Understanding the Legitimacy of Executive Action In Immigration Law

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Ming Hsu Chen
Associate Professor
University of Colorado Law School
Wolf Law Building, 2450 Kittredge Loop Road
Boulder, CO 80309
303-492-8398
f: 303-492-1200
ming.h.chen@colorado.edu

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UNDERSTANDING THE LEGITIMACY OF EXECUTIVE ACTION IN IMMIGRATION LAW
By Ming H. Chen*

Abstract
Recent uses of executive action in immigration law have triggered accusations that the President is acting imperially, like a king, or as a lawbreaker. President Obama’s Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) programs, which provide protection from deportation and a work permit during a temporary period of lawful presence, serve as the lightning rod for these accusations. But even as legislative and litigation challenges to DACA proceed, many states appear to accept and comply with it, including nearly all of the states that have joined the Texas v United States lawsuit that challenges the President’s legal authority for these actions (S.D. Texas order filed Feb. 16, 2015). How can the high-level legal resistance and on-the-ground acceptance be understood?

This Article claims that the controversy is better understood as a fight about legitimacy than a fight about legality. It reframes the discourse around a concept of legitimacy that emphasizes public acceptance of the policy on the basis of perceived institutional authority. Based on an empirical examination of how and where DACA has gained acceptance, it shows that individual and state actors base their actions on perceptions that the institutions that enacted DACA are worthy of trust and merit their cooperation. For this reason, legitimacy is a more productive way of analyzing DACA’s success or failure than the legal analysis in the current lawsuits.

The Article makes two key contributions to scholarship on executive action in immigration law. First, it offers a theoretical frame for analyzing DACA’s legitimacy in a manner that is truer to the underlying controversy than the frame of current challenges. This framework will endure long after the lawsuits resolve. Second, it describes the puzzling disjuncture between the lawsuits and the broad acceptance on-the-ground from the vantage point of individuals and states whose legitimacy perceptions—warranted or not—will shape the opportunities for undocumented immigrants in many spheres of life. Doing so exposes public attitudes toward executive action that will determine the degree of cooperation with DACA, and it also generates insights about what the Obama Administration and future administrations can do to either build, or undermine, the legitimacy of the executive action and institutions that sustain it.

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TABLE OF CONTENTS

I. UNDERSTANDING EXECUTIVE ACTION IN IMMIGRATION LAW
   A. Immigration Law's Responses to the Undocumented Population
   B. Framework for Understanding Executive Action in Immigration Law
      1. Legal Analysis
      2. From Legality to Legitimacy

II. OPERATIONALIZING LEGITIMACY: INDIVIDUAL COMPLIANCE WITH DACA
   A. Compliance with Temporary Protection from Deportation
   B. Employer Compliance with Work Authorization

III. OPERATIONALIZING LEGITIMACY: STATE COOPERATION WITH DACA
   A. States and Driver’s Licenses
      i. States' Gradual Acceptance and Acquiescence
      ii. States' Begrudging Acceptance and Compliance Dubitante
      iii. States' Continuing Resistance
   B. States and Other Public Benefits

IV. OTHER ILLUSTRATIONS OF COMPLIANCE WITH EXECUTIVE ACTION
   A. Deferred Action for Parental Accountability and Texas v. US
   B. Deferred Action for DACA Parents

V. CONCLUSION

VI. APPENDIX
“A legitimate social order is one where everyday citizens perceive an obligation to obey legal authorities.” – Max Weber, Economy and Society (1968)

“Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.” – U.S. Department of Homeland Security Memo by Jeh Johnson (November 20, 2014)

INTRODUCTION

Recent uses of executive action in immigration have triggered accusations that the President is acting "imperially," "like a king," or as a “lawbreaker.” ¹ The lightning rod for these accusations is President Obama’s Deferred Action for Childhood Arrivals (DACA) program, which provides qualifying undocumented immigrant youth a temporary reprieve from deportation and lawful status during the renewable two-year or three-year term.² DACA is merely one piece of a spectrum of immigration policies premised on executive authority instead of Congressional reform.³ The challenges to DACA and the other executive programs have culminated in

¹ Speaker John Boehner also stated through his spokesperson: “If ‘Emperor Obama’ ignores the American people and announces an amnesty plan that he himself has said over and over again exceeds his Constitutional authority, he will cement his legacy of lawlessness and ruin the chances for Congressional action on this issue—and many others.” Juliet Eilperin et al., President Obama To Announce Executive Action on Thursday, WASH. POST (Nov. 19, 2014), http://www.washingtonpost.com/politics/obama-to-announce-executive-action-on-immigration-thursday/2014/11/19/c7988ecc-701b-11e4-8808-afaa1e3a33ef_story.html.
³ The Deferred Action for Parental Accountability (DAPA) program that extends the same benefits of the deferred action program to the parents of lawful permanent resident (LPR) and U.S. citizen children, provided that they have resided in the United States for five years and meet other qualifications. See Johnson DACA & DAPA Memo Nov. 2014, supra note 2. USCIS will be issuing further program procedures and begin accepting applications for the new program in mid-2015 (180 days from announcement). Other programs announced in President Obama’s Immigration Accountability Executive Action include a re-issuance of policies for the apprehension, detention, and removal of undocumented immigrants; replacement of the Secure Communities Program with the Priority
Congress passing legislation to roll back the executive actions and twenty-six states filing a lawsuit to challenge President Obama’s executive authority to issue the actions. The leading scholars of Constitutional and Immigration Law have joined in the debate. Meanwhile, there is evidence of broad acceptance of and compliance with DACA on the ground, including in nearly all of the states that have joined the Texas v United States lawsuit. How can the high-level legal resistance and on-the-ground acceptance be understood?

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As one of several bills introduced, Mo Brooks introduced legislation that would authorize litigation to challenge the President’s 2012 executive actions in immigration law. Todd Ruger, GOP Lawsuit on Immigration Order Viewed With Skepticism, ROLL CALL (Nov. 20, 2014, 1:00 PM) (describing Representative Mo Brooks’ bill that would authorize suit against the government). Within one week of President Obama’s November 2014 executive action, Representative Ted Yoho sponsored and the House passed the Executive Amnesty Prevention Act of 2014, H.R. 5979, 113th Cong. (2014), and within the first month of the 114th Congress the House passed an even more extensive bill to roll back executive action in immigration law. See House Vote 550, C-SPAN CONG. CHRON. (Dec. 4, 2014, 2:20 PM), http://www.c-span.org/congress/votes/?104775/House/113-2/550 (219 voted yes, 196 voted no).


Constitutional scholars who wrote to support the President’s exercise of executive discretion under the Take Care Clause include Lee Bollinger, Erwin Chemerinsky, Walter Dellinger, Harold Koh, Gillian Metzger, Eric Posner, Cristina Rodríguez, David Strauss, Geoffrey Stone, and Lawrence Tribe. See, e.g., Lee C. Bollinger et al., Letter from Constitutional Law Scholars (Nov. 20, 2014), available at http://thehill.com/sites/default/files/scholars_letter_on_immigration_2_1.pdf [hereinafter Nov. 20 Letter from Constitutional Law Scholars]. Immigration law professors wrote to the President on numerous occasions, beginning with Hiroshi Motomura et al., Letter to President Obama Regarding Executive Authority to Grant Administrative Relief for DREAM Act Beneficiaries (May 28, 2012), available at http://www.pri.org/sites/default/files/story/additional/2012%20Letter%20from%20Legal%20Scholars%20to%20President%20Obama%20on%20Deportations_0.pdf [hereinafter May 28 Letter to President Obama]. For purposes of disclosure, I was one of 136 law professors who signed the initial letter outlining the President’s legal authority to take executive action on immigration.

See infra Part III.
This Article seeks to reframe the discourse around DACA by shifting attention from legality to legitimacy. The Article theorizes the legitimacy of executive action in immigration law and offers concrete examples of how and where it has gained acceptance on-the-ground. It claims that lurking behind the impassioned political rhetoric is a profoundly important concern about whether the legal institutions that fostered DACA are worthy of trust and can inspire cooperation by the public officials who will implement it. Current discussions miss this important concern.

In the context of this Article, legitimacy is defined as the recognition of the President's authority to govern through executive action. This definition is based on classical conceptions of legitimacy such as Max Weber's notion of a legitimate social order as one where everyday citizens perceive an obligation to obey legal authorities and appears in many modern socio-legal studies of legal compliance in a range of subject matters. In this modern formulation, the perception of the binding and obligatory quality of a law motivates citizens to obey: “[A]ction may be guided by the belief in the existence of a legitimate order . . . and the validity of the order in question turns on, among other reasons, an actor's appreciable regard of the order being obligatory or exemplary for him.” While the belief in legitimacy may be joined with self-interested motives such as avoiding a sanction or obtaining a benefit, the belief in legitimacy is itself a reason for obeying the law, whether that belief is warranted or not. Social scientists consider legitimacy to be consequential for the smooth operation of society.

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9 For a prominent example of this usage in the social sciences, see TOM TYLER, WHY PEOPLE COOPERATE 3 (2011) (citing MAX WEBER, ECONOMY AND SOCIETY (1968)). Tyler uses empirical studies to demonstrate that everyday compliance with the law is shaped not only by instrumental concerns such as incentives and sanctions. It is also shaped by what people think about the procedural fairness of laws. Many other studies of law and society over the last several decades have found similarly robust associations across cultural context and substantive areas of law.
11 See also TOM TYLER, WHY PEOPLE OBEY THE LAW (1990).
12 NINA PERSAK, LEGITIMACY AND TRUST IN CRIMINAL LAW, POLICY, JUSTICE: NORMS, PROCEDURES, OUTCOMES 2-3 (2014) (“From the viewpoint of society (and democracy, in particular), at least minimal trust in political institutions is required to enable their functioning. Even though no government enjoys—and perhaps even ought to enjoy—the absolute trust of its citizens, it must enjoy at least a minimum of public confidence in order to operate effectively. Trust enables governments to function properly without having to seek approval from citizens for every decision or resort to coercion. Trust is also crucial for the establishment of civil society, the creation of the sense of community and successful participation of individuals in the public life and collective institutions . . . . Trust facilitates coordination and cooperation.”). Tom Tyler makes similar observations in subsequent empirical research that goes beyond the question of individual legal compliance to institutional legal compliance. See TOM TYLER, WHY PEOPLE COOPERATE (2011).
This definition of legitimacy is merely one of several available. Richard Fallon distinguishes the use of the word legitimacy in three senses: legal, sociological, and moral. My focus is on the sociological. In this sociological sense of legitimacy, the willingness to voluntarily comply with the law is a signal of legitimacy that can be studied empirically. Observable indicia include both attitudes of acceptance and compliant behaviors. This Article makes an attempt to study these signals of legitimacy using case studies of public and private compliance with DACA. It uses two sets of case studies: in Part II, it presents evidence of individual compliance with DACA's twin goals of motivating immigration officials to defer deportations and motivating employers to hire those with lawful presence documentation; in Part III, it presents evidence of state cooperation with federal laws that rely upon DACA as a basis for granting driver's licenses. There is much to be gained from an empirical approach—gains that offset the unavoidable losses of operationalizing a complex concept. Conceptually, attitudes of individual and state acceptance of DACA condition broad compliance and cooperation with it, whether or not the underlying belief is warranted and whether or not it is mixed with other motivations. Empirically, a study of the behaviors uncovers on-the-ground acceptance at odds with the resistance expressed in litigation and legislative debate that occupy so much public attention. This mismatch merits explanation and reflection insofar as it speaks to the legitimacy of DACA.

The Article makes two key contributions to scholarship on executive action in immigration law. First, defining the current debates as fights about the legitimacy—not merely the legality—of

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16 Social scientific usages of legitimacy should especially be distinguished from its usage in theoretical debates about the relationship between morality, legitimacy, and legality. As explained more fully by Richard Fallon, the distinction between legal, social, and moral legitimacy assumes that a law can be legal without necessarily being socially or morally legitimate, widely accepted without being legally or morally correct, or morally desirable without being legally or sociologically accepted. The reason is that legal legitimacy depends on one set of tests, moral legitimacy on another, sociological legitimacy on yet another. Thus, the claim in this Article is not that citizenship perceptions of the obligation to obey authorities constitutes legal or moral legitimacy; it is that the perceptions signal beliefs about legitimacy that, turn, motivate compliance and cooperation with the law’s requirements. The disaggregation of these three strands of legitimacy will leave some unsatisfied for reasons that go beyond the scope of the Article. Nevertheless, it is the interpretation that I adopt in this Article. For more discussion of the differing usages of legitimacy, see also notes 17–20 and Part I.C (From Legality to Legitimacy).
DACA opens up new ways of understanding what is noteworthy about executive action in immigration law in a manner that will endure beyond the current litigation and legislative attacks. DACA and the responses to it are not noteworthy because they are new or high-profile, but because they illuminate a form of lawmaking that is often misunderstood and whose contestation reveals persistent, if perplexing, features of law and policymaking. Second, the Article addresses the puzzling disjuncture of the lawsuits and broad acceptance on-the-ground from the vantage point of public officials and states whose legitimacy perceptions, warranted or not, will shape the opportunities for undocumented immigrants in many spheres. Based on an empirical examination of how and where DACA has gained acceptance, it shows that private and public actors base their actions on perceptions that the executive institutions that fostered DACA are worthy of trust and merit their cooperation. For this reason, legitimacy is a more productive way of analyzing DACA’s success or failure than the legal analysis in the current lawsuits. It generates insights about what the Obama Administration and future administrations can do to either build, or undermine, the legitimacy of the executive action and the legal institutions that promulgate it. Put simply, the criterion for DACA’s success or failure will turn on perceptions of legitimacy by those called upon to implement and abide by it.

Part I of this Article explains executive action in immigration law. It begins with a sketch of the undocumented population and describes immigration law's primary responses: an assemblage of executive actions in the form of administrative policies and practices such as deferred action and the lawful presence designation. It then describes two frameworks for assessing executive action. The legal framework analyzes DACA’s legality as a Constitutional and statutory matter. The legitimacy framework analyzes DACA in a manner consistent with socio-legal research. Part II presents evidence of individual compliance with DACA's two key components: the temporary protection from deportation and the work permit. Part III posits states’ gradual acceptance of DACA as a second testing ground for its legitimacy. It presents case studies of state decisions to rely on DACA's legitimacy for the issuance of driver's licenses, highlighting the varying degrees and justifications for compliance. The basic premise behind these case studies is simple: within a framework that makes state participation voluntary rather than mandatory, states voluntarily cooperate if they accept the legitimacy of DACA; they limit cooperation or resist if they challenge the legitimacy of federal policy. As a third testing ground, Part IV compares the DACA case study with other executive actions in immigration law, including the Deferred Action for Parental Accountability (DAPA) program challenged in *Texas v. United States*. The Article concludes with reflections on how the Obama administration, and future administrations, can either build or undermine support for the legitimacy of their executive actions.

Before I proceed, a few clarifications are in order. First, the premise of the case studies is that people will only accept the legitimacy of DACA on-the-ground if President Obama has indeed acted lawfully at the end of the day (even if this acceptance is not immediate or automatic). The lawfulness of the program is a contested issue—one that is still working its way through the courts—and I am do not decide on the program's legality so much as bracket it. The vast
majority of individuals and states who comply with DACA and the lawful presence that it furnishes signal that they accept its legality and then move on to wrestle with its legitimacy. Those who doubt the legality of the program face a struggle that is analytically prior to their legitimacy analysis, as noted in Texas v. United States and the studies of Arizona and Nebraska continuing to resist DACA for driver's licenses. These skeptics are mistaken if they assume that a lawsuit will by itself resolve their qualms about legitimacy. A lawsuit might help to legitimate a policy by declaring it legal, but it will only delegitimize a contested policy in extreme circumstances. This is because laws can be found illegal and still not be considered illegitimate in the sociological sense of making people disobey or disrespect the law's underlying institutional authority. Those who disagreed with Bush v. Gore still acknowledged President Bush as the president for two presidential terms and obeyed his laws. For similar reasons, few would claim that every law overturned on appeal is illegitimate… or that a law facing preliminary injunction is illegitimate until the injunction is eventually overturned by a higher court. The equation of legality with legitimacy is understandable—and often presumed in a system of judicial precedent that considers past legal interpretations one source of legitimate authority—but it is important to disentangle the concepts. This Article considers legitimacy its core concern and acknowledges the relationship between assertions of legality and legitimacy as a secondary matter (primarily in discussions of Arizona and Nebraska in Part III.A and DAPA in Part IV.A). Second, a study of legitimacy makes it hard to avoid discussing substantive disagreements about the morality of DACA. The on-the-ground views reported in the case studies sometimes include morality among other compliance motivations, however, reporting on signals of a states’ belief in morality is not the same as determining the law is moral or that a state's belief in its morality makes it so. I defer the morality discussion to others who engage in normative analysis or otherwise study morality.

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17 The example of those who disagree with Bush v. Gore will still acknowledge the President and follow his laws, unless they believe them to be a grave injustice, comes from Richard Fallon, Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1791 (2005).

