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Presidential Power To Protect Dreamers: Abusive or Proper?

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Many young undocumented immigrants brought to the United States as children, affectionately known as “Dreamers,” enjoy substantial protection from deportation under the Deferred Action for Childhood Arrivals (DACA) program. President Trump’s administration is attempting to withdraw this protection, purportedly in an effort to promote the rule of law by limiting executive overreach into matters of congressional concern. This Essay argues that the attempted rescission of DACA is not only out of step with broadly held American values, but premised on a flawed vision of the relationship between the legislative and executive branches. Our constitutional tradition wisely grants the President flexibility to make social policy through enforcement discretion, within the broad legal contours drawn by Congress. DACA is a legitimate exercise of that presidential power.

INTRODUCTION

My daughter, now ten years old, was born outside of the United States. I brought her here when she was six months old and this has become her home. Luckily, because I am a U.S. citizen, my daughter entered and remains in the United States legally. She does not live in fear of being forcibly taken away from the only home she has truly known and returned to the country of her birth.

This is not the case for many young people living in the United States today, brought here by their non-U.S. citizen parents, and affectionately known as “Dreamers.”¹ These individuals, like my daughter, came to the United States not with the intent to violate U.S. immigration laws, or even to seek a better life than the one that they had in their country of birth. Rather, these individuals

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1. The term “Dreamer” originates with the Development, Relief, and Education for Alien Minors (DREAM) Act of 2001, a bipartisan bill that has failed to pass despite numerous attempts and iterations. See S. 1291, 107th Cong. (2001).

joined their parents who, for a variety of reasons, crossed into the United States without permission. Immigration laws in the United States do not distinguish between adults and children when determining legal status following an illegal border crossing. Thus, these young Americans are just as unlawfully present in the United States as their parents and live under the constant threat of deportation.

Many of these Dreamers enjoy substantial, though not unlimited, protection from deportation under the Deferred Action for Childhood Arrivals (DACA) program. But President Trump's administration is attempting to withdraw this protection, purportedly in an effort to promote the rule of law by limiting executive overreach into matters of congressional concern.² As this Essay will explain, the rescission of DACA is not only out of step with broadly held American values, but premised on a flawed vision of the relationship between the legislative and executive branches. When future policymakers look back on DACA, they should see it not as an aberration from constitutional governance, but as a model of one legitimate way for presidents to respond to sweeping federal statutes that lack enforcement guidelines.

What we believe to be right and wrong is not always reflected in our legislation. Our lawmakers are not always able to foresee the unintended consequences of the language that they craft. Recent surveys bear this out. A significant majority of citizens—both Democrats and Republicans—believe that Dreamers should not be deported to their countries of birth.³ To do so, advocates argue, would be cruel to the Dreamers who, in many cases, would not even recognize their country of birth, might not speak that country's language, and have made substantial contributions to the United States.

There are almost 800,000 DACA recipients, with an average age under twenty-five.⁴ Most of them are employed, all of them necessarily consume goods and services in the United States, and as a group they pay significant amounts in

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2. At the time of publication, the law surrounding DACA is in a state of flux. The attempted termination of DACA is the subject of ongoing litigation, and a federal district court has granted a preliminary injunction blocking the termination. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211, 2018 WL 339144, at *27 (N.D. Cal. Jan. 9, 2018). Meanwhile, a potential deal to protect Dreamers is being hotly debated in Congress. See Ed O'Keefe & Sean Sullivan, *Schumer Has Rescinded Offer to Trump on Border Wall Funding*, WASH. POST (Jan. 23, 2018, 11:24 PM), http://www.washingtonpost.com/politics/schumer-has-rescinded-offer-to-trump-on-border-wall-funding/2018/01/23/79d854d7-c28c-40a6-b006-67a675dcece6_story.html [<http://perma.cc/F4HZ-NXKL>].
 3. See William A. Galston, *Two-Thirds of Trump Supporters Want Dreamers To Stay in U.S.*, BROOKINGS INSTITUTION: FIXGOV (Sept. 13, 2017), <http://www.brookings.edu/blog/fixgov/2017/09/13/two-thirds-of-trump-supporters-want-dreamers-to-stay-in-u-s> [<http://perma.cc/WWR4-GA7H>].
 4. Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, CATO INST. (Jan. 18, 2017, 3:00 PM), <http://www.cato.org/blog/economic-fiscal-impact-repealing-daca> [<http://perma.cc/CRW4-VWTN>].

