative majority wished to leave the statute’s precise application to future resolution, that contending forces could not agree on a more precise expression of policy, or that legislators simply did not foresee all the implications of the text they adopted.”).

²³⁴ *Whitman*, 531 U.S. at 468.

Normatively, however, the Court's presumption is still warranted because of how these sorts of major decisions evade scrutiny. In his dissent in *Brown & Williamson*, Justice Breyer cited *Kent v. Dulles* as support for a possible "background canon of interpretation."²³⁵ When courts "interpret[] statutes, [they] should assume in close cases that a decision with 'enormous social consequences,' . . . should be made by democratically elected Members of Congress rather than by unelected agency administrators."²³⁶ Such a canon did not control in *Brown & Williamson*, Justice Breyer explained, because this "important, conspicuous, and controversial" decision could not "escape the kind of public scrutiny that is essential in any democracy."²³⁷ But when members of Congress quietly and tacitly allow agencies to resolve significant social policy questions — as with the Women's Health Amendment — "public scrutiny" is thwarted.

The aftermath of the Women's Health Amendment suggests that Justice Breyer's proposed canon applies here. According to *The New York Times*, "the Senate approved an amendment to its health care legislation that would require insurance companies to offer free mammograms and other preventive services to women."²³⁸ The article did not discuss whether the provision mandated emergency contraception coverage. Likewise, the *Catholic Exchange* addressed only the fact that "[p]ro-life leaders opposed the amendment over concerns that it provides authority that could be used to mandate abortion coverage in private insurance plans."²³⁹ Here too, the article did not discuss whether the provision mandated emergency contraception coverage. Even the National Organization for Women, which generally champions expansion of contraception coverage, said nothing about how this provision could be interpreted. The group's statement focused only on how the law would mandate coverage for "mammograms and cervical cancer screenings."²⁴⁰ As I noted elsewhere, "[o]utside the congressional record, I could not find a single contemporaneous discussion of a

²³⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting).

²³⁶ *Id.* (quoting *Regulation of Tobacco Products (Part I): Hearings Before the Subcomm. on Health & the Env't of the H. Comm. on Energy & Commerce*, 103d Cong. 69 (1994) (statement of David A. Kessler, Comm'r, FDA)).

²³⁷ *Id.* at 190–91.

²³⁸ Herszenhorn & Pear, *supra* note 73.

²³⁹ John J. Miller, *Senate Passes Amendment that Could Mandate Abortion Coverage in Insurance Plans*, CATH. EXCHANGE (Dec. 4, 2009), <http://catholicexchange.com/senate-passes-amendment-that-could-mandate-abortion-coverage-in-insurance-plans> [https://perma.cc/X4PZ-SG4Q].

²⁴⁰ Press Release, Terry O'Neill, President, Nat'l Org. for Women, Senator Mikulski's Women's Health Amendment Is an Important Improvement to the Senate Health Care Reform Bill (Dec. 1, 2009), <http://now.org/media-center/press-release/senator-mikulskis-womens-health-amendment-is-an-important-improvement-to-the-senate-health-care-reform-bill> [https://perma.cc/Z53C-5ZMP].

mandate for ‘family planning,’ let alone an employer mandate to provide emergency contraception.”²⁴¹ There was *absolutely nothing* reported about giving HHS the authority to decide which religious organizations would be subject to this requirement.

Even if Congress is willing to defer to an expert agency about the scope of “preventive care,” it cannot be presumed to stealthily delegate *carte blanche* to pick and choose which religious groups will not be burdened and which will be burdened only a bit. The Women’s Health Amendment vested HHS with authority over the “interstitial matters” of what constitutes preventive care, without addressing the “major questions” of how religious objectors should be accommodated.²⁴² Through the bifurcation of different religious organizations, the agency is “laying claim to [an] extravagant statutory power” affecting fundamental religious liberties — a power that the ACA “is not designed to grant.”²⁴³

Further, neither the express delegation to interpret “preventive care,”²⁴⁴ nor the ACA’s broad purposes of improving “public health” and “gender equality,” can be used to justify a great substantive and independent power over free exercise.²⁴⁵ The Court’s framework in *Gonzales* would yield a similar result for *Hobby Lobby*: “[t]he idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation in the” broad purposes of the ACA “is not sustainable.”²⁴⁶ The narrow source of their statutory authority — which offers no religious exemptions for providing “preventive care” — could not hide a mouse, let alone the nationwide debate over religious liberty.²⁴⁷ If “Congress wished to assign that question to an agency, it surely would have done so expressly.”²⁴⁸

Supporters of the mandate may contend that no discussion was necessary because nearly thirty states had already imposed a contraceptive mandate, and this was an uncontroversial change. But this argument fails to recognize that ERISA’s preemption created a nationwide self-insurance safe harbor from state-law mandates. In addition to total legislative silence about religious accommodations, the de-

²⁴¹ BLACKMAN, *supra* note 11, at 48.

²⁴² Breyer, *supra* note 165, at 370 (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”).

²⁴³ Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014); see Cato Institute Brief, *Zubik*, *supra* note 17, at 31.

²⁴⁴ Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014).

²⁴⁵ *Id.* at 2779.

²⁴⁶ *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

²⁴⁷ Cato Institute Brief, *Zubik*, *supra* note 17, at 32.

²⁴⁸ King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

bates over the amendment nowhere alluded to the fact that it would eliminate this exemption, which religious organizations nationwide had come to rely on. This was a radical change to an important regulatory structure affecting religious liberty that went utterly unnoticed. In light of the massive outrage after the announcement of the mandate, “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”²⁴⁹

Although some senators expressed general concern over abortion payments,²⁵⁰ the legislative debate over the ACA’s “preventive care” mandate reveals no concrete awareness that a contraceptive mandate would so directly burden free exercise — in contrast with the debates over the individual mandate. Congress’s silence in the ACA demonstrates that Congress did not intend for the agencies to exercise such an awesome power. The ACA should be so read.

This concern is particularly heightened in a gridlocked government, where specific members of Congress have extra incentives to obfuscate and hide from the public the tacit import of their monumental delegations. If a polarized Congress is unable to figure out how to define religious accommodations, it has no business imposing a contraceptive mandate in the first place. But the fact that Congress was able to come to a specific compromise over the individual mandate suggests this task was feasible. Perhaps Congress would have offered to provide free contraception on the ACA exchanges, or reimburse insurers directly without *any* involvement from the employer. As it turned out, the latter is roughly the sort of compromise reached after several rounds of litigation and rulemaking. It is true that these approaches may not have expanded coverage as “seamlessly” as Senator Mikulski would have wanted. But that’s the nature of the arduous legislative process the framers crafted — a process that cannot be bypassed, even in the case of gridlock.²⁵¹

3. *Accountability.* — Professor John Manning identified the major question doctrine employed in *Brown & Williamson* as a canon of avoidance for the nondelegation doctrine.²⁵² The Court will uphold a statutory delegation so long as it provides an “intelligible principle to

²⁴⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see also* *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination . . . to agency discretion . . . through such a subtle device.”).

²⁵⁰ *See supra* notes 73–82 and accompanying text.

²⁵¹ *See infra* section II.F, pp. 298–303.

²⁵² Manning, *supra* note 210, at 227; *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (enumerating several examples of canons of construction that contain nondelegation principles).

which the [agency] . . . is directed to conform.”²⁵³ Despite the doctrine’s hovering between “moribund”²⁵⁴ and “interred”²⁵⁵ — no law has been invalidated under this principle since the New Deal²⁵⁶ — concerns about unlawful delegations remain. Justice Thomas was frank enough to admit that there are still “cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”²⁵⁷ Several of his colleagues no doubt agree, but rather than finding an unlawful delegation, they instead narrowly construe an agency’s authority.²⁵⁸ The effect is the same — the agency cannot do what it planned to do — but the statute remains on the books.

Manning explains that this approach — ostensibly supported by norms of democratic accountability — has it backwards: “If the nondelegation doctrine seeks to promote legislative responsibility for policy choices and to safeguard the process of bicameralism and presentment,” he writes, “it is odd for the judiciary to implement it through a technique that asserts the prerogative to alter a statute’s conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process.”²⁵⁹ Moving the inquiry from “judicial review” when enforcing the nondelegation doctrine “to avoidance does not eliminate the difficulties in judicial line-drawing; it simply moves the line.”²⁶⁰

Moncrieff offers a qualified defense of the major question doctrine. Viewing this as a “doctrine of noninterference,” she writes, the Court can referee and “oversee[] a complex game of political bargaining and prevent[] costly intermeddling between political institutions.”²⁶¹ For example, in *MCI* the Court was sending a message that the FCC “should allow Congress to address deregulation because the Legisla-

²⁵³ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

²⁵⁴ See Transcript of Oral Argument, *Hobby Lobby*, *supra* note 93, at 56.

²⁵⁵ See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (“We hope to lay the doctrine to rest once and for all, in an unmarked grave.”).

²⁵⁶ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

²⁵⁷ *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

²⁵⁸ See *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“[W]e long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.” (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892))).

²⁵⁹ Manning, *supra* note 210, at 224.

²⁶⁰ *Id.* at 258; see also Note, *supra* note 178, at 2208 (“Perhaps it is exaggerating to compare *King*’s rendition of the major question exception to the notorious Chancellor’s Foot standard. But if the point of *Chevron* is to restrain the courts in a certain domain, the major question exception effectively arrogates significant power right back.” (footnotes omitted)).

²⁶¹ Moncrieff, *supra* note 179, at 597.

ture had already entered the debate.”²⁶² In other words, Moncrieff points out, “the court seemingly held that active congressional bargaining and deliberation should be allowed to continue,” and that the FCC cannot short-circuit that process through instituting a rulemaking.²⁶³ This modest approach does not require judges to evaluate the “majorness” of a policy, but only the “agency’s perceptible interference with a specific congressional bargain.”²⁶⁴ Still, Moncrieff acknowledges that the “greatest challenge” remains “distinguishing serious congressional deliberation from strategic congressional posturing.”²⁶⁵ She warns that this doctrine could be exploited by Congress to use “meaningless debate” as a “tool for blocking executive policymaking.”²⁶⁶ Rather, the purpose of the doctrine is to identify “sincere deliberation” to “prevent the Executive from interfering with ongoing and serious congressional policymaking.”²⁶⁷

Professor Lisa Bressman offers a stronger defense of the major question doctrine. She explains that the Court applied the exception in *Brown & Williamson* and *Gonzales* because the executive branch, “although electorally accountable, had interpreted broad delegations in ways that were undemocratic when viewed in the larger legal and social contexts.”²⁶⁸ In the former case, the FDA took action “that the current Congress likely opposed.”²⁶⁹ In the latter, the Attorney General took “a position on an issue that the people actively were debating, without involving or ascertaining the views of the public.”²⁷⁰ The Court intervened, Bressman explains, “to ensure accountability, or at least the promise of representative and responsive government for which accountability stands.”²⁷¹ Under this view, an agency “may not issue a rule knowing that Congress opposes its substance and would need supermajority support to reverse it, assuming a presidential ve-

²⁶² *Id.* at 623.

²⁶³ *Id.*

²⁶⁴ *Id.* at 633–34; see Manning, *supra* note 210, at 241 (“[T]he Court’s reluctance to invalidate statutes on the basis of the nondelegation doctrine reflects serious concerns about its own competence to draw appropriate lines between permissible and impermissible delegations.”); see also Loshin & Nielson, *supra* note 174, at 65 (“Indeed, problems of judicial administration similar to those that plague the nondelegation doctrine also afflict its more evanescent proxy, as there is no consistent way to determine when the doctrine should apply.”).

²⁶⁵ Moncrieff, *supra* note 179, at 642.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Bressman, *supra* note 199, at 764.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

to.”²⁷² Nor may it “resolve a politically charged issue essentially by fiat, knowing that the people presently are engaged in active debate.”²⁷³

Bressman addresses the “political accountability” line-drawing issues by adopting a “functional” approach that examines “current legal and social contexts”²⁷⁴ to ascertain the “backdrop” against which the agency acted.²⁷⁵ Courts can identify certain “accountability danger signals” to determine if an administration “has acted without regard to its continuous commitment to accountable government.”²⁷⁶ For example, judges can ascertain if “Congress or the public disfavors the administration’s resolution,” or if the “administration acted for opportunistic rather than public-regarding reasons.”²⁷⁷ However, Bressman concedes the difficulty of this approach, which potentially entails reading the administration’s mind.²⁷⁸

With *Zubik*, the conventional concerns about democratic accountability are reversed. As discussed in the previous section, there was no “compromise” reached by the legislative process. Congress was silent. This silence is not inherently problematic, as Congress may decide to ask an expert agency to figure out the details of a complex regulatory regime. Assigning HHS the task of deciding what should be covered by “preventive care” was a perfectly reasonable delegation. But that’s where the legitimacy stops.