18 This is the sequence of events in Texas v. United States, in which a federal judge issued a temporary injunction of the 2014 DACA extension and 2014 DAPA program on February 16, 2015. (The 2012 DACA program that forms the primary executive action analyzed in this Article is not addressed in the lawsuit).

19 Fallon explains this partly as the product of a tradition of precedent/stare decisis in which past legal interpretations constitute a source of legitimate authority. Richard Fallon, Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1793 (2005). It is also partly a product of strategic uses of illegitimacy. Id. at 1818 (“whereas an ascription of legal legitimacy often claims less than that a judicial judgment was correct, an allegation of illegitimacy almost invariably implies more than that a legal judgment was merely incorrect.”)

I. UNDERSTANDING EXECUTIVE ACTION IN IMMIGRATION LAW

In significant part because the immigration policy landscape has been marked by a stalemate in Congress for more than a decade, the Obama Administration’s immigration policy has largely emerged in the executive branch.21 Most notably, President Obama in 2012 and again in 2014 announced the DACA program that provides qualifying undocumented immigrant youth temporary protection from deportation and furnishes them with lawful presence—as distinguished from legal status—for a renewable two- or three-year term.22 His 2014 executive action expanded upon deferred action by covering the undocumented parents of US citizens and LPRs and by using similar measures to benefit military families, high-skilled workers, and others.23 Beyond immigration law, President Obama also used his executive authority in health care, the environment, and other policy arenas beyond the scope of this Article.24

While there is a well-pedigreed scholarship on the Presidency and the executive branch, most of it does not concern executive action in immigration law.25 Voices are arising in the legal academy to theorize aspects of executive action in immigration law, but they often analyze isolated judicial doctrines ruling on discrete legal questions rather than viewing executive action as part of a broader phenomenon of lawmakers. For example, inquiry into whether President Obama was acting within his powers when he announced DACA is marked by close analysis of the Take Care Clause and a few landmark cases on enforcement discretion.26 While it will have


22 Supra note 37–39 and accompanying text.

23 Supra note 40–42 and accompanying text.


26 Many immigration scholars have come together to support or dispute the exercise of discretion as a Constitutional matter. See, e.g., Kate Andrias, The President’s Enforcement Power, 88 N.Y.U. L. REV. 1031 (2013). But see Zachary S. Price, Enforcement Discretion and Executive Duty, 67 VAND. L. REV. 671 (2014); Robert Delahunty & John Yoo, Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 71 TEX. L. REV. 781 (2013). See also supra note 6 (listing letters from law professors to President Obama). The Office of Legal Counsel (OLC) November 2014 memo furthered this discussion with its examination of the proper scope of executive authority, although it follows the same lines of legal analysis. Karl R. Thompson, OFFICE LEGAL COUNSEL, Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the
significant bearing on current events, this style of scholarship resembles a legal brief for or against DACA. At its best, it offers a guide for the resolution of complex cases and without recognizing that legal analysis and lawsuits will not by themselves resolve intellectual debates over the President's proper role setting policy and administering the nation's law.

Another strand of inquiry hones in on the legal effect of the U.S. Department of Homeland Security's DACA memos and implementing guidance from the U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). This line of analysis examines the President's DACA policy as an exercise of Congressionally-delegated authority, its compliance with the Administrative Procedure Act (APA), and to a lesser extent its implications for state immigration laws. While the answers to each of these discrete legal questions is once again consequential, maybe more so than the Constitutional inquiry, they share the common flaw of failing to raise more fundamental questions about the legitimacy of lawmaking in the regulatory state, especially in the much-criticized realm of immigration enforcement agencies.

My contribution to the conversation around the immigration executive actions is to situate challenges to DACA in a more enduring theoretical frame than the current controversies. Part I


The scholarship on the non-delegation doctrine recognizes that the court's justifications only superficially grapple with core issues of lawmaking, and most of it occurs outside of immigration law. See supra note 96. Within immigration scholarship and jurisprudence, the emphasis is on the Plenary Power doctrinal analysis. See supra note 59; Kerry Abrams, Plenary Power Preemption, 99 VA. L. REV. 601 (2013) (identifying distortions that result from this obsession).


The regulatory preemption scholarship analyzes emerging doctrine from the Supreme Court that grants agency regulations preemptive effect over state laws in a variety of settings. While USCIS guidance falls outside the scope of this scholarship strictly speaking, some scholars have made the connection between guidance and deference in the DACA context. See Catherine Y. Kim, Immigration Separation of Powers and the President’s Power to Preempt, 90 NOTRE DAME L. REV. 691 (2014); David S. Rubenstein, Immigration Structuralism: A Return to Form, 8 DUKE J. CONST. L. & PUB. POL’Y (2013). See generally Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, DEPAUL L. REV. (2007) (describing the court as granting federal regulations preemptive effect).
sets forth a theory of legitimacy for immigration law that emphasizes public acceptance and compliance on the basis of perceived institutional authority. Part I.A describes DACA as background for understanding the use of executive action in immigration law. Part I.B synthesizes the two legal arguments that dominate public discussion of DACA and identifies its inadequacies. Part I.C reorients the DACA analysis around legitimacy, providing tools to conceptualize and measure individual and state compliance with DACA on-the-ground.

A. Immigration Law’s Responses to the Undocumented Population

Immigration law generally requires (1) eligibility for admission, and (2) individual admissibility. Those who enter without inspection lack authorization from the US government; so do those who properly acquire a visa document that later lapses, e.g. if they overstay or violate the terms of their visa. The total size of this population of undocumented immigrants—sometimes referred to as unauthorized rather than undocumented for comprehensiveness and accuracy—is currently estimated to be approximately 11.3 million. They are the undocumented immigrant population that is subject to removal via enforcement of the immigration laws.

The causes for such a large undocumented immigrant population are numerous. At the level of root causes, many scholars point to historical patterns of U.S.-Mexico migration, economic conditions that prompt migrants to seek a better life elsewhere, and social conditions that sustain unauthorized migration and/or prevent return. As Professor Hiroshi Motomura and others have observed, the lived reality of immigration law is that "immigration law on the books creates a

30 While “unauthorized” is indeed more accurate for describing the combined group, I sometimes interchange it with “undocumented” due to the prevalence of that term in the literature describing and studying this population.
32 See, e.g., MAE NGAI, IMPOSSIBLE SUBJECTS (2004) (talking about limitations on Western Hemisphere quotas that resulted from 1965 Hart Cellar Act and the unfairness of these ceilings in light of the Bracero Program). Some place the responsibility for these migration patterns on US policies inviting temporary labor without providing lawful means to remain permanently. See, e.g., HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014) (talking about federal government’s tacit consent to the large undocumented immigrant population); Joseph H. Carens, Who Should Get In?: The Ethics of Immigration Admissions, 17 ETHICS & INT’L AFF. 95 (discussing large amount of immigrants present as a result of guest worker programs); Kevin Johnson, Open Borders?, 51 UCLA L. REV. 193 (2003) (discussing large amount of immigrants present as a result of guest worker programs). Others lay the blame on the migrants’ disregard for immigration law and evasion of enforcement. See, e.g., Elise Foley, Rick Santorum: Undocumented Immigrants are All Law-Breakers, HUFFINGTON POST (Dec. 8, 2011), http://www.huffingtonpost.com/2011/12/08/rick-santorum-undocumented-immigrants_n_1136398.html (quoting former Senator from Pennsylvania as saying “You can’t be here for 20 years and commit only one illegal act . . . because everything you’re doing while you’re here is against the law.”).
large number of violators; immigration law in action has historically tolerated them.”33 At the level of policies that shape immigration, a mismatch between the many statutory grounds for ineligibility34 and the tremendous resources that it would take to remove everybody creates a sizeable and persistent gap.35 Deportations of certain segments of the undocumented immigrant population have been on the rise, with a historic high of 400,000 under President Obama in 2012.36 But even at this high level of deportation, with current levels of funding it would take more than thirty years to deport all 11.3 million undocumented immigrants—thirty years for the existing population and possibly longer when once adjusting for inflows and outflows of undocumented immigrants during that thirty-year period.37

Faced with a gap between the size of the undocumented immigrant population and the resources required to remove them, the Department of Homeland Security sets enforcement priorities to guide the exercise of its enforcement discretion. Among these agency policies and practices, the DACA program in June 2012 made approximately 2.5 million people eligible for deferred action and a work permit (though only 600,000 or so have received the benefit).38 A November 2014 expansion of DACA made an additional 1 million people eligible for deferred action and a work

33 HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 22 (2014) (describing willingness to tolerate unauthorized immigration for the purposes of labor as tacit consent to the unauthorized migration).

34 Individuals are ineligible for citizenship if they are either inadmissible or deportable under the Immigration and Nationality Act. See Immigration and Nationality Act (INA), Pub. L. 101-649, § 245, 104 Stat. 4978 (1990). Some of the many statutory grounds for inadmissibility are conviction for a crime of moral turpitude (including theft), most drug-related convictions, prostitution, membership in totalitarian parties, and money laundering. INA §§ 212(2)(A)-(D), (I), (3). Grounds for deportability include all grounds of inadmissibility, in addition to being present in the United States in violation of the law, violating nonimmigrant status, smuggling, marriage fraud, committing a crime of moral turpitude, most controlled substances convictions, firearms offenses, domestic violence, failure to register, and document fraud. INA §§ 237(1)-(3), 8 U.S.C. §§ 1227(1)-(3) (2012). See also Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law, 119 Yale L.J. 458 (2009) (offering further support of the Congress-President mismatch said to produce de facto discretion over immigration enforcement).


permit, and the corollary DAPA program for parents of U.S. citizens and LPRs made yet another 2-3 million people eligible.\textsuperscript{39} The program's two components are briefly described in turn.

\textit{Enforcement Discretion and Deferred Action}

The deferred action component of the DACA program represents an exercise of enforcement discretion. As an extension of inherent executive authority, DACA builds on an established tradition of prosecutorial discretion in immigration enforcement that goes back to the 1970s.\textsuperscript{40} Before the DHS was forged from its legacy agency, the Immigration and Naturalization Service (INS), INS Commissioner William Howard in 2005 laid out the reality of resource limitations for immigration enforcement in a memo explaining the need for prosecutorial discretion.\textsuperscript{41} That memo and subsequent ones note that the immigration enforcement agency only has resources to deport a fraction of the estimated undocumented immigrant population of the United States, less than 4 percent in 2011.\textsuperscript{42} As an exercise of the immigration enforcement agency's delegated authority from Congress, the U.S. Department of Homeland Security (DHS) has issued a series of agency guidance documents setting out criteria for prioritizing their enforcement activities; these will be followed up by additional guidance from the units administering the programs, such as the USCIS. Specifically, these deferred action memoranda list positive and negative factors for consideration of the cases of individual immigrants facing deportation, generally \textit{raising} the priority level for removable immigrants with criminal records or who pose a danger to the community and \textit{lowering} the priority for those without criminal records or who contribute positively to the community and demonstrate stakes in the community.\textsuperscript{43}


\textsuperscript{43} These criteria are articulated in the INS Operations Instruction (1970), the Memorandum from Doris Meissner, Comm’r, U.S. Immigr. & Naturalization Serv., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, Reg’l & Dist.
Consistent with the longstanding practice of deferred action as a means of prioritization, President Obama's DHS Secretary Janet Napolitano issued a guidance document in 2012 that makes explicit the agency's discretionary considerations when processing the applications of immigrants who entered without inspection as children and have remained while incurring positive criteria and without incurring negative criteria for remaining in residence. The DACA selection criteria track affirmative and negative criteria from prior memos, even though the applications remain subject to the individual determinations of USCIS officials. It also formalizes a process for applicants to apply for the temporary protection from deportation, rather than leaving the consideration of these discretionary factors to the whims of USCIS field offices. The 2012 USCIS guidance specifies that the deferral term is two-years with the possibility of renewals, rather than leaving the odds of removal open-ended, and provides work authorization for the protective period. The justification for the program is that young immigrants who entered with their families should not bear responsibility for their actions.

DHS Secretary Jeh Johnson's 2014 Memos on Prosecutorial Discretion and Deferred Action (2014) substantially mirror the parameters from Secretary Napolitano's memo and maintain most of the qualifying criteria. The Johnson memo expands the program by lifting the age cap on eligibility so that otherwise qualifying individuals can apply for deferred action, even if they...
are not 30 or younger at the time of application. The deferral term is lengthened from two years to a renewable three-year period. The Johnson memo also provides for a new Deferred Action for Parental Accountability (DAPA) program that benefits parents of US citizen or LPR children. Although the DAPA program does not have precedent in the 2012 DACA program, its eligibility requirements similarly encompass individuals who would have been low priority under all of the DHS’ previous enforcement priority memoranda. DAPA applicants undergo a similar application process and, if their applications are granted, receive a similar renewable three-year term of protection and a work permit for the duration of the protective period. Unlike DACA, the primary justification for DAPA is enhancing family unity by reducing the odds that children in mixed status families lose their parents through deportation and providing a mechanism of parental accountability for their unlawful entry.

While each of the DHS’ deferred action memos varies in its particulars and its emphasis, the memos constitute a relatively consistent body of agency practice over several administrations. Under the framework of administrative law, each of these memos constitutes legal authority as agency guidance documents that fall within a statutory exception for general statements of policy and interpretive rules. While they are not legally binding on courts, collectively, these guidance documents establish a body of institutionalized understandings about how to handle immigration enforcement when resource limitations make full enforcement infeasible. They also signal the DHS’ seriousness and commitment to implementing the program fairly, which is critical to building public confidence. DACA may not significantly alter existing priorities, but it changed the formality and the degree of agency investment in preexisting priorities by revising forms used to process DACA applications, by committing resources and hiring staff to implement the priorities, by marking successes and failures in a high-profile way. Committing practices to writing directs executive power by specifying criteria for the exercise of that authority. It also limits executive power by implicitly excluding exercises that fall short of the criteria. In this sense, DACA constrains the exercise of enforcement discretion and promotes stability.

**Lawful Presence and Work Authorization**

In addition to the temporary protection from deportation, DACA furnishes lawful presence and work authorization. As compared with those possessing lawful status, DACA recipients who

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47 See id.
48 See Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (2012). While agencies and courts are not legally bound to follow the interpretations contained in guidance documents, regulated entities often follow their interpretations because they assume the agency will do the same. As Nina Mendelson explains, “the document . . . establishes the law for all those unwilling to pay the expense, or suffer the ill-will of challenging the agency in court.” Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 Cornell L. Rev. 397, 398–401 (2007) (quoting Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 Admin. L. Rev. 159, 167 (2000)).
obtain lawful presence are not truly undocumented and yet they are also not subject to removal during the protective period. Thus, their immigration status is not a legal binary in which a person is unqualifiedly legal or illegal; those possessing lawful presence occupy a liminal space in immigration law sometimes referred to as a twilight status. The designation is an official recognition that acknowledges that federal immigration law is technically complex and that the lives of immigrants are socially complex as well.

As a result of the liminality of lawful presence gained with DACA, one’s eligibility for various rights and benefits is somewhat indeterminate; also, the twilight status itself may change over time. A pertinent example of an associated benefit is the DACA work authorization during the two- or three-year term during which the individual holds lawful presence. The Immigration and Naturalization Act (INA) § 274 and its implementing regulations expressly delegate authority to the DHS Secretary to issue a “work permit” in the form of an employment authorization document (EAD) that serves as proof of an individual’s right to work in the country. The document shows that the bearer has “lawful presence,” rendering the immigrant in compliance with laws that might otherwise impede their ability to obtain employment. While the EAD does not undo laws prohibiting employers from knowingly hiring undocumented workers, it makes it possible to hire workers with lawful presence. The transformative effect of DACA is that it makes the previously undocumented "DACAmented".

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50 David Martin labels deferred action and similar forms of immigration relief a “twilight status.” See DAVID A. MARTIN, MIGRATION POL’Y INST., POL’Y BRIEF, TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION (2005), available at http://www.migrationpolicy.org/research/twilight-statuses-closer-examination-unauthorized-population (explaining that twilight statuses can result for those with legally recognized claims to eventual LPR status or those with legally recognized temporary statuses, of which the most numerically significant are TPS beneficiaries, aliens paroled into the United States, those benefitting from prosecutorial discretion regarding the decision to commence or pursue removal proceedings, those granted voluntary departure and other forms of temporary or permanent relief). The term “liminal law” is used by Juliet Stumpf & Stephen Manning, Reexamining the Law in Immigration Law (Unpublished paper) (forthcoming in CHICAGO-KENT L. REV.).

51 HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014)

52 8 C.F.R. § 274a (2015); 52 Fed. Reg. 16216 (May 1, 1987) (“(a) The term unauthorized alien means, with respect to employment of an alien at a particular time, that the alien is not at that time either: (1) Lawfully admitted for permanent residence, or (2) authorized to be so employed by this Act or by the Attorney General.”). As discussed infra, the INA expressly grants to the DHS Secretary the determination of which aliens are “unauthorized” for employment purposes, regardless of whether the INA elsewhere would define them as unauthorized. The INA regulations (enacted pursuant to APA notice and comment rulemaking powers) define “unauthorized alien” with respect to employment by delineating three classes of aliens authorized to accept employment, despite lacking formal immigration status: (a) aliens authorized employment incident to status (e.g. lawful temporary residents or asylees); (b) aliens authorized for employment with a specific employer incident to status (e.g. a nonimmigrant student on F-1 visa); (c) aliens who must apply for employment authorization (e.g. includes deferred action recipients). 52 Fed. Reg. 16216 (May 1, 1987). The third category constitutes the executive authority for work permits that accompany DACA. Obtaining employment authorization for people with deferred action also requires a showing an “economic necessity” to obtain employment. Id.


