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# BEYOND LEGALITY: THE LEGITIMACY OF EXECUTIVE ACTION IN IMMIGRATION LAW

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“A legitimate social order is one where everyday citizens perceive an obligation to obey legal authorities.” – Max Weber, *Economy and Society* (1968)<sup>1</sup>

“The issues before the [District] Court do not require the Court to consider the public popularity, public acceptance, public acquiescence, or public disdain for the DAPA program.” – Judge Hanen in *Texas v. United States* preliminary injunction order (2015)<sup>2</sup>

#### INTRODUCTION

President Obama may be best remembered for his executive policies in health care, immigration, consumer protection, and the environment. Yet many of these policy legacies are tied up in litigation. Most significantly, recent uses of executive action in immigration law have triggered accusations that the President is acting imperially, like a king, or as a lawbreaker; they have also prompted Supreme Court review.<sup>3</sup> The legal issues raise important issues of executive power and agency authority. Yet framing the disputes in terms of the lawsuits challenging them overlooks a critical aspect of executive policymaking that is more far-reaching and enduring: the legitimacy of the sources and authorities behind the executive actions.<sup>4</sup> This Article reframes the executive action debates around the concept of legitimacy, using as a primary example President Obama’s executive actions in immigration law. The delineation of legitimacy and legality as analytically distinct concepts, even if related ones, provides a new way of thinking about executive policymaking.

The legitimacy of laws has particular significance for the executive actions in immigration law. Having failed to achieve legislative changes in immigration law, the most noteworthy changes in immigration policy during this administration have been the Deferred Action for Childhood Arrivals (DACA) program and Deferred Action for Parental

1. MAX WEBER, *ECONOMY AND SOCIETY* 215 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al., trans., Univ. of Cal. Press 1978) (1922).

2. *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015), *aff’d*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

3. *See id.*; *see, e.g.*, Athena Jones, *Immigration Question: How Far Can the President Go on Executive Actions?*, CNN (Aug. 7, 2014), <http://www.cnn.com/2014/08/07/politics/obama-executive-actions/>.

4. *See infra* Part II.A (defining legitimacy).

Accountability (DAPA). The programs provide temporary protection from deportation for undocumented immigrants who meet qualifying criteria.<sup>5</sup> Both policies are the product of executive action and, as nonbinding federal policies, both programs depend on voluntary cooperation for their successful implementation.<sup>6</sup> DACA and DAPA are similar in their purpose of providing lawful presence to qualifying individuals, though they differ in their eligibility criteria. States are nearly unanimous in their willingness to enact state laws and policies that permit undocumented immigrants with the DACA lawful presence designation to obtain driver's licenses. At the same time, twenty-six states are challenging the President's authority to issue DAPA in *Texas v. United States*, impeding the many benefits that would flow from it. How can we understand the seeming disconnect between on-the-ground support for DACA and high-level opposition to DAPA?

This Article claims that lurking behind the impassioned political rhetoric is a profoundly important concern about whether the legal institutions that fostered DACA are worthy of trust and can inspire cooperation in the public officials who will implement it. While there is important literature focusing on the legality and politics of executive action, this is the first law review article to theorize the significance of legitimacy for executive action and to study it empirically.<sup>7</sup> This

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5. See discussion *infra* Part I.A, Part IV. While "unauthorized" is sometimes preferred and indeed more accurate for describing the undocumented immigrant population, the Article interchanges "undocumented" due to the prevalence of that term in the scholarship describing and studying this population. Similarly, deportation and removal interchange even though changes in immigration law make "removal" the more accurate term.

6. There are many forms of executive action, which bear similarities and also important differences such as whether the executive action is legally binding. President Obama's immigration actions are not legally binding in this sense, unlike an executive order. See Naomi Cobb, Comment, *Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means to an End That Misses the Bull's-Eye*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 651, 655 (2013); Phillip Bump, *Why John Boehner Is Really Suing Barack Obama*, WASH. POST: FIX (June 25, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/25/why-john-boehner-is-really-suing-barack-obama/?hpid=z5>.

