

The American DREAM: DACA, DREAMers, and Comprehensive Immigration Reform

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“Immigration policy shapes the destiny of the Nation The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.”

—Justice Anthony Kennedy, *Arizona v. United States*¹

“A dream you dream alone is only a dream. A dream you dream together is reality.”

—John Lennon²

I. INTRODUCTION

In 2011, Maria Gomez earned her master’s degree in architecture and urban design.³ This is an outstanding achievement for any student. For Maria, it was the result of the same hard work and diligence she had practiced since her days as a middle-school honor student, when she first knew that she wanted to become an architect.

In high school, Maria excelled in community service, extracurricular, and school leadership activities.⁴ She graduated tenth in her class with a 3.9 GPA and was accepted by every college to which she applied.⁵

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1. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

2. While this quote was made famous by and is often attributed to John Lennon, it was actually written by Yoko Ono. See DAVID SHEFF, *ALL WE ARE SAYING: THE LAST MAJOR INTERVIEW WITH JOHN LENNON AND YOKO ONO* 16 (St. Martins 2000).

3. 158 CONG. REC. S5072–01 (July 17, 2012) (statement of Sen. Durbin) (introducing Maria Gomez’ story to Congress in support of Dream Act legislation.).

4. See *id.*

5. See *id.*

But she faced an obstacle most of her classmates did not: she was ineligible for financial aid because she did not have a social security number.⁶ In fact, Maria had no legal status at all. She was brought to the United States as a child from Mexico without any documentation.⁷ Maria is a DREAMer.⁸

Maria's lifelong goal was to become an architect; however, she couldn't afford to attend the University of California at Berkeley—the only state college in California with an undergraduate architecture program.⁹ Instead, she chose to attend the University of California at Los Angeles (UCLA) while living at home and riding the bus two and a half hours each way to school every day, cleaning houses and babysitting to cover her tuition as a full-time student.¹⁰ Despite the great adversity she faced, Maria was the first member of her family to graduate from college.¹¹

When Maria finally enrolled in the Master of Architecture Program at UCLA, the long and hard-earned road to her future did not get much easier. She continued to struggle financially, eating at the school food bank and sleeping many nights on the floor of the school's printing room.¹² But she persevered, and Maria finally realized her dream of becoming an architect.¹³

Upon graduation, Maria faced yet another obstacle that her colleagues did not: she could not work in her newfound profession. She was still without legal status in the United States and therefore could not legally work in any job. Employment authorization is the key that turns in motion the dream that Maria and so many others have worked so hard to achieve:

I grew up believing in the American dream and I worked hard to earn my place in the country that nurtured and educated me Like the thousands of other undocumented students and graduates across America, I am looking for one thing, and one thing only: the opportunity to give back to my community, my state, and the country that is my home, the United States.¹⁴

6. *See id.*

7. *See id.*

8. *See id.*; *see infra* Part II.A.

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

On June 15, 2012, President Obama made an announcement that changed the lives of millions¹⁵ of qualified DREAMers like Maria.¹⁶ Effective immediately, the Obama administration would implement a new program—what would come to be known as Deferred Action for Childhood Arrivals (DACA)—offering eligible DREAMers both a two-year respite from the haunting possibility of deportation as well as the eligibility to apply for employment authorization.¹⁷ Having employment authorization not only allows DREAMers the ability to work legally in the United States, but also qualifies them to apply for a social security number.¹⁸ A social security number is an essential element to life in the United States today: it opens the door to a bank account, certain student loans, credit cards, a driver's license, a cell phone plan, and countless other aspects of everyday living that most of us take for granted and would struggle enormously without.

While millions were elated by the President's announcement, he also faced harsh criticism. Many claimed that his action exceeded federal statutory limits, exceeded his Executive powers, and usurped congressional authority. Still others, anxious to see comprehensive immigration reform implemented, were disappointed that he had not gone further.¹⁹

This Comment will address both criticisms before concluding that DACA is within the President's power as a form of prosecutorial discretion and that the attendant grant of employment authorization is necessarily within the scope of that power. Part II of this Comment outlines the development of prosecutorial discretion in the law and reviews the scope of judicial review over agency decision-making. It then discusses the history and use of prosecutorial discretion in immigration law specifically and summarizes administrative guidance regarding prosecutorial discretion in the immigration context. Part III outlines the DREAM Act and DACA, explores the criticisms of DACA, and evaluates the statutory and constitutional limits of the Executive Branch authority. Part IV addresses comprehensive immigration reform and discusses how DACA is

15. See Jeffery S. Passel & Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW HISP. CENTER (Aug. 14, 2012), http://www.pewhispanic.org/files/2012/12/unauthroized_immigrant_youth_update.pdf.

16. President Barack Obama, Remarks by the President on Immigration (Jun. 15, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

17. *Id.*

18. SOC. SECURITY ADMIN., SOCIAL SECURITY NUMBER—DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *available at* http://www.socialsecurity.gov/pubs/deferred_action.pdf (last visited Aug. 29, 2013).

19. See *infra* Part III.

likely to influence that reform. Part V briefly summarizes, reflects, and concludes.

II. PROSECUTORIAL DISCRETION AND JUDICIAL REVIEW: A BACKGROUND

This Section describes the history and scope of prosecutorial discretion. Part II.A introduces and defines the major terminology used throughout this Comment. Part II.B outlines the role of prosecutorial discretion outside of the immigration context while Part II.C tracks the role and use of prosecutorial discretion within immigration law.

A. Definitions

The DREAM Act is a piece of bipartisan legislation that, if passed, would allow undocumented youth who arrived in the United States as children to earn legal status.²⁰ “DREAMer” is the term used to describe those youth.²¹ The Immigration and Nationality Act (INA), enacted in 1952 and amended frequently since then, is the primary federal statute governing immigration law;²² it is now hundreds of pages long.²³ The Immigration and Naturalization Service (INS) was the federal agency that oversaw U.S. immigration law until 2003,²⁴ and the term is used in this Comment when referring to memoranda released and cases that were adjudicated under its authority. Its functions included inspection, enforcement, and administrative duties.²⁵ The INS was replaced in 2003 by

20. See Luis Miranda, *The Dream Act: Good for Our Economy, Good for Our Security, Good for Our Nation*, THE WHITE HOUSE BLOG (Dec. 01, 2010, 7:19 PM), <http://www.whitehouse.gov/blog/2010/12/01/get-facts-dream-act>.

21. See Julia Preston, *A ‘Dreamer’ Addresses the Democratic Convention*, THE CAUCUS, THE POLITICS AND GOVERNMENT BLOG OF THE TIMES (Sept. 6, 2012, 12:44 PM), <http://thecaucus.blogs.nytimes.com/2012/09/06/a-dreamer-addresses-the-democratic-convention/>; see also David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L. J. ONLINE 167, 167–68 (2012), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/executive-power/a-defense-of-immigration%11enforcementdiscretion:-the-legal-and-policy-flaws-in-kris-kobach’s-latest-crusade/>.

22. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2012) [hereinafter INA]; see also *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGRATION SERV., <http://www.uscis.gov/portal/site/uscis/> (follow “Laws” hyperlink, then follow “Immigration and Nationality Act” hyperlink) (last visited Aug. 29, 2013). “Created in 1952, the INA stands alone as a body of law, but it is also contained in Title 8 of the United States Code . . . Although it is correct to refer to a specific section by either its INA citation or its U.S. code, the INA citation is more commonly used.” *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGRATION SERV., *supra*; see STEPHEN H. LEGOMSKY & CRISTINA RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1 (Robert C. Clark et al. eds., 5th ed. 2009).

23. LEGOMSKY & RODRIGUEZ, *supra* note 22, at 1.

24. See *id.* at 3.

25. See *id.*

the Department of Homeland Security (DHS), a cabinet department which now oversees all immigration matters through three agencies: Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE), and United States Citizenship and Immigration Services (USCIS).²⁶ ICE is currently the agency in charge of enforcing our nation's immigration laws within our nation's borders.²⁷ The term "prosecutorial discretion" is used to refer generally to a law enforcement or administrative agency's authority to decide whether to pursue charges against a person.²⁸ "Deferred action" is a form of prosecutorial discretion in the immigration context, referring to the discretionary decision to not pursue removal against a person—usually based on equitable and humanitarian factors.²⁹ "Alien" is a term of art defined by the INA as "any person not a citizen or national of the United States,"³⁰ which therefore includes those with legal status, as well as those without legal status.³¹ Other terms are defined throughout the text.

B. A Short History of Prosecutorial Discretion Outside of the Immigration Context

The prosecutor's broad discretion in deciding who and when to prosecute—or, alternatively, not to prosecute—is a principle deeply entrenched in American criminal law.³² One of the major reasons behind prosecutorial discretion is the practical reality of a finite availability of resources.³³ To deny a prosecutor the authority to exercise discretion without having the resources to prosecute every offense has been likened to "directing a general to attack the enemy on all fronts at once."³⁴ Ra-

26. DHS was formed pursuant to the Homeland Security Act of 2002 (HSA). *Id.* at 2–3. In addition to dissolving the INS, the HSA brought some twenty-two federal agencies under the new single umbrella of the DHS. *Id.*

27. *Id.*

28. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 266 (2010).

29. *See id.* at 245.