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taxes.⁵ The economic implications of the mass deportation of these young people cannot be overstated. In an aging country such as the United States,⁶ replenishing our workforce with young immigrants keeps our Social Security and Medicare programs funded.⁷ Deporting these immigrants would also have an enormous adverse impact on the economies and budgets of individual states.⁸ Facing this economic reality, several states have sued the Trump Administration, challenging the termination of DACA.⁹

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On its face, protecting Dreamers appears to be an easy thing to do. Offering them a pathway to permanent residence or citizenship would allow them to go on contributing to the United States, which is often the only country that they truly know. But below the surface, there are more complex concerns. Should the Dreamers become citizens, immigration law would eventually permit them to apply for legal status for their parents, who intentionally entered the United

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5. *Id.*; see also Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue To Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017), <http://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow> [<http://perma.cc/LK4N-KD7N>] (finding that ninety-one percent of DACA recipients are employed).
 6. See Jennifer Ortman et al., *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU (May 2014), <http://www.census.gov/prod/2014pubs/p25-1140.pdf> [<http://perma.cc/6FHY-DQTJ>].
 7. Ai-jen Poo, *America's Boomers and Undocumented Immigrants Need Each Other*, PBS NEWS HOUR (Mar. 9, 2015, 12:30 PM), <http://www.pbs.org/newshour/nation/americas-boomers-and-undocumented-immigrants-need-each-other> [<http://perma.cc/XS7X-K8FX>].
 8. See Ike Brannon, *The Economic and Budgetary Cost of Repealing DACA at the State Level*, CATO INST. (Aug. 31, 2017, 4:13 PM), <http://www.cato.org/blog/economic-budgetary-cost-repealing-daca-state-level> [<http://perma.cc/TE3T-AKGA>]; John W. Schoen, *DACA Deportations Could Cost US Economy More than \$400 Billion*, CNBC (Sept. 5, 2017, 12:24 PM), <http://www.cnbc.com/2017/09/05/daca-deportations-could-cost-us-economy-more-than-400-billion.html> [<http://perma.cc/VF2M-CQX8>].
 9. See Patrick McGreevy, *California Sues Trump Administration over Plan To End DACA*, L.A. TIMES (Sept. 11, 2017, 11:10 AM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-sues-trump-administration-1505150334-htmlstory.html> [<http://perma.cc/3BRF-T9GT>]; Mallory Shelbourne, *Colorado Joins Lawsuit To Block Trump from Ending DACA*, HILL (Sept. 13, 2017, 1:30 PM), <http://thehill.com/homenews/state-watch/350481-colorado-joins-lawsuit-to-block-trump-from-ending-daca> [<http://perma.cc/C9UX-5CXA>].

States without permission. The process of doing so would require these undocumented parents to wait until their U.S. citizen child turns twenty-one,¹⁰ leave the United States, wait until their ban on reentry has passed (usually either three or ten years, depending on how long they stayed unlawfully in the country¹¹), and then apply for permission to enter lawfully.¹² Despite the difficulty of actually using citizen children as “anchors” for parents’ citizenship, the idea has led some to call for an end to birthright citizenship, which is granted by the Fourteenth Amendment.¹³ President Trump has asserted that U.S. citizen children of unlawfully present parents, sometimes known pejoratively as “anchor babies,” should not be citizens at all.¹⁴ However, a majority of citizens reject the idea of changing the Constitution to eliminate birthright citizenship,¹⁵ and the idea is therefore probably politically infeasible.

Another common objection to legalizing Dreamers’ immigration status is that granting lawful status to Dreamers might incentivize additional unlawful border crossings with children.¹⁶ Yet this and the aforementioned criticisms are not insurmountable problems; they could be allayed with carefully crafted legislation that targets protections for the Dreamers already present in the United States and creates a better pathway for the lawful entry of minors in the future.

In contrast to the flawed arguments that have been made against legal protection for Dreamers, the positive justifications for providing such protection are compelling. Dreamers live in a precarious position. Although

10. 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

11. 8 U.S.C. § 1182(a)(9)(B)(i) (2012).

12. 8 U.S.C. § 1201 (2012).

13. For example, Rep. Steve King (R-Iowa) has introduced a proposal to end automatic birthright citizenship. See Birthright Citizenship Act of 2017, H.R. 140, 115th Cong. (2017).

14. Reena Flores, *Donald Trump: “Anchor Babies” Aren’t American Citizens*, CBS NEWS (Aug. 19, 2015, 10:44 AM), <http://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens> [<http://perma.cc/CAT4-Q9WB>] (quoting then-candidate Donald Trump as stating, incorrectly, that children born in the United States to unlawfully present parents are not U.S. citizens).

15. Jeffrey S. Passel & D’Vera Cohn, *Number of Babies Born to Unauthorized Immigrants in U.S. Continues To Decline*, PEW RES. CTR. (Oct. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/10/26/number-of-babies-born-to-unauthorized-immigrants-in-u-s-continues-to-decline> [<http://perma.cc/M2PV-CV2K>].