The accommodation was promulgated by HHS, along with the Departments of Treasury and Labor, which jointly have jurisdiction over ERISA.²⁷⁹ As the Supreme Court has observed about government departments in other contexts, these agencies “ha[ve] no expertise,” whatsoever, in crafting regulations to protect free exercise.²⁸⁰ As I’ve noted elsewhere, “[t]he fact that the rulemaking here was premised not on health, financial, or labor-related criteria, but on subjective determinations of which employees more closely adhere to their employers’ religious views, ‘confirms that the authority claimed by’” the agencies is “both beyond [their] expertise and incongruous with the statutory purposes and design.”²⁸¹

In *MCI*, the FCC had expertise in setting telecommunication tariffs. In *Brown & Williamson*, the FDA had expertise in regulating

²⁷² *Id.* at 765.

²⁷³ *Id.*

²⁷⁴ *Id.* at 779.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 782.

²⁷⁷ *Id.* at 782–83.

²⁷⁸ *Id.* at 784.

²⁷⁹ See Certain Preventive Services, *supra* note 97, at 39,892.

²⁸⁰ King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

²⁸¹ Cato Institute Brief, *Zubik*, *supra* note 17, at 21–22 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

various drugs. In *UARG*, the EPA had expertise in regulating greenhouse gasses. And in *King*, I would concede that the IRS had expertise in managing tax credits. However, if the IRS lacked the “expertise” to reinterpret Section 36B, it is *beyond question* that HHS, Labor, and Treasury could not concoct an ever-changing series of accommodations, picking and choosing which religious groups have their burden on free exercise reduced. “Deciding which religious groups should and should not be exempt from the contraceptive mandate,” I’ve noted, “and how others should be accommodated, was simply ‘not a case’ for HHS, Labor, and Treasury.”²⁸² It is generally the case that a judicial invalidation of a regulation usurps the political process. Here, a vacatur of the accommodation would return a difficult decision to Congress, one that it should have made in the first instance.

* * *

Solicitor General Donald Verrilli, Jr., was surprised at the contentious reaction to the *Zubik* litigation.²⁸³ “There’s a lot of ferment out there,” he said.²⁸⁴ “More than I had anticipated.”²⁸⁵ Verrilli observed that “the accommodation the government is trying to work out to provide contraceptive coverage to employees of religious nonprofits seems like it’s a big effort to respect religion and to respect the employee’s health.”²⁸⁶ That it has “drawn such sharp criticism . . . personally surprises me.”²⁸⁷ From Verrilli’s perspective, the executive branch was “working very hard in these circumstances to try and find a way that protects religious exercise, religious liberty, and protects the rights of employees.”²⁸⁸ No doubt the Administration was well-meaning in its determinations, but this was a judgment that should have been made by the wisdom of the crowds in the legislature, and not the monolithic Executive.

I. *Zubik’s Compromise*

What happened in *Zubik v. Burwell* is complicated. Following the conclusion of arguments, the eight Justices seemed evenly divided.²⁸⁹

²⁸² *Id.* at 32 (quoting *King*, 135 S. Ct. at 2489 (“This is not a case for the IRS.”)).

²⁸³ See Tony Mauro & Marcia Coyle, *Cases and Controversies: Verrilli on Privacy, Voting Rights and Doing Penance*, NAT’L L.J.: SUP. CT. BRIEF (June 27, 2016), <http://www.nationallawjournal.com/supremecourtbrief/id=1202761092924/Cases-and-Controversies-Verrilli-on-Privacy-Voting-Rights-and-Doing-Penance> [https://perma.cc/7D4T-EZ9E].

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ BLACKMAN, *supra* note 11, at 521.

During the hearing, Justice Breyer in particular expressed concern about how best to draw the line “between those things that we do require people to do despite their religious objection and those things that we don’t.”²⁹⁰ The Solicitor General answered that “no line is perfect, and I’m sure this line isn’t perfect But the line is a valid line.”²⁹¹ During his rebuttal, Paul Clement replied: “Now, my friend on the other side says the line doesn’t have to be perfect. Well, under [the RFRA test], it at least has to be pretty good. And the line that they have drawn here is absurd”²⁹² These are the tough questions, best resolved by the legislative process.

Despite this division, a 4-4 vote would have been untenable due to the circuit split. Eight circuits had ruled for the federal government, while the Eighth Circuit had ruled for the plaintiffs.²⁹³ If the Court had affirmed by an equally divided margin, the circuit split would persist. As a result, the religious employers in some states would have been subject to the mandate, but those in other states would be exempt. This outcome would have created massive confusion and an inconsistent application of federal law. So the Justices tried something else.

Three days after arguments, the Court assigned what I’ve referred to as “some unexpected homework”²⁹⁴:

The parties are directed to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioners’ employees through petitioners’ insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees.²⁹⁵

The purpose of this supplemental briefing was to determine if there was some alternate way that the insurers could provide the contraceptive coverage, without a formal objection from the religious employer. The Court stressed that “such coverage [would not be] paid for by petitioners and [would not be] provided *through* petitioners’ health plan.”²⁹⁶ In any event, the Court was open to other suggestions. “The parties may address other proposals along similar lines,” the order

²⁹⁰ Transcript of Oral Argument, *Zubik*, *supra* note 9, at 39.

²⁹¹ *Id.* at 68.

²⁹² *Id.* at 87.

²⁹³ See Timothy Jost, *Eleventh Circuit Upholds Religious Accommodation on Contraceptive Coverage*, HEALTH AFF. BLOG (Feb. 19, 2016), <http://healthaffairs.org/blog/2016/02/19/eleventh-circuit-upholds-religious-accommodation-on-contraceptive-coverage/> [<https://perma.cc/63SV-FHGQ>].

²⁹⁴ BLACKMAN, *supra* note 11, at 522.

²⁹⁵ *Zubik v. Burwell*, No. 14-1418, 2016 WL 1203818 (U.S. March 29, 2016).

²⁹⁶ *Id.* (emphasis added).

stated, “avoiding repetition of discussion in prior briefing.”²⁹⁷ This order was simply “unprecedented.”²⁹⁸ The Court has requested supplemental briefing only twenty-eight times over the last three decades.²⁹⁹ While previous requests for more briefing were premised on new developments in the case, “the *Zubik* order was a product of the Justices’ own agitation.”³⁰⁰

The plaintiffs and the government filed supplemental briefs, both suggesting that the proposal would not resolve a significant disagreement between them. The plaintiffs insisted that the contraceptives be provided through “separate” plans,³⁰¹ and the government insisted that the same plan be used for seamless coverage.³⁰²

How did the Justices resolve this dilemma? By pretending it didn’t exist. On May 16, the Court issued an 822-word order vacating the lower courts’ decisions. The opinion observed that, “[f]ollowing oral argument, the Court requested supplemental briefing from the parties addressing ‘whether contraceptive coverage could be provided to petitioners’ employees, through petitioners’ insurance companies, without any such notice from petitioners.’”³⁰³ The petitioners and respondents “now confirm that such an option is feasible.”³⁰⁴ The nonprofits, the Court explained, “have clarified that their religious exercise is not infringed where they ‘need to do nothing more than contract for a plan

²⁹⁷ *Id.*

²⁹⁸ BLACKMAN, *supra* note 11, at 523.

²⁹⁹ *Id.* at 522. “[E]ight cases were rescheduled for argument the following term.” *Id.*; see *Johnson v. United States*, 135 S. Ct. 939 (2015); *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012); *Citizens United v. FEC*, 557 U.S. 932 (2009); *Vt. Agency of Nat. Res. v. United States*, 528 U.S. 1015 (1999); *Slack v. McDaniel*, 528 U.S. 949 (1999); *Reno v. Bossier Par. Sch. Bd.*, 527 U.S. 1033 (1999); *Price v. Bossier Par. Sch. Bd.*, 527 U.S. 1033 (1999); *Kungys v. United States*, 483 U.S. 1017 (1987). “[I]n nine cases additional briefing was requested before the case was argued.” BLACKMAN, *supra* note 11, at 522; see *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 444 (2015); *Wittman v. Personhuballah*, 136 S. Ct. 25 (2015); *Christeson v. Roper*, 135 S. Ct. 14 (2014); *Panetti v. Quarterman*, 549 U.S. 1320 (2007); *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 542 U.S. 963 (2004); *Abdur’Rahman v. Bell*, 537 U.S. 996 (2002); *Ford Motor Co. v. McCauley*, 536 U.S. 987 (2002); *Swint v. Chambers Cty. Comm’n*, 513 U.S. 958 (1994); *Hartigan v. Zbaraz*, 481 U.S. 1008 (1987). “In eleven cases additional briefing was requested after the case was argued.” BLACKMAN, *supra* note 11, at 522–23; see *Zubik*, 2016 WL 1203818; *Douglas v. Indep. Living Ctr.*, 132 S. Ct. 546 (2011); *New Process Steel, L.P. v. NLRB*, 559 U.S. 1059 (2010); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 556 U.S. 1219 (2009); *Montejo v. Louisiana*, 556 U.S. 1150 (2009); *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 990 (2008); *Dada v. Mukasey*, 552 U.S. 1138 (2008); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 1035 (2007); *United States v. Resendiz-Ponce*, 549 U.S. 974 (2006); *Whitman v. Dep’t of Transp.*, 547 U.S. 1124 (2006); *W. Air Lines, Inc. v. Bd. of Equalization*, 479 U.S. 958 (1986).

³⁰⁰ BLACKMAN, *supra* note 11, at 523.

³⁰¹ Supplemental Brief for Petitioners at 1, *Zubik*, 136 S. Ct. 1557 (No. 14-1418).

³⁰² Supplemental Brief for Respondents at 15, *Zubik*, 136 S. Ct. 1557 (No. 14-1418).

³⁰³ *Zubik*, 136 S. Ct. at 1559–60 (citation omitted).

³⁰⁴ *Id.* at 1560.

that does not include coverage for some or all forms of contraception,’ even if their employees receive cost-free contraceptive coverage from the same insurance company.”³⁰⁵ Further, the government “has confirmed that the challenged procedures ‘for employers with insured plans could be modified to operate in the manner posited in the Court’s order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.”³⁰⁶ The Court suggested that a compromise could be worked out following the vacate-and-remand.³⁰⁷ A remand was appropriate, the Court explained, because it is “more suitable than addressing the significantly clarified views of the parties in the first instance.”³⁰⁸ As I noted elsewhere, the “decision scrounged together three cases to demonstrate that ‘this Court has taken similar action in other cases in the past.’”³⁰⁹ However, “in each precedent, the Justices sent the case back to the lower court due to circumstance[s] changed by the parties. Here, the remand was caused by the Justices’ own instigation.”³¹⁰

The *Zubik* decision, I have explained, was an “effort to chart some sort of middle ground that would obviate the need for the Court to draw the figurative line between conscience and compliance — at least for now.”³¹¹ The Court went out of its way to stress that it “expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners’ religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.”³¹²

In a concurring opinion, Justice Sotomayor, joined by Justice Ginsburg, urged the courts on remand not to read the *Zubik* decision as a “signal[] of where this Court stands.”³¹³ She noted that in the

³⁰⁵ *Id.* (citation omitted).

³⁰⁶ *Id.* (citation omitted).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ BLACKMAN, *supra* note 11, at 533 (quoting *Zubik*, 136 S. Ct. at 1560). The per curiam decision cites *Madison County v. Oneida Indian Nation*, 562 U.S. 42, 43 (2011) (per curiam) (remanding case to “address, in the first instance, whether to revisit its ruling on sovereign immunity in light of this new factual development, and — if necessary — proceed to address other questions in the case consistent with its sovereign immunity ruling”); *Kiyemba v. Obama*, 559 U.S. 131, 132 (2010) (per curiam) (remanding case to “determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments”); and *Villarreal v. United States*, 134 S. Ct. 1939 (2014) (remanding case “for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2014”).