54 Several immigrants’ rights groups have adopted this clever nomenclature. See, e.g., The Top Ten Benefits of Being DACA-Mented!, UNITED WE DREAM, http://unitedwedream.org/daca-top10/ (last visited Feb. 4, 2015).
B. Frameworks for Understanding Executive Action in Immigration Law - Legality

Although the legal analysis of DACA does not end the debate, it is an appropriate place to begin. Part I.B summarizes two legal arguments about executive authority and then points out how the legal analysis will leave important questions unresolved without also considering legitimacy.

Executive Power to Decide and Take Care Clause

The primary legal analysis surrounding DACA concerns the Constitutional sources of executive power. While these legal arguments have mostly been unsuccessful, they are important to understand in relationship to the alternative frame of legitimacy presented in Part I.C.55

President Obama's claim is that the executive power is broad, even if not unlimited. While the Obama Administration grounds its argument in Constitutional sources, the specific texts supporting them are not immediately obvious. Article II’s Vesting Clause states: "The executive power shall be vested in a President of the United States" and, relatedly, that he shall appoint “other officers of the United States” to help execute the law.56 Article II’s Take Care Clause states: "[The President] shall take care that the laws be faithfully executed, and shall Commission all the officers of the United States."57 Beyond textual sources, the federal government's broad authority is also said to extend from the "inherent power as sovereign to control and conduct relations with foreign nations."58 As applied in the immigration context, the plenary power doctrine has long served to promote national interests and to limit the power of the judiciary to review Congressional determinations about their exercise in immigration.59 Notwithstanding these cases, plenary power over immigration reserves decisions to the "political branches."

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55 See infra note 69 (discussing legal obstacles); supra note 17 (discussing relationship between legality and legitimacy).
56 U.S. CONST., art. II, § 1.
57 U.S. CONST., art. II, § 3.
59 For example, foundational plenary power cases state that "over no conceivable subject is the legislative power of Congress more complete than it is over immigration." CRS Report Dec. 2013, supra note 41, at 4 n.20 (citing foundational cases). The term “plenary power doctrine” was coined by Professor Stephen H. Legomsky in Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255 (1984) (describing the rise of the doctrine, identifying various rationales the Supreme Court has used to justify it and critiquing those rationales); see also STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA (1987) (tracing the evolution of the plenary power doctrine from its origins to its contemporary use, noting that current usage relies on cases that actually supported more modest propositions than would be upheld today); Stephen H. Legomsky, Commentary, Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 307 (2000); Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power, in IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds. 2005) (describing the traditional perception of immigration law as primarily federal in nature and the broad deference granted to Congress on issues pertaining to immigration).
Executive actions asserted under these broad powers can take many forms, ranging from executive orders to presidential directives to policy memos. While many refer to President Obama’s 2012 and 2014 DACA programs as an executive order, they are more accurately referred to as a presidential directive that resulted in implementing guidance from agencies such as DHS and its subunit USCIS.\textsuperscript{61} DACA draws primarily on the executive branch’s prerogative of setting enforcement priorities under \textit{Heckler v. Chaney}.\textsuperscript{62} Supporters of the recent immigration-related executive actions argue that the President was within his inherent powers in deciding on enforcement priorities that focus on criminals and gang members and safeguard the children of undocumented immigrants; as President Obama put it in his November 2014 announcement “on felons, not families.”\textsuperscript{63} Constitutional Law and immigration law professors extending to both Congress and the President, a proposition reaffirmed in the \textit{Arizona v. United States} decision recognizing the federal government’s broad enforcement discretion.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{61} While there are many similarities among these forms, there are also some important differences. Paramount among these is whether the executive action is legally binding and whether it is subject to judicial review (and, if so, at what level of deference). President Obama’s executive action is not legally binding in this sense, unlike a true executive order. \textit{See Naomi Cobb, Note, Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means To An End That Misses the Bull’s-Eye, 15 SCHOLAR: ST. MARY’S L. REV. RACE & SOC. JUST. 651 (2013); Phillip Bump, Why John Boehner is Really Suing Barack Obama, WASH. POST (June 25, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/25/why-john-boehner-is-really-suing-barack-obama/?hpid=z5.}
\item \textsuperscript{62} \textit{Heckler v. Chaney}, 470 U.S. 821 (1985). As the OLC Memo explains, “[T]he ‘faithful[]’ execution of the law does not necessarily entail ‘act[ing] against each technical violation of the statute’ that an agency is charged with enforcing. . . . Rather, as the Supreme Court explained in Chaney, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to ‘balance[] . . . a number of factors which are peculiarly within its expertise.’” OLC Memo, \textit{supra} note 26, at 4–5 (quoting \textit{Heckler v. Chaney}, 470 U.S. 821, 831 (1985)).
\item \textsuperscript{63} President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), \textit{available at} http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration; \textit{see also} Kate Andrias, \textit{The President’s Enforcement Power}, 88 N.Y.U. L. REV. 1031 (2013); Shoba Sivaprasad Wadhia, \textit{In Defense of DACA, Deferred Action, and the DREAM Act}, 91 TEX. L. REV. 59 (2013); Lauren Gilbert, \textit{Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform}, 116 W. VA. L. REV. 255 (2013). Gilbert argues that DACA falls within the foreign policy exception to rule making under the APA, among other separation of powers justifications. Gilbert, \textit{supra}, at 291–92. She also says DACA was adopted in anticipation of a possible favorable ruling by the Court on S.B. 1070 and was aimed at weakening the impact of S.B. 1070 and other copycat laws by carving out a class of individuals eligible for relief from deportation whom the states could not touch as a federalism matter. Gilbert, \textit{supra}, at 261; \textit{see also} Andrew Rosenthal, \textit{Government by Executive powers in immigration policy).
have authored several letters to the President that support this legal interpretation. The U.S. Department of Justice’s Office of Legal Counsel (OLC) largely agrees with their legal interpretations, though the OLC memo advises additional limitations on the exercise of this power and issues cautionary notes, given that the parameters and of the legal inquiry associated with the Take Care Clause is not well-defined: "The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is "faithful" to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules." The Obama Administration heeded many of these cautions in the design and drafting of its 2014 executive actions, suggesting that—even if they reserved inherent authority for their actions—they recognized the value of remaining in the safety zone where Congressional intent overlaps with executive actions.

Critics of the recent immigration-related executive actions claim that President Obama’s use of executive authority is overreaching and specifically that it violates the Take Care clause. Their critiques have been waged in Congress and in the courts. While legal challenges to President

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64 The first letter from 95 immigration law professors states that the executive has long exercised his inherent authority in these forms of actions, even and perhaps especially where enforcement discretion is involved. May 28 Letter to President Obama, supra note 6. A second letter from 136 immigration law professors states that this prerogative extends to categorical grants of affirmative relief such as the DACA. Sept. 3 Letter to President Obama, supra note 60. An update of this letter was re-issued to the Associated Press following the President's announcement of his executive actions on immigration on November 23, 2014. A subsequently-released letter from the lead authors to President Obama reaffirms the application of these principles to the parents of DACA recipients, who were apparently being considered for the DAPA program. Letter from Shoba Sivaprasad Wadhia, Stephen H. Legomsky, Hiroshi Motomura, & Michael A. Olivas to President Barack Obama (Nov. 3, 2014) [hereinafter November 3 Letter to President Obama]. Constitutional scholars who wrote to support the President's exercise of executive discretion under the Take Care Clause include Lee Bollinger, Erwin Chemerinsky, Walter Dellinger, Harold Koh, Gilian Metzger, Eric Posner, Cristina Rodriguez, David Strauss, Geoffrey Stone, and Lawrence Tribe. See, e.g., Nov. 20 Letter from Constitutional Law Scholars, supra note 6.

65 OLC Memo, supra note 26, at 4–6. The OLC memo says that, in general, limits on enforcement discretion are implied in the Constitution's allocation of governmental powers between the two political branches. The OLC memo offers four limiting principles governing the permissible scope of enforcement discretion: (1) The decision to decline enforcement should reflect factors peculiarly within the enforcing agency’s expertise; (2) A program may not effectively rewrite the laws in the guise of exercising enforcement discretion; the action must be consonant with broad congressional policy underlying the regulatory statute; (3) The program cannot be so extreme as to amount to abdication of statutory responsibilities; and (4) Non-enforcement decisions are “most comfortably” sustained when they are done on a case-by-case basis.

66 Id. at 5.


68 Multiple bills have been introduced in the House that challenged the President's overreach, including a 2015 114th Congressional session House Bill that would limit DHS spending necessary for the administration of DACA and otherwise roll back Obama’s executive actions in immigration law, the Department of Homeland Security
Obama's executive actions on Constitutional grounds continue, so far, none of the federal challenges to DACA and related executive actions have been successful on the merits of their claims. With one possible exception, each lawsuit has faced difficulty showing the particularized harm or concrete injury required to prove standing, a threshold requirement for bringing a lawsuit. In addition, the Congressional Research Service's search for legal precedent was unable to find a single case in which a court invalidated a policy of non-enforcement via prosecutorial discretion because it violated the Take Care clause.

Whichsoever interpretation prevails, litigation over DACA on the basis of the Take Care clause will not resolve the public debate. Resolution of Constitutional legality is not enough. The legal analysis misses more fundamental theoretical contention over the powers of presidency that are

Appropriations Act, H.R. 240, 114th Cong. (2015); a 2014 House bill that expresses general disapproval and limiting principles for Obama's executive actions, the Executive Amnesty Prevention Act of 2014, H.R. 5979, 113th Cong. (2014); the 2014 ENFORCE Act would allow either chamber of Congress to file a civil action if it believes that the President has violated the Take Care clause, H.R. 4138, 113th Cong., 2nd Session (passed March 13, 2014); 159 CONG. REC. 3208–3212, 3222, 3225 (2013) (amendment, debate, and vote to de-fund DACA and administration of the Morton Memo). All of these bills face political hurdles: they are unlikely to pass in the Senate or to survive a legislative veto from President Obama.

69 Texas v. United States, No. 1:14CV00254 (S.D. Tex., Dec. 3, 2014) (Oral arguments held Jan. 15, 2015, temporary injunction filed Feb 16, 2015), discussed supra note 5. In the Texas v. United States lawsuit brought by 26 state governors and officials (17 initially with additional states joining later), injury is claimed on the premise that executive action will increase illegal immigration and impose costs on the states, plus that work permits for undocumented workers will strain the economy and threaten jobs for native-born workers. While the district court found sufficient injury to prove standing, the empirical evidence of the net positive economic impact of deferred action and contested causal links between DACA and costs imposed on states renders this finding vulnerable in future appeals. By comparison, in Arpaio v. Obama, Sheriff Joe Arpaio sued President Obama for similar reasons and lost on standing. Arpaio v. Obama, 27 F. Supp. 3d 185 (D.D.C. 2014). In Crane, ICE agents sued DHS Secretary Napolitano over the implementation of DACA and aspects of the June 17, 2011 Morton memo on prosecutorial discretion. The ICE agents argued that DACA and the Morton Memo are unconstitutional because Congress, by federal statute, requires the agents to place aliens who are not “clearly and beyond a doubt entitled to be admitted” to the United States into removal proceedings. In their view, DACA and the Morton memo prohibit the agents from complying with this statute for aliens who meet the DACA criteria and creates for them an inability to fulfill their charge in violation of their oaths to uphold the law. Crane v. Napolitano also foundered on a jurisdictional issue. Crane v. Napolitano, 920 F. Supp. 2d 724 (N.D. Tex. 2013), appeal pending, Crane v. Johnson, No. 14-10049 (5th Cir. 2014).

70 Id. An op-ed from the editorial staff of the New York Times anticipating future challenges noted that even if the federal judge assigned to Texas v. United States rules in favor of the governors on the basis of his conservative views of immigration enforcement, the programs rest on “rock-solid legal footing” and “sound legal scholars” seem assured that a favorable outcome would ultimately be overturned. Editorial Bd., Nativist Lawsuit on the Texas Border, N.Y. TIMES (Jan. 20, 2015), http://www.nytimes.com/2015/01/20/opinion/nativist-lawsuit-on-the-texas-border.html. Of course, this prediction does not mean that the pending lawsuits and legislation will not create delay or other complications for the DHS in their effort to begin accepting applications for the expanded DACA and DAPA programs. One day after the temporary injunction was ordered, the DHS announced that he would not begin accepting applications for the expanded DACA or DAPA program, pending resolution of the litigation. See Statement by Secretary Jeh Johnson, Sec'y Dept Homeland Sec., Concerning the District Court's Ruling Concerning DAPA and DACA (Feb. 17, 2015), available at http://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa).

connected to the legal texts and yet more specifically focused on institutional authority in the absence of strong, clear textual mandates. As will be explained in Part I.C, institutional authority is an important component of procedural justice and is a largely non-instrumental motivation for legal compliance. Thus, legal contentions about institutional authority themselves “depend[s] much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification.”

Congressionally-Delegated Authority and the APA Rulemaking Requirements

A secondary legal inquiry concerns the DHS’ exercise of Congressionally-delegated lawmaking authority in its use of deferred action. This line of inquiry comes closer to the legitimacy analysis proposed in Part I.C and is useful to sharpen the contrast between legality and legitimacy.

Executive authority can be delegated from Congress to the executive in the form of statutes such as the Immigration and Naturalization Act of 1952 (INA). The INA establishes a comprehensive scheme governing immigration and naturalization that includes specific criteria for admission and deportation (or removal) of noncitizens. For the enforcement of the statute, immigration law grants broad discretion over immigration enforcement to DHS. These principles apply with particular force in immigration law. The Obama administration’s legal analysis specifically locates DACA’s delegated authority in Section 103 of the INA. Section 103


73 Richard Fallon, Legitimacy and the Constitution, 118 HARV. L. REV. 1787, 1972 (2005); see also infra Part I.C.

74 For a parallel discussion of Congressionally-delegated authority and APA compliance in DAPA, see Part IV.


78 As the Supreme Court has noted on several occasions, Congress when enacting the INA understood immigration to be “a field where flexibility and the adaptation of Congressional policy to infinitely variable conditions constitute the essence of the program.” OLC Memo, supra note 26, at 4 (citing United States ex rel. Kanuff v. Shaughnessy, 338 U.S. 537, 543 (1950); INA § 103, 8 U.S.C. § 1103(a)(3) (2012); see also Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 483 (1999) (“[T]he Executive has discretion to abandon the endeavor . . . .”); Arizona v. United States, 132 S. Ct. 2492, 2599 (2012).
authorizes the Secretary of Homeland Security to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." The same provision specifically grants the Secretary authority to enforce the immigration laws as an officer of the President, including the decision to enforce or to defer enforcement using prosecutorial discretion. Professor David Martin, who served as General Counsel to the legacy INS, stated that going back many decades: “Congress gave explicit statutory blessing to th[e] practice of permitting withdrawals, in the discretion of the officer, instead of detaining for removal.” Congress has recognized deferred action by name in the INA.

Of course, this broad grant of authority to the executive branch presumes that agencies will act within the bounds of statutory objectives. Congress’ priority for executive enforcement is "identification and removal of aliens convicted of a crime by the severity of that crime." The 2012 and 2014 DHS Secretary memos on enforcement priorities reflect this priority. The INA expressly grants discretionary relief for a variety of humanitarian purposes, including family unity. DACA focuses on undocumented youth for similar reasons.

Another way that agencies stay within the bounds of delegated authority is by following APA procedures when issuing rules. Whether DACA remains within the bounds of APA rulemaking is subject to continuing dispute and not easily resolved under existing legal tests. The legal standards for distinguishing nonbinding and binding agency interpretations are under dispute.

80 INA § 103(a); 8 U.S.C. § 1103(a) (2012).
84 Discretionary relief includes parole, temporary protected status and asylum. Other occasions of discretionary relief include VAWA, T/U Visa, Hurricane Katrina, and DACA 2012. See OLC Memo, supra note 26, at 14–18. Some of these forms of relief have Congressional backing through subsequent codifications and some do not, or at least not at the time the executive action came into force. See Stephen H. Legomsky, Why Can’t Deferred Action Be Given to the Parents of the DREAMers?, Online Symposium on Administrative Reform of Immigration Law, BALKINIZATION (Nov. 25, 2014), http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html.
85 See supra notes 28 and 93.
and the judicial doctrines for determining deference to such agency interpretations are "muddled." The DACA policy expressly states that it is guidance containing criteria used to guide individualized, case-by-case determinations of applications. Notwithstanding the criteria set forth in the memo, the agency renders decisions on a case-by-case basis, reserves the ability to depart from the criteria if deemed in the federal interest, and remains subject to change at any time. These design choices lower the agency's procedural burden. However, the scope and parameters of the program are quite specific compared to other DHS guidance and the associated benefits concrete and practical for everyone involved.

