

UCLA

UCLA Public Law & Legal Theory Series

Title

The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law

Permalink

<https://escholarship.org/uc/item/4zd7956g>

Journal

Washburn Law Journal, 55

Author

Motomura, Hiroshi

Publication Date

2015



UCLA | SCHOOL OF LAW

PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES

RESEARCH PAPER NO. 15-47

THE PRESIDENT'S DILEMMA:
EXECUTIVE AUTHORITY, ENFORCEMENT, AND THE RULE OF LAW IN IMMIGRATION LAW

by

HIROSHI MOTOMURA
SUSAN WESTERBERG PRAGER PROFESSOR OF LAW

55 *Washburn Law Journal* 1 (2015)

The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law

Hiroshi Motomura*

My topic for the 2015 Foulston Siefkin lecture was the President's authority to undertake what in immigration law has come to be called "executive actions" to grant temporary reprieves from deportation. The broad question that framed my comments was whether these measures are within or beyond the President's authority as set out and limited by the U.S. Constitution and federal statutes.¹ To be clear, I am already amply on record as one who believes that the President's executive actions are legal and within his constitutional and statutory authority.² My overall conclusion on this broad question rests on multiple grounds, which are not mutually exclusive or inconsistent; in fact, they are mutually reinforcing.

In this Article, as in my Foulston Siefkin lecture, my purpose is not to address all of the legal and policy issues that the President's executive actions might raise. Instead, I would like to step back and analyze the debate from one perspective that is often overlooked, yet may be the

* Susan Westerberg Prager Professor of Law, School of Law, University of California, Los Angeles (UCLA). I am very grateful for the honor of delivering this year's Foulston Siefkin lecture. My thanks go to the Foulston Siefkin law firm for its generous support of this lecture series, to Professor David Rubenstein and Articles Editor Gabby Ilaria for all of their help with my visit to Washburn University School of Law, and to Editor-in-Chief Nathaniel Martens and Articles Editor Destiny Bounds for organizing this Issue of the *Washburn Law Journal*. I am indebted to Jason Cade, Patrick Charles, Michael Kagan, Peter Margulies, Ignacia Rodríguez, and Shoba Sivaprasad Wadhia for their helpful comments on earlier drafts, and to all of this Issue's authors for their generous thoughtful engagement with the important topic of executive authority. I would also like to thank Andrés Kwon, UCLA School of Law class of 2016, for his excellent research and editorial assistance.

1. As explained more fully in Parts I.B–D, and II.B *infra*, these statutes include the Immigration and Nationality Act ("INA"), other federal immigration statutes, and the Administrative Procedure Act.

2. See Letter from Shoba Sivaprasad Wadhia Samuel Weiss Faculty Scholar, Clinical Professor of Law, Pa. State Univ. Dickinson School of Law, et al. to President Barack Obama (Sept. 3, 2014), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf [<http://perma.cc/52UL-8WWA>]; HIROSHI MOTOMURA, THE PRESIDENT'S DISCRETION, IMMIGRATION ENFORCEMENT, AND THE RULE OF LAW (American Immigration Council Perspectives, Aug. 2014); Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA School of Law, et al., to President Barack Obama (May 28, 2012), <https://www.law.uh.edu/ihe/g/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf> [<https://perma.cc/3C6D-F6NY>].

most fundamental and compelling of the justifications for the President's executive actions. It is the perspective offered by the following practical question. What is the President to do when confronted with this dilemma: he is in command of a highly discretionary enforcement system, and his subordinates in the field resist the enforcement priorities that he has adopted to guide the exercise of prosecutorial discretion?

In answering this question, I will first outline what President Obama has done through executive actions, and then backtrack to explain what preceded those actions in Congress and the Executive Branch. I will also draw on the history of U.S. immigration law to put the current controversy in broader context. In particular, I will explain why it is difficult to evaluate the President's executive actions without understanding how unauthorized migration to the United States has evolved over the past century into a system marked by vast discretion.

Overall, I have two basic goals in this Article, both building on prior work.³ The first goal is to explain the pivotal role of discretion in immigration law enforcement. The second is to suggest how this discretion should be exercised in the context of an enormous enforcement apparatus that poses substantial supervisory challenges for high-level federal officials. The key question, I will explain, is not *whether* discretion is exercised in immigration law enforcement. Instead, it is *who* exercises the discretion that is inevitable in the current system, and *how*, if at all, that discretion is supervised. Fundamentally at stake in the President's dilemma is the meaning of the "rule of law" in immigration law enforcement.

3. Much of this Article builds on thoughts that I have outlined in prior work previously. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 204–05 (2014) [hereinafter IMMIGRATION OUTSIDE THE LAW] (explaining the need for President Obama to adopt formal deferred action programs as a response to the reluctance or resistance of immigration enforcement personnel in the field to carry out the President's enforcement priorities and prosecutorial discretion guidelines). In exploring this aspect of deferred action programs in IMMIGRATION OUTSIDE THE LAW, then in my Foulston Siefkin lecture, and now more fully in this Article, I have found myself in the excellent company of commentators whose work on this aspect of Deferred Action for Childhood Arrivals ("DACA") and Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") is generally consonant with mine, often explaining many points in greater detail than I do here. We seem to have been exploring these issues in parallel. See, e.g., Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. (forthcoming 2016) (manuscript at 17–27); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 135–42 (2015); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 77–78 (2015) [hereinafter Kalhan, *Deferred Action*]; Ahilan Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014), <http://perma.cc/XFF3-LDGL>. If anything distinguishes this Article's treatment of the President's executive actions and prosecutorial discretion, it is that my analysis here is grounded in an overall examination of unauthorized migration to the United States, which IMMIGRATION OUTSIDE THE LAW offers in much fuller form, and also that Part IV.C of this Article connects executive actions and prosecutorial discretion in immigration law to the plenary power doctrine and immigration federalism.

I. PRESIDENT OBAMA'S EXECUTIVE ACTIONS AND THE JUDICIAL RESPONSE

A. *DACA and DAPA*

President Barack Obama adopted his recent executive actions on immigration law in two phases. The first came in June 2012, when he announced the Deferred Action for Childhood Arrivals (“DACA”) program.⁴ Approval of a DACA application provides certain noncitizens with a temporary two-year reprieve from deportation in the form of “deferred action.” This reprieve triggers preexisting provisions of federal law that confer eligibility for federal work authorization upon a showing of economic need. The reprieve from deportation is renewable, but it is also revocable. It does not grant lawful permanent residence or any other formal immigration status, nor does it put a noncitizen on a path to citizenship. DACA does not make any of the recipient’s family members eligible for a reprieve from deportation.

The threshold eligibility requirements for DACA reflect its purpose: to address the predicament of young persons who are in the United States without lawful immigration status after having been brought to this country at a tender age by their parents or by other adults.⁵ Applicants must have arrived before their sixteenth birthday. They must have been under thirty-one years of age as of the date that DACA was announced—June 15, 2012—and they must have resided in the United States since June 15, 2007. Applicants must be high school graduates or be enrolled in school or another educational program. Applicants are categorically disqualified if they have been convicted of a felony, a significant misdemeanor, or three or more misdemeanors.⁶ Beyond these threshold eligibility requirements, DACA approval and the resulting grant of deferred action require the favorable exercise of discretion.⁷

4. See President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <http://perma.cc/SE55-2W4U>; Memorandum from Janet Napolitano, Sec’y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to The United States as Children at 1 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/2NZ8-6R96>] [hereinafter DACA Memorandum].

5. See DACA Memorandum, *supra* note 4.

6. See *id.*

7. The degree of discretion exercised in decisions on DACA applications is contested, as became clear in *Texas v. United States*, 86 F. Supp 3d 591, 663–72 (S.D. Tex. 2015); and then on appeal in that litigation in *Texas v. United States*, 787 F.3d 733, 762–65 (5th Cir. 2015), and in *Texas v. United States*, No. 15-40238, 2015 WL 6873190 (5th Cir. as revised Nov. 5, 2015) *petition for cert. filed*, No. 15-674 (U.S. Nov. 20, 2015). Relying in significant part on his conclusion that discretion was an insufficient part of the process of deciding DACA applications, Judge Hanen issued a preliminary injunction blocking the implementation of President Obama’s November 2014 executive actions. See *infra* text accompanying notes 30–31.

The second phase of President Obama's executive actions began in November 2014, when he announced an expansion of the DACA program in several dimensions. One expansion was to eliminate the maximum age limit of thirty-one years. The second change was to move up the date by which noncitizens must have come to the United States from June 15, 2007, to January 1, 2010.⁸ According to one estimate, the combination of these two changes would make approximately 290,000 additional noncitizens eligible.⁹ The third change in DACA was to lengthen the duration of a DACA grant from two to three years. The expanded version of DACA was the same as the original version in all other respects.

At the same time that the President announced this expansion of DACA, he also announced a new deferred action program called Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA").¹⁰ DAPA would provide DACA-like temporary reprieves from deportation to parents of U.S. citizens and lawful permanent residents.¹¹ These parents must have been in the United States for five years before the program was announced in November 2014. Successful applicants would, as in the expanded DACA program,

8. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., on 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 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/2K3L-CMML>] [hereinafter DAPA Memorandum].