16. Tom K. Wong & Hillary Kosnac, *Does the Legalization of Undocumented Immigrants in the US Encourage Unauthorized Immigration from Mexico? An Empirical Analysis of the Moral Hazard of Legalization*, 55 INT’L MIGRATION 159, 159-60 (2017).

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they are more likely than other undocumented immigrants to be educated and employed,¹⁷ they share with their parents unlawful status and the fear of being deported at any time—a fear exacerbated by performing the many social activities of young people, such as attending school, seeing a movie, or hanging out with friends in public. Prior to DACA, Dreamers lived in the shadows of society, afraid to raise their heads for fear of being identified as unlawful aliens and deported.¹⁸ Thanks to a historic Supreme Court decision in 1982, Dreamers are allowed to attend public school.¹⁹ But other benefits associated with lawful status, including the rights to work, receive economic assistance such as Medicaid or food stamps, and pursue a pathway to citizenship, are closed off by immigration law in the absence of DACA. Without lawful status, and without the temporary respite offered by DACA, Dreamers will quickly fall back into the shadows and out of the American economy in which they have been participating.

Congress's failure to protect Dreamers is part of its broader failure to provide needed changes in immigration law. Both Democrats and Republicans have failed to enact significant immigration law reforms for decades. Though some minor reforms were enacted during the Reagan and Clinton Administrations,²⁰ the last comprehensive immigration reform took place in 1965.²¹ The United States today is a more diverse and more tolerant place than it was around 1965,²² but our laws fail to reflect these changes.

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17. Alicia Parlapiano & Karen Yourish, *A Typical 'Dreamer' Lives in Los Angeles, Is from Mexico and Came to the U.S. at 6 Years Old*, N.Y. TIMES (Jan. 23, 2018), <http://www.nytimes.com/interactive/2017/09/05/us/politics/who-are-the-dreamers.html> [<http://perma.cc/XN9D-GQXT>] (profiling the average DACA recipient as more educated and more highly skilled than the average undocumented immigrant ineligible for DACA).
 18. See Elizabeth Aranda, *The American Nightmare Dreamers Fear*, CNN (Aug. 31, 2017, 5:01 PM), <http://www.cnn.com/2017/08/31/opinions/daca-nightmare-dreamers-fear-aranda/index.html> [<http://perma.cc/ALA7-8KXQ>].
 19. Plyler v. Doe, 457 U.S. 202 (1982) (striking down a Texas law withholding funds from public schools that admitted undocumented students).
 20. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.
 21. See Pub. L. No. 89-236, 79 Stat. 911 (1965).
 22. See Anna Maria Barry-Jester, *Attitudes Toward Racism and Inequality Are Shifting*, FIVETHIRTYEIGHT (Jun. 23, 2015, 9:52 AM), <http://fivethirtyeight.com/features/attitudes-toward-racism-and-inequality-are-shifting> [<http://perma.cc/XJ9K-Q9UP>]; D'vera Cohn & Andrea Caumont, *10 Demographic Trends That Are Shaping the U.S. and the World*, PEW RES. CTR. (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world> [<http://perma.cc/JXL6-6SSA>].

In an effort to address this problem, President Obama pushed legislators to pass comprehensive bipartisan immigration reform during his first two years in office.²³ With a pro-immigration-reform President and a Democrat-led Congress, reforms that addressed Dreamers and many other facets of immigration law appeared to be within reach. However, the 2010 midterm elections and the loss of Democratic control of the House of Representatives signaled rising partisanship and significantly diminished the likelihood of congressional immigration reform.²⁴ While the Democrat-led Senate passed a bill in 2013 that would have enacted substantial changes to existing immigration law,²⁵ the Republican-led House refused to consider the bill at all, leading it to die alongside any further bipartisan proposals for immigration reform.²⁶

Recognizing that Congress was not going to act to reform immigration law due to resistance from House Republicans, President Obama resorted to extraordinary executive measures. He applied prosecutorial discretion in the enforcement of immigration law by prioritizing enforcement against the most significant threats to society, namely terrorists and criminals.²⁷ DACA was born out of this executive discretion, and offered a temporary and limited solution to the problems faced by Dreamers. Dreamers would be allowed to come out of the shadows in which they were hiding under the government's promised