The concreteness of the DACA work permit is also worthy of consideration in the context of agency exercises of authority, although that component rests on an exercise of delegated authority made through prior regulations that underwent APA rulemaking procedures. The

86 Lisa Schultz Bressman, How Mead has Muddled Judicial Review of Agency Action, 58 VAND. L. REV. 1443 (2005) (“Despite numerous Court of Appeals decisions [interpreting Mead], we still do not know when an agency is entitled to Chevron deference for interpretations issued through procedures less formal than notice-and-comment rulemaking or formal adjudication.”).

87 The Obama Administration is likely to have contemplated the consequences of these design choices during its extensive vetting with legal scholars and the OLC. The OLC memo notes that non-enforcement decisions most comfortably characterized as judicial are unreviewable when made on case-by-case basis and takes note of the Johnson memo's reservation of discretion to remove non-priority aliens when “removing such an alien would serve an important federal interest.” OLC Memo, supra note 26, at 7, 11. It also contains a caveat that general policies can provide framework for individualized decisions. Id. at 7.

88 Notwithstanding these general rules and DACA’s use of individualized determinations, legal scholars challenge the premise that categorical decision making is disallowed as a legal matter. See Sept. 3 Letter to President Obama, supra note 60; see also Gillian Metzger, Must Enforcement Discretion by Exercised Case-by-Case?, Online Symposium on Administrative Reform of Immigration Law, BALKINIZATION (Nov. 24, 2014), http://balkin.blogspot.com/2014/11/must-enforcement-discretion-be.html (“Nothing in the categorical nature of an enforcement policy entails that it will be more likely used to defeat statutory policies rather than enforce them. Insofar as categorical policies make enforcement choices more transparent and better constrain low-level discretion, they actually represent an important mechanism for enforcing adherence to governing law.”). Rodriguez and Cox's reflections acknowledge a definitional disagreement between this view and others expressed in the online symposium: “In our view, part of what has divided commentators on this issue is a definitional disagreement: is an exercise of prosecutorial discretion ‘individualized’ if the executive applies a set of rule-like criteria to an individual person? Or is it ‘individualized’ only if the decisionmaker makes an all-things-considered judgment that cannot be reduced to specific criteria spelled out in advance of the decision?” Adam B. Cox & Cristina M. Rodriguez, Concluding Thoughts: Line Drawing, the Separation of Powers, and the Responsibilities of the Political Branches, Online Symposium on Administrative Reform of Immigration Law, BALKINAZATION (Nov. 26, 2014), http://balkin.blogspot.com/2014/11/concluding-thoughts-line-drawing.html.


90 The issue is whether DACA’s work permit complies with APA rulemaking requirements. To some, DACA’s grant of employment authorization is a substantive benefit and not merely an enforcement priority, thereby constituting an ultra vires exercise of executive power if it did not go through notice and comment procedures. Peter Margulies, The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law, 64 AM. UNIV. L. REV. 22–24 (Forthcoming 2015) (distinguishing discretion from benefits in Obama’s 2014 deferred
DHS 2012 and 2014 deferred action memos expressly state they rely on INA § 274A and its implementing regulations for DACA work authorization.\(^9\)\(^1\) INA § 274A expressly grants the executive branch authority to determine which aliens are granted employment authorization and the corresponding regulations name those with deferred action among other forms of immigration relief. DACA work authorization is premised on CFR § 274A and articulated and administered through the DHS’ memoranda and implementing guidance, such as the revised Form I-795 application for an EAD that includes a specific code for DACA beneficiaries and inclusion of a DACA EAD for verifying I-9 eligibility to work.\(^9\)\(^2\) The § 274A regulations are binding legal authority insofar as they are consistent with statutory law. The memos and forms that fall into an exception to the APA rulemaking requirements as guidance are persuasive authority, even if not legally binding.\(^9\)\(^3\)

Whichever legal interpretation of DACA’s reliance on delegated authority prevails, the Obama administration’s decision to design DACA in reliance on OLC’s analysis permits it to make

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\(^{91}\) INA § 274A(h)(3); 8 U.S.C. §1324a(h)(3) (2012) (“[T]he term ‘unauthorized alien’ means, with respect to the employment of an alien . . . that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the [DHS Secretary]” ) (emphasis added); 8 C.F.R. § 274a.12(c)(14) (2015) (specifically authorizing USCIS to issue work permits to recipients of deferred action provided they demonstrate economic necessity). See supra note 52 and accompanying text for more discussion of the statute and implementing regulations.


\(^{93}\) Upon legal challenge, the precise legal effect of these administrative interpretations falling outside of APA rulemaking requirements is unclear. In an administrative hearing, the agency may use the guidance as persuasive authority for its interpretation, but it cannot rely on guidance per se without also pointing to other authorities. In court, the agency cannot automatically rely on guidance as legal authority—nor can agencies presume that their interpretations will preempt state law. See Jill E. Family, An Unexceptional Aspect of the Battle Between President Obama and Congress Over Immigration Law (Paper presented at the AALS 2015 Academic Symposium on Executive Action, Forthcoming in Chicago Kent L. Rev. (2015)); Jill E. Family, Administrative Law Through the Lens of Immigration Law, 64 ADMIN. L. REV. 565 (2012). Some scholars point out that DACA’s binding effect is more questionable than a notice and comment regulation given the muddled doctrines for judicial deference to guidance post-Mead and contradictions between Separation of Powers and regulatory preemption analysis. David S. Rubenstein, Immigration Structuralism: A Return to Form, 8 DUKE J. CONST. L. & PUB. POL’Y (2013).
policy choices calibrated to bolster the legitimacy of the program as consistent with tradition and practice,\footnote{The Obama administration stresses that executive action and regulations providing work authorization for deferred action were adopted during President Reagan’s administration and implemented in President Bush’s administration in the years after the Immigration Reform and Control Act of 1986 (IRCA).} consonant with administratively- and legislatively-enacted policies,\footnote{Paramount is the OLC’s emphasis on the consonance of administrative priorities in prosecutorial discretion with Congressional policies such as family unity. As Professors Cox and Rodriguez state, “This approach has considerable appeal in some respects. By tying the exercise of discretion to an inference about congressional intent drawn directly from the INA, the President advances a cooperative conception of the separation of powers and answers critics who claim that he is making policy unmoored from the elaborate statutory scheme that occupies the field of immigration law. . . . [T]he appeal is that Congress, not the President, appears to make the tough value judgments. The problem with this otherwise attractive theory is that it may not be true to the practice of separation of powers and executive decision-making.” Adam B. Cox & Cristina M. Rodriguez, Concluding Thoughts: Line Drawing, the Separation of Powers, and the Responsibilities of the Political Branches, Online Symposium on Administrative Reform of Immigration Law, BALKINAZATION (Nov. 26, 2014), http://balkin.blogspot.com/2014/11/concluding-thoughts-line-drawing.html.} and considerate of the balance of agency expertise and political accountability.\footnote{Two areas of scholarship help to illuminate these theoretical debates, which are largely unexamined in the immigration context. Scholarship on the paradox of the nondelegation doctrine giving way to pragmatic recognition of the need for agency administration of law, e.g., Lisa Schultz Bressman, Reclaiming the Legal Fiction of Congressional Delegation, 97 VA. L. REV. 2009 (2011), and scholarship exposing the “chronic legitimacy crisis” of the regulatory state e.g., infra note 208; JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 9–11 (1978); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). But see Adrian Vermeule, Our Schmittian Administrative Law, 122 HARV. L. REV. 1095 (2009); Adrian Vermeule, ‘No’ Review of “Is Administrative Law Unlawful?”, 93 TEX. L. REV. (Forthcoming 2015)).} These are not legal arguments so much as legitimacy arguments that aim to motivate DACA’s acceptance on-the-ground. Consequently, while the legal debates proceed over the delegated authority exercised in DACA, this Article maintains that the legal analysis is secondary to legitimacy.\footnote{This general emphasis on legitimacy notwithstanding, Part IV on DAPA and Texas v. United States’ APA challenge will discuss the relationship between legality and legitimacy more completely.}

C. From Legality to Legitimacy

As explained in the Introduction, legitimacy invokes multiple distinct criteria that support three concepts: legal legitimacy, sociological legitimacy, and moral legitimacy.\footnote{See text accompanying supra notes 9-13 (differentiating sociological, legal, and moral legitimacy.)} This first view of law as legal legitimacy is a positivist one that asserts the mere existence of duly-enacted law compels obedience. The second concept of sociological legitimacy is an internal one that recognizes people require more than an assertion of legality to obey the law. Legality (the first view) is required for people to adhere to the law, but people also want to know that the procedures and institutions behind the law are legitimate. Legitimacy in this sociological sense is distinguished from the third concept of moral legitimacy, which requires that a law is respect-worthy according to an external, moral criterion. While morality might be part of a person's normative view that a law is substantively just or right, the sociological sense of legitimacy requires something less than an evaluative statement that the law is correct in a moral sense.
Differentiating the three concepts is useful because the sociological concept of legitimacy I rely on is not the most frequently used in legal scholarship and because I want to make empirical claims about its presence in DACA disputes on-the-ground.\footnote{Richard Fallon, \textit{Legitimacy and the Constitution}, 118 HARV. L. REV. 1787, 1791 n.7 (2005).} The intuition behind these empirical claims is that:

When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the Constitution or a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience—or, in a weaker usage . . . insofar as it is otherwise acquiesced in. . . . Pursuant to a moral concept, legitimacy inheres in the moral justification, if any, for claims of authority asserted in the name of the law.\footnote{Richard Fallon, \textit{Legitimacy and the Constitution}, 118 HARV. L. REV. 1787, 1790–91 (2005).}

As many of scholars have noted, the multiple uses of the term legitimacy overlap and interrelate. For example Alan Hyde considers these distinctions inextricable and Fallon acknowledges, “law does not rest on a single rock of legitimacy . . . but on sometimes shifting sands. Realistic discourse about constitutional legitimacy must reckon with the snarled interconnections among constitutional law, its diverse sociological foundations, and the felt imperatives of practical exigency and moral right.”\footnote{Richard Fallon, \textit{Legitimacy and the Constitution}, 118 HARV. L. REV. 1787, 1792 (2005); see also Alan Hyde, \textit{The Concept of Legitimacy in the Sociology of Law}, 1983 WIS. L. REV. 379 (1983) (cautioning that legitimacy should be abandoned because it “has no clear operational meaning, nor agreed upon empirical referent” and expressing skepticism of whether it can be disentangled from other explanations of compliance such as coercion and self-interest).} Yet blurring the distinctions between them can lead to confusion and differentiating them yields an “immediate and practical payoff.”\footnote{Richard Fallon, \textit{Legitimacy and the Constitution}, 118 HARV. L. REV. 1787, 1791 n.7 (2005).} At the cost of glossing over important concepts from legality and morality, the Article uses a sociological concept paired with an empirical investigation of its precepts and parameters. The choice is justified by this unavoidable fact: “Sociological acceptance is a necessary condition for a constitution or legal system to exist at all.”\footnote{Max Weber, \textit{Economy and Society} (1968).}

This working definition of legitimacy derived from socio-legal scholars—"the perception of obligation to obey legal authorities"\footnote{This distinction is also captured by socio-legal scholars such as Roscoe Pound and others who refer to “law on the books” and “law-in-action.” See, e.g., Roscoe Pound, \textit{Law in Books and Law In Action}, 44 AM. L. REV. 12 (1908).}—requires further elaboration. Some describe this obedience as public acquiescence. Returning to Hart's rule of recognition, Hart makes the important caveat that general acceptance of law is apt to be seen differently by high-level government officials and ordinary citizens.\footnote{As the case studies of on-the-ground acceptance of}
DACA will show, DACA is considered legitimate to scores of citizens, even if its “legality” is (not surprisingly) still being contested by government officials and in courts. However, the public acquiescence shown in the case studies of individual and states confronted with DACA can only convey only a weak sense of legitimacy, e.g. people have not overtly resisted its claims of authority. A stronger sense would rest compliance and cooperation more squarely on attitudes of acceptance apart from self-interest, custom, and other motivations. In this Article, qualitative study of proffered justifications and disaggregated behaviors helps to tease out weaker and stronger evidence of legitimacy, as compared with a quantitative count of compliance or non-compliance. Translating this "active belief by citizens" and states into observable indicia of acceptance of DACA's legitimacy requires specification of at least two dimensions; an attitudinal one (expressed as a sense of obligation toward legitimate institutions, self-interest, habit and measured through public justifications) and a behavioral one (public acquiescence to assertions of authority along a spectrum consisting of comply/not comply, dedication of resources, commitment to implementation and enforcement). Although these are not precise measures and they do not capture the totality of motivations for compliance, they capture important aspects of legitimacy and are highlighted in the case studies in Parts II and III.

An example of the attitudinal measure can be found in the work of Tom Tyler. Tom Tyler's seminal work on legitimacy empirically examines the motivations of people who comply with the law. In Why People Obey the Law, Tyler interviewed more than 1,500 people about their motivations for complying with a range of laws, most famously traffic laws and littering laws. Contrary to conventional wisdom, Tyler finds that people obey laws for reasons beyond their fear of getting caught. They also factor in their belief in the legitimacy of the legal system that promulgated the law. According to Tyler, people obey the law for instrumental reasons and non-instrumental reasons. Instrumental reasons include the promise of legal benefits or threat of legal sanctions. Non-instrumental include both their conceptions of a law's procedural fairness (e.g. it was duly enacted and will be fairly administered) or their sense that the institution or person authorizing the rule merits respect (e.g. he was duly-elected or governs in a democratically responsive manner). Non-instrumental motivations might also include a sense that the law corresponds to one's own substantive views of justice or a social motivation to conform to custom or organizational practices. Ultimately, Tyler concludes that the goal for regulation is to use policies and practices to shape dispositions and, through them, to inspire cooperation. The

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106 Id. at 1795. See Craig A. McEwen & Richard J. Maiman, In Search of Legitimacy: Toward an Empirical Analysis, 8 L. & POL'Y 257, 257 (1986) (claiming that institutional, attitudinal, behavioral dimensions of legitimacy can be operationalized and that institutional legitimacy is related to voluntary compliance and expressed in “language of obligation”).
persistent finding in Tyler's studies and numerous follow up studies is that, knowing people obey the law for multiple reasons, policymakers must think about the procedures used to promulgate the law and the people called upon to implement it.

An example of the behavioral measure is one's conformance of conduct with the law's requirements. Two examples are provided in this paper. In Part II, a private employer confronted with a DACA beneficiary bearing a lawful presence designation can either accept the EAD as valid documentation (full compliance), request another document from the I-9 list (partial compliance), or turn away the noncitizen worker on the basis of the EAD (noncompliance). Part III offers the example of a state issuing driver's licenses on the basis of DACA documentation of lawful presence, which similarly leads to a spectrum of compliance behaviors ranging from commitment (public outreach, allocation of resources, implementation) to grudging acceptance (technical compliance), to resistance (foot dragging or subterfuge), to outright defiance (denying IDs, perhaps coupled with litigation to challenge DACA).

Part I.C has summarized Tyler at length because his operational definitions provide the inspiration for the empirical studies of legitimacy undertaken in Parts II and III.

II. OPERATIONALIZING LEGITIMACY – INDIVIDUAL COMPLIANCE WITH DACA

Understanding the motivations of immigration officials and employers tasked with implementing DACA begins with an instrumental analysis of their motivations for complying with the law. However, understanding their non-instrumental motivations for compliance is more revealing of the distinctive quality of legitimacy—the “perception of obligation to obey” on the basis of accepted institutional authority. Part II.A begins with basic motivations for compliance with DACA: self-interest or acquiescence to a law for instrumental reasons such as its promised benefits and threatened sanctions. For DACA, these benefits and sanctions entail temporary protection from deportation and employment authorization as the means to attain a threshold of economic well-being. As this Part shows, for DACA to operate successfully on-the-ground, it depends on compliance from immigration officials to avoid prosecution of DACA recipients. Part II.B shows that private employers also comply with DACA's lawful presence designation in their hiring decisions. Even if these private individuals may feel bound by the program as a matter of law, their legal requirements are more ambiguous. Perhaps for this reason, measures of DACA employment show that compliance is neither full nor automatic—though it is high—suggesting more complex motivations involving perception of institutional authority.