9. See ANGELO MATHAY & MARGIE MCHUGH, MIGRATION POLICY INSTITUTE, *DACA AT THE THREE-YEAR MARK: HIGH PACE OF RENEWALS, BUT PROCESSING DIFFICULTIES EVIDENT*, 12 n.3 (Aug. 2015), <http://www.migrationpolicy.org/research/daca-three-year-mark-high-pace-renewals-processing-difficulties-evident> [<http://perma.cc/5F5M-PWHV>] (follow "Download Brief" hyperlink). Under the first change, 205,000 noncitizens would be additionally eligible. Under the second change, 85,000 additional noncitizens would be eligible. See Press Release, *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, MIGRATION POL'Y INST. (Nov. 19, 2014), <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new> [<http://perma.cc/H35K-VYRA>] [hereinafter MPI, Press Release].

10. See *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 20, 2014), <http://www.uscis.gov/immigrationaction> [<http://perma.cc/4CRV-QHG4>].

11. See *id.* As part of the deliberations that led to DAPA, the administration considered deferred action for parents of noncitizens granted deferred action through DACA. See Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Sec'y of Homeland Sec. and the Counsel to the President at 31–33 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [perma.cc/8M53-3NJB]. On November 19, 2014, the Department of Justice Office of Legal Counsel ("OLC") issued an opinion explaining that a DACA-like deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that it would not be permissible for any such program to include parents of DACA recipients. OLC found that the first proposed program (which became DAPA) was permissible largely because it would be "consonant with congressional policy embodied in the INA." *Id.* at 26. The OLC opinion noted that numerous provisions of the INA tend to favor family members of U.S. citizens and, to a lesser extent, of lawful permanent residents, but the second program could not claim the same statutory consonance. *Id.* at 31–33. As announced by President Obama the next day, DAPA was limited to certain parents of U.S. citizens and lawful permanent residents. *Id.*

have a renewable but revocable reprieve for three years, and they would be eligible for employment authorization based on a showing of economic necessity.¹² As with DACA, certain criminal convictions would be categorically disqualifying, and approval would require not only threshold eligibility but also the favorable exercise of discretion.¹³ According to one estimate, about 3.7 million people would qualify for DAPA.¹⁴

B. Legislative and Executive Branch Background

Analysis of DACA and DAPA requires understanding not only these basic features of both programs, but also the legislative and executive branch background from which DACA and DAPA arose. On the legislative side, the key fact is that recent sessions of Congress mustered significant support for a number of proposals that included some limited legalization of unauthorized migrants. The proposal that went the furthest in recent years was Senate Bill 744,¹⁵ which won passage in the Senate by a 68-32 vote in late June 2013.¹⁶

Like other “comprehensive immigration reform” legislation, Senate Bill 744 included provisions for intensified immigration enforcement, a reworking of both permanent and temporary lawful admissions to the United States, and legalization of some of the unauthorized population, as well as a host of changes that were less global but nevertheless significant.¹⁷ The legalization component of Senate Bill 744 and similar prior bills included three separate programs—to grant lawful immigration status to (1) young persons in the group generally eligible for DACA, (2) agricultural workers, and (3) many, but by no means all, other unauthorized noncitizens. After Senate approval, Senate Bill 744 went to the House of Representatives, which never brought it to a formal vote.¹⁸

More directly relevant as background to DACA and DAPA is executive branch activity on immigration law enforcement during the

12. See DAPA Memorandum, *supra* note 8.

13. As with DACA, I note that the degree of discretion exercised in decisions to approve or deny DAPA applications is a contested point. See text accompanying notes 31–32 *infra*.

14. See MPI Press Release, *supra* note 9.

15. S. 744, 113th Cong. (1st Sess. 2013).

16. *U.S. Senate Roll Call Votes 113th Congress—1st Session, On Passage of the Bill (S. 744 As Amended)*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00168 [<http://perma.cc/8N8K-YP7A>].

17. See S. 744, §§ 1101–1203 (border security); §§ 3101–3911 (enforcement); §§ 2301–2323 (permanent admissions); §§ 4101–49133 (temporary admissions); §§ 2101–2244 (legalization).

18. See Ashley Parker & Jonathan Weisman, *After Deriding G.O.P. on Immigration Bill, Boehner Shifts His Aim to Obama*, N.Y. TIMES, Apr. 30, 2014, at A16; Julia Preston, *Immigration Advocates Undeterred as House Departs Without Action*, N.Y. TIMES, Dec. 13, 2013, at A25; Julia Preston, *Immigration Vote Unlikely This Year, Lawmaker Says*, N.Y. TIMES, Nov. 9, 2013, at A13.

several years before the June 2012 DACA announcement. Key are several memoranda issued by high-ranking officials of the Department of Homeland Security (“DHS”) to address the exercise of prosecutorial discretion in immigration enforcement. Most noteworthy are the so-called “Morton Memos,” issued in 2011 by John Morton, who at that time was the Director of Immigration and Customs Enforcement (“ICE”). These documents, issued internally but publicly available, estimated that the deportation capacity of the U.S. government at about four hundred thousand annually and set out criteria for government officials involved in immigration enforcement to consider in deciding whether to exercise prosecutorial discretion—in particular, whether to prioritize, delay, or stop enforcement proceedings against an individual noncitizen who might be removable from the United States.¹⁹

Some aspects of these memos identified high priorities for removal, such as noncitizens with criminal convictions, or noncitizens who pose a threat related to terrorism or some other aspect of national security.²⁰ The Morton Memos also identified factors that described categories of noncitizens who would be low priorities for removal, such as young persons without lawful immigration status who had been brought at a young age to the United States.²¹ Though several prior presidential administrations had issued similar guidelines, the Morton Memos were more detailed, and they publicly named certain factors for the first time.²² For example, no prior executive branch document had

19. Memorandum from John Morton, Dir., U.S. Customs & Immigration Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, & Removal of Aliens (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [http://perma.cc/5T8Z-RER9] [hereinafter Morton, Exercising Prosecutorial Discretion]; Memorandum From John Morton, Dir., U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion: Certain Victims, Witnesses, & Plaintiffs (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [http://perma.cc/5T8Z-RER9]; Memorandum from John Morton, Dir., U.S. Customs & Immigration Enforcement, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, & Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [http://perma.cc/MXC2-U4U4] [hereinafter Morton, Civil Immigration Enforcement]; see also Memorandum from John Morton, Assistant Sec’y, Department of Homeland Security, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010), <http://www.scribd.com/doc/36524371/John-Morton-Memo> [http://perma.cc/PH5E-YMFU].

20. See Morton, Exercising Prosecutorial Discretion, *supra* note 19.

21. See *id.*

22. See Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal (Sept. 25, 2009), https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf [http://perma.cc/A5XS-CBSB]; Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion (Oct. 24, 2005), <http://www.scribd.com/doc/22092975/ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05> [http://perma.cc/THE2-2SKN]; Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion To Dismiss Adjustment Cases (Oct. 6, 2005), <http://www.aila.org/infonet/ice-prosecutorial-discretion-to-dismiss-adjustment>

articulated participation in government enforcement actions for labor or civil rights violations as a basis for the favorable exercise of prosecutorial discretion.

C. Court Challenges

Almost immediately after the first DACA announcement in June 2012, various opponents of the program filed lawsuits to challenge the President's authority to adopt and implement it.²³ And after President Obama announced the expansion of DACA and the new DAPA program in November 2014, opponents filed additional lawsuits, again arguing that the President had exceeded his authority under the U.S. Constitution and federal statutes. Of these lawsuits, the most effective has been *Texas v. United States*,²⁴ filed by Texas and twenty-five other states in the federal district court for the Southern District of Texas.

On February 16, 2015, U.S. District Judge Andrew Hanen issued a preliminary injunction in *Texas v. United States*, blocking the implementation of DAPA and the expansion of DACA.²⁵ He first found that the state of Texas has standing to sue the federal government based on the cost of issuing state driver's licenses to noncitizens who would become eligible for licenses under Texas law if the federal government approved their DAPA applications.²⁶ Judge Hanen then reached the merits of the plaintiffs' arguments. He seemed to concede, at least for the sake of further analysis, that as a general matter the federal executive branch may exercise prosecutorial discretion in immigration law enforcement.²⁷ At the same time, however, he viewed the central issue as whether DAPA went beyond that executive authority to exercise prosecutorial discretion. On this issue, Judge Hanen's opinion reflected deep skepticism that the President has authority to exercise prosecutorial discretion to grant anything more than a bare temporary reprieve from removal.²⁸ This part of the opinion targeted the threshold eligibility to apply for federal work authorization that DAPA recipients gain when they receive deferred

[<http://perma.cc/SC2U-KFQZ>]; Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., on Exercising Prosecutorial Discretion (Nov. 17, 2000), <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00> [<http://perma.cc/G2RS-5JTV>]. For a much fuller history than I provide here, see Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 L. & SOC. INQUIRY 666, 671–75 (2014).

23. See, e.g., *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

24. 86 F. Supp. 3d 591 (S.D. Tex. 2015) *aff'd*, No. 15–40238 (5th Cir. Nov. 9, 2015).

25. See *id.* at 677; see also Michael D. Shear & Julia Preston, *Dealt Setback, Obama Puts Off Immigrant Plan*, N.Y. TIMES, Feb. 17, 2015, at A1.

26. *Texas v. United States*, 86 F. Supp. 3d at 614–44.