30. Immigration and Nationality Act, § 101(a)(3), 8 U.S.C. 1101(a)(3) (2012).

31. *See id.* Because of the inaccurate and stereotypical connotations carried by the term, this Comment will only use the word "alien" in direct quotations; "noncitizen" will be used elsewhere. "'Noncitizen' conveys essentially the same technical meaning" as the statutory definition of "alien." LEGOMSKY & RODRIGUEZ, *supra* note 22, at 1. For these same reasons, "illegal" will be replaced with "undocumented."

32. *See* WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 13.2(a) (3d ed. 2012).

33. *See id.* Within the immigration context, the financial impossibility of enforcing every possible removal is discussed in Part III.C.2, *infra*.

34. LAFAVE ET AL., *supra* note 32 (citing T. ARNOLD, THE SYMBOLS OF GOVERNMENT 153 (1935)).

ther, “the prosecutor must remain free to exercise his judgment in determining what prosecutions will best serve the public interest.”³⁵

Within the realm of agency decision-making, the Supreme Court has maintained a general presumption against judicial reviewability of prosecutorial discretion going back to the nineteenth century.³⁶ The Court made a short departure from precedent in the 1960s when it began to uphold judicial review of prosecutorial discretion, a transition attributed to the 1946 enactment of the Administrative Procedure Act (APA),³⁷ which established a framework for the promulgation and enforcement of regulations by federal agencies.³⁸ However, this trend was short lived; in 1975, the Court signaled a return to its earlier presumption against reviewability of agency decision-making in *Dunlop v. Bachowski*.³⁹ The *Dunlop* Court held that judicial review of an agency’s decision *not to act* is limited to the deferential “arbitrary and capricious” standard under APA § 706(2)(A).⁴⁰ Ten years later, the Court made a full and clear return to a presumption against reviewability in *Heckler v. Chaney*, holding that “an agency’s decision not to take enforcement action is presumed immune from judicial review under [APA] § 701(a)(2).”⁴¹ The Court explained its rationale with the following:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits

35. *Id.*

36. Wadhia, *supra* note 28, at 286 (citing RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1252 (4th ed. 2002)). The Court first recognized an exception to the general presumption against judicial reviewability of agency decision-making in the landmark 1886 decision of *Yick Wo v. Hopkins*, which was “based on a claim that the agency’s selective enforcement of an ordinance against two hundred Chinese (and zero non-Chinese) was racially motivated.” Wadhia, *supra* note 28, at 287. There, the Court held that a facially race-neutral law may still violate the Equal Protection clause of the Fourteenth Amendment if it is administered prejudicially. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

37. Wadhia, *supra* note 28, at 287; Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended 5 U.S.C. § 551 *et. seq.*).

38. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 580–603 (Foundation Press ed., 2010). The APA was passed as a source of procedural law for federal administrative agencies; a legislative compromise following a lengthy political struggle over executive agencies. *Id.* However, it is not the exclusive source of procedural law for federal administrative agencies; the Constitution, other statutory provisions, and the agency’s own regulations also impose constraints. *Id.*

39. 421 U.S. 560 (1975).

40. *Id.* at 566.

41. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved.⁴²

The reasons espoused by the Court to support a presumption against judicial review of an agency's decision not to enforce are rooted in one of the bedrock purposes of prosecutorial discretion in criminal law previously mentioned: finite resources. Like criminal prosecutors, administrative agencies simply do not have the resources available to enforce every violation. Just as criminal prosecutors must make a threshold decision regarding whether they have the evidence to prosecute a crime and whether their limited resources are best spent prosecuting that specific crime over another, so too must agencies assess which violations best justify the use of their limited enforcement resources. These decisions are based on factors that the agency—rather than a court—knows best.

C. Prosecutorial Discretion in Immigration Law: Historical Development

Within the immigration context, prosecutorial discretion is a tremendous power, one that “affects the fate of more noncitizens than any other government action.”⁴³ For some, it may be the only relief available from deportation.⁴⁴ In 1889, the Court in *Chae Chan Ping v. United States* held for the first time that the Government has plenary power to regulate immigration.⁴⁵ Although this great power does not emanate from any specific constitutional provision, the Court reasoned that the power to exclude foreigners was an inherent incident of a nation's sovereignty.⁴⁶ Furthermore, it held—carving out a large exception to *Marbury v. Madison*⁴⁷—that the immigration laws Congress chooses to pass are not

42. *Id.* at 831–32; see also Administration Procedure Act, 5 U.S.C. § 706 (1) (2012). In 2004, the Court in *Norton v. Southern Utah Wilderness Alliance* went even further: it held that a claim under APA § 706(1) “can only proceed where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

43. Wadhia, *supra* note 28, at 246.

44. MARY KENNEY, LEGAL ACTION CENTER, AM. IMMIGRATION COUNCIL, PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT 4 (2011), available at <http://www.ailawebcde.org/resources/Resourc%20for%208-24-11%20Seminar.pdf>.

45. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

46. See *id.* at 603–05, 607, 609.

47. See *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the Supreme Court has the power to review acts of the other branches of government to determine their constitutionality).

reviewable by any court.⁴⁸ In stark terms, “[t]he bottom line of the plenary power doctrine may be that Congress could expel all or any class of resident aliens whenever it wants without judicial opposition.”⁴⁹ However, there is *some* restraint; “since the 1970s, the Court has modified this doctrine and accepted a limited responsibility to assure the rationality of substantive immigration policies.”⁵⁰

Although plenary power over immigration remains with the Legislature, Congress conferred discretion to the Administrative Branch to suspend deportation as far back as 1940.⁵¹ Later, under the INA, Congress delegated to the Executive Branch the authority to enforce the immigration laws.⁵² While this delegation of authority does not give the Executive Branch the authority to decide who is removable, it does delegate practically unbridled authority to the Executive Branch to determine whether to *pursue* removal,⁵³ for the practical reasons discussed in Part II.B.

The application of prosecutorial discretion to the immigration context did not become public until a series of cases involving the deportation of the musician John Lennon.⁵⁴ Prior to his deportation proceedings, “the nonpriority program was a secret operation of the INS.”⁵⁵ John Lennon and Yoko Ono were initially admitted to the United States on

48. See *Chae Chan Ping*, 130 U.S. at 606.

49. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 620 (2006).

50. *Id.* at 619 (citing *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

51. Neuman, *supra* note 49, at 622 (“Prior to 1940, the primary curative instrument for preventing the break-up of families by deportation in sympathetic cases was the private immigration bill, enacted by Congress for the relief of named individuals.” (citing BERNADETTE MAGUIRE, *IMMIGRATION: PUBLIC LEGISLATION AND PRIVATE BILLS* 20–23, 89–90 (1997))). *Id.*

52. Immigration and Nationality Act, § 103(a) (2012); Letter from Hiroshi Motomura, et al., to President Barack Obama (May 28, 2012), available at www.nilc.org/document.html?id=754 (citing § 103(a)).

53. INA § 237(a)(1)(A) (“Any alien who at the time of entry [was] . . . inadmissible by the law existing at such time is deportable.”); § 237(a)(1)(B) (“Any alien who is present in the United States in violation of this Act [which includes those who have overstayed their visas] . . . is deportable.”) (emphasis added); see also Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 513 (2009) (citing § 212(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled . . . is inadmissible.”)).

54. *Lennon v. Richardson*, 378 F. Supp. 39, 40 (S.D.N.Y. 1974); *Lennon*, 15 I. & N. Dec. 9 (BIA 1974) vacated by *Lennon v. Immigration & Naturalization Serv.*, 527 F.2d 187 (2d Cir. 1975). For those few who may not be aware, John Lennon was one of the four members of the Beatles, an anti-war activist and adversary of the Nixon administration, and was famously shot to death outside his New York City apartment building in 1980. *Biography*, JOHN LENNON, <http://www.johnlennon.com/biography> (last visited Aug. 29, 2013).

55. Wadhia, *supra* note 28, at 246 (citing Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976–77)).

nonimmigrant visas,⁵⁶ and Lennon was later placed in deportation proceedings for overstaying his temporary visa.⁵⁷ An immigration judge adjusted Ono's status to that of a legal permanent resident⁵⁸ but found that because Lennon had been convicted in England for possession of "cannabis resin,"⁵⁹ he was deportable as a matter of law.⁶⁰ Lennon asserted that it was the practice of INS to decline prosecution in cases involving circumstances similar to his⁶¹ and that the Nixon administration was only targeting him because of his political beliefs and potential to become a leader in the anti-war movement.⁶² Lennon sought INS records relevant to a "nonpriority" category of cases and the standards used in determining its applicability, believing the records would both confirm the agency practice and reveal his eligibility for relief.⁶³ He eventually obtained the records under the Freedom of Information Act,⁶⁴ and as a consequence, the INS finally made public the existence and details of its nonpriority program.⁶⁵ Although Lennon was eventually granted a green card—mooting the question of his nonpriority status—his Second Circuit case

56. Upon arrival, Lennon was found excludable under INA § 212(a)(23), but applied for and received a waiver under § 212(d)(3)(a).

57. Wadhia, *supra* note 28, at 246.

58. Lennon and Ono filed third preference petitions, a visa given to qualified "immigrants who . . . because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." *Lennon*, 527 F.2d at 189; INA § 203(b)(1)(A)(i). The application can be a challenge to Lennon's classification as an excludable noncitizen. *Lennon*, 527 F.2d at 189.