A. Compliance with Temporary Protection from Deportation

DACA promises to temporarily protect undocumented immigrants from deportation, which promises to weaken the threat of a legal sanction in Tyler's framework for legal compliance. To
assess the credibility of this promise, official statistics about removal proceedings within the population of DACA-eligible immigrants are informative. Several reports issued on the two-year anniversary of DACA demonstrate its effectiveness for the lives of its beneficiaries. USCIS regularly releases ongoing statistics about processing and released a fuller report on the characteristics of DACA 2012 applicants.\footnote{U.S. CITIZENSHIP & IMMIGR. SERVS., CHARACTERISTICS OF INDIVIDUALS REQUESTING AND APPROVED FOR DACA: 2012 TO 2013 (2014), available at http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/USCIS-DACA-Characteristics-Data-2014-7-10.pdf.} According to these official reports, 500,000 of 600,000 or so applications accepted for consideration of deferred action were granted in the first term of the program, shielding approximately 95 percent of the applicants from removal for the promised two years (2012-2014)\footnote{Id. A complaint filed in a federal district court in Texas erroneously claims that 99.5% of DACA applications have been granted deferrals, “an acceptance rate that rounds to 100% is a de facto entitlement” and amounts to changing immigration law. Complaint for Declaratory and Injunctive Relief, Texas v. United States, No. 1:14CV00254 (S.D. Tex., Dec. 3, 2014).} and making them eligible for a second term upon renewal (2014-16).\footnote{Id.} That the deferrals have indeed prevented removals is corroborated by Transnational Records Access Clearinghouse data showing that removals have shifted from the interior to the border generally\footnote{TRAC reports that the overall number of federal detainer requests has declined by one-third. Immigration Detainers Decline 39 Percent Since FY 2012, TRAC IMMIGR. (Nov. 12, 2014), http://trac.syr.edu/immigration/reports/370/.} and also by high-profile cases such as the initial detention and then subsequent release of immigrants’ rights activist Jose Antonio Vargas on grounds that he does not meet the enforcement priorities on the basis of positive equities aligned with DACA.\footnote{Jose Antonio Vargas is a Pulitzer Prize winning journalist who disclosed his undocumented status and became a prominent leader of the DefineAmerican organization that mobilizes youth to tell their stories about being undocumented. Stand with the 11 Million, DEFINE AMERICAN, http://www.defineamerican.com/site/splash (last visited Feb. 15, 2015). Vargas was not eligible for DACA in 2012 because he exceeded the age cap by one year; he now qualifies under the 2014 extension. Dara Lind, Jose Antonio Vargas Will be Protected from Deportation, VOX (Nov. 20, 2014), http://www.vox.com/2014/11/20/7257665/jose-antonio-vargas-obama.} Moreover, even if DACA recipients fit the criteria set forth in prior prosecutorial discretion memos, raising the possibility that the deferral rates result from causes other than DACA, there is some evidence that the prior memos themselves did not suffice to close cases and that DACA made the difference.\footnote{ICE Rarely Uses Prosecutorial Discretion to Close Immigration Cases, TRAC IMMIGR. (Apr. 24, 2014), http://trac.syr.edu/whatsnew/email.140424.html.}

Discerning reasons for agency officials complying at high rates with greater confidence requires further empirical investigation—preferably qualitative analysis. Based on legitimacy theory, these officials are motivated by acceptance of institutional authority, at least in a weak sense, in addition to perceptions of their statutorily-defined duty, professional duty, or substantive policy views.\footnote{For a discussion of bureaucratic motivations, see Ming H. Chen, Where You Stand Depends on Where You Sit: Immigrant Incorporation in Federal Workplace Agencies, 33 BERKELEY J. EMP. & LAB. L. 259 (2012).} For purposes of this initial examination, what can be discerned is that the cooperation
of USCIS immigration officials who exercise discretion while deciding whether to issue DACA applications is required on a case-by-case basis to produce high compliance rates. For the 5 percent of applicants that are denied deferred action despite meeting its requirements, the USCIS agency officials making individualized determinations are exercising discretion—not only acting under unquestioned mandate—an option also exercised by ICE officials who declined to comply with DACA.\textsuperscript{117} As a whole, individual exercises of discretion turn on whether immigration officials feel DACA compels their compliance as a matter of institutional authority and not merely legal mandate. In other words, they turn on legitimacy and not merely on legality.

B. Compliance with Work Authorization

A second measurement of DACA compliance relates to the employment authorization that enables otherwise undocumented immigrants to work and maintain their own livelihood during their lawful presence. Obtaining DACA comes with important documentation in the form of an EAD, which enables the bearer to obtain lawful employment in the face of federal laws such as IRCA prohibiting the knowing hire of undocumented immigrant workers.\textsuperscript{118} Upon hire, lawfully-present workers can show their EAD for purposes of I-9 documentation. They should also show up in the e-Verify system that many private employers use to discharge their hiring responsibilities under IRCA. While further empirical investigation of I-9 and e-Verify usage would be helpful to illuminate reasons for compliance, preliminary analysis is possible. The EAD constitutes the promise of a legal benefit in Tyler's compliance framework. However, it does not guarantee the DACA recipient a job. Empirical measure of the EADs legitimacy among employers include rates of employment and other employment outcomes for DACA recipients. Though no systematic reports on private employment practices toward DACA beneficiaries exist, anecdotal reports demonstrate that DACA has made a positive difference in their employment experiences.\textsuperscript{119} Reports show that 60 percent or more of DACA recipients have secured jobs and that most of the jobs have improved wages and working conditions over the

\textsuperscript{117} In contrast with USCIS officials who issue DACA applications, ICE officials who defer deportation because of DACA chose not to comply, on the belief that DACA was not procedurally legitimate. They were disciplined for their noncompliance, leading them to sue the DHS Secretary on grounds that the mandate precluded them from honoring their oaths to execute the law. Their lawsuit was dismissed for lack of standing and because . See Crane v. Napolitano, 920 F. Supp. 2d 724 (N.D. Tex. 2013), appeal pending, Crane v. Johnson, No. 14-10049 (5th Cir. 2014).

\textsuperscript{118} See supra notes 91–93 and accompanying text.

kinds of work they obtained beforehand. In addition, immigrants' rights organizations such as the National Immigration Law Center report few instances of employers refusing to accept the EAD as a hiring document or requiring additional documentation in lieu of it and, in any case, have not generated widespread litigation. These numbers suggest broad acceptance of the EAD, a conclusion that could be confirmed with qualitative data about employers' mindsets.

The portrait of DACA's effectiveness in eliciting employment is more mixed than its record for deferring deportations. Immigration law clinics have also been tracking instances of employment discrimination against DACA employees in addition to outright refusals of official recognition. Private employers may, under some circumstances, lawfully decline to hire individuals who have documentation that marks them as lawfully present and yet lacking formal legal status. For example, some employers discriminate against DACA workers upon the revelation that a longstanding employee never had valid work authorization to begin with or provided fraudulent documents—many undocumented immigrant workers have previously used fraudulent documents to obtain work, sometimes with the consent of the employers—by firing them or by issuing harassing request for additional documentation to show proof of eligibility. Moreover, neither employment nor immigration law requires private employers to hire noncitizens; it does not even forbid them from declining to hire them on the basis of their status as noncitizens, so long as the hiring decision does not mask unlawful considerations of race or national origin or make unfair distinctions between DACA workers and others holding similar deferred status. For workers, this combination of legally ambiguous, less-than-robust legal protections and practical realities produces a tenuous situation. For employers, the choice to cooperate or not is constrained by legality and legal ambiguity before perceptions of legitimacy kick in. This is especially true for employers already reluctant to cooperate with the program on the basis of

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121 Outright refusals to recognize an EAD would be out of compliance with federal law because DACA EAD holders would not be considered unauthorized aliens under section 1324a(h)(3) once they are “authorized to be so employed . . . by the Attorney General.” INA § 274a(h)93), 8 U.S.C. § 1324a(h)(3) (2012). DACA EAD holders would not be considered unauthorized aliens once they have lawful presence, however under the INA they are not “protected individuals” as defined in section 1324b(a)(3) because they do not fall into any of the statutorily-listed categories, INA § 274B(a)(3), 8 U.S.C. § 1324b(a)(3) (2012) What follows is that under section 1324b(a)(1), it is illegal for an employer to discriminate against a DACA recipient because of his or her national origin, but it is not illegal to discriminate against that person because of his or her citizenship status. For further explanation of these complicated employment protections, see the official guidance from the DOJ Office of Special Counsel for Immigration-Related Unfair Employment Practices and USCIS. OFFICE OF SPECIAL COUNSEL IMMIG.-RELATED UNFAIR EMP’T PRACTICES, CIV. RIGHTS DIV., U.S. DEP’T JUSTICE, DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) RECIPIENTS: LEARN ABOUT YOUR RIGHT TO WORK. But cf: Juarez v. Nw. Mut. Life Ins. Co., Inc., No. 14-cv-5107 (KBF), 2014 WL 6363919 (S.D.N.Y. Nov. 14, 2014) (denying motion to dismiss noncitizen’s complaint against employer for refusal to recognize EAD for hiring).
autonomous concerns such as profit margins, substantive disagreement with immigration enforcement and workplace protections, and concern for citizen workers among others. In sum, the work permit component of DACA that relies on private cooperation produces mixed portrait of compliance: it is not working for everyone and is powerless to overcome certain forms of discrimination, even if it improves working conditions for many in ways not otherwise possible.

III. OPERATIONALIZING LEGITIMACY: STATE COOPERATION WITH DACA

Part III examines compliance with DACA by states who are not legally compelled to follow DACA to shed light on noninstrumental motivations for compliance.

A national conference of state governors convened in the week leading up to the November 2014 extension of DACA. While some of the commentary centered on legality, more of it turned on legitimacy: the question of whether the President's use of executive action is responsible.\(^\text{122}\) How can this legitimacy orientation be explained when so many states are challenging the President in the *Texas v. United States* litigation? Presumably their legitimacy orientation stems from the states' initial recognition of their on-the-ground responsibilities; states will prove instrumental to implementing DACA and making it operational in a range of public arenas. Governors in several states expressed concerns about how to integrate beneficiaries into local programs such as driver's licenses or how to pay for costs associated with more targeted immigration enforcement. Others acknowledged the weighty decisions they must make regarding the extension of higher education admission, tuition, financial aid, and other state benefits. As the Governors put it, their concerns were "operational" as well as "ideological."\(^\text{123}\) This Part posits a natural experiment that builds on this distinction between lawfulness and legitimacy. Presuming that states cooperation with DACA's lawful presence designation is voluntary for the issuance of driver's licenses, states believing in the legitimacy of DACA will choose to cooperate; those who doubt the legitimacy of DACA will choose not to cooperate. Cooperation, then, becomes a proxy for the state's beliefs about the legitimacy of the federal policy in a legal framework that leaves their participation voluntary.

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\(^{122}\) *See, e.g.*, Interview by Chuck Todd of Mike Pence, Gov. Ind., Rick Perry, Gov. Tex., Bobby Jindal, Gov. La., Scott Walker, Gov. Wis., and John Kasich, Gov. Ohio, at the 2014 Republican Governor’s Association Meeting, C-SPAN (Nov. 19, 2014).


\(^{124}\) Following a federal district court's invalidation of an Arizona state law declining to issue driver's licenses to DACA recipients, some suggest that state recognition of DACA is legally compelled. However, the Arizona state law was invalidated on Equal Protection grounds rather than the conclusion that federal law compels the result. *See* infra 170-178 (discussing *Arizona DREAM Act Coalition v. Brewer*.)
Voluntary compliance from states, in this sense, constitutes cooperation within a scheme of cooperative federalism. Scholars often write about the involvement of states in immigration law—termed immigration federalism—without differentiating the significance of whether (sovereign) federalism or cooperative federalism is in operation. In an article mapping types of federalisms, Professor Heather Gerken notes that federalism involving statutes and regulations does not involve "one theory to rule them all," but "multitudes”—among them, sovereignty, process, and cooperative federalism. Cooperative federalism is distinguished from the other forms of federalism by its vision of state power. Whereas the other federalisms involve state claims to sovereignty that would be intruded upon by federal claims—thus resulting in situations where the federal or state government can compel the exit of the other—cooperative federalism involves situations where state power emanates from the states' importance as a "servant" in the carrying out of federal policy. Thus, cooperative federalism recognizes states as participants in a shared zone of federal governance. In subsequent work, Gerken and Jessica Bulman-Pozan posit that uncooperative federalism shares the attribute of states shaping federal policy, albeit by challenging rather than acceding to federal law. The distinction is important because legitimacy is clearest in situations of voluntary compliance, where the threat of sanction is insignificant or absent, or where cooperation may even be against self-interest.

DACA’s operation in the states constitutes a case study of voluntary compliance within a cooperative federalism regime. As federal policy, DACA relies on states to act as servants, accepting the lawful presence and work authorization documents to achieve its purpose of enabling work and integration into mainstream institutions. State services include the issuance of driver's licenses that enable immigrants to improve their life prospects by facilitating transport to

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125 Heather K. Gerken, Our Federalism(s), 53 WM. & MARY L. REV. 1549, 1556–60 (2002) (explaining that the power of the state stems from its discretion to implement federal law, its status as an insider which enables it to challenge federal policy, and its separate power base from the federal government).
126 Whether the federal executive actions intrude on state sovereignty is an issue indirectly raised in Arizona v. United States, 132 S. Ct. 2492 (2012). In Arizona v. United States, the Supreme Court declared Arizona's state law, S.B. 1070, preempted by federal immigration law. Their decision relied on recognition of the broad discretion federal authorities have over immigration enforcement. While prosecutorial discretion was not squarely addressed, arguably DHS’s exercise of delegated authority under the INA to administer deferred action would be justifiable on the same grounds.
129 Craig A. McEwen & Richard J. Maiman, In Search of Legitimacy: Toward an Empirical Analysis, 8 L. & POL’Y 257, 260 (1986) (setting forth conditions for empirically examining legitimacy). In the state driver ID case studies, compliance with REAL ID may be partially in their own interest (fraud detection, insurance, etc.), but the state also bears administrative costs. Uncertainty as to whether DACA has preemptive effect on state laws weakens the threat of enforcement and the associated sense of coercion.
jobs, bank accounts, and other services that require government identification. Though driver's licenses are traditionally the autonomous realm of the state, they come under a cooperative federalism regime insofar as the REAL ID Act of 2005 sets federal standards for the state licenses if they opt to issue driver's licenses to immigrants, thereby creating a zone of shared governance.\textsuperscript{130} Within this framework of shared governance, states can choose whether or not to grant driver's licenses to undocumented immigrants.

While the federal REAL ID constrains states' driver's license policies, DACA does not compel state compliance in the way that a federal statute might under a regulatory preemption framework. That is because DACA is administered under nonbinding agency guidance.\textsuperscript{131} In the absence of a clear legal mandate, the states can elect to cooperate or not—presumably on the basis of their own values and estimations of the federal policy's legitimacy. By comparison, a legal framework involving a federal law that mandates state participation might lead states to feel compelled to comply out of respect for the rule of law, even if they do not believe the federal policy to be legitimate.\textsuperscript{132} Granted, states are not always clear about their legal obligations and they may have multiple motivations for their public actions that are not fully captured in their

\begin{footnote}{See REAL ID Act, P.L. 109-13, §§ 201–07, 119 Stat. 231, 31–16 (2005). Post-September 11, the National Commission on Terrorist Attacks upon the US recommended that the federal government set standards for identity documents such as driver's licenses. In response, Congress enacted the REAL ID Act in 2005, which set national requirements for state-issued licenses when being used for federal purposes and generally restricted noncitizen access to driver's licenses. Among other requirements, the state-issued license must bear distinctive markings so that it is not confused with an ordinary license when being used for federal purposes such as accessing federal buildings, identification for airline travel, and proof of identity for accessing federal benefits. States may choose to provide licenses that fail to meet the minimum federal standard with the understanding that such licenses may not be acceptable for federal purposes. See\textsuperscript{2} TATELMAN, CONG. RESEARCH SERV., RL34430, THE REAL ID ACT OF 2005: LEGAL, REGULATORY, AND IMPLEMENTATION ISSUES 1–3 (2008), available at http://www.fas.org/sgp/crs/misc/RL34430.pdf.}
\end{footnote}

\begin{footnote}{Some scholars contend that DACA could have preemptive effect. See, e.g., Catherine Y. Kim, \textit{Immigration Separation of Powers and the President's Power to Preempt}, 90 NOTRE DAME L. REV. 691 (2014) (arguing that executive immigration policies that are subject to accountability, transparency and deliberation mechanisms, including DACA, have the same preemptive effect as official agency decisions promulgated pursuant to procedural formalities); David S. Rubenstein, \textit{Immigration Structuralism: A Return to Form}, 8 DUKE J. CONST. L. & PUB. POL. ’13 (2013) (noting contradictory claims about whether DACA carries the force of law and should have preemptive effect given that it is considered law for separation of powers purposes and non-law for the APA).}
\end{footnote}

\begin{footnote}{State resistance to the Secure Communities program, which until November 2014 sought for states to honor federal requests to detain immigrants beyond their jail time on suspicion of removability, might serve as an example. Although the motivations of states for honoring or not honoring these requests is complex, a significant number of states believed that complying with Secure Communities would run afoul of the Tenth Amendment's Anti-Commandeering Clause (unless the contrary state law was found to be conflict preempted) or expose them to jurisdictional liability for violating the immigrants' Fourth Amendment rights. An extended discussion of Secure Communities and cooperative federalism will be undertaken in a future article to be published by Chicago-Kent Law Review (forthcoming 2015). For a review of state reactions to Secure Communities, see States and Localities That Limit Compliance With ICE Detainer Requests (Oct. 2014), CATHOLIC LEGAL IMMIGR. NETWORK, https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014 (last visited Nov. 18, 2014).}
\end{footnote}
proffered public justifications.\textsuperscript{133} This Part presents case studies of states' driver's license policies as portraits of voluntary compliance, noting the varying degrees and rationales for state cooperation that range from willing acceptance to continuing resistance.