³¹⁰ BLACKMAN, *supra* note 11, at 533–34.

³¹¹ *Id.* at 526–27.

³¹² *Zubik*, 136 S. Ct. at 1560.

³¹³ *Id.* at 1561 (Sotomayor, J., concurring).

past, the lower courts have treated the Court's ACA "shadow docket"³¹⁴ as decisions on the merits, despite "similarly explicit disclaimers in previous orders."³¹⁵ The Courts of Appeals, she warned, "should not make the same mistake."³¹⁶ Harvard Law Professor Adrian Vermeule replied promptly on Twitter: "Rule of thumb (re *Zubik v. Burwell*): whoever writes separately to interpret the Per Curiam is afraid of a more obvious interpretation."³¹⁷

The Court concluded with a nudge for the lower courts: "We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them."³¹⁸ Good luck with that. Due to the intricacies of ERISA, the Court's order failed to completely resolve disputes involving "insured" plans, and did absolutely nothing to resolve the claims of employers with "self-insured" plans.³¹⁹ An application of the major question doctrine to return this question to the legislature would obviate this seemingly intractable mess, without having to wrestle with the irreconcilable dispute of conscience.

II. UNITED STATES V. TEXAS

DAPA shares a similar pedigree with the accommodation. The Administration implemented both executive actions to resolve foundational questions that Congress did not. But there are key differences.

First, whereas the accommodation arose from congressional silence, DAPA emerged from congressional defeat. Through the "preventive care" mandate, the legislature showed no awareness of the need to balance free exercise and expansion of contraception coverage. In contrast, over the past seven years, Congress has held vituperative debates over immigration reform, with always the same result: no new law.

Second, the Administration purported to rely on new interpretive authority in the ACA to pick and choose which religious groups would be exempted from the mandate (though no such authority exists). But with DAPA, the Administration cited generic immigration statutes and

³¹⁴ William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

³¹⁵ *Zubik*, 136 S. Ct. at 1561 (Sotomayor, J., concurring).

³¹⁶ *Id.*

³¹⁷ Adrian Vermeule (@avermeule), TWITTER (May 16, 2016, 7:38 AM), <https://twitter.com/avermeule/status/732218554439872512> [<https://perma.cc/KG4E-3ADD>]. For a discussion of Supreme Court signaling, see Richard M. Re, *Justice Sotomayor on Signaling in the Contraception Cases*, RE'S JUDICATA (May 17, 2016, 10:09 AM), <https://richardresjudicata.wordpress.com/2016/05/17/justice-sotomayor-on-signaling-in-the-contraception-cases/> [<https://perma.cc/3K7X-8E82>], Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 970 (2016), and Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 245 (2016).

³¹⁸ *Zubik*, 136 S. Ct. at 1560.

³¹⁹ BLACKMAN, *supra* note 11, at 528–35.

regulations from three decades ago, as well as far more constrained past practice, to support the action.

Third, the President consistently maintained that he had the authority to promulgate the accommodation. However, with DAPA, the President discovered the authority to defer the deportation of four million aliens only *after* Congress rejected comprehensive immigration reform.

These differences warrant a modified application of the major question doctrine, though the problem with DAPA is the same as with *Zubik*: the Executive attempted to resolve a critically important political and economic issue, without even the slightest hint that Congress intended the Executive to have that power. Indeed, as the chronology of DAPA shows, the President acted in response to Congress's rebuffing his agenda. Far more than *Zubik*, the relationship between the executive and legislative branches in *Texas* resides in the "lowest ebb" from Justice Jackson's *Youngstown* concurrence.³²⁰ These actions "must be scrutinized with caution."³²¹

A. DAPA

In June 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act.³²² The so-called *Gang of Eight* — a bipartisan group of senators supporting comprehensive immigration reform — united to defeat a filibuster.³²³ In mid-2014, by all accounts,³²⁴ the House of Representatives was slated to take up the measure for a vote. But the fate of immigration reform changed on June 10, 2014, when House Majority Leader Eric Cantor (R-VA) was defeated in his primary by the relatively unknown Dave Brat. Many analysts opined that his support of the Gang of Eight bill contributed to his unexpected defeat.³²⁵ The timing of the defeat was critical.

According to PBS's *Frontline*, on the morning of June 9, the House Republican leadership thought it had crafted an immigration bill that the majority of the House would support.³²⁶ The day before, Repre-

³²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

³²¹ *Id.* at 638.

³²² S. 744, 113th Cong. (2013).

³²³ See Ashley Parker, *Senate Vote on Border Gives Push to Immigration Overhaul*, N.Y. TIMES (June 24, 2013), <http://www.nytimes.com/2013/06/25/us/politics/senate-endorses-proposal-calling-for-extra-border-security-measures.html> [<https://perma.cc/VA89-PYGV>].

³²⁴ See Aaron Blake, *Make No Mistake: Immigration Reform Hurt Eric Cantor*, WASH. POST (June 11, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/11/yes-immigration-reform-hurt-eric-cantor/> [<https://perma.cc/7JXP-RWUG>].

³²⁵ *Id.*

³²⁶ *Frontline: Immigration Battle* (PBS television broadcast Oct. 20, 2015), https://www.youtube.com/watch?v=HKcJ_FlRuQ [<https://perma.cc/H3DA-PM6G>].

sentative Kevin McCarthy (R-CA), House Majority Whip, had confirmed that enough Republicans would back the bill. But with Representative Cantor's defeat — four months shy of the general election — Republicans quickly withdrew their support.³²⁷ Reform was dead. Had the vote happened one week earlier, before Representative Cantor's defeat, the bill would have likely passed. On June 30, 2014, Speaker of the House John Boehner (R-OH) announced that the House would not bring an immigration bill to a vote in 2014.³²⁸

Four months after Representative Cantor's defeat, and two weeks after the Republicans gained seats in the midterm election, President Obama announced his new executive action on immigration. "Like the mythical phoenix . . . DAPA arose from the ashes of congressional defeat."³²⁹ The policy had two components, each detailed in a memorandum from Homeland Security Secretary Jeh Johnson.³³⁰ The first component, which was never contested in court, declared that aliens without criminal history were the lowest priority for removal.³³¹

The second memorandum introduced DAPA.³³² The policy did "not confer any form of legal status," such as a green card.³³³ Rather, it employed an administrative practice known as *deferred action*, which would defer the removal of aliens without lawful presence. DAPA would have employed deferred action to halt the removal of, and grant "lawful presence" to, approximately four million alien parents of certain minor children who are U.S. citizens or lawful permanent residents.³³⁴

B. Texas v. United States

Two weeks after DAPA was announced, Texas and sixteen other states challenged DAPA in court.³³⁵ (For simplicity's sake, I will refer

³²⁷ See *id.* at 1:24:46.

³²⁸ Steven T. Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL (June 30, 2014, 2:24 PM), <http://www.rollcall.com/white-house/immigration-bill-officially-dead-boehner-tells-obama-no-vote-this-year> [https://perma.cc/PD5M-4ZVS].

³²⁹ Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, *supra* note 17, at 267.

³³⁰ See Johnson, DAPA Memorandum, *supra* note 5; Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/5GLH-RXF2] [hereinafter Johnson, Detention and Removal Memorandum].

³³¹ Johnson, Detention and Removal Memorandum, *supra* note 330.

³³² Johnson, DAPA Memorandum, *supra* note 5.

³³³ *Id.* at 2.

³³⁴ *Id.* at 4–5.

³³⁵ Complaint for Declaratory & Injunctive Relief, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 14-CV-254).

to the states collectively as Texas.) Texas challenged DAPA as a violation of the Administrative Procedure Act³³⁶ (APA) — both procedurally and substantively — as well as a violation of the President’s duty to “take Care that the Laws be faithfully executed.”³³⁷ The U.S. District Court for the Southern District of Texas enjoined DAPA on February 16, 2015 — four days before it would go into effect — finding that Texas had standing, and that DAPA must first go through the APA’s notice-and-comment process.³³⁸ The court did not reach Texas’s other claims.

Three months later, a divided panel of the Fifth Circuit Court of Appeals rejected the government’s request for a stay.³³⁹ Judge Jerry E. Smith, joined by Judge Jennifer Walker Elrod, affirmed the district court’s finding that Texas had standing, and would likely prevail on its procedural APA claim.³⁴⁰ The court did not expressly decide whether DAPA was substantively reasonable, but concluded that “the INA provisions cited by the government for that proposition cannot reasonably be construed, at least at this early stage of the case, to confer *unreviewable* discretion.”³⁴¹ Judge Stephen A. Higginson would have granted the stay. He concluded that Texas lacked standing and that the dispute was not justiciable.³⁴² The United States did not request a stay from the Supreme Court, rendering it nearly impossible to resolve the matter before the spring of 2016.³⁴³ Six months later, on the merits panel, Judges Smith and Elrod affirmed the district court’s injunc-

³³⁶ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

³³⁷ U.S. CONST. art. II, § 3, cl. 5. I hit for the Article III cycle with amicus briefs before the District Court, Fifth Circuit Court of Appeals, and Supreme Court. The filings, each on behalf of the Cato Institute, took the position that DAPA was inconsistent with the President’s duty under the Take Care Clause of Article II. See Cato Institute Brief, *Texas*, *supra* note 17; Brief of the Cato Institute & Professor Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238) (I served as counsel along with Peter Margulies, Leif Olson, and Ilya Shapiro.); Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute & Law Professors, *Texas*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254) (I was one of the law professors serving as amici, and contributed to the authorship of the brief.).

³³⁸ *Texas*, 86 F. Supp. 3d at 623, 666–77.

³³⁹ *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015).

³⁴⁰ *Id.*

³⁴¹ *Id.* at 759.

³⁴² *Id.* at 776–84 (Higginson, J., dissenting).

³⁴³ Cato Institute Brief, *Texas*, *supra* note 17, at 31. In hindsight, the decision not to seek a stay from the Court was prudent, as there were not likely five votes to stay the injunction. However, this decision carried the risk that DAPA would remain on ice until the end of President Obama’s term — which is exactly what happened in light of the 4–4 affirmance. See Michael D. Shear, *Today in Politics: Immigration Ruling Stymies Obama and Those Seeking His Job*, N.Y. TIMES: FIRST DRAFT (May 28, 2015, 7:00 AM), <http://www.nytimes.com/politics/first-draft/2015/05/28/today-in-politics-immigration-ruling-stymies-obama-and-those-seeking-his-job> [https://perma.cc/N5MF-TGCE].

tion.³⁴⁴ Judge Carolyn Dineen King dissented.³⁴⁵ Overall, of the four circuit judges to consider the issue, two ruled for Texas, and two ruled for the United States.

On November 20, 2015, the United States petitioned for certiorari.³⁴⁶ Texas's brief in opposition to certiorari was due thirty days later.³⁴⁷ The Solicitor General's expeditious filing was designed to ensure the case would be distributed for the January 15, 2016, conference.³⁴⁸ Generally, cases granted before February are scheduled for argument during the current term.³⁴⁹ However, Texas requested a thirty-day extension, which would have pushed the case forward to the February 19 conference.³⁵⁰ Barring an extremely rare May sitting,³⁵¹ the case would not be heard until October 2016. Without recorded dissent, the Court granted Texas only a nine-day extension, so its brief would be due on December 29, 2015 — one day before the distribution deadline for the January 15 conference.³⁵² Certiorari was granted on January 19.³⁵³

The Court held the oral argument on April 18. The House of Representatives voted to authorize an amicus brief supporting the plaintiff states and participated in arguments.³⁵⁴ From my perspective five rows from the bench, there were not five votes for either side. The Justices seemed evenly divided on the merits of the case. In an interview, Justice Ginsburg later suggested she thought Texas had standing.³⁵⁵ But we would not find out how the Justices voted. On June 23, 2016, they announced the riddle of the Court:

³⁴⁴ *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015).

³⁴⁵ *Id.* at 188 (King, J., dissenting).