27. See *id.* at 644–46.

28. See *id.* at 658–61.

action.²⁹

Despite the breadth of Judge Hanen's apparent skepticism of executive authority to grant any broad form of relief from removal, the ultimate basis of his preliminary injunction was much narrower. He held that DAPA was a change in law that required DHS to follow the notice and comment procedures set out in the Administrative Procedure Act ("APA"). DHS had not followed those procedures.³⁰ Essential to this conclusion was Judge Hanen's view that DAPA did not call for DHS to make discretionary decisions. Rejecting the federal government's argument that DHS would exercise meaningful discretion after an applicant met threshold eligibility requirements, Hanen found that DAPA would automatically grant a reprieve to any applicant who meets the threshold eligibility criteria.³¹ This meant, in turn, that DAPA constituted a legislative rule that could not be adopted without notice and comment. Judge Hanen did not address the states' other claims—that the implementation of DAPA would violate the substance of the APA or be unconstitutional as a violation of the Take Care Clause or separation of powers.

The federal government appealed the preliminary injunction and moved to stay or narrow the scope of that injunction pending resolution of the merits of that appeal. A Fifth Circuit panel majority rejected the government's request for a stay and to narrow the scope of the injunction, issuing an opinion that first upheld Judge Hanen's reasoning and conclusion on the standing issue.³² The majority then agreed that DAPA went beyond the nonenforcement at the core of prosecutorial discretion by conferring benefits beyond a temporary reprieve from deportation.³³ The appeals court also affirmed the basis of the district court's decision—that the APA's notice-and-comment requirement—applies to DAPA.³⁴ Judge Higginson dissented on the grounds, among others, that DAPA reflected non-justiciable agency discretion, and that the APA's notice-and-comment requirements do not apply to DAPA because the program is not a legislative rule.³⁵

In November 2015, the Fifth Circuit affirmed the district court decision to grant a preliminary injunction. A majority of this three-judge panel affirmed Judge Hanen's decision on the issues of standing and the requirements of the Administrative Procedure Act. The

29. *See id.* at 654–56, 658–60.

30. *See id.* at 664–73.

31. *See id.*

32. *Texas v. United States*, 787 F.3d 733, 747–54 (5th Cir. 2015) (denying the federal government's motion to stay preliminary injunction or narrow its scope pending appeal).

33. *See id.* at 757–58.

34. *See id.* at 762–65.

35. *See id.* at 776–84.

majority also went further than Hanen's reasoning and found that DAPA extended eligibility for work authorization beyond executive branch authority under federal statutes. Judge Carolyn King dissented on all three major issues. As of this writing, the preliminary injunction against the implementation of President Obama's November 2014 executive actions remains in effect, and a petition for certiorari, filed by the federal government, is pending in the U.S. Supreme Court.³⁶

Similar issues about the President's authority arose but led to a different outcome in two other court challenges to DACA and DAPA. In *Arpaio v. Obama*,³⁷ the U.S. Court of Appeals for the District of Columbia Circuit ruled that Maricopa County (Arizona) Sheriff Joe Arpaio lacked standing to bring a legal challenge to the Obama administration's deferred action policies, including DACA and DAPA.³⁸ The state of Mississippi and federal immigration enforcement personnel filed a different lawsuit, which a federal district court dismissed after finding that all plaintiffs lacked standing to sue. The Fifth Circuit Court of Appeals later affirmed that dismissal.³⁹

D. The Debate Over Legal Authority

Those who challenge DACA and DAPA as exceeding presidential authority seem to believe that the President has taken the law into his own hands by doing unilaterally what only Congress can do through legislation. From this perspective, the purpose and effect of DACA and DAPA are to protect "illegal aliens" whom federal immigration authorities should remove from the United States. This argument continues that the President, by adopting DACA and DAPA, is violating his duty under Article II of the U.S. Constitution to "Take Care" that the laws of the United States be faithfully executed.⁴⁰ Moreover, it is contended, DACA and DAPA are inconsistent with federal immigration statutes because they not only shield "illegal aliens" from apprehension and removal, but also give them affirmative benefits, most prominently work authorization.

Those who defend the President's legal authority to adopt DACA and DAPA generally cast these executive actions as proper exercises of prosecutorial discretion.⁴¹ They argue that work authorization and

36. *Texas v. United States*, No. 15-40238, 2015 WL 6873190 (5th Cir. as revised Nov. 5, 2015) *petition for cert. filed*, No. 15-674 (U.S. Nov. 20, 2015).

37. 797 F.3d 11 (D.C. Cir. 2015).

38. *See id.* at 15; *Court Throws Out Arizona Sheriff's Immigration Policy Challenge*, REUTERS (Aug. 14, 2015), <http://www.reuters.com/article/2015/08/14/us-usa-court-immigration-idUSKCN0QJ1I920150814> [http://perma.cc/D8Q2-RZNR].

39. *See Crane v. Johnson*, 783 F.3d 244, 251–55 (5th Cir. 2015).

40. U.S. CONST. art. II, § 3.

41. *See, e.g., Texas v. United States*, 787 F.3d at 770–73 (Higginson, J., dissenting);

other federal collateral benefits derive from preexisting federal statutes, not from DACA or DAPA.⁴² Moreover, any collateral state benefits such as driver's license eligibility reflect the implementation of state statutes, not the direct federal law effects of DACA or DAPA.⁴³ These arguments are rooted in the federal statutory scheme for immigration regulation, centered in the Immigration and Nationality Act ("INA"). And as a rebuttal to Judge Hanen's conclusion that the executive branch must heed the APA's notice-and-comment requirement, this side of the debate maintains that this requirement does not apply because DACA and DAPA are discretionary.⁴⁴ This side adds that DHS has rejected DACA applications by noncitizens who meet the threshold eligibility criteria,⁴⁵ and that an administrative agency or a court of law has no basis for reviewing the discretionary aspect of a denial.⁴⁶

II. SOURCES OF LEGAL AUTHORITY

To unpack and understand this debate, it is essential to tease apart several layers of executive branch decisionmaking that are inherent in adopting and administering the DACA and DAPA programs. In the first layer, the President or his duly empowered agents in the executive branch are exercising bare prosecutorial discretion in the form of a temporary reprieve from deportation for persons identified as a low priority for removal. In the second layer, the executive branch is going further to publicize the guidelines for the exercise of prosecutorial

Confirmation Hearing on the Nomination of Loretta Lynch As Attorney General of the United States Before the S. Comm. on the Judiciary, 114th Cong. 2–6 (2015) (written statement of Professor Stephen H. Legomsky, Washington University School of Law), <http://www.judiciary.senate.gov/imo/media/doc/01-29-15%20Legomsky%20Testimony.pdf> [<http://perma.cc/9TGA-QNY5>] [hereinafter Legomsky Testimony].

42. See, e.g., *Texas v. United States*, 787 F.3d at 775–76; Legomsky Testimony, *supra* note 41, at 11–12.

43. See, e.g., CAL. VEH. CODE § 12801.6 (West 2013) (issuing original driver's licenses to DACA recipients); IND. CODE ANN. § 9-24-9-2.5 (West 2009) ("[F]or a license or permit . . . the bureau shall require an applicant to present to the bureau valid documentary evidence that the applicant . . . has approved deferred action status."); VA. CODE ANN. § 46.2-328.1 (West 2013) ("[A]n applicant who presents in person valid documentary evidence of . . . approved deferred action status . . . may be issued a temporary license, permit, or special identification card."); *Are Individuals Granted Deferred Action under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?*, NAT. IMMIGR. L. CTR., <http://www.nilc.org/dacadriverslicenses.html> [<http://perma.cc/EVC6-2WQF>] (last updated Jun. 19, 2013) ("At least [fifteen] states recognize deferred action as meeting a lawful presence requirement, either through explicit inclusion or by accepting documents showing a grant of deferred action (AR, CA, FL, GA, IN, KS, ME, MO, OK, PA, TX, UT, VT, VA, WI)").

44. See, e.g., *Texas v. United States*, 787 F.3d at 770–73 (Higginson, J., dissenting). Those who argue that the notice and comment are not required do not necessarily oppose the use of notice and comment procedures as a matter of policy. See, e.g., Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority: Response to Hiroshi Motomura*, 55 WASHBURN L.J. 189, 195 nn.35–37 (2015).

45. See, e.g., Kalhan, *Deferred Action*, *supra* note 3, at 77–78.

46. See *Heckler v. Chaney*, 470 U.S. 821, 831–35 (1985).

discretion. Third, DACA and DAPA provide that this temporary reprieve will take the form of a grant of deferred action. Fourth, the grant of deferred action within DACA or DAPA has further consequences within a preexisting scheme of statutes and regulations—both federal and state—that can lead to work authorization, driver's licenses, and other benefits.

The next question is whether the President can do any or all of these things without any new congressional authorization. In turn, the key inquiry is ascertaining whether and when executive actions are consistent or inconsistent with the statutes that Congress has enacted to regulate immigration. If they are inconsistent, then the President is acting beyond his statutory authority and may run afoul of the Take Care Clause of the U.S. Constitution.