59. *Lennon*, 15 I. & N. Dec. 9, 25 (BIA 1974). "[Lennon] contends that his conviction does not place him within the exclusion provision of section 212(a)(23) because (1) the British statute under which he was convicted did not require mens rea, and (2) cannabis resin is not 'marihuana' within the meaning of section 212(a)(23)." *Id.* at 17.

60. *Lennon v. Richardson*, 378 F. Supp. 39, 40 (S.D.N.Y. 1974).

61. *See Lennon*, 15 I. & N. Dec. 9.

62. *Biography*, JOHN LENNON, <http://www.johnlennon.com/biography> (last visited Aug. 29, 2013).

63. Wadhia, *supra* note 28, at 247. "Nonpriority" referred to a category of cases in which the INS will defer the departure of a noncitizen indefinitely and take no action to disturb his immigration status on the ground that such action "would be unconscionable because of the existence of appealing humanitarian factors." *Lennon*, 378 F. Supp. at 41–42. Lennon's asserted ground was that Ono "desired to remain in the United States to endeavor to locate and obtain custody of her child by a former marriage, and [Lennon] desired to remain with and assist her." *Id.* at 41.

64. Administrative Procedure Act § 2, 5 U.S.C. § 552 (2012).

65. Wadhia, *supra* note 28, at 248 (citing Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 47 (1976–77); Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 820 (2004)).

was the first to discuss the concept of an “administrative stay of deportation.”⁶⁶

Prosecutorial discretion has since remained a significant and public part of the enforcement of our nation’s immigration laws, and with its exposure has come the question of judicial review over such agency decisions. Prior to 1996, “judicial review of most administrative action under the INA was governed by 8 U.S.C. § 1105(a),” which directed that “‘the sole and exclusive procedure for . . . the judicial review of all final orders of deportation’ shall be that set forth in the Hobbs Act,”⁶⁷ which [gave] exclusive jurisdiction to the courts of appeals.”⁶⁸ Then in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁶⁹ which expressly restricted judicial review of the Attorney General’s “‘decision or action’ to ‘commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.’”⁷⁰ The Court noted that “*many* provisions of IIRIRA are aimed at protecting the Executive’s discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.”⁷¹ *Reno v. American-Arab Anti-Discrimination Committee* outlined the common law, equity-based development of deferred action as a form of prosecutorial discretion in the immigration context:

To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority⁷² and is now designated as deferred action treatment Approval of deferred action status means that, for the humanitarian reasons . . . , no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated.⁷³

Prior to IIRIRA, judicial review over decisions *not* to grant deferred action was largely unrestricted, allowing cases like *Lennon*—which were

66. *Id.* (citing *Lennon v. Immigration & Naturalization Serv.*, 527 F.2d 187, 191 n.7 (2d Cir. 1975)).

67. 28 U.S.C. § 2341 *et seq.*

68. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 (1999) (citation omitted).

69. 110 Stat. 3009-546.

70. *Reno*, 525 U.S. at 473 (quoting 8 U.S.C. § 1252(g) (1994 ed., Supp. III)).

71. *Id.* at 486 (emphasis in original).

72. A reference back to the *Lennon* cases.

73. *Reno*, 525 U.S. at 484 (citing C. GORDON, S. MAILMAN, & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (6th ed. 1998)).

based on selective-enforcement arguments—to be litigated on the basis of equal protection, due process, or abuse of discretion grounds.⁷⁴ Post-IIRIRA, in line with the legislation’s theme of limiting judicial review, even those decisions are now largely unreviewable.⁷⁵ “INA Section 242(g) [created under IIRIRA] bars judicial review of such decisions as whether to commence removal proceedings (a matter of generally unreviewable prosecutorial discretion) and whether to execute a removal order (rather than stay temporary removal).”⁷⁶

D. ICE Guidance and Related Actions Regarding Prosecutorial Discretion

In recent years, the Executive Branch issued numerous memoranda regarding the authority of immigration officers to exercise prosecutorial discretion, with specific direction as to how that discretion should be exercised.

On November 17, 2000, then-INS Commissioner Doris Meissner issued a memorandum entitled “Exercising Prosecutorial Discretion” (Meissner Memo) in which she clearly articulated the role of prosecutorial discretion in immigration enforcement.⁷⁷ She instructed that “[a]s a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service’s resources and in recognition of the alien’s interest in avoiding unnecessary legal proceedings.”⁷⁸ The memorandum also directed that “field agents and officers are not only authorized by law to exercise discretion within the authority of the agency, but are expected to do so in a judicious manner at all stages of the enforcement process.”⁷⁹ The Meissner Memo remains in use today and is the founda-

74. *Reno*, 525 U.S. at 484–85.

75. *Id.* at 485–86 (“Section 1252(g) seems clearly designed to give some measure of protection to ‘no deferred action’ decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed.”).

76. LEGOMSKY & RODRIGUEZ, *supra* note 22, at 769.

77. See IMMIGRATION POL’Y CENTER, UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW (2011) [hereinafter UNDERSTANDING PROSECUTORIAL DISCRETION], available at http://www.immigrationpolicy.org/sites/default/files/docs/IPC_Prosecutorial_Discretion_090911_FINAL.pdf.

78. Memorandum from Doris Meissner, Comm’r, Immigration and Naturalization Serv., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, Reg’l & Dist. Counsel 6 (Nov. 17, 2000), available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-DorisMeissner-11-7-00>.

79. *Id.* at 1.

tion for the many memoranda on prosecutorial discretion that have since followed.⁸⁰

On October 24, 2005, William Howard, Principal Legal Advisor for ICE, released a memorandum simply entitled “Prosecutorial Discretion,” emphasizing the critical importance of prosecutorial discretion in managing the overwhelming workload faced by ICE.⁸¹ Noting that “the universe of opportunities to exercise prosecutorial discretion is large,” Howard urged: “It is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States . . . are truly worth litigating.”⁸² He closed by neatly summarizing both the human and economic importance of prosecutorial discretion in the immigration context:

Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering. It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers in both narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of a result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.⁸³

Five years later, on June 30, 2010, John Morton, then-Assistant Secretary of ICE, issued a memorandum to all ICE employees: “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens.” In it, he emphasized ICE’s priority to focus its limited resources on “removal of aliens who pose a danger to national security or a risk to public safety.”⁸⁴ He directed that “[t]he rapidly increasing number of criminal aliens who may come to ICE’s attention heightens the need for ICE employees to exercise sound judgment and

80. See IMMIGRATION POL’Y CENTER, UNDERSTANDING PROSECUTORIAL DISCRETION, *supra* note 77.

81. Memorandum from William Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to all OPLA Chief Counsel (Oct. 24, 2005), available at <http://www.scribd.com/doc/22092975/ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05>.

82. *Id.* at 2–3.

83. *Id.* at 8.

84. Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement, to all ICE Employees 1 (June 30, 2010), available at http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

discretion consistent with these priorities when conducting enforcement operations.”⁸⁵ He further instructed that officers should continue to be guided by the principles set forth previously by the Meissner and Howard Memos.⁸⁶

On June 17, 2011, now-current ICE Director John Morton issued an important guidance memorandum to all ICE personnel: “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (the Morton Memo).⁸⁷ The Morton Memo, like its predecessors before it, emphasized the economic necessity of employing prosecutorial discretion:

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise ‘prosecutorial discretion’ if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.⁸⁸

With these principles in mind, the Morton Memo specifically outlined those agency employees who may exercise prosecutorial discretion and what factors those officers should consider when doing so.⁸⁹ Officers were directed to review the cases of certain classes of individuals with “particular care and consideration,” including those involving veterans, long-time residents, childhood arrivals, minors, elderly, pregnant or nursing women, victims of domestic violence, and individuals with serious physical or mental health conditions.⁹⁰ Meanwhile, officers were directed

85. *Id.* at 4.

86. *Id.* Morton also instructed officers to continue to follow the November 7, 2007 memorandum from then-Assistant Secretary Julie Myers, which directed all field officers and special agents to exercise prosecutorial discretion when making arrest and custody determinations for nursing mothers. *Id.*; see Memorandum from Julie Myers, Assistant Sec’y, U.S. Immigration & Customs Enforcement, to all Field Office Dirs. and all Special Agents in Charge (Nov. 7, 2007), available at <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>.

87. Memorandum from John Morton, Dir., U.S. Customs & Immigration Enforcement, to all Field Office Dirs., all Special Agents in Charge, and all Chief Counsel (Jun. 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

88. *Id.* at 2.

89. See generally *id.*

90. *Id.* at 5 (re-stating factors outlined in the Meissner Memo).

to focus their enforcement priority on those cases involving individuals who pose a national security risk, those with serious criminal records, gang members, and those with a lengthy record of immigration violations.⁹¹

Prior to DACA, both the Obama and Bush administrations followed the prosecutorial discretion guidelines outlined in the various ICE memoranda, granting deferred action to some DREAMers.⁹² However, the lack of a formal process for handling DREAMer cases led to inconsistent practices by different officers and between different field offices nationwide.⁹³ In April 2011, Assistant Senate Majority Leader Richard Durbin (D-IL), Senate Majority Leader Harry Reid (D-NV), and twenty other democratic senators wrote a letter to President Obama, requesting that his administration “consider establishing a formal process for applying for deferred action and for tracking of DREAM Act cases, to ensure more consistent treatment of like cases.”⁹⁴ In essence, the letter requested that in the absence of the DREAM Act—or any other legislation—the President implement a program very much like DACA.⁹⁵

In August 2011, Secretary of Homeland Security Janet Napolitano responded to the senators’ letter, announcing DHS’s continued intent that low-priority cases at every stage of the removal process be considered for the exercise of prosecutorial discretion.⁹⁶

The President has said on numerous occasions that it makes no sense to expend our enforcement resources on low-priority cases, such as individuals like those you reference in your letter, who were brought to this country as young children and know no other home. From a law enforcement and public safety perspective, DHS enforcement resources must continue to be focused on our highest priorities. Doing otherwise hinders our public safety mission—clogging immigration court dockets and diverting DHS enforcement resources away from individuals who pose a threat to public safety.⁹⁷

91. *Id.*

92. Letter from Richard Durbin, Assistant Senate Majority Leader, et. al, to President Barack Obama (Apr. 13, 2011), *available at* <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c>.