A. States and Driver's Licenses for DACA Recipients

Until DACA was issued in 2012, most states were reluctant to issue licenses to undocumented immigrants.\textsuperscript{134} The release of DACA memos clarifying that the federally-issued EAD is sufficient documentation for a REAL-ID compliant license led to an increased number of states granting undocumented immigrants driver's licenses.\textsuperscript{135} As of February 2015, the national landscape evinces a trend toward states' issuing driver's licenses in recognition of DACA's lawful presence designation. Depending on how you count, between forty-six and forty-nine states rely on DACA's legitimacy in their driver's license policies and litigation may lift the remaining bans.\textsuperscript{136} The virtual consensus among states granting licenses to DACA recipients after 2012—in

\textsuperscript{133} In addition to these objections, states may confront many of the collective action problems that confront Congress and other federal entities: collective action problems among multiple actors, divided government across branches, dissent within the executive branch (e.g. twenty-four of twenty-six state plaintiffs in \textit{Texas v. United States} have Republican governors and the two states with non-Republican governors experienced disagreement between the Governor and Attorney General about the decision to join the lawsuit). \textit{See} Ronald Brownstein, \textit{Most States Suing Obama Over Immigration Have Small Undocumented Populations}, NAT’L J. (Jan. 29, 2015), http://www.nationaljournal.com/next-america/newsdesk/most-states-suing-obama-over-immigration-have-small-undocumented-populations-20150129.

\textsuperscript{134} States lagged in their compliance with REAL ID conditions for noncitizen driver’s licenses to such a great extent that the DHS has repeatedly delayed their implementation and enforcement efforts. For a review of state compliance with and delayed implementation of the REAL ID Act, see \textit{Countdown to REAL ID}, NAT’L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/transportation/count-down-to-real-id.aspx (last updated Dec. 29, 2014).


\textsuperscript{136} \textit{See Deferred Action for Childhood Arrivals (DACA): Federal Policy and Examples of State Actions}, NAT’L CONF. ST. LEGIS. (Jun. 30, 2013), \textit{available} at http://www.ncsl.org/research/immigration/deferred-action.aspx. The categorization of state policies depends on the specific elements of state law being tracked and measured. Some scholars contend that forty-six states have affirmative policies granting driver's licenses and two states have policies affirmatively denying them (although Arizona’s policy was permanently enjoined on January 22, 2015), leaving two more with no express policies despite their affirmative practices. A NILC report breaks out states granting licenses to DACA beneficiaries into categories: states where officials have confirmed that DACA beneficiaries are eligible for licenses through statements or simply through granting licenses (without explicit law, forty-five states); state laws explicitly including DACA or deferred action documents as proof of lawful presence to obtain a license (fifteen states have laws, but no legislation v executive document distinction provided in table); states mentioning the EAD in a law or document list (forty-five states); I-797 communication regarding immigration benefits (eleven states).

\textit{Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver’s Licenses?}, NAT’L IMMIGR. L. CTR. (last updated June 19, 2013), http://wwwNILC.org/dacadriverslicenses.html. An AAMVA White Paper from 2013 uses different requirements for licenses to categorize states and tracks the timing of state law adoption. AM. ASS’N MOTOR VEHICLE
addition to the timing of those laws—speaks to the states' broad acceptance of DACA as a legitimate source of lawful presence and valid evidence for compliance with workplace laws.

What the numbers obscure is the variety of attitudes and justifications for going along with DACA and the varying degrees of cooperation. To illustrate the complex and dynamic thought process behind state compliance, the Article engages in qualitative analysis of six states where attitudes toward licenses was clearly influenced, if not altered, by DACA's lawful presence designation. In each situation, the states were initially unclear or opposed to issuing licenses to immigrants and gradually changed their policies or practices in recognition of DACA's lawful presence designation. Evidence of these shifting attitudes and behaviors toward DACA can be found in legislative histories, executive memoranda, public statements, and other informal communications about state policy. The states that engaged in litigation left behind a useful paper trail of their views and positions.137

The case study analysis makes two findings. First, it identifies suggestive commonalities and differences among the states' attitudes for cooperating, many of which line up with the factors identified in Part II and other sociological studies of legitimacy: instrumental and normative concerns (legal incentives and threat of sanction for noncompliance, effectiveness against stated objectives); attitudes toward federal authorities manifested in state deference to the executive branch's lawful presence designation (procedural legitimacy); congruence or conflict with states' moral values such as being a welcoming community committed to immigrant integration or by deterring unlawful migration through efforts to encourage self-deportation or deportation by attrition (dispositions); autonomous policy goals such as public safety, fraud prevention, insurance liability, public expense (dispositions); and social motivations such as promoting

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ADMINISTRATORS, DRIVER LICENSING FOR UNDOCUMENTED IMMIGRANTS IN 2013: HOW STATES ARE REACTING AND THE EFFECTS ON THE MOTOR VEHICLE COMMUNITY fig. 1 (2014), available at https://www.google.com/url?q=https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.aamva.org%2FWorkArea%2FDownloadAsset.aspx%3Fid%3D3D4879%26ei=n4bhVKGILoqqggSZjoCoAw&usg=AFQjCNHRIk9UqrunkAX6RPz0ZbZmXq4-w&sig2=ht66R6gzTP1_Cpv_yHOsyA&bvm=bv.85970519,d.eXY. In their article, Pratheepan Gulasekaram and Karthick Ramakrishnan point out that 46 states have affirmatively stated that they would provide DACA recipients with driver's licenses, however, only two states actively withheld driver's licenses from DACA recipients. See Pratheepan Gulasekaram & Karthick Ramakrishnan, The President and Immigration Federalism 42 (Feb. 4, 2015) (unpublished manuscript) (on file with author).

137 One difficulty with trusting these kinds of self-reports is that they might be made strategically and that individual spokespersons cannot speak for an entire state’s motivations, especially if the state’s branches of government have divided opinions or multiple motivations or misinterpretations of what the law requires. Some states who filed as plaintiffs in Texas v. United States, for example, possess internal disputes between the Attorney General and Governor about whether to join the lawsuit, see Dara Lind, A Federal Judge Just Put The Brakes on Obama’s Immigration Actions, VOX (Feb. 17, 2015, 1:41 PM), http://www.vox.com/2015/2/16/8025691/immigration-lawsuit-obama, and others chose whether or not to file based on arbitrary considerations such as the filing deadlines. While these kinds of concerns should be taken seriously, the verbal accounts of behavior offered by public officials remain useful insofar as they constitute the official justification for the state’s policy. Also, they promote greater understanding rather than solely relying on compliance or noncompliance.
solidarity and membership within a community.\textsuperscript{138} States declining to honor DACA shared these concerns and additionally raised their concerns about DACA’s lawfulness and the perception of being legally compelled by executive action, suggesting that legality operates not only as a threshold for legitimacy but also a constraint.

[Insert figure summarizing factors for cooperation and compliance]

Second, the case studies suggest that acceptance of a law’s legitimacy falls along a spectrum of cooperation. States engage in a dynamic process as they decide whether to cooperate and, if so, how much.\textsuperscript{139}

[Insert figure summarizing spectrum of six state case studies]

\textit{States’ Gradual Acceptance and Acquiescence to DACA’s Legitimacy}

Generally, states have been willing to accept DACA’s legitimacy and to acquiesce to its lawful presence designation as valid documentation for driver’s licenses. However, this acceptance is sometimes gradual, as seen in North Carolina and Iowa where policies initially denying licenses were subsequently reversed upon the issuance of DACA and clarification of its legal authority.

\textit{North Carolina.} North Carolina went back and forth in their effort to align their state recognition with federal recognition, suggesting a deference to the federal authorities as opposed to shifting substantive policy views at the state level. Prior to DACA, North Carolina law required applicants for driver’s licenses to provide a valid social security number.\textsuperscript{140} Because there was no law on point, North Carolina waivered with regard to providing driver’s licenses to DACA beneficiaries.\textsuperscript{141} According to a statement made by the Department of Transportation in January 2013, the DMV had issued thirteen licenses to DACA recipients prior to that time.\textsuperscript{142} However, officials within the North Carolina DMV questioned whether DACA conformed with North Carolina law, and therefore requested an official opinion from the state’s Attorney General.\textsuperscript{143} In a 2014 letter to the Acting Commissioner for the Division of Motor Vehicles, Chief Deputy Attorney General Grayson Kelley confirmed that the DMV should issue driver’s licenses to

\begin{itemize}
\item \textsuperscript{138} \textsc{Tom Tyler, Why People Cooperate} (2011); see also sources cited supra notes 136 (detailing various states’ behavior in granting or denying licenses to DACA beneficiaries).
\item \textsuperscript{139} \textsc{Tom Tyler, Why People Cooperate} (2011). The list of factors from Tyler comports with those in the case studies.
\item \textsuperscript{140} \textsc{N.C. Gen. Stat.} § 20-7 (b)(1) (2014) (“The Division shall not issue an identification card, learners permit, or drivers license to an applicant who fails to provide the applicant’s valid social security number.”). This section of the law remained the same prior to and after 2012.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.}
\end{itemize}
immigrants that have documentary proof that they received DACA’s lawful presence designation pursuant to N.C. Gen. Stat. section 20-7(s). According to the letter, although DACA recipients do not receive lawful immigration status, they are entitled to driver’s licenses because they are lawfully present for a certain period of time. In reaching this conclusion, the letter adopts the reasoning expressed in President Obama’s executive action and Janet Napolitano’s subsequent DHS guidance. It states, “[b]ased on our review of the historical background and legal concepts applicable to prosecutorial discretion and deferred status in the enforcement of immigration laws, we believe that individuals who present documentation demonstrating a grant of deferred action by the United States government are legally present in the United States and entitled to a driver’s license of limited duration . . . .” Therefore, North Carolina expressly aligned its practice with its belief that DACA validly confers legal presence sufficient to require the state to issue driver’s license to DACA beneficiaries. The vacillation in state policy suggests that North Carolina’s conception of legitimacy is tied up in their concerns about its legality and their desire to respect federal authority insofar as merited. It suggests that executive action may have the most sway when implemented in a state environment in which views are not strongly set for or against as a substantive matter.

**Iowa.** Iowa, like North Carolina, reversed its prior position of refusing driver’s licenses to most immigrants once DACA issued from the federal authorities. Iowa’s state law required a social security number for the issuance of a driver’s license. Residents of Iowa brought suit against Iowa’s strict law claiming that requiring applicants for licenses to provide a social security number or prove their lawful presence violated the Equal Protection Clause. Among other things, they argued that the state law authorized the Iowa Department of Transportation to waive this requirement for non-citizens authorized to be present in the state temporarily (e.g. foreign students), but that this still precluded all undocumented immigrants. The Iowa Supreme Court upheld the state law, finding that it was rationally related to legitimate state interests.

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144 See Letter from Grayson G. Kelley, Chief Deputy Att’y Gen., N.C. DOJ, to Eric Boyette, Acting Comm’r, Div. Motor Vehicles, Jan. 17, 2013 [hereinafter Letter from Grayson Kelly] (explaining that the state should offer driver’s licenses to undocumented, DACA-eligible immigrants based on Janet Napolitano’s DACA guidance memo); see also Tung Sing Wong, Note, Branded to Drive: Obstacle Preemption of North Carolina Driver’s Licenses for DACA Grantees, 37 Hamline L. Rev. 81 (2014).

145 Letter from Grayson G. Kelly, supra note 144, at 2.


148 This restrictionist law survived legal challenge in 2005. Sanchez, 692 N.W.2d 812. In Sanchez, the Iowa Supreme Court heard an equal protection challenge to state law that denied access to driver’s licenses for undocumented immigrants. Id. The Court declared that unlawfully present aliens were not a suspect class, and applied rational basis review to the state law denying driver’s licenses to illegal aliens. Id. at 817. The Court upheld the law as rationally related to the state interests of 1) not facilitating the concealment of illegal immigrants, 2) limiting services to citizens and legal residents, 3) precluding those subject to immediate deportation from obtaining driver’s licenses because they will not be responsible for damage resulting from automobile accidents, and 4) discouraging illegal immigration. Id. at 818–19. Given this legal background, it is clear that the state’s Department of Transportation interpreted DACA as sufficiently legitimate to confer lawful presence on its recipients.
individuals eligible for DACA.\footnote{See Iowa DOT Will Not Issue Driver’s Licenses or Nonoperator IDs to Persons Granted Deferred Action for Childhood Arrivals Status, IOWADO.T.GOV (Dec. 27, 2012), http://www.news.iowadot.gov/newsandinfo/2012/12/iowa-dot-will-not-issue-drivers-licenses-or-nonoperator-ids-to-persons-granted-deferred-action-for-c.html.} It based this decision on the state’s requirement that the DOT is only authorized to grant licenses to lawfully present individuals, but that USCIS’s most recent guidance explicitly stated that DACA conferred no legal status.\footnote{Id.; see also IOWA CODE §§ 321.182, 321.190, 321.196 (2014).} However, in January 2013, the Iowa DOT revised its policy. They did so in response to USCIS clarifying that Deferred Action rendered a recipient lawfully present, but it did not grant lawful status.\footnote{See Frequently Asked Questions, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 18, 2013), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.} Once the issue of lawfulness was settled, the Iowa DOT returned to its prior position of issuing driver’s licenses to DACA recipients.\footnote{See Iowa DOT Will Issue Driver’s Licenses or Nonoperator IDs to Persons Granted Deferred Action for Childhood Arrivals Status, IOWADO.T.GOV (Jan. 23, 2013), http://www.news.iowadot.gov/newsandinfo/2013/01/iowa-dot-will-issue-drivers-licenses-or-nonoperator-ids-to-persons-granted-deferred-action-for-child.html.} Both of Iowa’s policies were based on a recognition of DACA’s licenses, suggesting deference to federal authority over the state’s original substantive policy preferences once the legality of the federal policy is established.

States' Begrudging Acceptance and Compliance Dubitante

The case studies of states agreeing to accept DACA’s EAD for the issuance of their own licenses illustrate the widely-shared acceptance of DACA’s legitimacy in states. This acceptance, while widespread, is not unanimous or uncontested. Texas and Michigan represent states that came to eventual acceptance of DACA’s legitimacy, albeit begrudgingly.