A. Federal Legislation

This part of the analysis starts with federal legislation.⁴⁷ At the most basic level, one federal statute makes DHS responsible for establishing national immigration enforcement policies.⁴⁸ Also foundational are the appropriations acts adopted by Congress, which provide funds for immigration law enforcement at a level that is insufficient to effect the removal of all of the approximately eleven million unauthorized migrants in the United States, and which therefore makes necessary some exercise of prosecutorial discretion.⁴⁹

Other federal statutes embody constitutional recognition that DHS or other federal agencies must allocate enforcement resources in some manner that reflects discretionary choices. For example, the statutory emphasis on identifying, detaining, and removing noncitizens with criminal convictions⁵⁰ implies that other groups of potentially removable noncitizens are a lower enforcement priority. Along these lines, the 2012 U.S. Supreme Court decision in *Arizona v. United States*⁵¹ found that Arizona's tough immigration enforcement statute—

47. Compare Legomsky Testimony, *supra* note 41, with Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015) [hereinafter Margulies, *The Boundaries of Executive Discretion*].

48. See 6 U.S.C. § 202(5) (2012).

49. On the number of unauthorized migrants in the United States, see *Unauthorized Immigrants in the U.S., 2012*, PEW RES. CTR. (Nov. 18, 2014), <http://www.pewhispanic.org/interactives/unauthorized-immigrants-2012/> [http://perma.cc/934S-HF8A]; ANDORRA BRUNO, CONG. RESEARCH SERV., R41207 UNAUTHORIZED ALIENS IN THE UNITED STATES: POLICY DISCUSSION 1–2 (2014).

50. See, e.g., Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574 (2008). See also Legomsky Testimony, *supra* note 41, at 3.

51. 132 S. Ct. 2492 (2012).

Senate Bill 1070, enacted in 2010—was preempted because it would interfere with the federal government’s exercise of these discretionary prerogatives.⁵²

Statutory analysis also reaches beyond immigration law itself. The most directly relevant general rule of administrative law comes from the 1985 U.S. Supreme Court decision in *Heckler v. Chaney*,⁵³ which interpreted the APA to make agency decisions unreviewable if they are “committed to agency discretion by law.”⁵⁴ There is an exception to this general rule if the challenged agency decision amounts to an “abdication of its statutory responsibilities.”⁵⁵ But this “abdication” exception merely rephrases the core question: are DACA and DAPA inconsistent with federal statutes? If they are inconsistent, then the President’s decision to adopt DACA and DAPA could be seen as an abdication of statutory responsibilities. But if DACA and DAPA are consistent with federal statutes, then these deferred action programs are discretionary decisionmaking schemes of the type that *Heckler* insulates from judicial review.

As I have noted, even Judge Hanen seemed to concede that federal officials have the legal authority to exercise prosecutorial discretion in immigration law enforcement in the minimal sense that some removable noncitizens will be higher priorities than others for arrest, detention, and removal.⁵⁶ The real controversy seems to concern *how* President Obama exercised this discretion beyond bare-bones prosecutorial discretion in the form of a temporary reprieve only. Can he go further to grant deferred action as part of a scheme that would also publicize prosecutorial discretion criteria, allow noncitizens to apply affirmatively for deferred action, and in turn lead to the grant of further federal and state benefits?

52. *Id.* at 2510. Because DACA and DAPA reflect multiple layers of prosecutorial discretion as explained above, the basic fact of broad discretion in the enforcement of federal immigration laws, which provided the foundation for the U.S. Supreme Court’s decision on immigration federalism in *Arizona v. United States*, is insufficient by itself to justify DACA and DAPA as an exercise of executive authority within the federal government. See Patrick J. Charles, *The Sudden Embrace of Executive Discretion in Immigration Law*, 55 WASHBURN L.J. 59, 62–63 (2015). One goal of this Article is to explain why the President has authority not only to exercise prosecutorial discretion, but also to go further to formalize the exercise of that prosecutorial discretion in programs like DACA and DAPA. See discussion in Part IV. *infra*.

53. 470 U.S. 821 (1985).

54. *Id.* at 831–35.

55. *Id.* at 833 n.4. Another exception to nonreviewability applies where the agency itself has created the law, such as a regulation, that makes a decision discretionary. See, e.g., *Kucana v. Holder*, 558 U.S. 233, 251 n.18 (2010).

56. See *Texas v. United States*, 86 F. Supp. 3d 591, 644–46 (S.D. Tex. 2015); text accompanying note 27 *supra*.

B. Authority for Prosecutorial Discretion

Federal statutes offer some answers to challenges to these “prosecutorial-discretion-plus” aspects of DACA and DAPA. As for the basic decision to exercise prosecutorial discretion by granting deferred action, several statutes expressly recognize deferred action as a form of relief from removal that is known to the public and for which individual noncitizens may apply.⁵⁷ Another federal statute, the REAL ID Act of 2005, expressly acknowledges federal authority to grant deferred action, by making deferred action recipients eligible for driver’s licenses that are valid for various federal purposes, including identification to board commercial aircraft.⁵⁸ Moreover, Congress, through many amendments to the INA and appropriations acts for the federal agencies responsible for administering and enforcing federal immigration laws, has never curtailed the exercise of deferred action over the almost fifty years that deferred action has been a consistent part of agency practice.⁵⁹

In 1999, the U.S. Supreme Court’s decision in *Reno v. American-Arab Anti-Discrimination Committee*⁶⁰ acknowledged these congressional endorsements of deferred action as well as executive branch practices administering deferred action. The Court held that INA section 242(g) deprives federal courts of jurisdiction to review any executive branch decisions not to prosecute an immigration law violation.⁶¹ Justice Scalia’s majority opinion specifically mentioned deferred action as a form of prosecutorial discretion exercised by government officials who have immigration enforcement responsibilities.⁶²

When the analysis next considers the collateral benefits that noncitizens may derive from a grant of deferred action under DACA or DAPA, further questions arise. Why, it seems reasonable to ask, should noncitizens who benefit from prosecutorial discretion also get federal authorization to work and state licenses to drive? But neither DACA nor DAPA changed prior federal or state law regarding these incidents of deferred action. Existing federal immigration statutes have long

57. See, e.g., Immigration and Nationality Act § 237(d)(2), 8 U.S.C. § 1227(d)(2) (2012) (“The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, *deferred action*, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.”) (emphasis added).

58. Act of May 11, 2005, U.S. Pub. L. No. 109–13, 119 Stat. 302 (2005).

59. See SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14–22 (2015) [hereinafter WADHIA, BEYOND DEPORTATION].

60. 525 U.S. 471 (1999).

61. *Id.* at 477–91.

62. *Id.* at 483–86.

authorized the executive branch to grant work authorization to noncitizens who lack perfected lawful immigration status, and federal regulations have filled out that authority in more specific terms.⁶³ Other federal statutes, such as the one that authorizes the issuance of Social Security numbers, similarly outline the benefits that come with deferred action in that setting.⁶⁴ Likewise, statutes in many states make deferred action recipients eligible for driver's licenses.⁶⁵

Admittedly, these federal enactments do not eliminate all doubts about exactly what they authorize, or what is or is not consistent with them. For example, one side will argue that the federal statutes that expressly acknowledge deferred action as a form of prosecutorial discretion are mere examples—just a non-exhaustive listing of congressional authorizations of deferred action, suggesting that further instances are equally permissible. The counterargument is that these statutes signify congressional refusal to authorize deferred action in all other contexts.

C. *The Impasse*

How is this clash of characterizations to be resolved fairly? The relevant legislative texts may not provide an answer that will convince everyone on the question of what is consistent with the overall statutory scheme, with the individual statutes that make up that scheme, or with the long-standing regulations that implement what Congress has enacted. And the historical record pertaining to prosecutorial discretion is open to multiple, conflicting interpretations.⁶⁶ The only way to hope to resolve the controversy is to enrich analysis of these texts and history by examining the broader context—of immigration law in general, and of unauthorized migration in particular—in which the President adopted DACA and DAPA. This broader analysis has two essential layers. The first is the meaning of unlawful presence in the United States. The second is the role of discretion in immigration law enforcement.

III. DELVING DEEPER

Let us start this next part of the analysis with three questions. How is it that about eleven million unauthorized migrants now live in the United States? What does it mean to be in the United States without

63. See Immigration and Nationality Act § 274a, 8 U.S.C. § 1324a (2012); see also 8 C.F.R. § 274a.12(c) (2013).

64. See Social Security Act § 205(c)(2)(B)(i)(I), 42 U.S.C. § 405(c)(2)(B)(i)(I) (2012).

65. See *supra* note 43.

66. Compare Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U.L. REV. 1295, 1299 (2015), with Charles, *supra* note 52, at 71–75.

lawful immigration status? And what is the role of prosecutorial discretion in immigration enforcement?

A. Labor Migration in the First Half of the Twentieth Century

As I have explained in greater detail elsewhere, the story of the modern unauthorized population of the United States starts with the quest for a steady supply of the labor that was needed to work the fields and factories as the nation filled out and expanded westward in the 1800s.⁶⁷ This quest on the “frontier” would define immigration law through successive cycles of labor recruitment followed by exclusion. For example, Chinese laborers were essential to settling California in the mid-nineteenth century. But after the transcontinental railroad was completed in 1869, an economic recession and growing unemployment turned Chinese laborers, though previously welcomed, into outcasts.⁶⁸ Soon thereafter, Congress enacted the first of what have come to be collectively called the Chinese exclusion laws.⁶⁹ Then, as the economy recovered and grew in different sectors, a new wave of laborers from Japan provided the immigrant workforce that the Chinese exclusion laws had cut off.⁷⁰

Over time, all Asian exclusion came to be severely restricted. This trend culminated in the 1924 Johnson-Reed Act, which adopted the so-called national origins quota system.⁷¹ This law limited the number of new immigrants to the United States on a country-by-country basis, with the overall intent to preserve the nation’s ethnic composition at the end of the nineteenth century. The scheme favored immigration from northern and western Europe, and it limited immigration from southern and eastern Europe. It cut off practically all immigration from Asia and Africa. These developments occurred around the same time that the expansion of large-scale agriculture in the southwestern part of the United States unleashed yet another search for a new source of cheap labor.⁷²

That source was Mexico. Mexican laborers were welcomed largely because they were seen as workers who could easily be sent home, and not seen as a threat to remain in the United States. According to the 1911 report of the Dillingham Commission, that Congress had established to “make full inquiry, examination, and

67. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 31–37.