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23. Peter Baker, *Obama Urges Fix to 'Broken' Immigration System*, N.Y. TIMES (July 1, 2010), <http://www.nytimes.com/2010/07/02/us/politics/02obama.html> [http://perma.cc/W2GK-DG9C].
 24. See Ewan MacAskill, *GOP and Democrats Gear Up for All-Out Combat*, GUARDIAN (Nov. 2, 2010, 10:35 PM), <http://www.theguardian.com/world/2010/nov/03/gop-democrats-tea-party> [http://perma.cc/QK5B-2247] (describing the chances of immigration reform legislation as “about zero” after the 2010 midterms); see also Christopher Parker, *The (Real) Reason Why the House Won't Pass Comprehensive Immigration Reform*, BROOKINGS INSTITUTION: FIXGOV (Aug. 4, 2014), <http://www.brookings.edu/blog/fixgov/2014/08/04/the-real-reason-why-the-house-wont-pass-comprehensive-immigration-reform> [http://perma.cc/4F7U-QQAU].
 25. Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/us/politics/immigration-bill-clears-final-hurdle-to-senate-approval.html> [https://perma.cc/M27M-4VP9].
 26. Alan Gomez, *House GOP Kills Last Hope for Immigration Bill*, USA TODAY (July 10, 2014), <http://www.usatoday.com/story/news/politics/2014/07/10/immigration-house-republicans/12477925> [http://perma.cc/3Z4P-778R].
 27. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to All ICE Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [http://perma.cc/8VRZ-DR8D].

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protection from deportation.²⁸ Again utilizing his prosecutorial discretion power, in 2012 President Obama offered work authorization and protection from deportation to all Dreamers who had no criminal record, had graduated from a U.S. high school or been honorably discharged from the U.S. military, and could show that they had been brought to the United States under the age of sixteen.²⁹

The DACA program was a dream come true for many of these young people who had been waiting for their chance to openly join the society in which they lived. However, it came with a few significant caveats. First, because DACA was issued by the executive and not the legislature, the sustainability of the program was doubtful. Second, DACA did not create a legal right for these young Americans to remain in the country. It was merely a temporary freeze on deportations. And third, in order to receive work authorization and deportation relief, Dreamers had to reveal themselves to the government. Despite these risks, over 800,000 Dreamers came forward to request relief. As of 2016, the government had granted the requests of eighty-eight percent of those who applied for DACA.³⁰

Yet, however valuable DACA appears to be for its beneficiaries, it is important to understand that it was created out of executive discretion to enforce the law rather than as law itself. To better understand how this difference manifests in practical terms, it is important to examine the relationship between executive policymaking and legislative lawmaking.

DISCRETION VS. LEGISLATION

The framers of the Constitution separated power between three branches of government. The power to make laws was vested in Congress.³¹ The power to

28. Memorandum from Janet Napolitano, U.S. Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/TBL2-UAQ8>].

29. *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/childhoodarrivals> [<http://perma.cc/9VXR-EX82>] (last updated Oct. 6, 2017).

30. *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2016 (June 30)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 30, 2016), http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr3.pdf [<http://perma.cc/4TJZ-NATW>].

31. U.S. CONST. art. I, § 1.

enforce those laws was vested within the executive.³² The Constitution also makes clear that Congress, and not the executive, maintains power over immigration.³³ The President, therefore, has no power to enact immigration laws or to act contrary to immigration laws promulgated by Congress. His duty is to enforce the laws that Congress enacts.³⁴ But does it follow that the executive, in its enforcement of the legislature's immigration laws, has the power to apply its own policies and principles in the interpretation of the laws that it is asked to enforce?

Limitations on resources and manpower make the enforcement of every law in every case utterly impossible.³⁵ Consider the case of minor traffic infractions, such as speeding or failing to use turn signals. If law enforcement officers were required to pursue every such instance of these violations, no matter how minor, they would be less able to respond to more serious offenses. The same could be said of tax compliance, worker safety laws, environmental laws, and many other areas where minor infractions are often committed without triggering any enforcement action. Prosecutorial discretion allows the enforcement branch of our government to set priorities for the use of its limited resources at the behest of the President and his executive appointees.

The same prioritization happens in immigration law. U.S. Immigration and Customs Enforcement (ICE), a law enforcement agency within the Department of Homeland Security (DHS) that is designated by statute to enforce immigration laws, has the power to interpret immigration laws in light of available resources. ICE exercised this prerogative in 2011, when its director, at the behest of President Obama, issued a memorandum directing federal law enforcement officers to prioritize the capture and removal of terrorists, serious criminals, and threats to national security.³⁶

Shortly after this refocusing of enforcement priorities at ICE, President Obama's Secretary of Homeland Security, Janet Napolitano, issued the DACA memorandum, which applies prosecutorial discretion to a group of undocumented immigrants who already fall within the lower levels of priorities set by ICE, though they are not exempt from deportation.³⁷ The memorandum

32. *Id.* art. II, § 3 (providing that the President “shall take care that the laws be faithfully executed”); *see also* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013) (providing extensive background on the Take Care Clause, which has been interpreted to give the President law enforcement powers).