³⁴⁶ Petition for Writ of Certiorari, *Texas*, 136 S. Ct. 2771 (No. 15-674); see also Ilya Shapiro & Josh Blackman, *The Supreme Court Should Hurry Up and Wait on Immigration*, THE FEDERALIST (Nov. 24, 2015), <http://thefederalist.com/2015/11/24/the-supreme-court-should-hurry-up-and-wait-on-immigration> [https://perma.cc/UKA5-PEL6].

³⁴⁷ Shapiro & Blackman, *supra* note 346.

³⁴⁸ See *id.*

³⁴⁹ See *id.*

³⁵⁰ *Id.*; Letter from Scott A. Keller, Solicitor Gen. of Tex., to Scott Harris, Clerk, Supreme Court of the U.S. (Nov. 23, 2015), http://object.cato.org/sites/cato.org/files/wp-content/uploads/texas_v_us_scotus_extension_letter.pdf [https://perma.cc/3T5A-GSU5].

³⁵¹ See Josh Blackman, *May Oral Arguments at #SCOTUS are Very, Very Rare*, JOSH BLACKMAN'S BLOG (Nov. 20, 2015), <http://joshblackman.com/blog/2015/11/20/may-oral-arguments-at-scotus-are-very-very-rare> [https://perma.cc/XL93-VX8S].

³⁵² See SUPREME COURT OF THE U.S., CASE DISTRIBUTION SCHEDULE — OCTOBER TERM '15 at 3, <https://www.supremecourt.gov/casedistribution/casedistributionschedule2015.pdf> [https://perma.cc/J9B6-4AAN].

³⁵³ *United States v. Texas*, 136 S. Ct. 906 (2016) (mem.).

³⁵⁴ H.R. Res. 639, 114th Cong. (2016).

³⁵⁵ Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> [https://perma.cc/9GRQ-UMK4] (“‘That would have been hard for me,’ Justice Ginsburg said, ‘because I’ve been less rigid than some of my col-

What are nine words that nine Justices can never write?
 “The judgment is affirmed by an equally divided Court.”

C. *Major Questions of Immigration Policy*

Because this case will likely return to the Court following the remand, there will be a rare opportunity to revisit the appeal in a new light. The major question doctrine provides an alternate ground of resolution for this difficult and contentious case. A prominent thread in the Court’s major question jurisprudence focuses on whether an executive action implicates an issue of “deep ‘economic and political significance.’”³⁵⁶ The Court has not clarified the criteria for this category. Measuring *significance* is no more specific than quantifying “*majorness*.”³⁵⁷ Why were the tariff rates in *MCI* and refundable tax credits in *King* so significant? Without any further explication, these seem like mundane attributes of well-worn regulatory schemes.

In Part I, I discussed how the accommodation to the ACA’s contraceptive mandate broached one of the most major questions confronting America: how Congress protects free exercise while expanding access to health care. This analysis was premised on general principles of government, enshrined in the First Amendment and RFRA, about how our polity treats faith. The legislative debate that preceded DAPA provides a far more concrete basis for its inclusion as an issue of “deep ‘economic and political significance.’” A decision to alter the immigration status quo for millions is the sort of “major question” that Congress would not cryptically delegate to agencies in long-extant, generalized, anodyne statutes. Furthermore, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’” the Court “typically greet[s] [the agency’s] announcement with a measure of skepticism.”³⁵⁸

DAPA cannot be supported by deferred action, a practice originally “conceived as an administrative measure without explicit congressional authorization.”³⁵⁹ There is little question that deferred action is a permissible manifestation of immigration enforcement discretion, although Congress has never clearly defined this practice.³⁶⁰ The gov-

leagues on questions of standing. There was a good argument to be made, but I would not have bought that argument because of the damage it could do’ in other cases.”)

³⁵⁶ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

³⁵⁷ Moncrieff, *supra* note 179, at 600 (emphasis added).

³⁵⁸ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

³⁵⁹ Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 111.

³⁶⁰ See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (describing the INS’s “regular practice (which had come to be known as ‘deferred action’) of exercising [deporta-

ernment has explained that deferred action is premised on 6 U.S.C. § 202(5) and 8 U.S.C. § 1103(a). The Solicitor General's brief to the Supreme Court in *Texas* cited these two provisions as the basis for the Secretary of Homeland Security's "broad statutory authority."³⁶¹ The former provides that the Secretary shall be responsible for "[e]stablishing national immigration enforcement policies and priorities."³⁶² The latter states that the Secretary "shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."³⁶³

As I have noted elsewhere, "[r]eading [§ 1103(a)(3)] to grant the Secretary the significant residual power to confer benefits on millions that Congress deemed unworthy of such benefits would render much of the INA superfluous,"³⁶⁴ since the INA has specific criteria for cancellation of removal and other practices.³⁶⁵ Were courts to read a provision allowing the Secretary the authority to do what "he deems necessary" to provide unfettered discretion over removal, it would not possess an "intelligible principle," violating even the "moribund" nondelegation doctrine.³⁶⁶ The proper construction is that the Secretary can priori-

tion] discretion for humanitarian reasons or simply for its own convenience"); *id.* ("This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action." (quoting 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (1998))). For a study of the history of prosecutorial discretion in the immigration context, see SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

³⁶¹ Brief for the Petitioners, *Texas*, *supra* note 150, at 42. The brief also cited a third provision, 8 U.S.C. § 1324a(h)(3), concerning work authorization, *id.*, but this is subsidiary to the broader power to grant deferred action.

³⁶² 6 U.S.C. § 202(5) (2012).

³⁶³ 8 U.S.C. § 1103(a)(3).

³⁶⁴ Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 111 n.87; see *Texas v. United States*, 809 F.3d 134, 183 (5th Cir. 2015) ("Likewise, the broad grants of authority in 6 U.S.C. § 202(5), 8 U.S.C. § 1103(a)(3), and 8 U.S.C. § 1103(g)(2) cannot reasonably be construed as assigning 'decisions of vast economic and political significance,' such as DAPA, to an agency." (footnotes omitted) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014))); *Texas v. United States*, 86 F. Supp. 3d 591, 658–61 (S.D. Tex. 2015). *But cf. Texas*, 809 F.3d at 218 (King, J., dissenting) ("DAPA appears to further DHS's mission of '[e]stablishing national immigration enforcement policies and priorities.'" (alteration in original) (quoting 6 U.S.C. § 202(5))).

³⁶⁵ Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 111 n.87.

³⁶⁶ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–76 (2001). Professors Adam Cox and Cristina Rodríguez have taken the position that "the structure of modern immigration law simply leaves us with no discernable congressional enforcement priorities." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 155 (2015). They note that, although Congress still retains "a monopoly over the[] formal legal criteria . . . for admission and removal" of noncitizens, the President enjoys a "de facto delegation of power that serves as the functional equivalent to standard-setting authority." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511 (2009) (foot-

tize as “he deems necessary” within the constructs of his statutory authority.³⁶⁷ Deferred action, itself not clearly defined by Congress, can exist only in far more constrained circumstances.

Under this framework, it is well established that “ad hoc deferred action” status can be granted “in individual cases,” based on special extenuating circumstances.³⁶⁸ Additionally, several instances of broad relief have been premised on the President’s Article II powers over foreign affairs.³⁶⁹ For example, in 1990, following the Tiananmen Square massacre, President George H.W. Bush deferred the prosecution of certain Chinese nationals who were in the United States at the time of the Beijing massacre.³⁷⁰ A different analysis follows when a deferred action policy is announced in advance to grant relief to an entire class of aliens, regardless of their home country, who meet certain criteria. The Office of Legal Counsel (OLC), in an opinion released contemporaneously with DAPA, explained that the “breadth” of “class-based programs . . . may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances.”³⁷¹ Recognizing this deficiency, the OLC opinion applied a practical gloss to the text, arguing that Congress’s

note omitted); *see also* Letter from Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar & Clinical Professor of Law, Pa. State Dickinson Sch. of Law, Stephen H. Legomsky, Professor of Law & John S. Lehmann Univ. Professor, Wash. Univ. Sch. of Law, Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA Sch. of Law & Michael A. Olivas, Bates Distinguished Chair of Law, Univ. of Houston Law Ctr., to President Barack Obama (Nov. 3, 2014), <http://www.scribd.com/doc/249080684/Wh-Letter-Final-November-2014> [<https://perma.cc/MJA4-U6AR>] (“[T]here is *no legal requirement* that the executive branch limit deferred action or any other exercise of prosecutorial discretion to individuals whose dependents are lawfully present in the United States. . . . [And] any other criteria for deferred action or other exercises of prosecutorial discretion — *are policy choices, not legal constraints.*” (emphases added)). I appreciate their candor, as they articulate a consistent legal basis for the government’s position: there are no appreciable limits on executive discretion because Congress has already handed over the keys. As a descriptive matter, I do not think their position is correct — Congress has articulated far more constraints than they concede — but assuming *arguendo* that this is what Congress has done, then a judicial reexamination of immigration enforcement, through the lens of the separation of powers, is long overdue. *See* Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 120–21; Blackman, *Immigration Inside the Law*, *supra* note 17.

³⁶⁷ Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 111 n.87.

³⁶⁸ The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 14 (Nov. 19, 2014), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/C7DF-GKMX>] [hereinafter *Deferred Action Opinion*].

³⁶⁹ *See* U.S. CONST. art. II, § 2; *see also* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320–21 (1936).

³⁷⁰ *See* Exec. Order No. 12,711, 3 C.F.R. 283 (1991).

³⁷¹ *Deferred Action Opinion*, *supra* note 368, at 22.

past acquiescence to deferred action indicated that a broad, class-based deferred action was consistent with congressional policy.

One of the touchstones of OLC's analysis was whether DAPA "would resemble in material respects the kinds of deferred action programs Congress has *implicitly approved* in the past."³⁷² This acquiescence, the opinion continued, "provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action."³⁷³ OLC stressed that a "particularly careful examination is needed to ensure that any proposed expansion of deferred action" beyond the scope of previous executive actions "complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it."³⁷⁴ The Supreme Court has also recognized that one of the best measures of the lawfulness of an executive policy is its consistency with prior incidences of congressional acquiescence.³⁷⁵

This framework is premised on the importance of a symbiosis between executive action — which does not have a clear statutory footing — and congressional policy. If Congress has embraced an action, OLC reasoned, that is an indication that the executive branch was performing a role that Congress intended it to perform. The flipside of this theory, which OLC made far less clear, is that if Congress has not embraced an action, that is an indication the executive branch is performing a role that Congress never intended it to perform. The OLC opinion acknowledged that DAPA "depart[s] in certain respects from more familiar and widespread exercises of enforcement discretion."³⁷⁶ This novel action must then be assessed by its consonance with congressional policy. The framework is sound enough, but the OLC opinion flounders on the facts.

OLC recognized only "five occasions since the late 1990s" where the federal government "made discretionary relief available to certain classes of aliens through the use of deferred action"³⁷⁷: deferred action for (1) "[b]attered [a]liens [u]nder the Violence Against Women Act"; (2)

³⁷² *Id.* at 29 (emphasis added). A discussion about prosecutorial discretion in the immigration context is beyond the scope of this Comment. See *supra* note 17. Rather, this analysis focuses on the symbiosis between Congress and the Executive in the context of class-based deferred action.

³⁷³ Deferred Action Opinion, *supra* note 368, at 29.

³⁷⁴ *Id.* at 24.

³⁷⁵ See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("[T]he longstanding 'practice of the government' can inform our determination of 'what the law is.'" (citations omitted) (first quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); then quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). But see *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (noting that historical "practice does not, by itself, create power" (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981))).

³⁷⁶ See Deferred Action Opinion, *supra* note 368, at 24.

³⁷⁷ *Id.* at 15.