Texas. Texas provides licenses to DACA recipients, but it does so \textit{dubitante}.\footnote{Dubitante means doubting and is typically used to describe a judge who expresses doubt about a decision reached by that court. MERRIAM WEBSTER DICTIONARY (2014).} The state bases its decision on its own state laws, policies, and values and with only grudging respect for the federal authorities behind the DACA policy. Both prior to DACA and currently, Texas law simply provides that “an applicant who is not a citizen of the United States must present to the department documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver’s license.”\footnote{TEX. TRANSP. CODE ANN. § 521.142(a) (West 2013).} In 2001, Texas’ legislature attempted to pass a statute providing licenses to all undocumented immigrants (including, but not limited to DACA recipients), but Governor Perry vetoed it.\footnote{H.B. 396, 77th Leg. (Tex. 2001), available at http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=77R&Bill=HB396; see also Rick Perry, Gov. Tex., Proclamation Vetoing H.B. 396 (Jun. 17, 2001), available at http://www.lrl.state.tx.us/scanned/vetoes/77/hb396.pdf#navpanes=0.} In October 2012, the Texas Department of Public Safety amended their administrative regulation
listing documents acceptable for proof of eligibility to include those with lawful presence and began issuing licenses to qualifying immigrants.\footnote{See Helene N. Dang, \textit{Texas DPS Implants New Verification Process for Driver's Licenses}, \textit{TEX. IMMIGR. LAW. BLOG} (Oct. 25, 2012, 11:52 AM), http://sinelson.typepad.com/susan-i-nelson-immigrat/2012/10/texas-dps-implements-new-verification-process-for-drivers-licenses-.html.} The Department of Public Safety cited the need to ensure public safety through verification of driving ability and insurance coverage, but made no reference to DACA.\footnote{Driver’s Licenses for All Immigrants: Quotes from Law Enforcement, NAT’L IMMIGR. L. CTR. (Oct. 2004) http://v2011.nilc.org/immspbs/DLs/DL_law_enforcement_quotes_101404.pdf (quoting thirteen law enforcement officers from a variety of states supporting universal licensing).} Around the time of the administrative change, Governor Perry made a public statement that DACA is a "slap in the face to the rule of law."\footnote{Helene N. Dang, \textit{Texas DPS Implants New Verification Process for Driver’s Licenses}, \textit{TEX. IMMIGR. LAW. BLOG} (Oct. 25, 2012, 11:52 AM), http://sinelson.typepad.com/susan-i-nelson-immigrat/2012/10/texas-dps-implements-new-verification-process-for-drivers-licenses-.html.} As a way of expressing his reservations about DACA, Governor Perry wrote a letter stating: “I am writing to ensure that all Texas agencies understand that Secretary Napolitano's guidelines confer absolutely no legal status . . . these guidelines do not change our obligations under federal law and Texas law to determine a person's eligibility for state and local public benefits. Federal law prohibits conferring such benefits to most unlawfully present aliens, absent a state law to the contrary.”\footnote{Letter from Rick Perry, Gov. of Texas, to Greg Abbott, Tex. Att’y Gen. (Aug. 16, 2012), \textit{available at} http://s3.amazonaws.com/static.texastribune.org/media/documents/O-AbbottGreg20120817_1.pdf. Governor Perry is presumably referring to the same Texas state law extending licenses that he tried to veto by proclamation.} Acknowledging that Texas does issue driver's licenses, Perry made clear that they do so because of the state's sovereign authority: “In Texas, our legislature has passed laws that reflect the policy choices that they believe are right for Texas. The secretary's directive does not undermine or change our state laws.”\footnote{Id.} This statement expresses continuing doubt over DACA's legality and suggests that skepticism of the lawfulness of the executive action conditions the willingness to cooperate.\footnote{Id.}

\textit{Michigan.} Michigan reluctantly reversed its prior opposition to extending driver's identification cards to DACA beneficiaries, suggesting minimal acceptance of DACA's authority. Prior to 2011, Michigan required non-citizen applicants for driver’s licenses to prove their legal presence in the United States.\footnote{Mich. Comp. Laws § 257.307(1)(b) (2008).} It also stated explicitly that “a person legally present in the United States includes, but is not limited to, a person authorized by the United States government for employment in the United States, a person with nonimmigrant status authorized under federal law, and a person who is the beneficiary of an approved immigrant visa petition or an approved labor certification.”\footnote{Id.} In 2011, the legislature struck that language and maintained the simpler
language requiring applicants to prove their legal presence. This is the state law that was in place when DACA issued in 2012. Michigan Secretary of State Ruth Johnson initially resisted DACA. Fred Woodhams, a spokesman for the Secretary of State’s office, stated “Because the Deferred Action on [sic] Childhood Arrivals program doesn’t confer legal presence on its participants, we are not able to issue licenses or ID cards to DACA participants . . . As its name implies, the program merely defers action on the individual and doesn’t make the individual legally present.” This was a mistaken assertion based on a misreading of the lawful presence/lawful status distinction. While Michigan law at one time explicitly stated that legally present individuals included those “authorized by the United States government for employment in the United States”—which would have included DACA-eligible noncitizens with an EAD—its removal of that language did not change the fact that lawfully present individuals were eligible for licenses. Therefore, USCIS’s guidance clarifying that DACA did grant lawful presence—but not lawful status—combined with pressure from immigrants' rights advocates, caused Secretary of State Johnson to reverse course in February 2013. Her press release corrected her 2012 statement and determined that DACA recipients have lawful presence and should be able to receive driver's licenses pursuant to Michigan state law. “The feds now say they consider these young people to be lawfully present while they participate in the DACA program, so we are required to issue driver’s licenses and identification cards.” Like Texas, Michigan's acquiescence reflects a grudging willingness to adhere to legitimately-enacted federal policy, despite dissonance with their own substantive policy preferences.

**States' Continuing Resistance to DACA**

Two states continue to resist federal policy by rejecting DACA as legal grounds for granting driver's licenses: Arizona and Nebraska. In essence, they are engaging in uncooperative federalism. More than in the studies of cooperation, these uncooperative states challenged the

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164 S.B. 495, 96th Leg., Reg. Sess. (Mich. 2011) (amending MICH. COMP. LAWS § 257.307). The statute now provides: “If the applicant is not a citizen of the United States, the applicant shall provide, and the department shall verify, documents demonstrating his or her legal presence.” MICH. COMP. LAWS § 257.307(1)(b) (2014).


166 Id.


169 Uncooperative federalism is a variant of cooperative federalism. It is defined by Professors Jessica Bulman-Pozen and Heather Gerken to include instances where states act as dissenters, rivals, and challengers from their position as insiders and partners in policymaking rather than passively acquiescing to federal policy or resisting as policymaking outsiders or sovereigns. Heather K. Gerken & Jessica Bulman-Pozen, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).
substance and procedures of DACA as federal policy as a legal matter—suggesting that legality is, to some degree, a constraint on legitimacy.

Arizona. Until January 22, 2015, Arizona was one of only two states that declined to offer IDs to DACA beneficiaries and defended its state policy in several rounds of litigation that reached the Supreme Court before being permanently enjoined in federal district court.¹⁷⁰ In direct response to DACA’s announcement in 2012, Arizona Governor Jan Brewer issued her own executive order stating that Arizona would not issue driver’s licenses to DACA recipients for reasons similar to North Carolina’s for reaching the opposite conclusion.¹⁷¹ Governor Brewer argued that Secretary Napolitano’s memorandum could have no preemptive effect on Arizona state law. The federal district court initially agreed with Governor Brewer:

The memorandum does not have the force of law. Although the Supreme Court has recognized that federal agency regulations ‘with the force of law’ can preempt conflicting state requirements, federal regulations have the force of law only when they prescribe substantive rules and are promulgated through congressionally-mandated procedures such as notice-and-comment rulemaking . . . . Secretary Napolitano’s memorandum does not purport to establish substantive rules (in fact, it says that it does not create substantive rights) and it was not promulgated through any formal administrative procedure. As a result, the memorandum does not have the force of law and cannot preempt state law or policy.¹⁷²

Her announcement was codified in A.R.S. section 28-3153(D). Notably, Arizona’s state law expressly allowed noncitizens to use EAD’s as proof of eligibility for driver’s licenses.¹⁷³ But it reversed that policy for DACA recipients. Several “Dreamers” challenged the Arizona law in federal court. The federal district court initially denied the plaintiffs’ requests for injunctive relief, holding that the Arizona laws did not violate the Equal Protection Clause and were not preempted by DACA.¹⁷⁴ The district court held that the regulations conferred no substantive rights, did not have the force of law, and therefore could not preempt Arizona’s policy.¹⁷⁵ The Ninth Circuit disagreed, ruling that Arizona’s state law violated the Equal Protection Clause,¹⁷⁶

¹⁷⁰ For more on the work permit aspect of the Brewer litigation, see supra note 90.
¹⁷³ Id. at 1054 (citing ARIZ. REV. STAT. ANN. § 28-3153(D) (2013) (“[T]he Department shall not issue or renew a driver license . . . for a person who does not submit proof satisfactory to the department that the applicant’s presence in the United States is authorized under federal law.”)).
¹⁷⁴ Id. at 1057–60.
¹⁷⁵ Id.
¹⁷⁶ Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014). The Ninth Circuit declined to decide what standard of review to apply, but it found that that Arizona had improperly attempted to classify noncitizens, and that its law was not rationally related to a legitimate state purpose. Id. It also left open the question of whether Arizona’s laws would be preempted by Obama’s executive action.
and the United States Supreme Court declined to stay the Ninth Circuit's ruling.\textsuperscript{177} The federal district court in Arizona then ordered the Arizona Department of Transportation to stop denying licenses to DACA recipients effective December 22, 2014. The federal district court permanently enjoined the Arizona law on Equal Protection grounds on January 22, 2015.\textsuperscript{178} Because the appeals left open the question of DACA's preemptive legal effect, it is difficult to say that the courts vindicated DACA's legality over the Arizona law. But it remains to be seen whether Arizona will embrace DACA as legitimate policy now that all three federal courts have chimed in on the legality of the program or whether they will continue to challenge its implementation. From Arizona's point of view, the persistent articulation of contrary policy preferences and mistrust of the federal government's executive authority suggests that Arizona's substantive views will remain unchanged despite federal court rulings, but it is less clear whether their procedural opposition will be softened. (According to Fallon's predictions, the ruling would soften it.)\textsuperscript{179} Their willingness to comply thereafter sets up a stark test for the extent to which legality constrains perceptions of illegitimacy in the face of continuing dissent. Should Arizona comply, it would likely be compliance dubitante similar to Texas and Michigan.

\textit{Nebraska.} Nebraska has taken a similar position to Arizona on driver's licenses, declining to issue driver's licenses while challenging the legality of DACA's lawful presence designation. On August 20, 2012, Nebraska Governor Dave Heineman announced that "The State of Nebraska will continue its practice of not issuing driver's licenses, welfare benefits, or other public benefits to illegal immigrants unless specifically authorized by Nebraska statute." He said he wanted to be "very, very clear" that President Obama's DACA program does not grant legal status and, "therefore, our policies [of not granting driver's licenses] are not changing."\textsuperscript{180} His rationale was that the administration and Congress failed to address the "issue that we have 15 million illegal immigrants in the country right now" and forces a conflict between federal and state government. Anticipating possible objections, he maintained that "America and Nebraska is [sic] a welcoming country and a welcoming state. We're glad to have them in our state, but do it legally. . . if you're here illegally, you shouldn't have a driver's license."\textsuperscript{181} This remark speaks to the complicated relationship between legality and legitimacy. The Governor articulates state values that are consonant with the substance of DACA's policy, but that they will not carry the day unless and until DACA's legality is established—once again suggesting that legality conditions legitimacy.

\textsuperscript{177} Brewer v. Arizona Dream Act Coalition, 135 S. Ct. 889 (2014).
\textsuperscript{178} Arizona Dream Act Coalition v. Brewer, No. CV12–02546 PHX DGC, 2015 WL 300376 at *12 (D. Ariz. Jan. 22, 2015). On remand, the District Court in Arizona granted relief for the plaintiffs, and ordered the state’s Department of Transportation to issue driver's licenses to DACA beneficiaries. \textit{Id.}
\textsuperscript{179} See supra note 17.
\textsuperscript{181} \textit{Id.}
but acceptance of institutional authority determines levels of compliance.\(^{182}\) Like Arizona, their compliance remains to be seen, but it is more likely given that the nature of their disagreement has more to do with contrary substantive views than mistrust of executive authority.

Part III.A has furnished glimpses of the dynamic process of acknowledging a law's legitimacy, through an empirical examination of states' changing attitudes and practices toward DACA's lawful presence designation. All of the states highlighted initially expressed reservation toward DACA's legitimacy and moved toward greater acceptance, to varying degrees and on varying grounds. The influence of their perceptions of DACA's legitimacy was a direct and important factor, even if not the only one. The next section identifies a range of other state-administered public benefits indirectly influenced by states' attitudes and acceptance of DACA's legitimacy.

**B. States and Other Public Benefits**

The extended case study of cooperation and noncooperation in the issuance of state driver's licenses demonstrates that driver’s licenses serve a host of practical and equally-important symbolic purposes and thus provide an important lens into the acceptance of DACA. Beyond satisfaction of proof of personal identity and driving ability, driver's licenses allow immigrants to get registered and insured so that they can get to work and conduct their affairs, e.g. opening bank accounts, paying taxes, obtaining library cards, and cashing checks.\(^ {183}\) At least one scholar has called driver’s licenses a “breeder identity” because the document becomes the basis for other proofs.\(^ {184}\)

More fundamentally, the driver's license studies demonstrate a public recognition of lawful presence by third-party actors that administer a range of public benefits. States and localities rely


on DACA as a proxy for lawful presence in higher education admissions, in-state tuition rates, and eligibility for state financial aid. Immigrants’ access to some forms of health care is conditioned on lawful presence at the federal level, and has indirectly catalyzed states to offer their own forms of health insurance to qualifying, undocumented immigrants who are also state residents. Private employers similarly rely on DACA, as discussed in Part II.B. While a comprehensive discussion of all of the ways states rely on DACA is beyond the scope of this Article, the variety bear mention because, as compared with the state drivers’ license case study, there may be not only parallels but also differences in the relationship between legality and legitimacy in light of the state-federal interstatutory relationships governing the policy arena.

Part III laid out positive criteria for the legitimacy of executive action, as well as some limits, in the context of DACA. Those criteria include: instrumental and normative concerns for legality, attitudes toward federal authorities asserting executive action; congruence or conflict with the states’ substantive values on immigration and autonomous policy goals; and social motivations such as extending membership within a community. DACA requires this kind of willing cooperation to be successful in achieving its own stated goals and in shoring up institutional respect. The case studies also illustrate that garnering respect is not immediate or automatic. Acceptance can be a gradual, involving varying degrees of cooperation and resistance. When states resist, legality commonly functions as a constraint on compliance, but not always an insurmountable one and may require multiple interventions to shift attitudes over time.

IV. OTHER ILLUSTRATIONS OF COMPLIANCE WITH EXECUTIVE ACTION


187 For example, there might be a difference between driver’s licenses, for which eligibility depends on state policies combined with the REAL ID Act, and arenas in which legitimacy is even more distinct from legality because state decisionmaking is more clearly independent of federal mandate based on the specifics of the state-federal statutes. Thanks to Hiroshi Motomura for pointing this out.
In November 2014, President Obama drew upon his executive authority in a range of executive actions.188 DAPA is the most relevant to this Article.189 This section discusses two aspects of DAPA in an effort to extend the theory of legitimacy to situations where it squarely abuts legality and morality constraints. It first discusses DAPA as an extension of the 2012 DACA program that has come under intense legal scrutiny with a federal district court’s order to preliminary enjoin it in Texas v. United States. It then considers the Obama Administration’s contemplated expansion of DAPA to DACA parents.

A. Deferred Action for Parental Accountability and Texas v. United States

The November 2014 expansion of the DACA program includes a DAPA program that provides deferred action and associated benefits to parents of US citizens and LPR children. The program relies on the same sources of legal authority as the 2012 DACA: the President’s executive authority to exercise enforcement discretion and Congressionally-delegated authority under the INA and immigration regulations.190 The OLC and the White House, during the announcement of the programs, also invoked the policy goal of promoting family unity.191 Twenty-six states challenged the DAPA program in Texas v. United States, seeking to block implementation of the program on the grounds that it violated the Constitution’s Take Care Clause and the APA’s rulemaking requirements.192 A federal district court granted in Texas granted a preliminary injunction on February 16, 2015 blocking DHS from accepting new applications until further proceedings on the merits.193 The district court focused on the plaintiff states’ claim that DAPA exceeds its delegated authority because it accomplishes its goals in violation of the APA rulemaking requirements.194 The district court rejected the Obama administration’s reply that


189 See Johnson DACA & DAPA Memo Nov. 2014, supra note 2. While the November 2014 executive action entails both an expansion of DACA to a broader class of childhood arrivals and the creation of DAPA for parents, the focus of this section is on DAPA because it is more distinct from the 2012 DACA already discussed in Part I.A. 190 See supra Part I.B.


192 Texas v. United States, Civ. No. B–14–254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). While Texas v. United States challenges both the DHS memo containing both 2014 DACA and 2014 DAPA, the focus here is on DAPA because the reasoning in the memorandum opinion and order is almost entirely on DAPA. Also, the memorandum opinion states in a section titled “issues before and not before the court”: “with three minor exceptions, this case does not involve the DACA program from 2012.” Id. at *2.


DAPA is "not a rule, but a policy that supplements and amends guidance" and therefore is subject to an APA exemption. The 123-page memorandum opinion accompanying the preliminary injunction proceeds with a detailed discussion of the legal tests used to determine whether an agency action is "substantive," rendering it ineligible for the rulemaking exemptions. Leaving aside the merits of the APA claim, the court concludes that DAPA was procedurally invalid as enacted.

Public attention to the DAPA preliminary injunction has been intense, in part because of the drama of court intervention that changed the administration's plans to begin accepting DAPA applications at the eleventh hour. In comparison, the Obama administration has characterized DAPA's delay as being a bump in the road and supporters have suggested that it is a mere procedural technicality could be cured by publishing the existing memo in the Federal Register and accepting public comments as prescribed by APA 553(b). Whether or not the district court's preliminary injunction withstands appeal and whether or not the procedural defect can be cured, the issue is not a mere technicality. By emphasizing procedural norms for agency rulemaking, it comes very close to raising the issue of legitimacy that is defined in this Article as belief and willingness to comply with a law because the institution or authority behind it is respect-worthy. Understood this way, the claimed failure to abide by APA procedures gives rise to a foundational challenge on the legitimacy of the administrative state that issued DAPA. So doing, the claim brings the legality and legitimacy frameworks close together, thrusting the


Texas v. United States, Civ. No. B–14–254, 2015 WL 648579, at *54–*56 (S.D. Tex. Feb. 16, 2015) (finding that DAPA has a binding effect on the agency under the binding effect test adopted in Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 596 n.27 (5th Cir. 1995), despite the DAPA memo's disclaimer that it confers no substantive rights and permits the agency discretion in its case-by-case determinations of applications, and finding that DAPA substantively changes existing immigration laws by creating a class of lawfully-present immigrants with rights to work and receive government benefits that they would otherwise not be entitled to).