33. U.S. CONST. art. I, § 8 (granting Congress the power to “establish a uniform rule of naturalization”).

34. *Id.* art. II, § 3.

35. *See* TODD GARVEY, CONG. RESEARCH SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW (2014), <http://www.fas.org/sgp/crs/misc/R43708.pdf> [<http://perma.cc/D4W2-NT42>].

36. Memorandum from John Morton to All ICE Emps., *supra* note 27.

37. Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 28.

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makes clear that no legal right is being granted and that even immigrants who qualify for discretionary relief may be charged and removed if appropriate.³⁸ However, unlike the example above regarding discretion for minor traffic violations, this policy effectively targeted a group of law violators for blanket non-enforcement. DACA therefore might be more akin to local or state law enforcement agencies exempting certain types of vehicles from the enforcement of traffic laws. Thus, we must ask whether the President has the power to utilize discretionary authority to exempt an entire group from enforcement of the law.

JUST A DREAM: DACA AND THE ACCUSATION OF EXECUTIVE OVERREACH

Our courts have long recognized that managing the day-to-day enforcement of the law is a job for the executive branch rather than Congress.³⁹ Executive agencies serve a crucial role in our legal system, promulgating regulations that blend legislative mandates with practical realities in order to make the application and enforcement of the laws more predictable and clear. Courts have supported broad deference to agency interpretations of the law, largely leaving them to interpret statutes as they see fit.⁴⁰ When agencies overstep their authority by acting arbitrarily or in a capricious manner, courts deny deference,⁴¹ but this is infrequent.⁴² That being said, there is currently significant uncertainty around the future scope of judicial deference to administrative agencies following the 2017 appointment of Justice Gorsuch, an ardent opponent of such deference, to the U.S. Supreme Court.⁴³

38. *Id.*

39. *See, e.g.,* Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (describing the role of executive agencies in choosing enforcement priorities); Myers v. United States, 272 U.S. 52, 177 (1926) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”).

40. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing the precept of deference to agency interpretations).

41. *See, e.g.,* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2127 (2016) (denying deference to the U.S. Department of Labor’s interpretation of an overtime statute for auto workers).

42. *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83-85 (2011) (summarizing empirical studies related to judicial review of agency actions, which generally found that courts uphold agency actions most of the time).

43. *See* Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N.Y. TIMES: DEALBOOK (Mar. 14, 2017), <http://www.nytimes.com/2017/03/14/business/dealbook/neil-gorsuch-chevron-deference.html> [<http://perma.cc/4VL8-AWHP>]; Ilya Somin, *Gorsuch Is Right About Chevron Deference*, WASH. POST: VOLOKH CONSPIRACY (Mar. 25, 2017),

Relatedly, the Supreme Court has affirmed that the President has the duty to enforce the laws, but also the power to apply discretion in how they are enforced.⁴⁴ So long as a statute does not specifically outline how a law is to be enforced in clear terms, courts cannot compel the executive to take specific enforcement actions; an “agency’s decision not to take enforcement action should be presumed immune from judicial review.”⁴⁵

DACA has generated new questions about the extent of executive power to apply discretion in the interpretation and enforcement of law. As in the case of objections brought against the Obama Administration for failure to strictly enforce the Controlled Substances Act against states that enacted marijuana “legalization” statutes,⁴⁶ some commentators and politicians have argued that DACA exceeds the limits of executive power. Opponents of DACA assert that discretion to this degree weakens the rule of law not only by negating the President’s obligation to enforce the law, but also by allowing the executive branch to create law, a function exclusively reserved to Congress.⁴⁷

An 1838 Supreme Court case exemplifies this fear of executive override of statutory law.⁴⁸ In that case, the Postmaster General, at the express direction of the President, refused to enforce a law requiring back pay for contracted postal carriers. The Court concluded that “the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”⁴⁹ However, courts have also recognized that Congress may not encroach on the executive’s enforcement powers. For example, in *United States v. Nixon*, the Supreme Court noted: “[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”⁵⁰ The Office of Legal Counsel at the U.S. Department of Justice has supported this interpretation.⁵¹

<http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference> [<http://perma.cc/MJF5-U4JY>].

44. Heckler v. Chaney, 470 U.S. 821, 831-35 (1985) (establishing a presumption that agency refusals to take enforcement action are unreviewable by courts).
45. *Id.* at 832.
46. See Halimah Abdullah, *Up in Smoke: The Obama Administration’s Pot Politics Problem*, CNN (Feb. 5, 2014, 9:00 AM), <http://www.cnn.com/2014/02/04/politics/pot-politics/index.html> [<http://perma.cc/8K9A-T55K>].
47. Kris W. Kobach, *The DACA Amnesty Must Be Ended*, BREITBART (Aug. 30, 2017), <http://www.breitbart.com/big-government/2017/08/30/kobach-the-daca-amnesty-must-be-ended> [<http://perma.cc/ZZ3U-ZECV>].
48. Kendall v. United States ex rel. Stokes, 37 U.S. 524 (1838).
49. *Id.* at 610.
50. 418 U.S. 683, 693 (1974).
51. Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 115 (1984).