“T and U Visa [a]pplicants”; (3) “[f]oreign [s]tudents [a]ffected by Hurricane Katrina”; (4) “[w]idows and [w]idowers of U.S. [c]itizens”; and (5) the 2012 “Deferred Action for Childhood Arrivals” (DACA) policy.³⁷⁸ (President George H.W. Bush’s 1990 “Family Fairness” policy,³⁷⁹ which was based on a different statutory authority known as *extended voluntary departure*,³⁸⁰ is not helpful to the government because this practice was severely curtailed in 1996.³⁸¹) As our amicus brief in *Texas* discussed:

The scope of Congress’s acquiescence [for the first four policies has been] far more constrained than [OLC] suggest[ed]. Each instance of deferred action was sanctioned by Congress — and in each of them, one of two qualifications existed: (1) the alien already had an *existing* lawful presence in the U.S., or (2) the alien had the *immediate prospect* of lawful residence or presence in the U.S. In either case, deferred action acted as a temporary bridge from one status to another, where statutorily provided benefits were construed as arising after deferred action. These conditions bring deferred action [as an interim measure] within the scope of congressional policy.³⁸²

Neither limiting principle exists for DAPA. While deferred action historically served as a temporary *bridge* from one status to another — where benefits were construed as arising within a reasonable period after deferred action — DAPA acts as a *tunnel* to dig under and through the INA. Unlike previous [recipients] of deferred action, DAPA beneficiaries have no prospect of a formal adjustment of status unless they become eligible for some other statutory grant of relief.³⁸³

³⁷⁸ *Id.* at 15–20. The Solicitor General’s brief cited these same exercises of deferred action. Brief for the Petitioners, *Texas*, *supra* note 150, at 6. For an in-depth discussion of the histories of these deferred action programs, see Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 111–21.

³⁷⁹ Deferred Action Opinion, *supra* note 368, at 14. At various stages of the litigation, the government told the courts that 1.5 million aliens were given extended voluntary departure and work authorization under the Family Fairness program. The Solicitor General admitted that the “INS could only estimate how many people were potentially eligible and how many would actually come forward.” Brief for the Petitioners, *Texas*, *supra* note 150, at 56. This estimate was based on an error in congressional testimony, with the actual estimate at approximately 100,000. See Glenn Kessler, *Obama’s Claim that George H.W. Bush Gave Relief to “40 Percent” of Undocumented Immigrants*, WASH. POST (Nov. 24, 2014), <https://www.washingtonpost.com/news/fact-checker/wp/2014/11/24/did-george-h-w-bush-really-shield-1-5-million-illegal-immigrants-nope/> [<https://perma.cc/J92E-C6M9>].

³⁸⁰ See 8 U.S.C. § 1254(e) (1988).

³⁸¹ See Pub. L. No. 104-208, § 240B(a), 110 Stat. 3009, 3596 (1996) (codified at 8 U.S.C. § 1229c(a)(2)(A) (2012)) (limiting the voluntary departure period to 120 days).

³⁸² Cato Institute Brief, *Texas*, *supra* note 17, at 26. I have written elsewhere that DACA is on even shakier legal footing than DAPA, because the Dreamer need not have *any* relation to a United States citizen. See Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 116–19.

³⁸³ Cato Institute Brief, *Texas*, *supra* note 17, at 26–27. Texas adopted the “bridge” argument. See Brief for the State Respondents at 59, *Texas*, 136 S. Ct. 2271 (No. 15-674) [hereinafter Brief for the State Respondents, *Texas*] (describing deferred action programs as “bridges from one legal

Even the 1990 Family Fairness policy, which was supported by explicit statutory authority, was also later ratified by Congress. Professors Adam Cox and Cristina Rodríguez wrote that “those legalized by” the 1986 Immigration Reform and Control Act (IRCA) “would become eligible to petition for the admission of their spouses and children through the already existing immigration system.”³⁸⁴ As the Fifth Circuit pointed out, the Family Fairness policy was “interstitial to a statutory legalization scheme.”³⁸⁵ But there is no ancillary statutory relief awaiting beneficiaries of DAPA after the three-year grant of deferred action. At best, DAPA is a bridge to the next administration, under which immigration reform might be enacted. Contrary to the Executive’s assertion, Congress has not acquiesced in DAPA’s novel usage of deferred action.

These four instances of deferred action teach an additional lesson: they were entirely uncontroversial because they were enacted against the backdrop of a symbiotic relationship between Congress and the Executive. The fact that these fairly routine exercises of deferred action were done without even a blip of opposition suggests that these were in fact the sort of delegated tasks that should be resolved by the agency, rather than “major questions” for Congress. In those cases, the Executive was working within the narrow confines of preexisting statutory authority. This analysis mirrors Justice Jackson’s tripartite taxonomy from *Youngstown*.³⁸⁶ The lawfulness of the Executive’s action is measured by its concordance with the legislative branch.

status to another” (citing Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, *supra* note 17, at 119–25)); see also Transcript of Oral Argument, *Texas*, *supra* note 9, at 49 (statement of Scott A. Keller, Solicitor Gen. of Tex.) (“DAPA is unprecedented because this is an extra statutory deferred action program that is not *bridging* lawful status. The aliens do not have a preexisting status, and they don’t have an imminent status.” (emphasis added)). So did the House of Representatives as amicus curiae. See Brief for Amicus Curiae the U.S. House of Representatives in Support of Respondents at 33, *Texas*, 136 S. Ct. 2271 (No. 15-674) (“Third, none of those other programs was adopted in response to Congress’ *refusal* to create a statutory *path* to lawful presence based on membership in that same category.” (second emphasis added)); Transcript of Oral Argument, *Texas*, *supra* note 9, at 85 (statement of Erin E. Murphy) (“There’s only about four deferred action programs that were class-based. Those all were *paths* to lawful status. U visas, T visas, people who held F1 visas during Hurricane Katrina.” (emphasis added)).

³⁸⁴ Cox & Rodríguez, *The President and Immigration Law Redux*, *supra* note 366, at 121 n.39. Regardless of what Congress may have acquiesced to in 1990, in 1996 Congress repudiated that prior position through subsequent legislation that had the effect of eliminating most federal benefits for unlawfully present aliens that the government had not yet removed. Brief for the State Respondents, *Texas*, *supra* note 383, at 48–49.

³⁸⁵ *Texas v. United States*, 809 F.3d 134, 185 (5th Cir. 2015); see also Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1217 (2015) (“Family Fairness was ancillary to Congress’s grant of legal status to millions of undocumented persons in IRCA.” (emphasis added)).

³⁸⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

During oral argument in *Texas*, Justice Kennedy explained that “[w]hat we’re doing is defining the limits of discretion,” and that the policy seemed to be “a legislative, not an executive act.”³⁸⁷ Once again, Justice Kennedy’s question was directly on point. The acrimony between the branches over a significant nationwide policy that affected millions demonstrates, by clear and convincing evidence, how *major* this major question was. This was not a routine interpretation of mundane authority like the government suggested it was. This policy was designed to effect a foundational change in our immigration policy. Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”³⁸⁸ The Fifth Circuit noted that if Congress had intended to give the President the hitherto unknown and unbounded power to “make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits,” then the court would expect to find an explicit delegation of authority.³⁸⁹ However, no such provision exists.³⁹⁰

Congress does not “hide elephants in mouseholes.”³⁹¹ A policy that provides four million aliens with lawful presence and work authorization cannot be crammed into fleeting sources of definitional statutory authority. In such an unprecedented and “extraordinary case[],” the Court should “hesitate before concluding that Congress has intended such an implicit delegation.”³⁹²

A judicial determination that DAPA is untethered to any legitimate construction of the underlying statutory regime avoids the far more difficult line-drawing question about when nonenforcement of the law becomes an abdication of the law.³⁹³ A vacatur of DAPA sends the question back to the legislative branch. If Congress did intend to delegate the authority for DAPA, clarifying amendments can be passed. If Congress did not intend to delegate such a vast swath of power, the status quo remains.

³⁸⁷ Transcript of Oral Argument, *Texas*, *supra* note 9, at 24.

³⁸⁸ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

³⁸⁹ *Texas*, 809 F.3d at 181.

³⁹⁰ *Id.* at 181–83.

³⁹¹ *Whitman*, 531 U.S. at 468.

³⁹² *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

³⁹³ *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (finding that an agency policy is reviewable, and could be set aside, if an “agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities” (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc))); *see also id.* at 853 n.12 (Marshall, J., concurring in the judgment) (noting that “[w]hen an agency asserts that a refusal to enforce is based on enforcement priorities, it may be that, to survive summary judgment, a plaintiff must be able to offer some basis for calling this assertion into question or for justifying his inability to do so”).

D. Presidential Administration

Another cornerstone of the Court's major question jurisprudence focuses on whether the executive branch has taken an action that it previously announced that it could not. The disavowal of authority, followed by a newly discovered fount of that exact authority, warrants close scrutiny. In 1996, the FDA expanded its jurisdiction to permit regulation of tobacco products, changing its longstanding and "unwavering" policy.³⁹⁴ "[S]ince [their] inception," the FDA and its predecessor had "expressly disavowed any such authority" over tobacco.³⁹⁵ Throughout the twentieth century, the agency "repeatedly informed Congress" that it did not have the "authority to regulate tobacco products."³⁹⁶ Until it did.

Justice O'Connor's majority opinion in *Brown & Williamson* noted that "[t]he consistency of the FDA's prior position is significant" because "[i]t provides important context to Congress' enactment of its tobacco-specific legislation."³⁹⁷ The agency's longstanding interpretation of the law "bolster[ed] the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA [was] without jurisdiction to regulate tobacco products and ratified that position."³⁹⁸ Critically, Congress legislated "against" the "backdrop" of the FDA's longstanding interpretation of its jurisdiction.³⁹⁹ Prior to 1965, for instance, Congress "considered and rejected several proposals to give the FDA the authority to regulate tobacco."⁴⁰⁰ These decisions, the Court noted, were premised on "the FDA's representations to Congress."⁴⁰¹ This framework sheds light on the significance of the President's statements about the scope of his authority to implement DAPA.⁴⁰²

After the announcement of DACA, immigration advocates called on President Obama to expand deferred action beyond the Dreamers. President Obama steadfastly and unwaveringly maintained that he could not. At the October 2012 presidential debate, the once-again-candidate said he lacked the authority to go further than DACA: "[W]e

³⁹⁴ *Brown & Williamson*, 529 U.S. at 157.

³⁹⁵ *Id.* at 125.

³⁹⁶ *Id.* at 146.

³⁹⁷ *Id.* at 157.

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 153.

⁴⁰⁰ *Id.* at 147.

⁴⁰¹ *Id.*

⁴⁰² I pause to note a critical distinction that is often lost in the immigration debate. The Gang of Eight bill provided a pathway to citizenship for eligible aliens. DAPA did not grant amnesty, or any other form of permanent status. However, what the bill and executive action both accomplished were a halt on the deportation of a significant number of aliens and the provision of work authorization and a host of other federal benefits.

need to fix a broken immigration system,” Obama said, “[a]nd I’ve done everything that I can on my own.”⁴⁰³ At a town hall meeting in January 2013, the host asked the President whether he could do for an “undocumented mother of three” citizens what he “did for the [D]reamers.”⁴⁰⁴ The President replied that with the Dreamers, “we were able to identify that group . . . [as] generally not a risk,” but for others “we can’t simply ignore the law.”⁴⁰⁵ During a February 2013 interview, the President was asked whether he could halt deportations to prevent family breakups.⁴⁰⁶ “My job is to execute laws that are passed,” he replied, and “we have certain obligations to enforce the laws that are in place.”⁴⁰⁷ The President stressed that, with DACA, “we’ve kind of stretched our administrative flexibility as much as we can.”⁴⁰⁸ He made similar statements on several other occasions.⁴⁰⁹

It is tempting to dismiss these off-the-cuff remarks as political posturing. After all, the President was trying to garner support for immigration reform.⁴¹⁰ Admitting that he could act unilaterally could have decreased the odds of passage.

This view is at once both myopic and hyperopic. It is true that the President’s statements in informal fora are far different than official executive branch regulations published in the Federal Register or

⁴⁰³ Gerhard Peters & John T. Woolley, *Barack Obama: Presidential Debate in Hempstead*, New York, AM. PRESIDENCY PROJECT (Oct. 16, 2012) <http://www.presidency.ucsb.edu/ws/index.php?pid=102343> [<https://perma.cc/4VGE-SP6X>].

⁴⁰⁴ *Obama Tells Telemundo He Hopes for Immigration Overhaul Within 6 Months*, NBC LATINO (Jan. 30, 2013, 10:26 PM), <http://nblatino.com/2013/01/30/obama-tells-telemundo-he-hopes-for-immigration-overhaul-within-6-months/> [<https://perma.cc/L2NQ-QWX9>].