68. See *id.* at 35.

69. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477; Act of 1882, ch. 126, 22 Stat. 58.

70. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 36.

71. See *id.* at 37.

72. See *id.* at 37–40.

investigation . . . into the subject of immigration,”⁷³

The Mexican migrants are providing a fairly adequate supply of labor. . . . While they are not easily assimilated, this is of no very great importance as long as most of them return to their native land. In the case of the Mexican, he is less desirable as a citizen than as a laborer.⁷⁴

The recruitment of Mexican workers became an essential part of the U.S. economy as it grew in the early twentieth century, endured the Great Depression and World War II, and then expanded in its postwar resurgence.⁷⁵

Against this economic backdrop, one fact is key to understanding the origins of the current unauthorized population of over eleven million. Until the 1960s, there was no limit on the number of immigrants allowed to come to the United States from Latin America.⁷⁶ To be sure, there were other restrictions, such as the exclusion ground for anyone “likely at any time to become a public charge.”⁷⁷ Some of these restrictions were applied strictly or harshly from time to time, but there was no hard numerical cap. And each year, several hundred thousand temporary workers were admitted from Mexico under the Bracero program.⁷⁸ Though it had many troubling aspects, especially its exploitation of migrant workers,⁷⁹ the Bracero program allowed a large work force to come legally from Mexico as temporary workers.

The legacy of this approach to immigration and temporary workers was to institutionalize decades-long reliance within the United States on labor from Latin America, especially from Mexico, as well as to embed migration patterns in the fabric of communities, both in the sending countries and in the United States.⁸⁰ Notwithstanding the formal admission rules, a culture took hold in which the federal government selectively tolerated unauthorized migration.⁸¹ Some Mexicans came as lawful immigrants, while others came as lawful temporary workers, and some came unlawfully. Informal Mexican migration became an essential fixture not only in southwestern agriculture, but also in other

73. 1 U.S. IMMIGRATION COMM’N, ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. Doc. No. 61-747, at II (3d Sess. 1911).

74. Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, in MEXICAN MIGRATION TO THE UNITED STATES: ORIGINS, CONSEQUENCES, AND POLICY OPTIONS 151, 156 (Wayne Cornelius & Jorge Bustamante eds., 1989) (quoting 1 U.S. IMMIGRATION COMM’N, ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. Doc. No. 61-747, at 690-91 (3d Sess. 1911)).

75. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 37-46.

76. See *id.* at 43.

77. Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163 (1952); Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

78. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 39-40, 42, 212.

79. See *id.* at 221.

80. See *id.* at 45.

81. See *id.* at 46-52.

regions of the United States.⁸²

The hallmarks of this system included selective enforcement against Mexican immigrants of federal admission restrictions, such as the bar to those “likely any time to become a public charge.”⁸³ Another area of selective enforcement concerned migrants who entered the United States unlawfully from Mexico. Many were left alone to work, even if many of these migrants were eventually deported. To a modern eye, this state of affairs may seem excessively casual, but it simply reflected a basic fact: the line between lawful and unlawful immigration simply did not have the same political significance that it has today. Through a combination of uncapped admissions, selective enforcement of immigration restrictions, and the Bracero program for temporary workers, Mexican immigrants came to be a large, flexible, disposable labor force on which the growing U.S. economy relied.

*B. The 1965 Immigration Act and New Limits
on Immigration From Latin America*

All of this changed in the 1960s, with developments in Congress and the executive branch that severely disadvantaged immigrants from Latin America in general and from Mexico in particular. Some of the legislative shift was long overdue, especially the end of the explicitly discriminatory admission system that had favored European immigrants, particularly those from northern and western Europe. In broad terms, this aspect of the 1965 Immigration Act was part of the same political and cultural movement that led Congress to approve, and President Lyndon Johnson to sign, the Civil Rights Act of 1964⁸⁴ and the Voting Rights Act of 1965.⁸⁵ By ending the outright express discrimination in the national origins system that had reigned since the 1920s, the 1965 Immigration Act is rightly viewed today as a civil rights victory. From 1965 forward, the federal scheme for admitting immigrants to be lawful permanent residents of the United States would treat all sending countries equally, rather than limit the supply of admission slots from many countries outside of northern and western Europe to a number that fell far short of demand. One major consequence has been a tremendous increase in lawful Asian

82. *See id.* at 39–41.

83. Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163 (1952); Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

84. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981–2000h (2012)).

85. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (to be codified as amended at 52 U.S.C (Supp. 2015)).

immigration in the decades since 1965.⁸⁶

But part of the hard-won legislative bargain that ended the national origins system was to apply—in the name of equal treatment—numerical limits to migration from throughout the world. And so Congress capped the number of immigrants from Latin America for the first time in history. Several years later, Congress limited the number of immigrants in the family and employment categories from any single country to about twenty-thousand per year. As a practical result, Mexican immigrants had to wait longer than immigrants from other countries. At the same time, the admission categories established by the 1965 Act left open few employment-based immigration avenues for anyone without a formal college-level education. It became virtually impossible for workers without close U.S. citizen relatives or a college degree to immigrate lawfully. Also in the mid-1960s, the Bracero program, long under fire for persistent violations of labor standards, ended without being replaced by any comparably broad new path for temporary workers.⁸⁷

The combination of these changes led to a profound overall result that still reverberates today. People who could have come lawfully before the 1960s could no longer do so. All of a sudden, they had a much longer line to stand in, or they had no line to stand in at all. Though the abolition of the explicitly discriminatory national origins system by the 1965 Immigration Act was a victory for principles of formal equality, the Act was an empty victory for immigrants from Latin America, especially those from Mexico.

No matter what the post-1965 immigration regime said, the social and economic patterns that had emerged over generations would not disappear just because Congress changed the rules. Mexican migrants kept coming to work, but many did so unlawfully. Why did Congress not simply fund the deportation system more fully, and why did the executive branch not simply enforce the new laws? The answer is unsurprising: Congress found it impractical or politically unpalatable to build an impervious border fence, to police every workplace and neighborhood where unauthorized migrants might be found, and then to arrest and deport them. Over time, the unauthorized population grew steadily, and tolerance of a large unauthorized population became a fact, not only of U.S. political life, but also of a national economy that steadily came to rely on a large unauthorized workforce in a variety of occupations and industries.⁸⁸

86. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 102–03.

87. See *id.* at 42–43.

88. See *id.* at 46–55.

The U.S. economy has continued to rely on these workers to fill jobs, though not simply to substitute unauthorized workers for U.S. citizens, lawful permanent residents, and lawful temporary workers. Unauthorized migration allowed employers to stay profitable, so that they could continue to employ U.S. workers. Tellingly, no federal law prohibited the hiring and retention of unauthorized workers until 1986.⁸⁹ That year, Congress adopted a system of employer sanctions nominally meant to abolish unauthorized work, but the design of the law made it ineffective from the start, and as a practical matter it could not keep employers from hiring unauthorized workers. Migrants, driven by harsh economic and political conditions, especially in Latin America, came to take jobs that employers were ready to offer—often coming outside the law because there was no other way. The U.S. immigration system became one that looked stringent on paper, but which allowed employment patterns that would soon lead to a large unauthorized population.⁹⁰

C. Selective Admission, Selective Enforcement, and Vast Discretion

By the 1980s and 1990s, a large gap emerged between immigration law on the books and immigration law in action. The law on the books now says that over eleven million people live in the United States without lawful authorization. But the law in action has acquiesced, tolerated, and even invited this population to serve the workforce needs of the U.S. economy.⁹¹ The unauthorized population that was under four million in the mid-1980s is now almost three times larger.⁹²

This combination of highly selective admissions and a large unauthorized population has one unavoidable consequence: highly selective enforcement. Because Congress' commitment of enforcement resources is insufficient to apprehend and remove all unauthorized migrants from the United States, the system runs on vast discretion to decide whether, when, and how immigration enforcement will take place.⁹³ In assessing how the law that can lead to a noncitizen's removal from the United States actually operates on the ground, the discretion that federal employees exercise to enforce—or not enforce—the law in any given setting, or against any given person, is practically more

89. *See id.* at 47–48.

90. *See id.* at 41–55.

91. *See id.*

92. *See* RUTH E. WASEM, CONG. RESEARCH SERV., RL33874, UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986 2–3 (2012) (discussing the unauthorized population in the mid-1980s). On the current population, see note 49 *supra*.

93. *See* text accompanying note 19 *supra*.

important than the letter of the law.⁹⁴

The U.S. Supreme Court emphasized this outsized role of executive branch discretion in its landmark 2012 decision in *Arizona v. United States*.⁹⁵ In explaining how the content of immigration law for enforcement and preemption purposes was not to be found in federal statutes, but rather in immigration law as it is actually enforced, the Court explained: “A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”⁹⁶ This means that the traditional distinction between Congress’s authority to make law and the President’s authority to enforce law—always a very imprecise line to begin with—has little practical meaning in ascertaining the content of immigration law as implemented.