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The DACA policy is an application of executive power to interpret existing legislation on the basis of DHS's allotted resources and the agency's expert interpretation of the manner in which the law should be enforced. The Trump Administration, which opposed DACA from the outset and considered it unconstitutional, terminated the program in September 2017.⁵² In announcing the termination, Attorney General Jeff Sessions likened the suspension of DACA to the restoration of the rule of law: "No greater good can be done for the overall health and well-being of our Republic, than preserving and strengthening the impartial rule of law." He believed that "[s]uch an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch."⁵³ Sessions contended that DACA was likely to follow the same judicial path as the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), discussed below.⁵⁴

As I have argued in this Essay, prosecutorial discretion is a necessary and proper use of executive power in its law enforcement role. Where Congress has failed to provide clear guidance or direct specific enforcement measures, the executive is left with the obligation to decide, within the parameters of statutory language, the intent of the law in order to enforce it. The 1985 *Heckler* decision, which rejected a challenge to a federal agency's authority to withhold enforcement of a law, stated in no uncertain terms the distinct role that an agency plays in selectively executing the law:

[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.⁵⁵

Thus, rather than weakening the rule of law, allowing executive agencies to issue policies that explain how they will best utilize their resources in the enforcement of that law provides transparency and accountability, two key components of strong rule of law. Acting under the presumption that a law will

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52. Vanessa Romo, Martina Stewart & Brian Naylor, *Trump Ends DACA, Calls on Congress To Act*, NPR (Sept. 5, 2017, 9:05 AM), <http://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act> [<http://perma.cc/W6S6-CSDZ>].
53. Jefferson Sessions, Attorney Gen., Remarks on DACA (Sept. 5, 2017), <http://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca> [<http://perma.cc/89VV-2KH2>].
54. See *infra* notes 56-66 and accompanying text.
55. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

be one hundred percent enforced when reality precludes the actual achievement of total enforcement leaves discretion to be doled out as an individual officer sees fit, reducing a citizen's ability to understand whether a law will be enforced or not.

DACA is an example of executive policymaking that reflects the role of the President in shaping the legal landscape in a way that reflects the will of the people. Unlike a legislator who is beholden to his or her principal constituents, the President can look to the majority of the voters to assess the temperature of the entire electorate in deciding how laws will be implemented. Congress maintains an array of tools for reining in presidential overreach, such as restrictions on funding, congressional hearings, and, most important, the enactment of legislation.

The Supreme Court has not yet addressed whether a blanket policy of discretion toward a single group of law violators merits deference to agency interpretation. Most cases addressing the issue of enforcement discretion are individual instances of discretion. However, the Supreme Court came close to answering the important legal questions about blanket prosecutorial discretion in 2016, when the Court considered—but ultimately failed to issue an opinion in—a lawsuit filed by Texas seeking to prevent the expansion of DACA and the implementation of new protections for certain undocumented parents under DAPA. The Court divided four to four, resulting in a one-sentence per curiam order preserving an injunction Texas had won in the Fifth Circuit in 2015.⁵⁶

In the underlying lawsuit, Texas and twenty-five other states sued the Obama Administration, claiming that the Administration's new DAPA program, together with the associated expansions of DACA, illegally contradicted immigration law enacted by Congress and failed to go through the traditional notice-and-comment process for agency rulemaking.⁵⁷ Texas argued that it would suffer financial harm from the Administration's actions because, under Texas law, providing undocumented residents with "lawful presence" status would enable them to apply for Texas driver's licenses, costing the state millions of dollars.⁵⁸

The Obama Administration disputed Texas's standing. It also argued that DHS maintained prosecutorial discretion to change its enforcement priorities in order to remove certain aliens from the crosshairs of deportation, and that such decisions are not reviewable by the courts.⁵⁹

In its 2015 ruling, the Fifth Circuit found that the fiscal burden on Texas satisfied the standing requirement. The court agreed with the Obama Administration that DHS maintains discretion to adjust enforcement priorities.

56. *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.).

57. Complaint for Declaratory & Injunctive Relief, *Texas v. United States*, 86 F. Supp. 3d 59 (S.D. Tex. 2014) (No. 1:14-cv-00254), 2014 WL 6806231.

58. *Texas v. United States*, 809 F.3d 134, 152-53 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

59. *Id.* at 163-64.