7. The closest examples are the sociological studies of Emily Ryo, although her studies focus on individual rather than institutional attitudes toward immigration law. See, e.g., Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 627 (2015) [hereinafter Ryo, *Less Enforcement*]; Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574, 582 (2013) [hereinafter Ryo, *Deciding to Cross*]. Both skeptics and supporters of studying legitimacy empirically note the rarity of the effort. See, e.g., Richard L. Abel, *Redirecting Social Studies of Law*, 14 L. & SOC'Y REV. 805, 822 (1980); Kenneth E. Boulding, *The Impact of the Draft on the Legitimacy of the National State*, in WHERE IT'S AT: RADICAL PERSPECTIVES IN SOCIOLOGY 509, 509 (S.E. Deutch & J. Howard eds., 1970) ("One of the most neglected aspects of the dynamics of society is the study of dynamic processes which underlie the rise and fall of legitimacy."); Craig A. McEwen & Richard J. Maiman, *In Search of Legitimacy*:

approach presents a way of understanding executive action in immigration law that will endure beyond the current litigation and legislative attacks. Executive action is not noteworthy because it is a new phenomenon, but the legal challenges to it illuminate a form of lawmaking that is often misunderstood. Contestation reveals persistent, if perplexing, features of law and policymaking that become clearer when studied as they operate on the ground, rather than in courts alone.

This Article also fills a gap in legal scholarship on executive action by considering the far reach of federal policy. Whereas most of the legal discussion around DACA and DAPA focuses on federal law, this Article highlights state policies that incorporate federal policy elements from DACA. Some studies of immigration federalism and DACA implementation are emerging that reveal the multiple sites of immigration policymaking.<sup>8</sup> This Article is unusual among them because it highlights the institutional dynamics of policymaking that emerge from interactions between state and federal law, rather than the substantive choice of state or federal law. The state policies that incorporate the DACA lawful presence designation represent sites for studying the process of cooperation. The qualitative study design focuses on the inputs into policymaking (attitudes of legitimacy, legality, and policy preferences that influence voluntary cooperation) and also the outputs of the decision-making process (a spectrum of cooperative behavior).

Bringing legitimacy and cooperative policymaking together, legitimacy becomes an important ingredient in eliciting a state's voluntary cooperation when federal policy cannot legally compel it. This insight has practical implications for cooperation between state and federal government in immigration policymaking. Thus, this Article is an example of scholarship that leads directly to a policy recommendation: presidential administrations should consider the fairness of the procedures they use to design and implement federal programs, and they should take steps to encourage voluntary cooperation from states and ordinary citizens rather than relying on legal mandates, even if they are

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*Toward an Empirical Analysis*, 8 L. & POL'Y 257, 258 (1986) (noting the virtual absence of empirical examination of legitimacy); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 776 (2001) ("Legitimacy is a word often used in our political debate, but seldom defined precisely.").

8. Immigration federalism studies state laws in relationship to federal law, but it often presumes conflict rather than cooperation. Implementation studies look at changes in a uniform federal law when implemented in multiple states, rather than the states' laws. See, e.g., Shannon Gleeson & Els de Graauw, *An Institutional Examination of Varying Local Approaches to Implementing DACA* (2015) (unpublished paper presented at Law & Society Association Annual Meeting) (on file with author); Joseph Benjamin Landau, *Bureaucratic Experimentation and Immigration Law*, 65 DUKE L.J. (forthcoming 2016).

not legally required to do so. Crafting legitimate executive policies enhances credibility and authority, smooths the way for more successful policymaking, and ultimately burnishes the Obama Administration's policy legacy—especially where the President's substantive goals may be contested in a legally or politically charged environment.

Part I of this Article explains executive action in immigration law. It begins with a sketch of the undocumented immigrant population and describes immigration law's primary response: an assemblage of executive actions granting deferred action to postpone deportation and permit work during a period of lawful presence. It then describes two frameworks for assessing executive action. The legal framework analyzes DACA's legality as a constitutional and statutory matter. The legitimacy framework analyzes DACA in a manner consistent with socio-legal research on cooperation. Part II defines legitimacy and explains its relationship to state cooperation. Part III presents case studies of state decisions to incorporate the DACA lawful presence designation into their state policies. It examines state policies that provide DACA recipients with driver's licenses, higher education, and health care. The comparisons highlight the varying justifications for state cooperation, despite disparate viewpoints of the underlying policies and of immigration enforcement. Part IV compares the broad acceptance of DACA in the states with the pointed legal challenge to the DAPA program in *Texas v. United States*. The comparison of DACA and DAPA teases out the limits of legitimacy as a motivation for voluntary cooperation. This Article concludes with reflections on how presidential administrations can build support for, or undermine, their executive actions.