⁴⁰⁵ *Id.*

⁴⁰⁶ Robert Farley, *Obama’s Immigration Amnesia*, FACTCHECK.ORG (Nov. 18, 2014), <http://www.factcheck.org/2014/11/obamas-immigration-amnesia> [<https://perma.cc/679W-ES4Q>].

⁴⁰⁷ *Id.* (quoting *Obama’s 2013 Google+ Fireside Hangout — Complete* at 19:27, YOUTUBE (Feb. 14, 2013), <https://www.youtube.com/watch?v=-gUo9bWifFo> [<https://perma.cc/4SD4-HFZF>]).

⁴⁰⁸ *Id.* (quoting *Obama’s 2013 Google+ Fireside Hangout—Complete*, *supra* note 407, at 20:30). Ultimately, the OLC opinion found the President could not extend deferred action to parents of DACA recipients. See *Deferred Action Opinion*, *supra* note 368, at 33.

⁴⁰⁹ See, e.g., Michael D. Shear & Julia Preston, *Obama Pushed “Fullest Extent” of His Powers on Immigration Plan*, N.Y. TIMES (Nov. 28, 2014), <http://www.nytimes.com/2014/11/29/us/white-house-tested-limits-of-powers-before-action-on-immigration.html> [<https://perma.cc/8UYZ-N7FQ>] (noting that President Obama remarked, in an interview with Univision, that “[u]ntil Congress passes a new law, then I am constrained in terms of what I am able to do”); President Barack Obama, *President Obama Speaks on Immigration Reform* (Nov. 25, 2013), <https://www.whitehouse.gov/photos-and-video/video/2013/11/25/president-obama-speaks-immigration-reform#transcript> [<https://perma.cc/R27T-BXFK>] (noting that “if, in fact, I could solve all these problems without passing laws in Congress, then I would do so” but that we must “use our democratic processes to achieve [that] . . . goal”).

⁴¹⁰ See, e.g., Seung Min Kim, *Cantor Loss Kills Immigration Reform*, POLITICO (June 10, 2014, 11:40 PM), <http://www.politico.com/story/2014/06/2014-virginia-primary-eric-cantor-loss-immigration-reform-107697> [<https://perma.cc/6KDT-LTV3>] (“The White House said recently that Obama had asked for a delay of his administration’s deportation review until the end of the summer — in an effort to give House Republicans space to act on a legislative overhaul.”).

sworn testimony submitted to Congress. But these remarks resonate on a much deeper level. When the President speaks for the nation, he speaks with one voice as the “sole organ” of the United States government.⁴¹¹ This oft-cited dictum from *United States v. Curtiss-Wright Export Corp.*,⁴¹² originally voiced by Representative John Marshall in 1800, is seldom taken literally.⁴¹³ Usually, courts listen to the “sole organ” speak through the form of general policy statements issued by an executive branch agency, or even developed by the Justice Department during the course of litigation. Seldom do we see such specific reflections from the Commander in Chief himself. Here, the President personally explained the contours of his own authority on a consistent and reasoned basis. That the comments of the only person elected to the highest office in the land were unscripted — and not prepared by an army of speechwriters — elevates this discourse. Further, these were not simply barbs about policy disputes, but explications about his presidential oath to “preserve, protect, and defend the Constitution of the United States.”⁴¹⁴ As the President acknowledged during a town hall meeting on police violence, “I’m aware that my words matter deeply.”⁴¹⁵ This may be particularly true when the President is, to borrow a phrase from Justice Frankfurter, “learned . . . in the law.”⁴¹⁶ Indeed, President Obama has opined that his experience as an attorney makes his statements on executive power more authoritative than those made by members of Congress who are not “constitutional lawyers.”⁴¹⁷ Perhaps most importantly, President Obama has defined the bounds of his own power in response to questions from we the people, the ultimate sovereigns in the United States and the source of his authority.⁴¹⁸ These presidential pronouncements are not hollow utterances.

⁴¹¹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. John Marshall)); see also Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2079 (2015).

⁴¹² 299 U.S. 304.

⁴¹³ Cf. U.S. CONST. art. II, § 2 (enumerating specific powers of the President with respect to foreign affairs).

⁴¹⁴ *Id.* art. II, § 1.

⁴¹⁵ Sean Collins Walsh, *Transcript: Dan Patrick Confronts Obama on Race and Policing*, THE STATESMAN (July 15, 2016, 10:29 AM), <http://www.statesman.com/news/news/national-govt-politics/full-transcript-dan-patrick-confronts-obama-on-rac/nrynk> [<https://perma.cc/3EXF-S8E5>].

⁴¹⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring).

⁴¹⁷ *Interview with President Obama*, N.Y. TIMES (July 27, 2013), <http://www.nytimes.com/2013/07/28/us/politics/interview-with-president-obama.html> [<https://perma.cc/86FM-BMY3>] (alleging that Congress frequently accuses him of usurping authority for anything, even “by having the gall to win the presidency. . . . But ultimately, I’m not concerned about their opinions — very few of them, by the way, are lawyers, much less constitutional lawyers” (emphasis added)).

⁴¹⁸ See generally RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016).

After the Gang of Eight bill passed the Senate, the President continued to maintain that he had already reached the outer bounds of what he could accomplish through deferred actions. His most pointed comments came during an appearance on Univision in March 2014.⁴¹⁹ The host asked him about “Guadalupe Stallone from California, [who] is undocumented. However, her sons are citizens.”⁴²⁰ She feared that she would be removed, even though her children could remain in the United States.⁴²¹ Ms. Stallone was the exact type of person who stood to benefit from DAPA: an alien who was subject to removal with U.S. citizen children.

The President said that he could not offer relief to Ms. Stallone: “[W]hat I’ve said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do.”⁴²² DACA, he conceded, “already stretched my administrative capacity very far.”⁴²³ The President could go no further because “at a certain point the reason that these deportations are taking place is, Congress said, you have to enforce these laws.”⁴²⁴ Citing Congress’s power over the purse, the President reiterated, “I cannot ignore those laws anymore than I could ignore . . . any of the other laws that are on the books.”⁴²⁵

The very action the President said he could not take in March 2014, he announced he could take eight months later.⁴²⁶ Neither the immigration laws nor the Constitution were altered in that period. Color me skeptical that the government suddenly unearthed this holy grail of prosecutorial discretion in the wake of immigration reform’s defeat.⁴²⁷

Press accounts suggest that the impetus for DAPA came from the top. According to news reports at the time, the Administration wanted DHS to stretch its legal authority “to the fullest extent” it could.⁴²⁸ Charlie Savage wrote in *Power Wars* that President Obama told immigration advocacy groups: “I’m going to go as far as [my White House counsel] says I can.”⁴²⁹ But the President would move his own goal

⁴¹⁹ *Univision News Transcript: Interview with President Barack Obama*, UNIVISION (Mar. 5, 2014), <http://communications-univisionnews.tumblr.com/post/79266471431/univision-news-transcript-interview-with> [https://perma.cc/5NPD-6P6E].

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ See Shear & Preston, *supra* note 409.

⁴²⁷ Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, *supra* note 17, at 276–77.

⁴²⁸ Shear & Preston, *supra* note 409.

⁴²⁹ CHARLIE SAVAGE, *POWER WARS* 661 (2015) (emphasis omitted).

posts. President Obama was disappointed when DHS presented him with a preliminary proposal that he thought “did not go far enough.”⁴³⁰ At that point, the whole affair became the veritable embodiment of what then-Professor Elena Kagan referred to as “presidential administration,” when we have “actual evidence of presidential involvement in a given administrative decision.”⁴³¹ President Obama ordered DHS to look at the problem again, even if it meant dredging up the necessary power from the deepest abyss of presidential authority.⁴³² According to *Politico*, over eight months the White House reviewed “more than [sixty] iterations” of the executive action.⁴³³ As might be expected, DHS eventually found the President the answer he was looking for.

To the extent that reports from FDA bureaucrats are sufficient to establish a “backdrop” for the major question doctrine under *Brown & Williamson*, the President’s personal and repeated statements about his Article II powers ought to serve a higher calling. Congress legislated with the presumption that if immigration reform failed, the status of over four million aliens with citizen children would remain the same. The President’s authoritative statements misled Congress, created false understandings of executive power, and further distorted the political process. The buck starts here.

E. Intransigence and Self-Help

Even the most casual observer of the immigration debate between 2009 and 2016 will realize that I have so far elided an important element of the political discourse. I conclude this Comment by addressing both a thin and thick version of this criticism. The thin account contends that the Republican leadership’s unreasonable opposition to a bill that enjoyed majority support in both houses of Congress justified the President’s actions. This argument collapses quickly, because under the House’s rules, which the Constitution empowers it to set,⁴³⁴ the Speaker has near-unfettered authority to decide what bills come up for a vote.⁴³⁵ The reverse dynamic applies with the Senate filibuster, as

⁴³⁰ Shear & Preston, *supra* note 409.

⁴³¹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2377 (2001); cf. Josh Blackman, *Presidential Maladministration* (Sept. 21, 2016) (unpublished manuscript) (on file with the Harvard Law School Library).

⁴³² See Shear & Preston, *supra* note 409.

⁴³³ Anna Palmer, Seung Min Kim & Carrie Budoff Brown, *How Obama Got Here*, POLITICO (Nov. 20, 2014, 9:02 PM), <http://www.politico.com/story/2014/11/how-obama-got-here-113077> [<https://perma.cc/BU4H-HS55>].

⁴³⁴ U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

⁴³⁵ RULES OF THE HOUSE OF REPRESENTATIVES, r. XX(1)(a), *reprinted in* H.R. DOC. NO. 113-181, at 825 (2015) (“The House shall divide after the Speaker has put a question to a vote by

the minority party can block a vote on a bill with majority support.⁴³⁶ More fundamentally, Congress has no constitutional obligation to vote on anything — bill or nominee⁴³⁷ — regardless of how strongly the President supports it. “Congress shall have Power” to make certain laws, but need not do so.⁴³⁸

However, there is a thicker and more potent form of this argument: Republican obstruction provided the President with additional constitutional authority to respond. Professor David Pozen has written that these interbranch assertions of power by the President should be viewed not as “self-aggrandizement,” but “self-help.”⁴³⁹ Obstruction in Congress, he explains, “does not simply paralyze politics in a system of separated powers” but “also generates its own correctives, through interbranch (and intrabranched) self-help.”⁴⁴⁰ Through these “countermeasures,”⁴⁴¹ executive branch officials “cease to follow ordinary norms of cooperation and constraint.”⁴⁴² Pozen takes no position on whether these “predictable” actions are “lamentable” or not.⁴⁴³

The strongest rejoinder to Pozen’s cogent argument is found in the Court’s oral argument and decision in *NLRB v. Noel Canning*.⁴⁴⁴ In 2012, Senate Republicans filibustered President Obama’s nominees to the five-member National Labor Relations Board (NLRB). As a result, the Board risked losing its quorum if it dropped down to two members.⁴⁴⁵ Previously, Senate Democrats filibustered President Bush’s nominees to the NLRB.⁴⁴⁶ In January 2012, President Obama purported to make three recess appoints to the NLRB during a

voice as provided in clause 6 of rule I if the Speaker is in doubt or division is demanded. Those in favor of the question shall first rise from their seats to be counted, and then those opposed.”)

⁴³⁶ STANDING RULES OF THE SENATE, r. XXII(2), reprinted in S. DOC. NO. 113-18, at 16 (2013) (requiring a vote of three-fifths of the Senate to invoke cloture and end debate on a measure, motion, or other matter).

⁴³⁷ Josh Blackman, *The Framers Made the Appointment Process Explicitly Political*, NAT’L REV. (Feb. 15, 2016, 4:00 AM), <http://www.nationalreview.com/article/431315/supreme-court-appointments-political-exactly-founders-intended> [<https://perma.cc/2AFY-VQX7>].

⁴³⁸ U.S. CONST. art. I, § 8, cl. 1.

⁴³⁹ David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 8 (2014) (“[M]any of the most pointed ways in which Congress and the President challenge one another can plausibly and profitably be modeled as self-help rather than self-aggrandizement, as efforts to enforce constitutional settlements rather than to circumvent them.”).