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However, the court concluded that the bestowing of benefits, such as lawful status, on aliens was an application of discretion that yields certain state and federal benefits beyond mere withholding of removal:

Some features of DAPA are similar to prosecutorial discretion: DAPA amounts to the Secretary’s decision—at least temporarily—not to enforce the immigration laws as to a class of what he deems to be low-priority aliens. If that were all DAPA involved, we would have a different case. DAPA’s version of deferred action, however, is more than nonenforcement: It is the affirmative act of conferring “lawful presence” on a class of unlawfully present aliens. Though revocable, that new designation triggers eligibility for federal and state benefits that would not otherwise be available.⁶⁰

The significance of conferring lawful status to this group of aliens, the court held, made the program eligible for judicial review.⁶¹

In ruling on the merits against DAPA and the expansion of DACA, the Fifth Circuit found that the Obama Administration was not merely exercising legitimate enforcement discretion. Rather, the Administration’s action was irreconcilable with the Immigration and Nationality Act (INA) because it deviated from “Congress’s careful plan” for “how parents may derive an immigration classification on the basis of their child’s status and which classes of aliens can achieve deferred action and eligibility for work authorization.”⁶² Moreover, the Fifth Circuit ruled, the Administration’s failure to go through notice-and-comment procedures violated the Administrative Procedure Act (APA) because its action amounted to a substantive rule, as opposed to a mere policy statement or an internal rule of agency procedure.⁶³

In her dissent, Judge King contended that Congress had created a problem that the executive was forced to resolve—how to effectively enforce a law with insufficient resources to do so. She pointed out that DHS is only provided with sufficient resources to remove approximately 400,000 of the more than eleven million unlawfully present aliens in the United States.⁶⁴ Judge King argued that the DAPA memo clearly fits within the scope of prosecutorial discretion recognized in past cases,⁶⁵ and that the courts should not interfere with the

60. *Id.* at 166.

61. *Id.* at 167.

62. *Id.* at 186.

63. *Id.* at 171-78.

64. *Id.* at 188-89 (King, J., dissenting).

65. *Id.* at 200.

agency's use of DAPA to guide the "difficult prioritization decisions" necessitated by Congress's underfunding of the agency.⁶⁶

While the DAPA case raises novel legal questions, Judge King's dissent is more persuasive and more faithful to precedent than the majority opinion. What appears to be clear from the past applications of executive discretion as both a criminal (prosecutorial discretion) and civil (administrative enforcement discretion) matter is that it is part and parcel of the President's constitutional duty to take care that the laws are faithfully executed.⁶⁷ The statute at issue here—the INA—clearly delegates enforcement authority to the executive branch.⁶⁸ No specific guidelines regarding how the provisions of that law are to be executed are made clear in the statute. DHS examined its policy, based upon the INA, of deporting immigrants brought to the United States as children and evaluated "whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."⁶⁹ DHS concluded that it was not worthwhile to deport Dreamers and that resources would be better spent on more serious enforcement concerns.

Consistent with Judge King's reasoning, the U.S. District Court for the Northern District of California recently ruled that the rescission of DACA must be placed on hold and the government must resume accepting applications to renew DACA enrollment.⁷⁰ The court order granting this preliminary injunction offers perhaps the most direct judicial articulation to date of why DACA is lawful.

In moving to dismiss a series of complaints against the DACA termination in the Northern District of California, the government made three jurisdictional arguments: 1) that the APA barred judicial review because the rescission of DACA was a discretionary act; 2) that the INA also barred judicial review; and 3) that most of the plaintiffs in the litigation lacked standing.⁷¹ The court rejected all of these arguments.⁷²

More importantly for our present purposes, the court also found that the plaintiffs were likely to succeed on the merits of their claim that the Trump Administration's termination of DACA was a substantive violation of the

66. *Id.* at 218.

67. U.S. CONST. art. II, § 3.

68. Immigration and Nationality Act § 103(a)(1), 8 U.S.C. § 1103 (2012) (granting the Secretary of Homeland Security authority to administer and enforce the INA).

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

70. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211, 2018 WL 339144, at *27 (N.D. Cal. Jan. 9, 2018).

71. *Id.* at *10.

72. *Id.* at *10-17.