IV. THE PRESIDENT’S DILEMMA

In this immigration enforcement system, the unavoidable role of the President and the executive branch is to exercise this essential and pervasive discretion. A key aspect of the constitutional frame for this role is the Take Care Clause of the U.S. Constitution, which reflects a concern not only that the President enforce the laws of the United States, but also that he or she do so in a manner that reflects constitutional values. Some of these values require the President to balance maximum enforcement against other concerns, which include uniformity and consistency, as well as the avoidance of impermissible discrimination in law enforcement.⁹⁷ To respect these concerns, it may be necessary to adopt enforcement policies that do not maximize and perhaps even diminish a law’s deterrent effect.⁹⁸ In short, watertight law enforcement is not an end to be pursued at all costs.

As a threshold matter, it is far from clear that a deferred action program will actually reduce the deterrent effect of federal immigration laws or the level of overall immigration enforcement. On the contrary,

94. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 26–30, 39–42, 52–53, 128–31; Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) [hereinafter Motomura, *The Discretion That Matters*]. Of course, the statement that discretion to enforce or not enforce the law is more important than the letter of the law depends on the context, which here is evaluating how the law operates on the ground. Judgments about “importance” may vary if made for other purposes, such as whether deferred action is practically the same as lawful permanent resident status; it is not. This analytical point is absent from the discussion in Josh Blackman, *Immigration Inside the Law*, 55 WASHBURN L.J. 31, 31 (2015).

95. 132 S. Ct. 2492 (2012).

96. *Id.* at 2499.

97. See Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661 (2015).

98. For an argument that DACA reduces the deterrent effect of federal immigration laws, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 716–48 (2014); see also Margulies, *The Boundaries of Executive Discretion*, *supra* note 47.

DACA and DAPA can enhance enforcement because the registration that is part of the application process identifies individuals who may be unauthorized migrants. In turn, registration can facilitate future enforcement efforts. Moreover, the overall structure of DACA and DAPA enables vigorous enforcement against at least two groups: those who do not win a favorable exercise of discretion,⁹⁹ and those who do not meet the threshold eligibility criteria even if the reasons for ineligibility do not make them removable.¹⁰⁰

But let us assume for discussion's sake that a program of temporary reprieves from deportation will reduce the overall quantum of federal immigration law's deterrent effect or enforcement. Even so, striking a sound balance among many aspects of immigration enforcement is the essence of the discretionary calculus entrusted to the federal government. After all, the federal government's capacity to compel the departure of over eleven million people who are now in the United States with lawful presence is limited to a fraction of this vast number in any given year. As noted earlier, former ICE Director John Morton once officially estimated that the U.S. government's deportation capacity is about four hundred thousand annually.¹⁰¹ And though the Obama administration has carried out deportations in this substantial order of magnitude, the unauthorized population as a whole has not declined significantly.¹⁰²

The President, as head of the federal executive branch, is ultimately in charge of enforcing the immigration laws of the United States. In turn, he must make discretionary decisions about whether and when to prosecute immigration law violators through removal and other enforcement methods. The President delegates these discretionary decisions to the Secretary of Homeland Security and the Attorney General, who further delegate to officials and employees within their agencies.¹⁰³ At each step, enforcement reflects general priorities for prosecution as well as countless determinations about individuals who should or should not be targeted for arrest, detention, and removal. Especially in a system—like modern U.S. immigration law—in which discretion is inherent and vast, two core questions emerge. First, how will this inevitable discretion be exercised? Second, will the exercise of that discretion be consistent with the rule of law?

99. See Elizabeth Keyes, *Considering What Is Lost*, 55 WASHBURN L.J. 129 (2015).

100. See Jayesh Rathod, *Crimmigration Creep: Reframing Executive Action on Immigration*, 55 WASHBURN L.J. 173 (2015).

101. See Morton, *Civil Immigration Enforcement*, *supra* note 19.

102. See DEPARTMENT OF HOMELAND SECURITY, 2013 YEARBOOK OF IMMIGRATION STATISTICS 103 (2014).

103. See Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a) (2012).

A. Discretion Out of Control

Now I come back to the immediate background of DACA and DAPA. In the 1990s, when the federal government issued publicly available prosecutorial discretion guidelines, national security threats and persons with serious criminal convictions were unsurprisingly a high priority, as they are today. Beginning in 2010, the Obama administration articulated general enforcement priorities and also identified categories of persons who might be suited for the *favorable* exercise of prosecutorial discretion. These included noncitizens who were brought to the United States as young children, who qualify for lawful status but are waiting in line, who have U.S. citizen family members, who are long-term residents, or who have particular vulnerabilities, such as nursing or pregnant women and victims of domestic violence.¹⁰⁴

In considering the 2011 Morton Memos in the overall context of an unauthorized migration of eleven million people, the nature of the President's dilemma becomes clear, as does the purpose of the memos. The Morton Memos tried to bring consistency and predictability to federal immigration enforcement in line with the administration's priorities. However, the prosecutorial discretion guidelines in these memos led to uneven enforcement patterns. In theory, individuals brought to the United States at a young age were a low priority group for removal; put differently, they were especially suited to favorable prosecutorial discretion. But even with the guidelines, the exercise of discretion—in cases involving these young people and in other low priority groups—was erratic and inconsistent,¹⁰⁵ with individuals in

104. See Morton, Exercising Prosecutorial Discretion, *supra* note 19; Morton, Prosecutorial Discretion: Certain Victims, Witnesses, & Plaintiffs, *supra* note 19.

105. See, e.g., Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES, Nov. 13, 2011, at A16 (reporting that the Morton Memos have been applied very unevenly throughout the country); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 30 (2014) ("ICE offices are inconsistently interpreting the prosecutorial discretion standards . . . [T]hroughout the country, ICE prosecutors closed only thirteen cases in the exercise of discretion between June and December of 2011."). By October 2012, only 2.7% of the 411,000 cases reviewed had been closed. See N.Y. IMMIGRATION COALITION AND THE N.Y. COUNTY LAWYERS' ASS'N, PROSECUTORIAL DISCRETION: HOW THE PROSECUTORIAL DISCRETION POLICY FAILED TO KEEP ITS PROMISE 11 (2013); see also Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RTS. J. 463, 542–43 (2013) ("[I]n the Morton Memorandum of June 2011, the government . . . urged prosecutors to use their discretion in considering the cases of [DREAMers]. Yet data from the DHS show that fewer than [three hundred] such students have been granted administrative closure to this day—a remarkably small number, given their clear qualifications for approval."). On racial or ethnic profiling in federally authorized local enforcement, see, e.g., TREVOR GARDNER II & AARTI KOHLI, THE WARREN INSTITUTE, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2009). On discrimination in immigration law enforcement, see MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 31–52, 128–38.

similar circumstances treated quite differently.¹⁰⁶ In many cases, it took media campaigns and congressional interventions to secure release from detention or to block removals in what seemed to be low priority enforcement cases.¹⁰⁷ Many noncitizens in low priority groups were removed from the United States.¹⁰⁸

The situation became even more problematic as the Morton Memos met outright resistance in the field. The National ICE Council, a union that represents about seven thousand ICE agents, initially refused to allow its members to attend training sessions.¹⁰⁹ The union president, Chris Crane, openly criticized the guidelines.¹¹⁰ ICE officers in Houston publicly contested the agency's implementation of the Morton Memos.¹¹¹ The union held and adopted a no-confidence vote directed at ICE leadership.¹¹² It became clear that guidelines or memos were not enough to make sure that discretionary decisions in the field conformed to the administration's enforcement priorities.

These field decisions are especially important because the chances that any given unauthorized migrant will be arrested are relatively low. But once an arrest by an enforcement agent brings an unauthorized migrant into the immigration enforcement system, the chances of removal proceedings and some form of forced departure are relatively high.¹¹³ The core concern is not whether the overall level of immigration enforcement is high or low, but rather whether the high-level officials in the federal government adopt a sound system for delegating but also controlling discretionary enforcement. For this

106. See Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, *supra* note 105, at 32–33.

107. See, e.g., Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES, Dec. 1, 2012, at A1 (“Dreamer groups stopped dozens of deportations, getting news coverage and rallying communities around young people facing removal.”); Lawrence Downes, *Don't Deport Benita Veliz*, N.Y. TIMES, Mar. 29, 2009, at A20; Jason Buch, *Graduate's Deportation Case Dropped*, SAN ANTONIO EXPRESS NEWS, Nov. 3, 2011, at A1.

108. See Zatz & Rodriguez, *supra* note 22, at 679–82.

109. See Julia Preston, *Agents' Union Stalls Training on Deportation Rules*, N.Y. TIMES, Jan. 8, 2012, at A15 (“[T]he union representing some seven thousand deportation officers of [ICE] has so far not allowed its members to participate in the training.”); Editorial, *Good Immigration Policy, on Hold*, N.Y. TIMES, Jan. 15, 2012, at SR10. See also Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 233 (2014) (noting that the National ICE Council “reacted to the prosecutorial discretion initiative with overt hostility” and refused to allow its members to participate in the training on prosecutorial discretion policies, and describing opposition within ICE to the Morton Memos).