⁴⁴⁰ *Id.* at 44.

⁴⁴¹ *Id.* at 8.

⁴⁴² *Id.* at 44.

⁴⁴³ *Id.*

⁴⁴⁴ 134 S. Ct. 2550 (2014).

⁴⁴⁵ See *New Process Steel, LP v. NLRB*, 560 U.S. 674, 676 (2010).

⁴⁴⁶ See *Noel Canning*, 134 S. Ct. at 2605 (Scalia, J., concurring in the judgment) (“Senator Kennedy reiterated that position in a brief to this Court in 2004. Brief for Sen. Edward M. Kennedy as Amicus Curiae in *Franklin v. United States*, O.T. 2004, No. 04-5858, p. 5. Today the partisan tables are turned, and that position is urged on us by the Senate’s Republican Members. See Brief for Sen. McConnell et al. as Amici Curiae 26.”).

seventy-two hour period between “pro forma” sessions held by the Senate.⁴⁴⁷ All nine Justices agreed that the appointments were unconstitutional.⁴⁴⁸ The Senate, and not the President, decides through its rules when the body is in session.⁴⁴⁹ By the same principle, the House, under its rules, can decide when a bill is brought up for a vote.

Far more relevant for our purposes, is how the Obama Administration relied on a species of the self-help doctrine to defend the appointments during oral argument.⁴⁵⁰ Justice Kagan asked the Solicitor General whether the President was using the recess power as a way to deal with “congressional absence” or “congressional intransigence.”⁴⁵¹ With a single question, Justice Kagan tapped the essence of the entire case and the self-help theory of executive power. Presidents rely on this power, she continued, to work around “a Congress that simply does not want to approve appointments that the President thinks ought to be approved.”⁴⁵² The problem is no longer “absence,” as it was in the “horse-and-buggy era,” Justice Kagan explained, but “intransigence.”⁴⁵³ She wondered “whether we’re dealing here with what’s essentially a historic relic, something whose original purpose has disappeared and has assumed a new purpose that nobody ever intended it to have.”⁴⁵⁴

Solicitor General Verrilli answered that if the President had not acted, “the NLRB was going to go dark. It was going to lose its quorum.”⁴⁵⁵ As I’ve noted elsewhere, “[t]he Solicitor General offered a gloss on executive power: The Board’s inability to act would bolster the President’s inherent authority, justifying an expanded recess-appointment power.”⁴⁵⁶ This is akin to how a foreign invasion would trigger the President’s commander-in-chief powers over military countermeasures. Justice Kagan replied that the NLRB going dark was “a result of congressional refusal.”⁴⁵⁷ It was the Senate’s decision —

⁴⁴⁷ See *id.* at 2557 (majority opinion).

⁴⁴⁸ See *id.* at 2578; *id.* at 2617 (Scalia, J., concurring in the judgment).

⁴⁴⁹ *Id.* at 2574–75 (majority opinion).

⁴⁵⁰ For a full discussion of the oral argument’s colloquy, see Josh Blackman, *Scalia Yells Stop: Standing Athwart History to Protect the Separation of Powers*, in HERITAGE FOUNDATION SPECIAL REPORT #186 — THE LEGACY OF JUSTICE ANTONIN SCALIA 12 (Elizabeth H. Slattery ed., 2016), <http://thf-reports.s3.amazonaws.com/2016/SR186.pdf> [<https://perma.cc/6T5R-WYQX>].

⁴⁵¹ Transcript of Oral Argument at 19, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), https://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_pmo2.pdf [<https://perma.cc/M8ES-JLTD>] [hereinafter Transcript of Oral Argument, *Noel Canning*].

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 20.

⁴⁵⁶ Blackman, *supra* note 450.

⁴⁵⁷ Transcript of Oral Argument, *Noel Canning*, *supra* note 451, at 20.

whatever the merits — to allow the Board to lose its quorum. It wouldn't be unprecedented.⁴⁵⁸

The Solicitor General, deviating from the position articulated in his brief, and taking up Justice Kagan's lead, cited "intransigence" as a reason to support the President's position.⁴⁵⁹ He replied, "I think the recess power may now act as a *safety valve* given that intransigence . . ."⁴⁶⁰ If Congress frustrates his agenda, the President can let off a little steam through a "safety valve" by flexing more powers than Article II would otherwise permit.

Solicitor General Verrilli's "safety valve" answer was not well received, and Justice Ginsburg observed that his answer was different from the position stated in his brief: "I think you said throughout your brief that the rationale for the recess power is the President must be able to have the government functioning and staffed even though . . . the Senate isn't . . . around. But now . . . you seem, in your answers, to be departing from the [argument that the] Senate [is] not available and making quite another justification for this."⁴⁶¹ Justice Ginsburg queried what the "constitutional flaw" is to justify this broad reading of executive power, as the Senate "is always available" and "can easily be convened."⁴⁶² Justice Breyer likewise noted that there is nothing in the history of the Recess Appointments Clause about executive evasion of congressional intransigence: "I cannot find anything . . . that says the purpose of this clause has anything at all to do with political fights between Congress and the President."⁴⁶³

The Court's unanimous decision ultimately reflected this rare consensus on a separation of powers question. Writing for the majority, Justice Breyer explained that "political opposition in the Senate would not qualify as an unusual circumstance" to justify the appointments.⁴⁶⁴ Justice Breyer stressed that this principle "should go without saying — except that Justice Scalia compels us to say it."⁴⁶⁵ Justice Scalia, "who apparently egged on the majority,"⁴⁶⁶ wrote in his concurring decision that the majority was "seemingly forgetting that the appointments at issue in *this very case* were justified on those grounds and that the So-

⁴⁵⁸ See, e.g., *New Process Steel, LP v. NLRB*, 560 U.S. 674, 676 (2010).

⁴⁵⁹ See Transcript of Oral Argument, *Noel Canning*, *supra* note 451, at 21.

⁴⁶⁰ *Id.* (emphasis added).

⁴⁶¹ *Id.* The closest the United States came to making this point in its merits brief was to say that the President "plainly has a direct interest in the balance that Article II strikes between his need to secure the Senate's advice and consent for appointments at certain times, and his unilateral power to make temporary appointments when the Senate is not available." Brief for the Petitioner at 62, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281).

⁴⁶² Transcript of Oral Argument, *Noel Canning*, *supra* note 451, at 21.

⁴⁶³ *Id.* at 31.

⁴⁶⁴ *Noel Canning*, 134 S. Ct. at 2567.

⁴⁶⁵ *Id.*

⁴⁶⁶ Blackman, *supra* note 450, at 15.

licitor General has asked us to view the recess-appointment power as a ‘safety valve’ against Senatorial ‘intransigence.’⁴⁶⁷ The Senate has no more constitutional obligation to confirm nominees than the House has to vote on an immigration bill.⁴⁶⁸ The refusal to do either does not transform otherwise indefensible arguments into constitutional necessities.

F. Gridlock and the Separation of Powers

Noel Canning was decided on June 26, 2014.⁴⁶⁹ Four days later, the House of Representatives announced it would not bring the Gang of Eight bill for a vote.⁴⁷⁰ As I noted elsewhere, only a few hours later, the President explained in impromptu remarks delivered in the Rose Garden that he would take immigration reform into his own hands.⁴⁷¹ He promised to “fix as much of our immigration system as I can on my own, without Congress.”⁴⁷² The President added, “I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing.”⁴⁷³ Shortly after Representative Cantor’s defeat, President Obama cited gridlock as a justification for why “[w]e can’t afford to wait for Congress,” and a reason for why he was “going ahead and moving ahead without them.”⁴⁷⁴ He said that “as long as they insist on [obstruction], I’ll keep taking actions on my own . . . I’ll do my job.”⁴⁷⁵ President Obama would later articulate his “temptation to want to go ahead and get stuff done,” because “there’s a lot of

⁴⁶⁷ *Noel Canning*, 134 S. Ct. at 2599 (Scalia, J., concurring in the judgment) (emphasis added) (quoting Transcript of Oral Argument, *Noel Canning*, *supra* note 451, at 21).

⁴⁶⁸ Blackman, *supra* note 437.

⁴⁶⁹ 134 S. Ct. at 2550.

⁴⁷⁰ President Barack Obama, *Transcript: President Obama’s June 30 Remarks on Immigration*, WASH. POST (June 30, 2014), https://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html [<https://perma.cc/H49J-8N2L>].

⁴⁷¹ *Id.* For a detailed summary of the President’s statements following the defeat of the Gang of Eight bill, see Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, *supra* note 17, at 268–69.

⁴⁷² Obama, *supra* note 470.

⁴⁷³ *Id.*

⁴⁷⁴ Jeffrey Sparshott, *Obama Blames Congress for Lack of Economic Progress*, WALL ST. J. (June 27, 2014) <http://www.wsj.com/articles/obama-blames-congress-for-lack-of-economic-progress-140388980> [<https://perma.cc/36Q7-DS89>]. Senate Democrats have voiced similar ideas. Mike Lillis, *Democrats: No Bluff; Obama Will Go It Alone on Immigration*, THE HILL (June 26, 2014, 3:00 PM), <http://thehill.com/homenews/house/210734-dems-no-bluff-obama-will-go-it-alone-on-immigration> [<https://perma.cc/DE72-6525>].

⁴⁷⁵ Press Release, White House Office of the Press Sec’y, Weekly Address: Focusing on the Economic Priorities for the Middle Class Nationwide (June 28, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/28/weekly-address-focusing-economic-priorities-middle-class-nationwide> [<https://perma.cc/NWR4-G4XF>].

gridlock.”⁴⁷⁶ The President’s “recess” appointments and executive action on immigration were both publicly defended as measured responses to congressional gridlock. Or, as Pozen explained, the government viewed the “current levels of . . . intransigence [as] sufficiently problematic to trigger a conditional self-help power.”⁴⁷⁷

This framework, though perhaps normatively attractive, suffers from three significant flaws. First, executives can and will exaggerate how “sufficiently problematic” the intransigence is to justify self-help. (We know all too well how the Executive has fabricated threats from belligerents across the world, to say nothing of those across the aisle.⁴⁷⁸) It is true enough that if the President’s three nominees were not confirmed by January 2012, the NLRB would have lost a quorum. But there was not a constitutional imperative that his preferred members be on the board. Indeed, less than a year later, the Senate and the President struck a deal on appointments to the NLRB, with a slate of more palatable nominees. On July 16, 2013, three weeks after certiorari was granted in *Noel Canning*,⁴⁷⁹ the Senate reached an agreement to “preserve the filibuster in exchange for confirmation votes on President Obama’s stalled nominees,” including three members to the NLRB.⁴⁸⁰ As the Court noted, “the President has nominated others to fill the positions once occupied by Members Block, Griffin, and Flynn, and . . . the Senate has confirmed these successors.”⁴⁸¹ This was a political battle that was resolved through the political process.

Second, vesting the Executive with a near-infinite range of authority to fashion “conditional self-help powers” forgoes actual contingency authority built into the Constitution. If the Congress was unreasonably blocking the President’s recess appointments, under his vested Article II powers, he could have adjourned the Senate, forcing them into recess: “in *Case of Disagreement* between them, with Respect to

⁴⁷⁶ Tanya Somanader, *President Obama Takes Over the Colbert Report*, WHITE HOUSE: BLOG (Dec. 9, 2014, 12:03 PM), <https://www.whitehouse.gov/blog/2014/12/09/president-obama-takes-over-colbert-report> [<https://perma.cc/NHC7-X4LW>].

⁴⁷⁷ Pozen, *supra* note 439, at 79 n.345.

⁴⁷⁸ See David G. Savage, *U.S. Official Cites Misconduct in Japanese American Internment Cases*, L.A. TIMES (May 24, 2011), <http://articles.latimes.com/2011/may/24/nation/la-na-japanese-americans-20110525> [<https://perma.cc/NF5G-YVXL>] (describing how, in 2011, Acting Solicitor General Neal Katyal told the Supreme Court that the Roosevelt Administration “deliberately hid from the court a report from the Office of Naval Intelligence that concluded the Japanese Americans on the West Coast did not pose a military threat. The report indicated there was no evidence Japanese Americans were disloyal, were acting as spies or were signaling enemy submarines, as some at the time had suggested”).