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APA.⁷³ The court reached this conclusion principally on the ground that the order rescinding DACA was based upon the flawed legal premise that the agency lacked discretionary authority to create DACA in the first place.⁷⁴ The court reasoned:

In short, what exactly is the part of DACA that oversteps the authority of the agency? Is it the granting of deferred action itself? No, deferred action has been blessed by both the Supreme Court and Congress as a means to exercise enforcement discretion. Is it the granting of deferred action via a program (as apposed [sic] to ad hoc individual grants)? No, programmatic deferred action has been in use since at least 1997, and other forms of programmatic discretionary relief date back to at least 1956. Is it granting work authorizations coextensive with the two-year period of deferred action? No, aliens receiving deferred action have been able to apply for work authorization for decades. Is it granting relief from accruing “unlawful presence” for purposes of the INA’s bars on reentry? No, such relief dates back to the George W. Bush Administration for those receiving deferred action. Is it allowing recipients to apply for and obtain advance parole? No, once again, granting advance parole has all been in accord with pre-existing law. Is it combining all these elements into a program? No, if each step is within the authority of the agency, then how can combining them in one program be outside its authority, so long as the agency vets each applicant and exercises its discretion on a case-by-case basis?⁷⁵

The court explained that just before DACA was terminated, Sessions told the Acting Secretary of DHS that the program was illegal. Sessions described DACA as an improper executive attempt to accomplish a result that Congress had repeatedly refused to authorize.⁷⁶ He also pointed to the Fifth Circuit’s DAPA decision as a reason to believe that DACA was illegal.⁷⁷ The court, however, was unpersuaded. Unlike the bills that Congress had considered and rejected, the court explained, DACA did not allow Dreamers to become lawful permanent residents or provide any similar option. “In fact, the 2012 DACA memo made explicit that DACA offered no pathway to lawful permanent residency, much less citizenship.”⁷⁸ As for the DAPA case, the court acknowledged that “at least some of the [Fifth Circuit] majority’s reasons for holding DAPA illegal would

73. *Id.* at *17.

74. *Id.*

75. *Id.* at *19.

76. *Id.* at *20.

77. *Id.* at *21.

78. *Id.* at *20.

apply to DACA,” but also pointed out some key distinctions between the cases.⁷⁹ For example, the Fifth Circuit’s ruling was based in part on its finding that DAPA interfered with the system Congress had set up for parents deriving immigration status from their children—an issue that did not apply to DACA.⁸⁰

It remains to be seen whether the District Court’s order will ultimately hold up on appeal. In the meantime, DHS is complying with the injunction by keeping DACA in place and accepting applications for renewal from DACA enrollees.⁸¹

CONCLUSION

Terminating DACA because the Trump Administration believes it fails to align with its enforcement priorities would be a reasonable thing to do. However, contending that it is being terminated because it weakens the rule of law reflects a lack of understanding of our history and legal traditions. And as the Northern District of California has highlighted, terminating DACA because it was never within the power of the executive to authorize ignores the extensive history of discretion in law enforcement.

Our legislators are empowered with the awesome authority to create laws for our great nation. Congress has the power to implement reforms to existing immigration law that set clear guidelines for what enforcement agencies can and cannot do with respect to removal of aliens. Yet it has failed to do so.

Congress is also free to expand substantially the funding it provides to immigration enforcement agencies, tying that funding to specific policy goals such as increased removals. However, it has not yet done so.

Prosecutorial discretion is a long-recognized approach for law enforcement agencies to apply the limited funding they receive from the legislature to their enforcement priorities. This will inevitably require them to evaluate the legal framework within which they work in order to interpret legislative intent and marry that interpretation to available resources.

In the case of DACA, the Obama Administration directed DHS to prioritize immigration enforcement in a manner consistent with American values as seen by that administration, while maintaining compliance with the intent of existing, albeit outdated, immigration laws. This was within the discretionary power of the executive and consistent with previous administrations. The Trump Administration’s contention that such discretion is executive overreach and that only the legislature can act to refocus its enforcement priorities effectively absolves the executive of responsibility to provide basic rights to the

79. *Id.* at *22.

80. *Id.*

81. *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 13, 2018), <http://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [<http://perma.cc/A3TP-MWT4>].

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hundreds of thousands of young people brought here by their parents and contributing to American society alongside their lawfully present compatriots.

I have argued elsewhere in favor of reforming the U.S. immigration system to account for the many social and economic changes that have occurred since the last major reform in 1965.⁸² Such reform would require congressional action and agreement over the impact of and appetite for immigrants in the United States. Given the current political environment, congressional reform appears far from certain today. Yet, congressional failure to modernize our immigration system places many economically desirable immigrants in a category of politically undesirable “illegals.” The result of this incongruence is the establishment of a shadow society of immigrants who escaped economic pressures at home only to face social and political pressures in the United States. Prosecutorial discretion allows the executive to relieve some of this pressure and give Congress time to define its vision of American society. Far from being a tyrannical power grab, DACA is an exemplar of how our constitutional tradition wisely grants the President flexibility to make social policy within the broad contours drawn by Congress.

82. See Kevin J. Fandl, *Taxing Migrants: A Smart and Humane Approach to Immigration Policy*, 7 NW. INTERDISC. L. REV. 127 (2014).