93. *Id.*

94. *Id.*

95. *See generally id.*; *see also infra* Part III.B.

96. Letter from Janet Napolitano, Sec’y of Homeland Sec., to Richard Durbin, Assistant Senate Majority Leader 1 (Aug. 18, 2011), *available at* http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226.

97. *Id.*

She announced that “[t]ogether with the Department of Justice, we have initiated an interagency working group to execute a case-by-case review of all individuals currently in removal proceedings to ensure that they constitute our highest priorities” and that the working group would “also initiate a case-by-case review to ensure that new cases placed in removal proceedings similarly meet such priorities.” Indeed, following her announcement, ICE initiated an “unprecedented review of all immigration cases pending in the immigration courts and incoming cases”⁹⁸ for consistency with ICE’s removal priorities. Those cases not deemed “high-priority” were to be administratively closed.⁹⁹

On November 17, 2011, ICE followed Napolitano’s August announcement with a guidance memorandum to all Chief Counsel.¹⁰⁰ The purpose of the memo was to ensure that those cases that were still being litigated actually conformed to the priorities set forth in the Morton Memo.¹⁰¹ However, as Napolitano cautioned in her letter to Senator Durbin, “this process will not alleviate the need for passage of the DREAM Act or for larger reforms to our immigration laws.”¹⁰² She was correct; the review was later criticized for being largely ineffective as the number of new cases filed far outweighed the slim percentage of cases identified as candidates for closure.¹⁰³ Moreover, many of those who were offered administrative closure declined to accept it, hoping for greater long-term success by a favorable court decision.¹⁰⁴ Meanwhile, the number of cases

98. U.S. DEP’T OF HOMELAND SEC., PRESS OFFICE, FACT SHEET: TRANSFORMING THE IMMIGRATION ENFORCEMENT SYSTEM 1 (2012), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/immigration-system.pdf>.

99. Lornet Turnbull, *Immigration Courts to Close While ICE Reviews Deportation Cases*, SEATTLE TIMES (Mar. 29, 2012), http://seattletimes.com/html/localnews/201787_0000_detained30m.html. During the review, immigration courts were closed in four cities, including Seattle, where approximately seventeen percent of cases were closed—much higher than the national average. *Id.*

100. Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Customs & Immigration Enforcement, to all Chief Counsel (Nov. 17, 2011), available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>.

101. *Id.*

102. Letter from Janet Napolitano, *supra* note 96, at 2.

103. Paloma Esquivel, *Deportation Case Closures Rise, but Backlog Continues*, L.A. NOW, (July 25, 2012, 4:03 PM), <http://latimesblogs.latimes.com/lanow/2012/07/deportation-cases-closed.html>. In July 2012, only about 23,000 cases (6% of cases reviewed) had been identified as candidates for closure, though 111,000 new cases had been filed. *See id.*

104. *Id.* “Administrative closure temporarily removes a case from the immigration courts’ calendar but does not confer lawful immigration status or, according to the Administration, provide an independent basis for employment authorization. Thus, many immigrants with strong claims for relief may prefer to present their case to an immigration judge in lieu of accepting an offer of administrative closure.” IMMIGRATION POL’Y CENTER, AM. IMMIGRATION COUNCIL, PROSECUTORIAL DISCRETION: A STATISTICAL ASSESSMENT 2–3 (2012) [hereinafter STATISTICAL ASSESSMENT],

found eligible under the review fell steadily from 8% at the start of the initiative to 3.4% by July 2012.¹⁰⁵ In fact, “[r]elative to the number of immigrants that ordinarily prevail in removal proceedings, the number likely to avoid removal as a result of the case-by-case review process is comparatively small.”¹⁰⁶ Additionally, the review was of limited scope; by definition, administrative closure applies only to those already in removal proceedings.¹⁰⁷ The review inherently would not reach the majority of DREAMers who live in the shadow of deportation but are not actually in removal proceedings.¹⁰⁸

On June 15, 2012, Napolitano formally announced the DACA program—yet another step in DHS’s longstanding practice of prosecutorial discretion—in a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.”¹⁰⁹ She directed that “certain young people who were brought to the United States through no fault of their own as children, do not present a risk to national security or public safety, and meet several key criteria will be eligible for relief from removal from the country or from entering into removal proceedings.”¹¹⁰ Under this memorandum, there are five key criteria that must be satisfied before an individual is to be considered for an exercise of prosecutorial discretion under DACA: the individual (1) came to the United States before the age of sixteen; (2) has continuously resided in the United States for at least five years preceding June

available at http://www.immigrationpolicy.org/sites/default/files/docs/pd_-_a_statistical_assessment_061112.pdf.

105. Ben Winograd, *ICE Numbers on Prosecutorial Discretion Keep Sliding Downward*, IMMIGRATION IMPACT (July 30, 2012, 2:21 PM), <http://immigrationimpact.com/2012/07/30/ice-numbers-on-prosecutorial-discretion-sliding-downward/>. Winograd stated that

Between the start of the initiative and March 5, for example, nearly 8.0% of all cases were deemed provisionally eligible for closure. The same figure dropped to 6.2% for cases reviewed between March 6 and April 16, and below 6% for cases reviewed between April 17 and May 29. Most recently, for cases reviewed between May 30 and July 20, the share eligible for closure shrunk to only 3.41%—well under half the rate as when the case-by-case review first began.

Id.

106. IMMIGRATION POL’Y CENTER, AM. IMMIGRATION COUNCIL, STATISTICAL ASSESSMENT, *supra* note 104, at 5.

107. *Id.* at 1.

108. See Passel & Lopez, *supra* note 15; see also Policy Center, *A Breakdown of DHS’s Deferred Action for DREAMers*, IMMIGRATION IMPACT (June 18, 2012, 4:33 PM), <http://immigrationimpact.com/2012/06/18/a-breakdown-of-dhss-deferred-action-for-dreamers/>.

109. *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, U.S. DEP’T OF HOMELAND SECURITY (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

110. *Id.*

15, 2012, and was present in the United States on June 15, 2012; (3) is currently in school, has graduated from high school, has obtained a GED, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) has not been convicted of a felony, a significant misdemeanor, multiple misdemeanors, or otherwise poses a threat to national security or public safety; and (5) is not above the age of thirty.¹¹¹ That same day, Morton issued a memorandum instructing all ICE agents and personnel to immediately begin exercising prosecutorial discretion in a manner consistent with DACA.¹¹²

III. THE BACKGROUND AND LEGALITIES OF DACA

This section analyzes the legalities of DACA as a form of prosecutorial discretion. Part III.A briefly discusses the DREAM Act, establishing a background to the development of DACA. Part III.B explores the legalities of DACA through the lens of specific criticisms of the program. Part III.C evaluates why an affirmative grant of employment authorization is within the scope of the Executive Branch's authority to exercise prosecutorial discretion.

A. The DREAM Act

The Development, Relief, and Education for Alien Minors Act is a bipartisan federal bill originally introduced by Senator Orrin Hatch (R-UT) and Senator Richard Durbin (D-IL) that would, if passed, legalize the status of millions of eligible undocumented youth.¹¹³ It has been proposed in Congress in various forms at least twenty-four times.¹¹⁴ Although the details of its specific components have varied over the years,

111. *Id.*

112. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement to all U.S. Immigration and Customs Enforcement employees 1 (June 15, 2012), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf>.

113. *DREAM Act*, DREAM ACTIVIST, <http://www.dreamactivist.org/text-of-dream-act-legislation/> (last visited Aug. 29, 2013); THE DREAM ACT PORTAL, <http://dreamact.info/> (last visited Aug. 29, 2013); DREAM ACT PORTAL, <http://dreamact.info/> (last visited Aug. 29, 2013).