Jethro Mullen & Jeremy Diamond, Obama Vows to Abide by Immigration Court Order, CNN (Feb. 17, 2015), http://www.cnn.com/2015/02/17/politics/texas-obama-immigration-injunction/ (quoting DHS Secretary Jeh Johnson as saying “We fully expect to ultimately prevail in the courts, and we will be prepared to implement DAPA and expanded DACA once we do”). Eric Holder referred to the matter as an "interim step." REUTERS (Feb. 17, 2015), http://www.washingtonpost.com/politics/holder-tex-judges-decision-on-immigration-an-interim-step/2015/02/17/175234d6-6e4f-11e4-bc30-a4e75503948a_video.html.

Dara Lind, A Federal Judge Just Put The Brakes on Obama’s Immigration Actions, Vox (Feb. 17, 2015, 1:41 PM), http://www.vox.com/2015/2/16/8025691/immigration-lawsuit-obama (quoting Cecilia Wang, Director of ACLU Immigrants’ Rights Project, for proposition that Obama Administration could cure procedural defect by commencing notice and comment proceedings set out by APA; plaintiff states’ supporters disagree).

See supra text accompanying notes 72–74 and notes 96–208.
legal analysis into the foreground since neither states nor individuals will have an opportunity to comply or not comply with DAPA unless and until the legal issue is resolved and the preliminary injunction is lifted.

For reasons discussed earlier in the Article,201 the connection between legality and legitimacy is not automatic and should not be presumed; that is, the preliminary injunction itself does not make DAPA illegitimate. Still, how the dialogue around the procedural legitimacy of DAPA unfolds as the lawsuit resolves will assuredly have an impact on public perceptions and willingness to accept DAPA. The mere fact of delay and the disruption in the program’s planned implementation is already shaping individual attitudes among those who might be eligible to apply, a reality not lost on community organizers exhorting immigrants eligible for DAPA to be patient, keep faith, and prepare their documents as part of their Si Se Puede Con DAPA (Yes We Can with DAPA) campaign.202 To some extent, all government programs rely on public participation for success,203 That is true to an even greater extent in DAPA, where applicants assume certain risks for disclosing sensitive personal information to the federal government knowing that their lack of formal immigration status leaves them vulnerable to deportation at several junctures—if their application is denied, if their two- or three-year protective period expires, or if the program is altered or withdrawn.204 Those who send in their applications do so in exchange the risk for the promise that they will be better off once granted deferred action. In other words, they accept the trade-off once the USCIS and community organizations earn their trust and confidence that their information is safe and the program is stable, even if its permanence cannot be guaranteed. The trade-off is harder to make when the promised benefits are shrouded in doubt. In that sense, the court’s declaration that DHS violated procedural norms and his issuance of a preliminary injunction that disrupts the program’s stability will shape the program’s legitimacy on-the-ground—notwithstanding the district court’s statement that "the issues before the Court do not require the court to consider the public popularity, public acceptance, public acquiescence, or public disdain for the DAPA program."205 Similar "chilling effects" can be expected to instill doubt and quell compliance among the individuals and states described in Parts II and III as broadly complying: USCIS officials (who have already delayed acceptance of new applications for 2014 DACA and DAPA), private employers confronted with

201 See supra text accompanying notes 17–19.
204 See Deferred Action PSAs, AM. IMMIGR. L. ASS’N (Mar. 27, 2013) (on file with author) (making available posters with the slogans “Deferred Action. It's not one size fits all,” “Deferred Action is no game. Make sure you know the rules,” “There's more to Deferred Action than just a simple application . . . applying for DACA involves some risk”); Consumer Advisory: The President’s Immigration Announcement Contains Protections for Some* Undocumented People, AM. IMMIGR. L. ASS’N (Dec. 22, 2014) (on file with author).
new EADs, and states confronted with decisions to accept new EADs for the purpose of driver's licenses and other public benefits.\footnote{DACA 2012 is not under the preliminary injunction but there may be a spill-over chilling effect from DACA 2014 and DAPA given the similarities. In fact, some states have already experienced changes in their driver’s license laws. For example, even before the preliminary injunction order was issued, Colorado pulled funding for a program that would extend driver’s licenses to all undocumented immigrants pursuant to state law. See Jack Healy & Julie Turkewitz, Unauthorized Immigrants’ Access to Driver’s Licenses is at Risk, N.Y. TIMES (Feb. 11, 2015), http://www.nytimes.com/2015/02/12/us/colorado-pulls-u-turn-on-licenses-for-illegal-immigrants.html?_r=0. In addition, in Texas v. United States, Judge Hanen explicitly invoked driver’s licenses, describing the costs to and burden on states in extending such licenses. See Texas v. United States, Civ. No. B–14–254, 2015 WL 648579, at *11–*15 (S.D. Tex. Feb. 16, 2015).}

Debate over the implementation of DAPA sharpens the legitimacy framework presented as the lynchpin of executive action garnering acceptance on-the-ground. It does so by amplifying the relationship between law and legitimacy. However, it does not alter the framework of analysis. Once the dust settles on the legality of the newly-created DAPA program and contemplated expansions, the administration's justifications for its policy design and implementation decisions will rest on the same concerns registered in the public response to DACA: attitudes toward the legal authorities granting official recognition to DAPA recipients and administering the applications and respect for the administrative process by which the program was enacted.

H. L. A. Hart once stated that "law" consists of “practices that have become normatively binding in the affected community, whether their source be in legal text, judicial decisions, or behavioral conventions that have achieved general acceptance.”\footnote{H.L.A. HART, CONCEPT OF LAW (1961). Loosely speaking, the general acceptance constitutes Hart’s rule of recognition. Commentary on what Hart meant by the rule of recognition and whether his theory stands is abundant. A helpful overview is provided by Scott J. Shapiro, What is the Rule of Recognition (And Does it Exist?), in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew Adler & Kenneth Einar Himma eds., 2009).} Misunderstandings about the forms of administrative law impede general acceptance. Questions about compliance with APA requirements reverberate through foundational challenges to the administrative state.\footnote{See, e.g., DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). But see Adrian Vermeule, Our Schmittian Administrative Law, 122 HARV. L. REV. 1095 (2009); Adrian Vermeule, ‘No’ Review of “Is Administrative Law Unlawful?”, 93 TEX. L. REV. ___ (forthcoming 2015). New governance theorists raise related concerns about excesses of administrative law. See, e.g., Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. REV. 1 (1997); Charles F. Sable & William H. Simon, Minimalism and Experimentalism in the Administrative State, 100 GEO. L. J. 53 (2011).} These concerns are particularly resonant with a program like DAPA because it constitutes agency guidance and customary practice—types of legal authority that deviate from the conventions of positivist law that are vulnerable to misunderstanding and mistrust for this very reason.

B. Deferred Action for DACA Parents
Other than legal disputes over program implementation, the Obama administration in its creation of DAPA notably omitted a more expansive version of the program from its design: including the parents of the DACA recipients themselves. The Obama Administration apparently struggled with the decision of whether to include the larger group. DREAMers (many of whom qualified as DACA beneficiaries) and immigrants' rights advocates sought the inclusion of DACA parents, pointing out that DACA beneficiaries might be reluctant to sign up and family unity could be compromised if DACA beneficiaries remained safe from deportation while their parents remained subject to removal. The fullest explanation for the Administration's decision to limit the scope of DAPA is provided in the US Department of Justice, Office of Legal Counsel memorandum, released alongside Obama's announcement of DAPA in November 2014. The OLC memo, following its general approval of deferred action, declares that deferred action could not be legally granted to a class of individuals consisting of parents of DACA recipients. Their premise is that existing law and legal and policy precedents prohibit the grant of deferred action based on family ties unless those family members are "legally entitled to the live in the United States." Their assertion begins with a reading of the INA that interprets Congress' general concern for not separating individuals who are legally entitled to live in the US from their immediate family members and then infers that such a reading precludes discretionary relief based on relationships to other family members. In response, four influential immigration law professors penned a letter to the White House disagreeing with the OLC conclusions on the availability of relief for parents of DACA recipients as a legal matter. That immigration professor letter emphasizes that an undocumented immigrant who is the parent of a DACA recipient is not prohibited from obtaining deferred action by "law or history," even if Congress has not expressed a clear preference for their protection. The letter argues that "Any decision by the Administration to include or exclude certain groups will be a policy choice not a legal

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209 See OLC Memo, supra note 26. Many of the Government's arguments are repeated in its Texas v. United States brief opposing the motion for preliminary injunction.
210 Id. at 25–33 (discussing deferred action for parents of U.S. citizen or lawful permanent resident children).
211 Id. at 32. Some scholars disagree with this assessment, and argue that extending relief is permitted as an exercise of executive authority.
212 OLC Memo, supra note 26.
213 November 3 Letter to President Obama, supra note 64 (clarifying that “there is no legal requirement that the executive branch limit deferred action or any other exercise of prosecutorial discretion to individuals whose dependents are lawfully present in the United States”). Several online symposium comments also address this point. In his Balkanization blogpost, Stephen Legomsky also disputes the lack of precedent argument and observes that there is nothing in the INA that requires the conditions for permanent discretionary relief to match the administration’s criteria for temporary relief. Stephen H. Legomsky, Why Can't Deferred Action Be Given to the Parents of the DREAMers?, Online Symposium on Administrative Reform of Immigration Law, BALKINIZATION (Nov. 25, 2014), http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html. He also observes that there are INA grounds for discretionary relief independent of family relations altogether. Id.; see also Sept. 3 Letter to President Obama, supra note 60.
one.” An online symposium on administrative relief more strenuously objects to the premise that administrative priorities must be consonant with Congressional ones.

These considerations highlight distinctions between procedural and substantive reasons for complying and the broader relationship between legitimacy and morality. While substantive or moral support for DAPA is more challenging than it is for DACA because the parents are generally not as sympathetic as the childhood arrivals who played no part in the decision to enter unlawfully. Also, the criterion of fairness for parents who entered the United States unlawfully is weaker than the argument for fairness toward childhood arrivals. Acknowledging legitimacy is easier when one's personal morality and substantive views correspond to the values embedded in a law. However, the willingness to comply despite contrary substantive preferences so is the clearest test of legitimacy.

It is too soon to gauge the on-the-ground reaction to the legitimacy of the DAPA program in light of still-unfolding legal challenges and delays in program implementation. Comparing it to the legitimacy framework developed through the Part II and III case studies of reception to the DACA program suggests a method of analysis and hypotheses about what level of compliance can be expected should DAPA proceed. Describing the heightened legal and moral considerations in legal challenges to DAPA reveal additional factors that will influence compliance with DAPA based on perceptions of legitimacy.

V. CONCLUSION

Executive action in immigration will persist, regardless of whether the preliminary injunction of Obama's deferred action programs lifts and even if Congress or the next Presidential administration act to reverse them. This Article urges us to maintain focus on legitimacy, rather

214 Id.
216 Reflecting these reservations about the affirmative criteria in DAPA, the political rhetoric used to justify the DAPA program is different. In his initial announcement and even in the naming of the program, President Obama emphasizes “parental accountability.” Instead of appealing to grace, he offers a “deal” that exchanges temporary protection for payment of fines and otherwise “getting right with the law.” President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), available at http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.
217 The President emphasizes the correspondence between personally-held and programmatic values through the invocation of “family unity,” the American dream of bettering life for one's family, and the IRCA Family Fairness legalization enacted under a Republican administration.
218 For further discussion between the convergence of substantive and procedural norms in the social scientific study of legitimacy, see Tom Tyler, Why People Obey the Law (1990); Why People Cooperate (2011). See also theoretical debates noted in Part I.C text accompanying notes 98-103, and notes 16, 20.
than be consumed with legality. While challenges to the legality of executive action in these forums play out, this Article has presented evidence that individuals and state officials generally deem DACA legitimate and that it will take much to overcome their willingness to obey the law. The disjuncture between legal analysis and on-the-ground acceptance reveals new and important ways to analyze executive action in immigration law.

Despite persistent misunderstandings and occasional mistrust of executive action, deferred action is gaining widespread acceptance among individuals and state actors. Part II showed that there is overwhelming individual compliance among the immigration officials and the private employers called upon to accept the lawful presence that DACA furnishes in their implementation of the program. These actors, arguably, are compelled to obey the law and presumably have instrumental as well as non-instrumental reasons for going along—at least one of which includes a belief in, or at least a willingness to accept, the legitimacy of using executive action along the terms of the DACA program. In the states, where cooperation with DACA for the issuance of drivers’ licenses is essentially voluntary, Part III showed evidence of broad acceptance as well. A survey of state driver’s license policies reveals that forty-eight states voluntarily issue driver's licenses to DACA recipients. In-depth study of six states reveals that their motivations for doing so include a willingness to acknowledge the legitimacy of DACA and to acquiesce to its lawful presence designation, albeit for differing reasons and to a different extent. The in-depth state study also reveals that compliance is a dynamic process, not an immediate or fixed position. These empirical portraits of legitimacy on-the-ground are telling.

Garnering public acceptance of DACA’s legitimacy will be equally important for other programs announced in President Obama's November 2014 executive actions on immigration. Key among these is the DAPA program. Many of the same criteria of legitimacy seen in the DACA studies will apply in the public reception to DAPA. Beyond the commonalities, the DAPA case study raises particular nuances in the legitimacy analysis. For example, the Texas v. United States legal challenge to the DAPA program enacted in 2014 illustrates that legality and legitimacy are related even if analytically distinct. The contemplative alternative design, that included DACA parents and was rejected without adoption, illustrates that morality and legitimacy are also related. Still, the paramount importance of legitimacy is missed in high-level decisionmaking—to the detriment of understanding executive action. These lessons should apply to other immigration executive actions as well.

Recalling legitimacy is important to executive action more generally. The President's initial reticence about moving forward with executive action—even as he consistently asserts its legality in court—and his continuing exhortation for Congress to take the next step by enacting legislation—reveals his keen understanding of the vulnerability of relying on executive action. Executive action is quick to enact; it is also quick to undo or alter. President Obama's executive actions can be overturned by Congress or a future president. Executive action through agency
guidance is also burdened by a "chronic legitimacy crisis" that is exacerbated by acute partisan divides. Immigration is not the only arena of live controversy or debate; executive actions on environmental law and especially health law are meeting similar challenge, suggesting that the nature of the challenges to Obama's deferred action programs is not peculiar to immigration law. For these reasons, executive action is a second-best means for crafting immigration law, even it does have its advantages and may be the only way to move forward under circumstances of Congressional gridlock. Congressional immigration reform that provides more meaningful and lasting changes remains the first-best alternative. But even if it is not always desirable, executive action is a viable means of making law and advancing policy, and it can be an effective one, provided that it can obtain on-the-ground acceptance of its legitimacy.

Those seeking to preserve an executive action can build the public support they need for their policy to succeed. Those seeking to undermine executive action can unravel a policy by upending its legitimacy in the eyes of those who will administer it. Doing so will require that either side prove itself in lawsuits and legal challenges. And it will require more. Beyond eliciting legal compliance, the success of an executive action requires the President to set its sights high by cultivating voluntary compliance and cooperation. Inspiring public confidence requires ongoing public dialogue and demonstrations of support for the program, at both the elite and community-based level. Beyond dialogue and symbols of ongoing commitment, the institutions of government will need to earn public trust through a meaningful allocation of resources and strong commitment to fair and consistent implementation. All of these commitments are needed to win over the hearts and minds of individuals and state actors.

In immigration law, all of this will be harder with doubt being cast on deferred action through the Texas v United States litigation that will take many months to fully resolve. But it is not impossible. This Article has offered ways that the Obama Administration, or any other administration, can pave the way for on-the-ground acceptance based on research into legitimacy that reveals the factors that influence compliance and cooperation. The President and his administration should take heed of this research, whatever their policy goals. It might not be possible to come to substantive agreement on the priorities for controversial issues like immigration enforcement, or health care mandates, or the environmental regulation. But it is worth trying to garner respect for their legitimacy as our nation’s laws. The success of these policies—and the institutions that administer them—depends on it.

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219 For example, President Obama made several speeches supporting his programs in their early months, usually in strategically-selected locales where the public requires convincing about its normative and procedural legitimacy. States and localities are also doing this work with Bill de Blasio’s gathering and Representative Gutierrez’s immigration forums. See Kirk Semple, De Blasio to Host Mayors at Immigration Reform, N.Y. TIMES (Dec. 6, 2014), http://www.nytimes.com/2014/12/07/nyregion/de-blasio-to-host-mayors-at-immigration-forum.html; Press Release, Cicilline, Gutierrez Hold Public Forum on President’s Executive Order on Immigration, CONGRESSMAN DAVID CICILLINE (Jan. 15, 2015), http://cicilline.house.gov/press-release/cicilline-gutierrez-hold-public-forum-president%E2%80%99s-executive-order-immigration.
APPENDIX

Table summarizing factors influencing attitudes toward DACA legitimacy

Instrumental Concerns
Deferred action
Work Authorization
Documentation

Non-Instrumental Concerns
Acceptance of executive authority to issue DACA
Congruence or conflict with state's moral values
Autonomous policy goals and institutional values
Legality constraints and motivations, including feelings of legal compulsion
Solidarity and Sense of Community

Figures summarizing behaviors of state cooperation with DACA EAD

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<th>Continuing Resistance</th>
<th>Compliance Dubitante</th>
<th>Gradual Acceptance</th>
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Driver IDs for DACA