110. See Preston, *supra* note 105 (“[B]efore the immigration subcommittee of the House Judiciary Committee, Mr. Crane said that Mr. Morton's guidelines were too complex and ‘cannot be effectively applied in the field.’ Rather than adding flexibility, Mr. Crane said, the guidelines ‘take away officers’ discretion and establish a system that mandates that the nation’s most fundamental immigration laws are not enforced.’”)

111. Zatz & Rodriguez, *supra* note 22, at 677.

112. See *id.* at 678; Julia Preston, *Immigration Agency Ends Some Deportations*, N.Y. TIMES, Aug. 26, 2010, at A14 (reporting that the National ICE Council approved a vote of no confidence in ICE director John Morton).

113. See Motomura, *The Discretion That Matters*, *supra* note 94.

purpose, the Morton Memos looked good on paper, but implementation in the field told a different story.

In this setting, President Obama's announcement of the DACA program in June 2012¹¹⁴ is most fairly and accurately viewed as an attempt to regularize and systematize immigration enforcement, and to make immigration enforcement uniform, consistent, and non-discriminatory.¹¹⁵ DACA operated as an effort to neutralize the resistance—or insurrection, as Ahilan Arulanantham has put it¹¹⁶—of the National ICE Council and many rank-and-file agents. The fact that the union later sued to block the implementation of DACA only reinforces this basic point.¹¹⁷

At stake was not *whether* discretion is exercised in immigration law enforcement, but rather *who* exercises it and *how*, if at all, that discretion is supervised.¹¹⁸ DACA creates a formal, application-based system for administering discretion. DACA also effectively transfers authority for prosecutorial discretion decisions for a sizeable,

114. See President Barack Obama, Remarks by the President on Immigration (June 15, 2012), www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration [<http://perma.cc/U3HR-Z2N4>].

115. Noteworthy as a foundation for this understanding of DACA and DAPA are, as Michael Kagan explains, key analyses of organizational interests within the executive branch, especially Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 UC IRVINE L. REV. 1 (2012), and Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014). See Kagan, *supra* note 3, at 18–22.

116. See Kalhan, *Deferred Action*, *supra* note 3, at 96–97 (“As the scale of the enforcement regime has grown to such enormous levels—making the interrelated challenges of ensuring sufficiently uniform execution of the law and fidelity to enforcement priorities more formidable—the need for effective mechanisms to guide the discretion exercised in the field has only grown more important.”); Arulanantham, *supra* note 3 (“[T]he new administrative relief program arises out of a historical context of defiance—some would say insurrection—by ICE enforcement agents and attorneys who essentially refused to implement prior directives on prosecutorial priorities.”).

117. See *generally* Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015) (challenging the broad policy of prosecutorial discretion), discussed at text accompanying notes 23, 39 *supra*; Julia Preston, *Agents Sue Over Deportation Suspensions*, N.Y. TIMES, Aug. 24, 2012, at A17; Julia Preston, *Judge Dismisses Suit to End Deportation Deferrals*, N.Y. TIMES, Aug. 1, 2013, at A12.

118. See Arulanantham, *supra* note 3, at 77–78 (“If supervisory officials . . . have authority to prioritize the resources of the agencies they direct, but field officers ignore their supervisory directives, one might expect that the supervisors would *then* have authority to take further steps . . . in order to ensure that their priorities are followed.”); Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, *supra* note 105, at 5–9 (discussing prosecutorial discretion in the context of ICE and the agency’s enforcement culture that is highly difficult to change, and the need to institute procedural reforms); Rabin, *supra* note 109, at 233–247 (arguing against placing discretionary decisions within ICE because they are inherently limited by ICE’s culture and institutional context); Michael Kagan, *The Conservative Case for DACA: The Intriguing Legal Theory You Won’t Hear on Fox News*, SALON (Feb. 19, 2015), http://www.salon.com/2015/02/19/the_conservative_case_for_daca_the_intriguing_legal_theory_you_wont_hear_on_fox_news/ [<http://perma.cc/324T-JG3S>] (“President Obama’s immigration actions should be understood as sensible measures to move power out of the hands of unaccountable civil servants, and return it to democratically elected officials. They are justifiable efforts to prevent a public sector union from hijacking public policy.”). Cf. Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1488 (2010) (“[I]t is through the device of top-down supervision, nested in the constitutional requirement that the President ‘[t]ake care that the [l]aws be faithfully executed,’ that we can assure the maintenance of [the rule of law] against external pressures of infidelity.”) (internal citations omitted).

identifiable part of the unauthorized population from ICE, with its pervasive enforcement culture and prosecutorial bias,¹¹⁹ to U.S. Citizenship and Immigration Services (“USCIS”), a separate agency within DHS.¹²⁰ As Nina Rabin has explained, the law enforcement culture within ICE made it highly unlikely that the agency would “energetically undertake individualized, case-by-case assessments that carefully consider humanitarian factors.”¹²¹ Instead, under DACA, if young people meet criteria relating to their residence in the United States, age at arrival, education, and good behavior, they are eligible for an individualized assessment and, as a possible outcome, a discretionary grant of temporary relief. Put differently, DACA recipients get confirmation that they are a low deportation priority, as the guidelines had previously announced, but which was a matter of luck and happenstance when left to enforcement in the field.¹²²

The DACA structure for formalizing and supervising the exercise of discretion is especially important in a field notorious for a substantial risk of racial profiling and discrimination.¹²³ Though only about seventy-eight percent of unauthorized migrants in the United States were of Latino descent between 2008 and 2012,¹²⁴ greater than ninety-six percent of the total number of noncitizens removed in 2012 were of Latino descent.¹²⁵ “Between 1997 and 2012, the U.S. government

119. See Rabin, *supra* note 109, at 246 (describing the development of ICE’s unifying mission to enforce and prosecute, steeped in a culture in which all immigrants are viewed as criminal threats, and discussing how the tensions between ICE’s dominant mission, on the one hand, and the prosecutorial discretion guidelines to consider humanitarian grounds, on the other, became apparent in the resistance by many ICE agents).

120. See *id.* at 237–38 (“[U]nlike the resistance and tepid implementation of the prosecutorial discretion effort, DACA is widely considered to be a successfully implemented program, with over [four hundred thousand] cases approved less than one year into the program.”).

121. *Id.* at 247.

122. Cf. Arulanantham, *supra* note 3 (“By providing precise criteria for determining who qualifies for low priority status as well as documentation individuals can use to prove that they have received that designation, the new program will make it harder for line enforcement agents and attorneys to ignore the priorities that the administration tried to set three years ago.”).

123. See MOTOMURA, *IMMIGRATION OUTSIDE THE LAW*, *supra* note 3, at 96–102.

124. Between 2008 and 2012, about seventy-one percent of the total unauthorized population were born in Mexico and other Central America countries, and seven percent were from South America. See Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (Feb. 26, 2015), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized Immigration> [<http://perma.cc/TZW2-3JVA>].

125. See John F. Simanski, *Immigration Enforcement Actions*: DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS (2013), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [<http://perma.cc/KGS7-R34M>] (“Mexican nationals accounted for [seventy-two] percent of all aliens removed in 2013. The next leading countries were Guatemala (11%), Honduras (8.3%) and El Salvador (4.7%). These four countries accounted for [ninety-six] percent of all removals in 2012.”); see also JOSÉ MAGAÑA-SALGADO, DETENTION, DEPORTATION, AND DEVASTATION: THE DISPROPORTIONATE EFFECT OF DEPORTATIONS ON THE LATINO COMMUNITY 2 (2013); AARTI KOHLI ET AL., WARREN INSTITUTE, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf

carried out 4.2 million deportations,” and nearly all of the deportees were of Latino descent.¹²⁶ Even U.S. citizens have been swept up because of their Latino appearance or identity.¹²⁷ The risk arises if immigration enforcement is left entirely to the exercise of prosecutorial discretion by ICE agents and federally-authorized local law enforcement personnel, or by state and local law enforcement personnel to whom enforcement authority is delegated. The result is the possibility of undetected and unremedied racial profiling, which not only jeopardizes the targets of improper law enforcement but also undermines public confidence in the fairness of the immigration law system as a whole.¹²⁸

My main point in this Part IV is that the legal authority to exercise prosecutorial discretion comes with the authority—indeed, the obligation—to adopt a system that justifies confidence that decisions will be consistent, predictable, and nondiscriminatory.¹²⁹ Designing and implementing such a system may need to rely heavily on categories, even if no applicant who fits into them will receive a DACA approval automatically.¹³⁰ Without such categories, high-level federal officials cannot exercise meaningful supervision.¹³¹ These considerations apply

[<https://perma.cc/BDX7-Z7UW>] (“Latinos comprise [ninety-three percent] of individuals arrested through Secure Communities though they only comprise [seventy-seven percent] of the undocumented population in the United States.”); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 90 (2013) (noting that ICE enforcement has been concentrated in Latino communities); Julia Preston, *Latinos Said to Bear Weight of a Deportation Program*, N.Y. TIMES, Oct. 19, 2011, at A16.

126. See Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUDIES 271, 272 (2013).

127. See, e.g., Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 318 (2009) (describing incidents in which U.S. citizens were racially profiled, arrested, and detained because of their Latino identity); see also KOHLI ET AL., *supra* note 125, at 2 (“Approximately 3,600 United States citizens have been arrested by ICE through the Secure Communities program.”). On a historical predecessor, see generally FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (2d ed. 2006).