114. *Crane v. Napolitano*, No. 3:12-cv-03247-0, 2012 WL 5199509 (N.D.Tex. Oct. 10, 2012) (stating the DREAM Act was introduced in the following bills: S. 1291, 107th Cong. §§ 2, 3 (2001); S. 1545, 108th Cong. (2003); S. 2863, 108th Cong. §§ 1801-1813 (2004); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621-632 (2006); H.R. 1275, 110th Cong. (2007); H.R. 1645, 110th Cong. §§ 621-632 (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621-632 (2007) (as amended by S.A. 1150 §§ 612-619); S. 1639, 110th Cong. §§ 612-620 (2007); S. 2205, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); H.R. 5281, 111th Cong. §§ 5-16 (2010); H.R. 6497, 111th Cong. (2010); S. 3827, 111th Cong. (2010); S. 3932, 111th Cong. §§ 531-542 (2010); S. 3962, 111th Cong. (2010); S. 3963, 111th Cong. (2010); S. 3992, 111th Cong. (2010); H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); S. 1258, 112th Cong. §§ 141-149 (2011); H.R. 5869, 112th Cong. (2012)).

its core requirements have remained fairly consistent.¹¹⁵ A 2011 version required that the DREAMer had arrived in the United States before the age of fifteen; been present in the United States for five years prior to passage of the bill; been a person of good moral character and have a clean record; have obtained a GED or high school diploma or has been admitted to an institution of higher learning; and be thirty-five years of age or younger on the date of enactment.¹¹⁶ A DREAMer who met these requirements would receive permanent residence on a conditional basis for six years, during which time they must have completed at least two years in a bachelor's or higher degree program or served in the military for at least two years, and after which point they could apply to have the conditions removed and be left with permanent resident status.¹¹⁷

In 2007, "the unlikely trio of John McCain, Ted Kennedy, and President Bush came together to champion [the Comprehensive Immigration Reform Act],"¹¹⁸ which contained the entirety of the DREAM Act.¹¹⁹ However, it came eight votes short from earning the sixty votes needed to break a Republican filibuster. In 2010, the DREAM Act passed the House of Representatives and received a bipartisan majority vote in the Senate; but it too failed to break filibuster, falling just five votes short.¹²⁰

B. DACA

In a speech from the Rose Garden on June 15, 2012, President Obama personally announced his administration's new immigration policy,¹²¹ emphasizing the public policy rationale behind his plan to "mend our nation's immigration policy, to make it more fair, more efficient, and more just—specifically for certain young people sometimes called DREAMers".¹²²

These are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this

115. *DREAM Act*, *supra* note 113.

116. H.R. 1842, Part IV, 112th Cong. (2011).

117. *Id.*

118. President Barack Obama, Remarks by the President on Immigration, *supra* note 16.

119. See Comprehensive Immigration Reform Act of 2007, S.1348, 110th Cong. (2007), available at <http://www.gpo.gov/fdsys/pkg/BILLS-110s1348pcs/pdf/BILLS-110s1348pcs.pdf>.

120. Letter from Sen. Richard Durbin, et al., to President Barack Obama (Apr. 13, 2011), available at <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c>.

121. President Barack Obama, Remarks by the President on Immigration, *supra* note 16.

122. *Id.*

country by their parents—sometimes even as infants— and often have no idea that they’re undocumented until they apply for a job or a driver’s license, or a college scholarship.

[I]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans—they’ve been raised as Americans; understand themselves to be part of this country—to expel these young people who want to staff our labs, or start new businesses, or defend our country simply because of the actions of their parents—or because of the inaction of politicians.

Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people.

[T]his is not amnesty, this is not immunity. This is not a path to citizenship. It’s not a permanent fix. This is a temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people. It is the right thing to do.¹²³

Between June 15, 2012, and August 15, 2012, the new policy was immediately implemented in both pending removal proceedings and by ICE officers in the field. On August 15, 2012, USCIS began accepting applications affirmatively filed by DREAMers requesting consideration of deferred action under DACA.¹²⁴

C. The Executive Authority to Implement DACA and Grant Employment Authorization As a Form of Prosecutorial Discretion

Many critiques of the DACA program can be summarized by addressing the arguments raised by ten ICE officers, who in August 2012 filed a lawsuit in federal court to block the program.¹²⁵ The officers claimed that DACA violates the INA and “transgresses our constitutional separation of powers.”¹²⁶ They argued that “virtually every time an ICE agent encounters unauthorized aliens, he or she has a duty under federal law—with which no supervisor can interfere—to place the aliens into formal removal proceedings.”¹²⁷ The following subsections will address these arguments.

123. *Id.*

124. *Deferred Action for Childhood Arrivals*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/deferred-action-childhood-arrivals#2> (last visited Aug. 29, 2013).

125. See Martin, *supra* note 21, at 167.

126. *Id.* at 168.

127. *Id.* at 169.

1. DACA Is Within Federal Statutory Limits

The officers¹²⁸ (Crane plaintiffs) argue that the IIRIRA eliminated prosecutorial discretion when ICE officers have become aware of a person's undocumented status¹²⁹ and it is therefore outside the authority of the Executive Branch to issue deferred action as a form of prosecutorial discretion. Their argument is based on a strict interpretation of the post-IIRIRA INA, which they contend directs—by the use of a mandatory “shall”—that immigration officers must arrest anyone they determine is present without having been admitted:

[A]n alien present in the United States who has not been admitted . . . *shall* be deemed for purposes of this chapter an applicant for admission¹³⁰ . . . [which requires that the alien] *shall* be inspected by immigration officers,¹³¹ . . . [and] if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a [removal] proceeding [in immigration court].¹³²

This interpretation is seriously flawed for several reasons. First, while the provisions cited by the Crane plaintiffs are indeed within the INA, as Professor David A. Martin explains, they are inaccurately presented as if they apply across the board.¹³³ Second, while the “alien present in the United States who has not been admitted”¹³⁴ likely represents the stereotypical “illegal alien” that the general public envisions, “by commonly accepted estimates [this population] make[s] up only fifty to sixty-seven percent of the unlawfully present population.”¹³⁵ All others have been admitted legally as temporary visitors and then either over-

128. Martin offers a description of Kris Kobach, the lead counsel for the officers: [Kobach] . . . was a prime mover behind the recent wave of state and local legislation designed to crack down on illegal migration. Kobach is also the elected Secretary of State of Kansas, although he is representing the plaintiffs here in his private capacity and, one assumes, his spare time. Evidently, since the Supreme Court squelched most of those crackdown provisions in its . . . ruling in *Arizona v. United States*, he feels the itch to find a new stage on which to complain about federal immigration policy.

Id. at 168–69.

129. Ariane de Vogue, *Legal Challenges to Immigration Announcement*, ABC NEWS BLOG (June 15, 2011, 5:39 PM), <http://abcnews.go.com/blogs/politics/2012/06/legal-challenges-toimmigration-announcement/>.

130. Immigration and Nationality Act, § 235(a)(1) (2012) (emphasis added).

131. INA § 235(a)(3) (emphasis added).

132. INA § 235(b)(2)(A) (emphasis added); *see also* Crane v. Napolitano, No. 3:12-cv-03247-0, 2012 WL 5199509 (N.D. Tex. Oct. 10, 2012); Martin, *supra* note 21, at 170.

133. Martin, *supra* note 21, at 171.

134. INA § 235(a)(1).

135. Martin, *supra* note 21, at 171.

stayed or otherwise violated their visa conditions.¹³⁶ Simply put, this statutory provision is irrelevant to as many as half of the removable persons encountered by ICE agents, “and there is no reason to think that different percentages would apply to DACA applicants.”¹³⁷

Regarding those persons to whom the cited provisions do apply, the Crane plaintiffs’ argument is still illegitimate. In 2000, the Board of Immigration Appeals (BIA)¹³⁸ found that subsequent to IIRIRA, the INS did in fact retain prosecutorial discretion in deciding whether to commence removal proceedings against a person.¹³⁹ Professor Stephen Yale-Loehr explained that the purpose of IIRIRA was to restrict judicial review, not to restrict agency discretion: “[IIRIRA] focused on restricting the ability of federal courts to overturn immigration agency decisions—it did not address the rule of the executive branch on this particular issue The action today [DACA] simply extended prosecutorial discretion policy that had already been in place.”¹⁴⁰

As Doris Meissner clearly addressed in her 2000 Meissner Memo, “[I]ike all law enforcement agencies, the [DHS] has finite resources, and it is not possible to investigate and prosecute all immigration violations.”¹⁴¹ Meissner advised, “[a]s a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement unless that discretion has been clearly limited by statute *in a way that goes beyond standard terminology*.”¹⁴² Recently, the BIA ruled that the word “shall” does not carry the ordinary meaning of an act that is manda-

136. *Id.*; see also Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 787 (2013).

137. Martin, *supra* note 21, at 171.

138. Either a noncitizen or ICE may appeal to the BIA for administrative review of the decision of an immigration judge. LEGOMSKY & RODRIGUEZ, *supra* note 22, at 744. The BIA was created by the Attorney General in 1940, sits permanently in Virginia, and its members are appointed by the Attorney General. *Id.* Until 1999, cases were decided by three-member panels; however, “a mounting backlog promoted Attorney General [Janet] Reno to issue regulations that authorized . . . particular categories of cases for one-member review.” *Id.* In 2002, Attorney General John Ashcroft “issued a controversial rule similarly aimed at the backlog . . . [which] substantially expanded the use of both single-member decisions and affirmances without reasoned opinions.” *Id.* at 745. “A Los Angeles Times investigation reported that some BIA members acknowledge deciding up to 50 cases a day.” *Id.* These procedures have come under appropriately harsh attack for seriously diminishing the quality of the already-limited review process, but are outside the scope of this Comment.