⁴⁷⁹ *NLRB v. Noel Canning*, 133 S. Ct. 2861 (2013) (mem.).

⁴⁸⁰ Jonathan Weisman & Jennifer Steinhauer, *Senators Reach Agreement to Avert Fight over Filibuster*, N.Y. TIMES (Jul. 16, 2013), <http://www.nytimes.com/2013/07/17/us/politics/senators-near-agreement-to-avert-fight-over-filibuster.html> [<https://perma.cc/C7YT-Q388>].

⁴⁸¹ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2558 (2014). These new personnel did “not moot the controversy about the validity of the previously entered Board order.” *Id.*

the Time of Adjournment, [the President] may adjourn [Congress] to such Time as he shall think proper.”⁴⁸² The Constitution speaks to congressional gridlock — “in Case of Disagreement” — and gives the President a power to work around the Congress that cannot agree to adjourn.⁴⁸³ Once adjourned, a recess appointment could be made. Additionally, both houses of Congress can take other measures, well within their constitutional authority, to make it easier to act. The Senate can eliminate the filibuster altogether by a mere majority vote⁴⁸⁴ — Democrats already got rid of the procedure for judicial nominees through the so-called “nuclear option.”⁴⁸⁵ The House can change its rules to make it easier for the minority party to force a vote, as the procedures for a discharge petition make this process extremely difficult.⁴⁸⁶

With respect to immigration, the President had uncontroverted authority to deprioritize the deportations of aliens with citizen children — totally separate and apart from granting lawful presence and work authorization. DHS was never under any obligation to remove this class. And the President admitted it. Less than two hours after the Supreme Court’s 4-4 affirmance in *Texas*, President Obama explained that the judgment would in no way impact his immigration policy⁴⁸⁷: “Enforcement priorities developed by my administration are not affected by this ruling,” he said.⁴⁸⁸ Those who “might have benefitted from the expanded deferred action policies — long-term residents raising children who are Americans or legal residents,” will still “remain low priorities for enforcement. As long as you have not committed a crime, our limited immigration enforcement resources are not focused on you.”⁴⁸⁹

After two years of posturing about limited resources and enforcement discretion, in three sentences, the President unwittingly admitted

⁴⁸² U.S. CONST. art. II, § 3 (emphasis added).

⁴⁸³ In January 2012, the Republican-controlled House would not allow the Democrat-controlled Senate to recess. David J. Arkush, *The Senate and the Recess Appointments*, 127 HARV. L. REV. F. 1, 6 (2013) (“It was the Speaker of the House of Representatives who threatened to prevent the Senate from adjourning from May through December 2011, an action which resulted in the Senate holding the *pro forma* sessions in question in *Noel Canning*.” (footnote omitted)).

⁴⁸⁴ Max Ehrenfreund, *The Discharge Petition’s Role in the Immigration Reform Debate, Explained*, WASH. POST (June 29, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/06/29/the-discharge-petitions-role-in-immigration-reform-explained> [<https://perma.cc/RC86-GMWD>].

⁴⁸⁵ BLACKMAN, *supra* note 11, at 229–33.

⁴⁸⁶ Ehrenfreund, *supra* note 484.

⁴⁸⁷ Press Release, White House Office of the Press Sec’y, Remarks by the President on the Supreme Court Decision on U.S. Versus Texas (June 23, 2016), <https://www.whitehouse.gov/the-press-office/2016/06/23/remarks-president-supreme-court-decision-us-versus-texas> [<https://perma.cc/C4VX-CVQJ>].

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

the true purpose of DAPA. The executive action was not really about reprioritizing resources. When announcing the policy on November 20, 2014, the President explained that DAPA would allow aliens to “come out of the shadows,” and would “make our immigration system more fair and more just.”⁴⁹⁰ In June 2016, Obama repeated that message. The Court’s decision, he said, “is frustrating to those who seek to grow our economy and bring a rationality to our immigration system, and to allow people to come out of the shadows and lift this perpetual cloud on them.”⁴⁹¹ The purpose of DAPA was to allow these aliens to become lawfully present, so they can work and contribute to our society. These are important policy goals — and goals I support⁴⁹² — but significant goals that only Congress can implement.

Parents of U.S. citizens and lawful permanent residents, without criminal records, were not high priorities for removal before DAPA, and were not high priorities after the Court’s decision. Nothing in the law required the President to prioritize their removal. Indeed, Texas never challenged the prioritization memorandum under DAPA, only the provision granting deferred action. Once again, the President had all the constitutional authority he needed to avoid the humanitarian concerns with removing the would-be DAPA beneficiaries. But these *minor* steps were not audacious enough, so he made the *major* decision to go further.

Third, and perhaps most fundamentally, this framework elevates routine political battles into full-blown constitutional crises that will exacerbate the underlying intransigence. As Justice Breyer pointed out during the *Noel Canning* oral argument, the NLRB dispute was a “political problem, not a constitutional problem.”⁴⁹³ The entire notion of treating legitimate policy disputes between Congress and the President like wartime measures that warrant countermeasures seems unlikely to resolve intractable gridlock. The root of gridlock is cultural. So long as the American people stridently disagree on foundational issues,⁴⁹⁴ their representatives in Washington will vote accordingly. Unilateral executive action creates the impression of disenfranchise-

⁴⁹⁰ Press Release, White House Office of the Press Sec’y, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/CMU2-BCZH>].

⁴⁹¹ Press Release, *supra* note 487.

⁴⁹² See Brief of the Cato Institute & Professor Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees, *supra* note 337, at 9 (“As a matter of policy, *amici* support comprehensive immigration reform that provides relief to the aliens protected by DAPA (among many other purposes).”).

⁴⁹³ Transcript of Oral Argument, *Noel Canning*, *supra* note 451, at 31.

⁴⁹⁴ See generally Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1 (2015).

ment and breeds distrust in the other party.⁴⁹⁵ Self-help will do little to solve the problem of gridlock, and will perversely further balkanize the electorate.⁴⁹⁶

This discussion underscores in a different light the grounding of the major question doctrine. Over the long term, the Executive is in a much stronger position than Congress to aggrandize authority. In *Noel Canning*, Justice Scalia observed that when the President asserts an executive “power and establish[es] a precedent, he faces neither the collective-action problems nor the procedural inertia inherent in the legislative process.”⁴⁹⁷ This legislative tragedy of the commons is exacerbated during times of gridlock. Members of Congress “may have little interest in opposing Presidential encroachment on legislative prerogatives,” Justice Scalia noted, “especially when the encroacher is a President who is the leader of their own party.”⁴⁹⁸ The President can readily seize on the failure of the legislature to enforce the Constitution’s structural barriers, as legislators debate other issues. “All Presidents,” Justice Scalia explained, “have a high interest in expanding the powers of their office, since the more power the President can wield, the more effectively he can implement his political agenda”⁴⁹⁹ He recognized that “[i]n any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch.”⁵⁰⁰

Gridlock does not license the expansion of the Executive’s power. Under our system of government, there is only one way to decide major questions, as difficult as it may be in our gridlocked polity. In the absence of consensus, the status quo remains.⁵⁰¹

⁴⁹⁵ See Esther Yu-Hsi Lee, *Boehner Won’t Advance Immigration Reform Until Republicans Can Trust Obama*, THINKPROGRESS (Feb. 6, 2014), <http://thinkprogress.org/immigration/2014/02/06/3258921/boehner-immigration-distrust-obama> [https://perma.cc/QFB9-8F5K] (quoting Speaker Boehner as explaining that the President boasting about his executive powers to bypass Congress “feed[s] more distrust about whether he’s committed to the rule of law” and that “there’s widespread doubt about whether this administration can be trusted to enforce our laws and it’ll be difficult to move any immigration legislation until that changes”).

⁴⁹⁶ See BLACKMAN, *supra* note 11, at 539 (“Republicans had no problem undermining [the ACA, which] they had no part in enacting and felt no attachment to.”).

⁴⁹⁷ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2606 (2014) (Scalia, J., concurring in the judgment).

⁴⁹⁸ *Id.* at 2605.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* (citing Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 439–47 (2012)).

⁵⁰¹ See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.”); see also *Noel Canning*, 134 S. Ct. at 2597–98 (Scalia, J., concurring in the judgment).

CONCLUSION

There are several unifying threads between the accommodation to the contraceptive mandate and DAPA. First, both policies affected critically divisive social issues: religious liberty and immigration policy. Second, Congress did not make a considered judgment on either issue. Congress was silent about religious accommodation, and rejected efforts to alter the status quo for millions of aliens. Third, the executive branch radically altered that status quo through a policy judgment premised on generalized statutes: authority to define what “preventive care”⁵⁰² should be covered by insurers and to “[e]stablish[] national immigration enforcement policies and priorities.”⁵⁰³ Fourth, both policies occasioned widespread controversy and litigation: religious organizations nationwide challenged the accommodation and half of the states challenged DAPA. Fifth, the judgment the executive branch reached would not be one our gridlocked Congress could have ever agreed to. Sixth, the courts struggled with the arduous task of assessing the line the Executive drew: did the accommodation impose a substantial burden on free exercise, and was DAPA within the scope of prosecutorial discretion? These difficulties are not surprising, because these are the “major questions” that should be resolved by Congress, not by the executive branch. Had Congress taken the time to craft a contraceptive mandate — rather than punting it to HHS — it would have likely created a conscience clause that satisfied democratic accountability. Had Congress enacted DAPA by statute, there would be no question of its lawfulness. But neither happened here, as the executive branch took it upon itself to make these judgments in the face of congressional silence and intransigence.

Alas, there is not much of a conclusion, because neither case is actually over. In another likely first for the *Harvard Law Review*’s Supreme Court issue, both of these cases are apt to become “SCOTUS repeaters.”⁵⁰⁴ The per curiam order in *Zubik* sent the case back to the courts of appeals. A complete compromise is unlikely, because the alternative accommodation the Court proposed does not bridge the gap between the government and the plaintiffs. The case will likely trickle back up to One First Street.

Texas was only the appeal of a preliminary injunction, so now the case proceeds to the merits, with certiorari possible within a year.

(“‘Convenience and efficiency,’ we have repeatedly recognized, ‘are not the primary objectives’ of our constitutional framework.” (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010))).

⁵⁰² 42 U.S.C. § 300gg-13(a)(3) (2012).

⁵⁰³ 6 U.S.C. § 202(5) (2012).

⁵⁰⁴ See Richard M. Re, *SCOTUS Repeaters*, PRAWFSBLAWG (Jan. 16, 2015, 2:10 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/01/scotus-repeaters.html> [<https://perma.cc/KBS3-93V7>].

That is, unless the outcome of the 2016 election moots the case: the forty-fifth President could rescind the DAPA memorandum or the 115th Congress could enact comprehensive immigration reform. But these nonjudicial resolutions illustrate that republicanism is perfectly capable of addressing this significant social issue. During his press conference after the *Texas* decision, President Obama admitted as much: “These are all the questions that voters now are going to have to ask themselves, and are going to have to answer in November.”⁵⁰⁵ He added that “this is how democracy is supposed to work.”⁵⁰⁶ President Obama is exactly right. Immigration reform was always a choice for the voters and their representatives to make, not for the Executive alone. DAPA, announced shortly after the midterm election, attempted to short-circuit this process. Until the law is changed, the status quo must remain.

Going forward, the Court’s fragmented decisions in both cases resolve little and saddle the lower courts with the unenviable task of deciding issues the Justices couldn’t. The application of the major question doctrine to *Zubik* and *Texas* obviates the difficult line-drawing issues over the bounds of religious liberty and scope of prosecutorial discretion. These are rightfully difficult topics to resolve, which are best left for Congress, the accountable lawmaking branch of government, to decide.

The Justices have a chance for a double mulligan. In light of the narrow “breadth of the authority” that Congress has afforded to the executive branch agencies over these controversial issues, courts are not “obliged to defer” to HHS’s and DHS’s “expansive construction” of their statutes.⁵⁰⁷ By resolving the cases along the lines suggested in this Comment, the Justices can avoid the difficult line-drawing problems that vexed them the first go-round, and restore to the legislative branch the role of deciding major questions of great societal import.

⁵⁰⁵ Press Release, *supra* note 487.

⁵⁰⁶ *Id.*

⁵⁰⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).