128. See, e.g., Nina Bernstein, *Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids*, N.Y. TIMES, July 22, 2009, at A20 (reporting ICE agents to have a “cowboy mentality” and a strong hint of racial profiling). For discussions of the relevance of this risk of discrimination by state and local personnel to the wisdom of such delegation and to the issue of federal preemption of state and local immigration-related authority, see MOTOMURA, *IMMIGRATION OUTSIDE THE LAW*, *supra* note 3, at 131–38. See also Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013) (arguing that the lack of judicially enforced remedies for violations of the Fourth Amendment imposes on the executive branch the duty to ensure that the government does not benefit from constitutional violations at any point in the immigration enforcement process).

129. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1929 (2015) (“[B]y openly stating a generally applicable policy and then instituting an administrative scheme to implement that policy, [President [Obama] and DHS Secretaries Napolitano and Johnson were actually fulfilling their constitutional duties to supervise.”).

130. See *Crane v. Johnson*, 783 F.3d 244, 254–55 (5th Cir. 2015) (finding that DACA instructed agents to “exercise their discretion in deciding to grant deferred action, and this judgment should be exercised on a case-by-case basis”); Kalhan, *Deferred Action*, *supra* note 3, at 77–78.

131. See Metzger, *The Constitutional Duty to Supervise*, *supra* note 129, at 1929 (“Precluding prospective and categorical articulation of immigration enforcement policy and priorities is

not only to DACA, but also to President Obama's November 2014 executive actions to expand DACA and establish the new DAPA program.¹³²

B. DACA, DAPA, and the Rule of Law

At stake, ultimately, is the rule of law.¹³³ DACA and DAPA apply rule of law principles to an immigration system, the hallmarks of which are selective admissions, selective enforcement, and vast prosecutorial discretion.¹³⁴ The enormous role of discretion in the immigration enforcement system requires special care to make sure not only that discretion is exercised in a consistent and predictable way, but also that discretion does not become discrimination. DACA and DAPA establish individualized, case-by-case determinations as part of a real process, with initial eligibility criteria, an application form and fee, and supporting document requirements, all within a more centralized framework for discretionary decisions to grant or deny.¹³⁵ With written public guidelines and an application-based system that made implementation more transparent than the guidelines alone, the Obama administration moved toward a rational system for exercising prosecutorial discretion within the immigration system that it inherited from prior Congresses and administrations.¹³⁶ Essential is a

tantamount to insisting that nonenforcement decisions be made by lower-level officials, a requirement as much at odds with constitutional structure as a presidential dispensation power.”); Rodriguez, *The Rule of Law Unplugged*, *supra* note 118, at 1488 (“[T]he accountability of low- and mid-level administrators to superiors within the executive branch line of authority helps to ensure that government decisions are consistent and stable. More generally, they can reassure us that . . . the bureaucrats, are governed by law and that discretion is properly limited.”).

132. See President Barack Obama, *Remarks by the President on Immigration* (Nov. 25, 2014) www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il [http://perma.cc/F2RK-RJUG].

133. For a broader discussion of the rule of law in immigration law, see MOTOMURA, *IMMIGRATION OUTSIDE THE LAW*, *supra* note 3, at 185–92, which evolved from Hiroshi Motomura, *Making Legal: The DREAM Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1141–48 (2013), and Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT’L L. 139, 144–53 (2008). For discussions of the rule of law in the context of prosecutorial discretion, deferred action, and DACA and DAPA, see Kalhan, *Deferred Action*, *supra* note 3, at 85–97, and WADHIA, *BEYOND DEPORTATION*, *supra* note 59, at 134–45.

134. Amanda Frost and Michael Kagan have identified significant other ways that formal recognition of prosecutorial discretion through deferred action enhances the rule of law. See Amanda Frost, *When Two Wrongs Make a Right: Response to Hiroshi Motomura*, 55 WASHBURN L.J. 101 (2015), and Michael Kagan, *The New Era of Presidential Immigration Law*, 55 WASHBURN L.J. 117 (2015).

135. See MOTOMURA, *IMMIGRATION OUTSIDE THE LAW*, *supra* note 3, at 192; see also Jill E. Family, *DAPA and the Future of Immigration Law as Administrative Law*, 55 WASHBURN L.J. 89 (2015) (observing that Judge Hanen’s approach in *United States v. Texas* to the question of whether DACA includes meaningful discretion creates an incentive for DHS to be less clear about its enforcement priorities).

136. See Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U.L. REV. 1259, 1262 (2015) (asking, then discussing, whether the removal priorities in the Priorities Enforcement Program, announced at the same time as DAPA by President Obama on November 20, 2014, will allow the federal government to “reclaim the discretion over

prophylactic approach that prevents, or at least minimizes the occurrence of discretion-cloaked discrimination that escapes detection and remedy.¹³⁷

More generally, the immigration enforcement system must reflect the President's choices as prosecutor-in-chief to administer systematic enforcement in the huge gap between the unauthorized population of over eleven million and the annual enforcement capacity of less than five percent of that figure. Part of taking care faithfully to execute the immigration laws is adopting an enforcement system that maximizes predictability and uniformity, and minimizes discrimination.

C. The Rule of Law, Plenary Power, and Immigration Federalism

I will conclude with a few observations about the relationship between executive authority in the DACA and DAPA setting and other core aspects of immigration law. One is the plenary power doctrine, which severely limits the role of courts in hearing constitutional challenges to decisions made by Congress and the federal executive branch to refuse admission to noncitizens, or to compel noncitizens to leave the United States. As I have explained in prior writing, courts should have a larger role in applying the principles and mandates of the U.S. Constitution to the immigration law decisions of the federal government's political branches. The plenary power doctrine is troubling from a rule of law perspective to the degree that it allows Congress and the federal executive branch to make immigration law decisions without serious regard to procedural due process, equal protection, and other constitutional considerations.¹³⁸

From this rule of law perspective, the plenary power doctrine prompts the same core concern that arises when executive branch officials and employees exercise prosecutorial discretion in ways that are unpredictable, inconsistent, or discriminatory, and yet elude scrutiny. As this Article has explained, DACA and DAPA were the President's responses to field-level resistance or reluctance to implement his enforcement priorities when those priorities were merely announced in

immigration enforcement priorities that Secure Communities devolved to the arresting line officer.”).

137. See also Peter Margulies, *Taking Care of Immigration Law*, 94 B.U. L. REV. 105, 173 (2014) (“DACA has significant positive spillover effects for lawful permanent residents and citizens, however, because it reframes organizational incentives The proclivity to take shortcuts spurs reliance on racial or ethnic profiling DACA is a small step toward reordering those incentives.”).

138. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 26–37, 43–45, 65–68, 91–92, 100–13, 121–22, 158–59 (2006); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

memoranda that set out general guidelines. DACA and DAPA formalized and systematized prosecutorial discretion by adopting programs to administer temporary reprieves from deportation in the form of deferred action. So viewed—as a way to make sure that government decisionmaking adheres to core legal principles—the conceptual foundation for DACA and DAPA is also the foundation for objections to the plenary power doctrine. It is quite consistent to argue for greater intra-branch supervision of prosecutorial discretion within the executive branch, and to argue for greater inter-branch constitutional judicial review of executive branch decisions. Both serve rule of law principles.¹³⁹

This rule of law perspective has other implications that are beyond the scope of this Article, but which merit mention because they touch on some important areas of controversy in immigration law and policy. As I have explained elsewhere, state and local immigration enforcement is deeply troubling because of its potential for undetected or unremedied discrimination. This potential is one important reason for preemption of state and local government authority in matters relating to the enforcement of immigration laws, not only directly through state and local involvement in arrest, detention, and removal, but also indirectly through state and local measures intended to make life difficult for persons believed to be unauthorized migrants.¹⁴⁰ In short, one key purpose of federal preemption of state and local immigration enforcement to promote consistency, predictability, and nondiscrimination.

* * *

To return to DACA and DAPA: the issue is not *whether* discretion is exercised,¹⁴¹ for it is pervasive and unavoidable within the current

139. This part of my analysis amounts to a response to Patrick Charles's assertions that "Motomura and other immigration law scholars are embracing federal plenary power," and "[w]hat Motomura and other immigration law scholars fail to disclose, . . . is just how drastically their views have changed." See Charles, *supra* note 52, at 60, 72. Charles seems not to account for the different contexts in which the term "plenary power" can be used. His term, "*federal* plenary power," may be most apt when analyzing federal preemption of state and local laws relating to immigration. *Id.* (emphasis added). But analyses of plenary power (in its customary usage without "federal") typically address a different issue: the federal judiciary's relationship to the political branches of the federal government, with the doctrine curtailing constitutional judicial review of immigration decisions by Congress or the executive branch. As this Article has explained, DACA and DAPA raise a third, different issue: presidential authority *within* the federal executive branch. To promote the rule of law, greater *intra-branch* supervision of prosecutorial discretion within the executive branch is consistent with greater *inter-branch* constitutional judicial review of executive branch decisions.

140. See MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 132–38; Motomura, *The Discretion That Matters*, *supra* note 94; Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729–46 (2010).

141. On this significant difference between types of discretion in immigration law, see MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 203.

U.S. immigration law system. Rather, the issue is *how* that discretion is exercised.¹⁴² My fundamental concern is that government decisionmakers involved in immigration enforcement respect the rule of law.

142. On the exercise of discretion in immigration enforcement, see *id.* at 46–55.