139. KENNEY, *supra* note 44 (citing Bahta, 22 I. & N. Dec. 1381 (BIA 2000)).

140. De Vogue, *supra* note 129; see also the discussion regarding IIRIRA, *supra* Part II.C.1.

141. Memorandum from Doris Meissner, *supra* note 78, at 4.

142. *Id.* at 3 (emphasis added).

tory.¹⁴³ In fact, “it is common for the term ‘shall’ to mean ‘may’ when it relates to decisions made by the Executive Branch of the Government on whether to charge an individual and on what charge or charges to bring.”¹⁴⁴ Because of this ambiguity, if Congress truly wanted to limit prosecutorial discretion, it would need to make its intent patently clear in a way that the Meissner Memo directs—by using language that goes beyond standard terminology. Criminal statutes frequently make use of the word “shall,” and no one rationally expects that police officers will make an arrest in every case or that prosecutors will follow through with a charge in every case,¹⁴⁵ as discussed in Part II.B. Similarly, it is entirely unrealistic to expect immigration officers to pursue a removal in every case.¹⁴⁶ “[A]s long as the same constitutionally based discretion that the executive branch possesses in the criminal realm also applies to immigration enforcement—as the BIA and the Supreme Court have indicated—then discretion continues, and it belongs . . . to the President and his delegates who head the relevant agency.”¹⁴⁷ The constitutional foundation for this authority is discussed below.

2. DACA Is Constitutional

There are two common arguments made by critics, such as the Crane plaintiffs, when asserting that the DACA program is unconstitutional. The first argument is that by not enforcing removal against removable persons, the President is violating his Article II, section three obligation to enforce the law.¹⁴⁸ The second argument is that the Executive Branch has intruded upon Congress’s Article I, section one legislative powers.¹⁴⁹

Regarding the first argument, acts are properly within the Executive authority when “an official interprets an enacted law and exercises judg-

143. Martin, *supra* note 21, at 182 (citing *E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522 (BIA 2011), where the provision at issue was INA § 235(b)(1)(A)(i)).

144. *Id.*

145. Martin, *supra* note 21, at 182 (“A typical petty larceny statute reads: ‘Whoever steals . . . the property of another [worth less than \$250] . . . shall be guilty of larceny, and . . . shall be punished by imprisonment’ for not more than a year or a \$300 fine.”).

146. *Id.* The financial impossibility of enforcing every possible removal is discussed in Part III.C.2, *infra*.

147. Martin, *supra* note 21, at 183.

148. Article II, Section 3 of the United States Constitution requires that the President, by and through his Executive Branch officials, “shall take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3; De Vogue, *supra* note 129.

149. Article I, Section 1 of the United States Constitution provides that “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1; De Vogue, *supra* note 129.

ment ‘concerning facts that affect the application of [that law].’¹⁵⁰ The President has done just that through DACA. As previously discussed, the President simply cannot enforce the removal of eleven million people, even if he wanted to. Apprehending, detaining, and removing the entire undocumented population residing in our nation today would require an ICE budget of \$135 billion; an impossible feat when “[c]urrently and for the next fiscal year, ICE’s appropriation will run under \$6 billion.”¹⁵¹ Moreover, with ICE’s annual removal quota of 400,000 persons a year,¹⁵² it would take nearly thirty years to affect such a plan, assuming the undocumented population remains unchanged. By implementing DACA, the President is exercising his judgment concerning the facts that affect the application of the immigration laws Congress has enacted, enforcing those laws by efficiently focusing our limited removal resources on those who truly pose a threat:

In the absence of any immigration action from Congress to fix our broken immigration system, what we’ve tried to do is *focus our immigration enforcement resources* in the right places . . . We *focused and used discretion* about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education . . . We’ve *improved on that discretion* carefully and thoughtfully. Well, today, we’re improving it again . . . Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization.¹⁵³

A response to the second argument is simple and obvious—DACA is not a legislative act. Legislative acts “[have] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the

150. Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 865 & n.192 (2009) (citing *Bowsher v. Synar*, 478 U.S. 714, 733 (1986)) (“[T]he executive branch must be exercising . . . creativity, judgment, or discretion in an ‘implementational’ context. In other words, the executive branch must be interpreting or enforcing a legislative choice or judgment; its actions cannot amount to the exercise of free-standing legislative power.” (quoting Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L. REV. 449, 480 (1991))).

151. Delahunty & Yoo, *supra* note 136, at 788 (citing WILLIAM L. PAINTER, CONG. RESEARCH SERV., R42557, DEP’T OF HOMELAND SECURITY APPROPRIATIONS: A SUMMARY OF THE HOUSE-PASSED AND SENATE-REPORTED BILLS FOR FY 2013 at 6 (2012)).

152. See generally Delahunty & Yoo, *supra* note 136, at 788.

153. President Barack Obama, Remarks by the President on Immigration, *supra* note 16 (emphasis added).

Legislative Branch.”¹⁵⁴ DACA does not alter the legal rights, duties, or relations of those eligible under the program; it does not confer legal status on any person that he or she did not have before.¹⁵⁵ It simply declines to enforce removal against those individuals for a period of two years.¹⁵⁶ It is an agency’s exercise of prosecutorial discretion with respect to how to spend its resources, as has been done many times before.¹⁵⁷ It is, “to a great extent, old wine in a new wineskin.”¹⁵⁸

“Though no statutes or regulations delineate deferred action in specific terms, the U.S. Supreme Court has made clear that decision to initiate or terminate enforcement proceedings fall squarely with the authority of the Executive.”¹⁵⁹ Congress has similarly recognized this authority. In November 1999, twenty-eight members of Congress signed a bipartisan letter requesting that the Attorney General and Commissioner of the INS exercise discretion in immigration cases.¹⁶⁰ The letter stated “there has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardships . . . we must ask why the INS has pursued removal in such cases when so many other more serious cases existed . . . The principle of prosecutorial discretion is well established.”¹⁶¹ The formalized nature of the DACA program ensures greater consistency and compliance agency-wide in its dealings with DREAMers, an element lacking in earlier prosecutorial discretion efforts.¹⁶²

On June 25, 2012, the Court in *Arizona v. United States* embraced and re-affirmed the Executive Branch’s authority to exercise prosecutorial discretion at all stages of removal, including the initial decision of whether to even pursue removal.¹⁶³ Writing for the majority, Justice

154. Jellum, *supra* note 150, at 862 (citing *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983) (holding that the legislative veto was “essentially legislative” in nature)).

155. See *Deferred Action for Childhood Arrivals*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Aug. 29, 2013). Employment authorization will be discussed in Part III.C.3, *infra*.

156. This period is potentially renewable. Martin, *supra* note 21.

157. See generally IMMIGRATION POL’Y CENTER, UNDERSTANDING PROSECUTORIAL DISCRETION, *supra* note 77.

158. Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RTS. J. 463, 542 (2012).

159. Letter from Hiroshi Motomura, et al., to President Barack Obama (May 28, 2012), available at www.nilc.org/document.html?id=754.

160. Letter from 28 Members of Cong. to Attorney Gen. Janet Reno & Doris Meissner, Comm’r, Immigration & Naturalization Serv. (Nov. 4, 1999), reprinted in 76 INTERPRETER RELEASES 1720 app. 1 (1999).

161. IMMIGRATION POL’Y CENTER, UNDERSTANDING PROSECUTORIAL DISCRETION, *supra* note 77, at 5.

162. See *supra* text accompanying note 99.

163. *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012).

Kennedy declared that “removal is a civil matter, and one of its principal features is the broad discretion exercised by immigration officials, who must decide *whether to pursue removal at all*.”¹⁶⁴ The Court recognized the practical need for prosecutorial discretion in a world of limited resources where it is simply impossible to remove every removable person: “The Executive Branch’s ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely.”¹⁶⁵ In remarking on the Court’s decision, President Obama reiterated that DACA is not new law but rather, an agency enforcement of current law in line with current priorities: “*We will continue to enforce our immigration laws by focusing on our most important priorities*.”¹⁶⁶

Some argue that granting eligibility for employment authorization to DACA recipients is a benefit that crosses the line into legislation and is outside the scope of prosecutorial discretion. This important argument is addressed below.

3. Employment Authorization Is Within the Scope of Prosecutorial Discretion

a. A Natural Consequence

If it is within the authority of the Executive Branch to grant deferred action as an exercise of prosecutorial discretion, it must also be within its authority to affirmatively grant eligibility for employment authorization. The Crane plaintiffs and other DACA critics argue that employment authorization is an immigration benefit for which eligibility cannot be conferred as a matter of prosecutorial discretion.¹⁶⁷ But without the authority to work legally, how are those who have been granted relief from deportation expected to support themselves and contribute to their communities in any meaningful way? This is an important question because it addresses not only the DACA population, but all persons relieved from deportation as a form of prosecutorial discretion both today and in the future. Long after the day when comprehensive immigration reform is finally passed, removals will continue and prosecutorial discre-

164. *Id.* (emphasis added).

165. *Id.* at 2520.

166. Statement by the President on the Supreme Court’s Ruling on *Arizona v. the United States* (June 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/25/statement-president-supreme-court-s-ruling-arizona-v-united-states> (emphasis added).

167. *Crane v. Napolitano*, No. 3:12-cv-03247-0, 2012 WL 5199509, at *10, *17 (N.D. Tex. Oct. 10, 2012); 8 § C.F.R. 274a.12(c)(14) (2011).

tion will remain—and with it will remain the question of employment authorization.

While technically it is not a crime to work without employment authorization, under the Immigration Reform and Control Act of 1986 (IRCA), harsh and lasting civil sanctions are imposed on those who do.¹⁶⁸ “Aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident,”¹⁶⁹ and “may be removed from the country for having engaged in unauthorized work.”¹⁷⁰ Additionally, “federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means,”¹⁷¹ such as using a false social security number. Thus, undocumented persons face frightening choices: (1) do not work at all and try to survive—not to mention support a family—without a source of income; (2) work without documentation, creating further immigration difficulties down the road and potentially exposing yourself to unscrupulous employers who may take advantage of your undocumented status;¹⁷² or (3) work with false documentation and break federal law. An undocumented person who is ineligible for relief of any kind may still decide that any one of these options is preferable to a life in their home country—assuming they even have a home country. It is difficult to fault them for this decision when “economic realities and government policies shape the apparently free choices of individuals much more profoundly than the superficial contours of the law as written.”¹⁷³ However, if the government in its discretion has affirmatively chosen not to enforce removal against an individual, it is against public policy—not to mention human decency—to bid that individual good luck and leave her without a legal means to support herself, still facing the same impossible dilemma.

In *Zadvydas v. Davis*,¹⁷⁴ the Court considered this dilemma in the context of slightly different circumstances, determining how to proceed

168. Congress enacted IRCA as a comprehensive framework for “combating the employment of illegal aliens.” *Arizona*, 132 S. Ct. at 2504 (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

169. See Immigration and Naturalization Act, § 245(c)(2) (2008); *Arizona*, 132 S. Ct. at 2504.

170. See INA § 237(a)(1)(C)(i); 8 C.F.R. § 214.1(e); *Arizona*, 132 S. Ct. at 2504.

171. See 18 U.S.C. § 1546(b) (2002); *Arizona*, 132 S. Ct. at 2504.

172. There are countless stories of employers who hire undocumented workers only to call ICE and have them detained on payday. *E.g.*, Maurice Belanger, *Workplace Enforcement: A Welcome Shift in Focus*, NAT’L IMMIGR. FORUM (May 6, 2011), <http://immigrationforum.org/blog/display/workplace-enforcement-a-welcome-shift-in-focus>.

173. See generally, Hiroshi Motomura, *Making Legal: The Dream Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1140 (2012) (noting that even the Supreme Court has recognized this point).

174. 533 U.S. 678 (2001).

when a person has been detained and ordered removed but circumstances make it essentially impossible to remove the person due to circumstances with his home country.¹⁷⁵ Writing for the majority, Justice Breyer declared it unconstitutional to detain a person indefinitely when there is no significant likelihood of removal in the reasonably near future and that such persons must therefore be released, albeit without legal status.¹⁷⁶ Justice Kennedy noted that “Congress . . . was well aware of the difficulties confronting aliens who are removable but who cannot be repatriated. It made special provisions allowing them to be employed, a privilege denied to other deportable aliens.”¹⁷⁷ These provisions provide that “no alien ordered removed shall be eligible to receive authorization to be employed in the United States *unless* the Attorney General makes a specific finding that . . . the removal of the alien is otherwise impracticable or *contrary to the public interest*.”¹⁷⁸ Indeed, in the context of DACA, a favorable exercise of prosecutorial discretion is simply a finding that removal of the noncitizen is contrary to the public interest (based on the priorities that were clearly set forth in the ICE memorandum). It is important to note that while the provisions applied in *Zadvydas* relate specifically to noncitizens that have already been ordered removed and are in detention—which may include some DACA recipients—there are many DACA recipients who affirmatively apply for the program without ever undergoing removal proceedings. It would be inconsistent and arbitrary to deny those without a final order of removal the eligibility to work; this is especially true with DACA recipients who are great candidates for employment with a U.S. education and a clean criminal history.

In fact, Congress has provided eligibility for employment authorization for many different classes of noncitizens who are granted relief from deportation. Persons granted relief under Cancellation of Removal,¹⁷⁹ Withholding of Removal,¹⁸⁰ Deferred Enforced Depar-

175. *Zadvydas* dealt with the cases of two detained individuals, Kestutis Zadvydas and Kim Ho Ma. *Id.* at 684. In the case of *Zadvydas*, removal was impossible because he was born in a displaced persons camp, and there was no home country to remove him to. *Id.* at 684–85. In the case of *Ma*, removal was impossible due to the lack of a repatriation agreement with his home country. *Id.* at 686.

176. *Id.* at 701 (establishing that after a six-month period, “once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing”; otherwise, they must release the individual.).

177. *Id.* at 709 (Kennedy, J., dissenting); see also INA § 241(a)(7)(A) (2006) (providing that an “alien [who] cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien” still remains eligible for employment in the United States).

178. INA § 241(a)(7)(B) (2006) (emphasis added).

179. INA § 240A (2006).

ture/Temporary Protected Status,¹⁸¹ Parole-in-Place,¹⁸² and Violence Against Women Act self-petitioners¹⁸³ placed in deferred action are all eligible to apply for employment authorization.¹⁸⁴ Employment authorization is, quite simply, a very practical consequence of the government's decision to relieve a person from deportation but not to confer a legalized status. To construe otherwise would be inconsistent with Congress's clear intent that these populations be extended the necessary authorization to support themselves¹⁸⁵—evidenced through the grant of employment authorization in INA's numerous relief provisions described above. Additionally, there are other provisions of the INA that expressly seek to avoid government financial support of noncitizens, such as the public charge inadmissibility and removal grounds¹⁸⁶ and affidavit of support requirements for intending immigrants.¹⁸⁷ Finally, the federal regulations very clearly state that "classes of aliens authorized to accept employment include aliens who have been granted deferred action."¹⁸⁸ There is no question that DACA recipients have been granted deferred action as a form of relief from deportation, and so they are therefore appropriately among those classes authorized to accept employment.

b. Employment Authorization and Equal Protection

DACA's June 15, 2011 birthdate fortuitously occurred on the thirtieth anniversary of the pivotal Supreme Court case *Plyler v. Doe*,¹⁸⁹ which declared that in addition to due process, undocumented persons are also entitled to equal protection under the Constitution.¹⁹⁰

Given the many instances where Congress extends eligibility for employment authorization to those populations who are granted relief from deportation but not lawful status,¹⁹¹ it is only natural that when the

180. INA § 241(b)(3) (2006).

181. INA § 244 (repealed 2004).

182. INA § 212(d)(5) (2013).

183. INA § 240(a)(2) (2006); *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERV., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b85c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=b85c3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited Aug. 20, 2013).

184. 8 C.F.R. § 274a.12(c)(14) (2011).

185. See sources cited *supra* at notes 179–84.

186. INA §§ 212(a)(4) (2013), 237 (2008).

187. INA § 213A (1996).

188. 8 C.F.R. § 274a.12(c)(14) (2011).

189. 457 U.S. 202 (1982); see also Olivas, *supra* note 158, at 542.

190. *Plyler*, 457 U.S. at 215 (holding "[t]hat a person's initial entry into . . . the United States, was unlawful . . . cannot negate the simple fact of his presence Given such presence . . . he is entitled to the equal protection of the laws").

191. See sources cited *supra* notes 179–84.

Executive Branch creates a similar population through a lawful exercise of prosecutorial discretion, it too should be free to grant employment authorization to that population as a natural extension of its authority. To deny a population that opportunity simply because their relief was provided by the Executive Branch rather than the Legislative Branch is arguably inconsistent with the Equal Protection Clause, which directs that all persons similarly circumstanced shall be treated alike.¹⁹²

While *Plyler* specifically dealt with the public education of undocumented children—the Court held that a state may not deny a discrete group of (undocumented) children the free public education it offers to others in the state¹⁹³—the case is rich with public policy rationale that closely parallels that at play behind DACA and the DREAM Act.¹⁹⁴ It also supports the idea that employment authorization is a natural and necessary extension to prosecutorial discretion.

Plyler recognized that “by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, ‘education prepares individuals to be self-reliant and self-sufficient participants in society.’”¹⁹⁵ Similarly, to offer a person relief from deportation while at the same time deny her employment authorization would also foreclose her ability to “rise to the level of esteem which is held by the majority,” as well as her ability to become “self-reliant and self-sufficient participants in society”—that is, to support herself and her family, and be a productive and active member of the economy. To make such a denial to DACA recipients (or other similar populations) while Congress has granted the opportunity to similarly situated classes of individuals offered relief from deportation¹⁹⁶ would not comport with equal protection.

In his majority opinion, Justice Brennan urged that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”¹⁹⁷ It could similarly be said that legal employment is also a basic tool “by which individuals might lead

192. See U.S. CONST. amend. XIV § 1 (“Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *Plyler*, 457 U.S. at 216.

193. *Plyler*, 457 U.S. at 230 (requiring such a denial to be justified by a substantial state interest).

194. See generally Motomura, *supra* note 173, at 1129 (“[T]he *Plyler* themes are pivotal in thinking about vehicles for conferring lawful status, including the DREAM Act, birthright citizenship, and broad-scale legalization.”).

195. *Plyler*, 457 U.S. at 221–22 (citation omitted).

196. See sources cited *supra* at notes 179–184.

197. *Plyler*, 457 U.S. at 221.

economically productive lives to the benefit of us all.” Justice Brennan went on to advise that “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”¹⁹⁸ In very much the same way that education holds such “a fundamental role in maintaining the fabric of our society,” so too does employment. Indeed, one of the major reasons behind education at any level is to prepare a person for employment. If it is within the authority of the Executive Branch to exercise prosecutorial discretion in order to provide relief from deportation, then as a matter of public policy and equal protection it must also be within that same authority to extend eligibility for employment authorization.

IV. DACA AND COMPREHENSIVE IMMIGRATION REFORM

This section primarily addresses comprehensive immigration reform; it explores the need for system-wide reform, what that reform might look like, and where DACA fits into it all.

As the numbers plainly indicate,¹⁹⁹ our immigration system has produced a nightmare that only drastic reform consistent with today’s social, economic, and enforcement priorities can hope to remedy. DACA is a great start, but it is a temporary measure and by no means a replacement for comprehensive immigration reform. In a sense, DACA is acting as a stand-in for eligible DREAMers until comprehensive immigration reform is finally passed.²⁰⁰ While DACA’s immense value to DREAMers cannot be understated, it is not a permanent solution. Rather, the program can be likened to a life-preserver, helping DREAMers tread water until the Legislature finally decides to change the law in a way that will secure them something better—a lifeboat, or even land (legalization or citizenship). Furthermore, DACA only reaches a fraction of the undocumented population²⁰¹ and it does not confer legal status—not to mention provide a path to citizenship.²⁰² And because it is not law, the program can disappear at any time.²⁰³

198. *Id.*

199. See *supra* text accompanying notes 151–152.

200. Many thanks to Professor Won Kidane for suggesting a discussion on this point.

201. See Passel & Lopez, *supra* note 15 (estimating 1.7 million individuals could be eligible for DACA).

202. President Barack Obama, Remarks by the President on Immigration, *supra* note 16.

203. Jon Leckie, *Oakland’s Undocumented Students Find Temporary Hope in DACA, California Dream Act*, OAKLAND LOCAL (Jan. 31, 2013), <http://oaklandlocal.com/article/oakland%E2%80%99s-undocumented-students-find-temporary-hope-daca-california-dream-act>.

In order to be effective, reform must address not only DACA students and DREAMers, but all of the eleven million-plus undocumented persons present in the United States.²⁰⁴ And it can't stop there—to make a real impact, reform will also need to address the more than 4.5 million individuals living abroad who have been sponsored by a family member in the United States and whose visas have been approved but are not yet available due to numerical caps.²⁰⁵ The backlog of these individuals is staggering: As of September 2013, a Filipino whose visa was sponsored by a United States citizen sibling and was approved in 1990 will just now receive that visa; a United States citizen who in 1993 sponsored their Mexican adult son or daughter will only now be able to celebrate a family reunion.²⁰⁶

With these figures in mind, some argue that DREAMers are being given preferential treatment, moving ahead of their hardworking parents who risked everything to bring them here²⁰⁷ as well as the backlog of individuals waiting “in line” for their visas to become available.²⁰⁸ Indeed, when advocating for reform, “[t]he temptation is strong—perhaps irresistible—to emphasize the innocence of children brought to the United States at a young age. And the temptation is equally strong to cite the many examples of young people who have excelled academically.”²⁰⁹ I myself succumbed to this temptation when introducing this Comment. “Viewed more fundamentally, however, the fairness and pragmatic arguments apply to all children, not just the honor students, and they apply

204. See MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRATION POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf

205. U.S. DEP'T OF STATE, ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER 2 (2012), available at <http://www.travel.state.gov/pdf/WaitingListItem.pdf> (report based on numbers as of Nov. 1, 2012); see also Julia Preston, *Path to Citizenship Divides Congress and, Polls Show, Confuses Country*, N.Y. TIMES (Apr. 4, 2013), http://www.nytimes.com/2013/04/05/us/politics/in-immigration-reform-path-to-citizenship-divides-and-confuses.html?ref=politics&_r=2&.

206. U.S. Dep't of State, Bureau of Consular Affairs, *Immigrant Numbers for September 2013*, VISA BULL., Sept. 2013, at 2, available at http://travel.state.gov/pdf/visabulletin/visabulletin_september2013.pdf.

207. Ruben Navarette, *DREAMers Are Pushing Their Luck*, CNN OPINION (Dec. 19, 2012), <http://www.cnn.com/2012/12/19/opinion/navarette-dreamers> (“While they probably don't realize it, their public tantrums are turning people against them and hurting the chances for a broader immigration reform package. And if they set back that cause, heaven help them. They'll sink the progress for a group of people who have given more, worked harder and made greater sacrifices—people like their undocumented parents. You know, the people who brought them to this country in the first place for a better life, and then fed them, clothed them and sheltered them.”).

208. See *supra* text accompanying notes 206–207.

209. Motomura, *supra* note 173, at 1141.

to adults as well.”²¹⁰ To really make a lasting change, reform will need to address everyone—all undocumented persons living in the United States in addition to the backlog of millions waiting abroad for their visas.

In his 2013 State of the Union Address, President Obama recognized that comprehensive immigration reform does not end with the undocumented population, insisting that “real reform means fixing the *legal* immigration system to cut waiting periods.”²¹¹ He also outlined his vision for comprehensive immigration reform: “Real reform means strong border security Real reform means establishing a responsible pathway to earned citizenship—a path that includes passing a background check, paying taxes and a meaningful penalty, learning English, and going to the back of the line behind the folks trying to come here legally.”²¹² Recent legislative proposals have shared similar elements.²¹³

Since the 2012 Presidential election and Mitt Romney’s failure at the polls with Latino voters—who make up ten percent of the electorate²¹⁴—it appears that the atmosphere amongst Republicans regarding immigration reform has shifted from the days of DREAM Act filibusters.²¹⁵ Senator Lindsay Graham (R-SC) expressed the party’s very practical rationale: “[Latino voters are] the fastest-growing demographic in the country and we’re losing votes every election cycle, it has to stop It’s one thing to shoot yourself in the foot—just don’t reload the gun.”²¹⁶ Furthermore, Senator Chuck Schumer (R-NY) recognized that “[t]he Republican Party has learned that being . . . anti-immigrant doesn’t work for them politically. And they know it.”²¹⁷

210. *Id.*

211. President Barack Obama, Remarks by the President in the State of the Union Address, (Feb. 12, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> (emphasis added) (adding that we also need to attract “the highly-skilled entrepreneurs and engineers that will help create jobs and grow our economy”).

212. *Id.*

213. *Menendez, Colleagues Re-introduce Comprehensive Immigration Reform*, ROBERT MENENDEZ (June 22, 2011), <http://www.menendez.senate.gov/newsroom/press/release/?id=0c6c73f2-5366-4fde-bd9d-4e5d85c1b8f3>. The bill was re-introduced by U.S. Senators Robert Menendez (D-NJ), Harry Reid (D-NV), Patrick Leahy (D-VT), Dick Durbin (D-IL), Chuck Schumer (D-NY), John Kerry (D-MA), and Kirsten Gillibrand (D-NY). *Id.*

214. Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW HISP. CENTER (Nov. 7, 2012), <http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election/> (noting that “Latinos voted for President Barack Obama over Republican Mitt Romney by 71% to 27%”).

215. *See supra* Part III.A.

216. Elise Foley, *Senate Immigration Talks: Lindsay Graham, Chuck Schumer Restart Discussions*, HUFFPOST POLITICS (Nov. 11, 2012, 4:56 PM), http://www.huffingtonpost.com/2012/11/11/senate-immigration_n_2113658.html.

217. *Id.*

Now that both parties seem to finally agree that reform is a must, the disagreement lies in the details. Many advocate for legalization and a pathway to citizenship for the entire undocumented population; others want to reserve citizenship for DREAMers and limit all others to simple legalization.²¹⁸ However, the fact that we are disagreeing over *how* rather than *whether* to implement reform confirms that the underlying effort has truly gained full bipartisan support.

V. CONCLUSION

Prosecutorial discretion has long been recognized as a legitimate and necessary authority exercised by law enforcement and government agencies when deciding whether to bring charges against a person; it is a decision generally not reviewable by the judiciary. Within the immigration context, “deferred action is a long standing form of administrative relief used by presidents of both parties over many years.”²¹⁹ It is used when deciding whether to pursue removal against a person, based in large part on the government’s enforcement priorities.

DACA was established by the President as a method of formally and consistently enforcing our nation’s immigration laws in a way that focuses ICE’s limited removal resources on criminals instead of hard-working students, reflecting the agency’s long-held priorities. Both Congress and the U.S. Supreme Court have recognized prosecutorial discretion as an Executive Branch authority, valid both statutorily and under the Constitution. DACA, including the attendant grant of employment authorization, is well within that authority.

While “[i]t remains to be seen whether the rules for [DACA] will carry over into legislative proposals,”²²⁰ the program will surely have lasting influence as a defining and important step along the way to comprehensive immigration reform. It has changed many lives, revived the immigration debate, and paved the way for future reform.

We didn’t raise the Statue of Liberty with its back to the world. We raised it with its light to the world. What makes us American is not a question of what we look like or what our names are. What makes us American is our shared belief in the enduring promise of this country—and our shared responsibility to leave it more generous and more hopeful than we found it.

218. *Id.* (Senators Graham and Schumer both indicated they would support a plan would include a pathway to citizenship for the broader undocumented population.); *see also* Preston, *supra* note 205.

219. De Vogue, *supra* note 129.

220. Motomura, *supra* note 173, at 1130.

—President Barack Obama ²²¹

221. Barack Obama, A Nation of Laws and a Nation of Immigrants, Time Ideas, June 17, 2012, <http://ideas.time.com/2012/06/17/A-NATION-OF-LAWS-AND-A-NATION-OF-IMMIGRANTS/>.