#### I. UNDERSTANDING EXECUTIVE ACTION IN IMMIGRATION LAW

Uses of executive action in immigration policymaking are “ascendant.”<sup>9</sup> Because the immigration policy landscape has been marked by a stalemate in Congress for more than a decade, the Obama Administration's immigration policy has largely emerged in the executive branch.<sup>10</sup> The U.S. Department of Homeland Security (DHS) is the federal agency responsible for enforcing federal immigration laws. Through DHS, President Obama in 2012 announced the DACA program

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9. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 223 (2015) [hereinafter Cox & Rodríguez, *Redux*].

10. See MARC R. ROSENBLUM, MIGRATION POLICY INST., U.S. IMMIGRATION POLICY SINCE 9/11, at 14 (2011), <http://www.migrationpolicy.org/sites/default/files/publications/RMSG-post-9-11policy.pdf>.

that provides qualifying, undocumented, immigrant youth temporary protection from deportation and furnishes them with lawful presence—as distinguished from lawful immigration *status*—for two years.<sup>11</sup> President Obama’s 2014 executive action, DAPA, expanded the criteria for deferred action to cover the undocumented parents of U.S. citizens and legal permanent residents (LPRs).<sup>12</sup> The 2014 package of reforms used similar measures to benefit military families and high-skilled workers and their spouses; it also revamped immigration enforcement practices used to transfer immigrants with criminal convictions from jails into civil removal proceedings.

While there is a well-pedigreed scholarship on the presidency and the executive branch, most of it does not adequately theorize executive action in immigration law.<sup>13</sup> Scholarship on executive action often analyzes isolated judicial doctrines concerning discrete legal questions rather than viewing executive action as part of a broader phenomenon of lawmaking. For example, inquiry into whether President Obama was acting within his powers when he announced DACA is marked by close analysis of the Take Care Clause and a few landmark cases on enforcement discretion.<sup>14</sup> Another strand of inquiry homes in on the legal

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11. The Deferred Action for Childhood Arrivals program was announced by President Obama and subsequently issued as a directive by DHS Secretary Janet Napolitano on June 15, 2012. See Memorandum from Janet Napolitano, Sec’y, Dep’t Homeland Sec., to David V. Aguilar, Comm’r, U.S. Customs & Border Prot., et al. 1–3 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter Napolitano Memo June 2012].

12. DACA was expanded to create the DAPA program by DHS Secretary Jeh Johnson on November 20, 2014. See Memorandum from Jeh Charles Johnson, Sec’y, Dep’t Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. 1–5 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [hereinafter Johnson Memo Nov. 2014]. DAPA is currently enjoined as a result of the *Texas v. United States* litigation. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff’d*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

13. Notable exceptions that examine executive authority and immigration law in their broader context occur in the scholarship of HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) [hereinafter Cox & Rodríguez, *The President and Immigration Law*]; Cox & Rodríguez, *Redux*, *supra* note 9; Pratheepan Gulasekaram & Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. (forthcoming 2016).

14. See, e.g., Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1117–19 (2013). But see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–61 (2014); Robert Delahunty & John Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 71 TEX. L. REV. 781, 784 (2013); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 234–37 (2015) [hereinafter Blackman Part II].

effect of the U.S. Department of Homeland Security's DACA memos as an exercise of congressionally-delegated authority<sup>15</sup> and its compliance with the Administrative Procedure Act (APA) rulemaking procedures.<sup>16</sup> While these legal questions are important and will be consequential for law and policy, this style of scholarship resembles a legal brief for or against DACA. It offers a valuable guide for the resolution of current lawsuits, but it does not recognize that legal analysis will not by itself resolve debates over the legitimacy of executive lawmaking in the regulatory state.

My contribution to the conversation around executive action is to situate challenges to DACA in a more enduring theoretical frame. This theoretical framework centers on legitimacy and relates it to state policies that voluntarily cooperate with federal law. Part I.A describes the background for understanding the use of deferred action in immigration law. Part I.B synthesizes the two legal arguments that dominate public discussion of DACA and identifies their inadequacies as a framework for understanding immigration debates. Part I.C reorients the DACA analysis around legitimacy, providing tools to conceptualize and measure voluntary cooperation with DACA in state policymaking.

#### *A. Executive Action as a Response to Undocumented Immigration*

Immigration law generally requires that immigrants seeking entry to the United States demonstrate and maintain their eligibility for admission.<sup>17</sup> Those who enter without inspection lack authorization from the U.S. government; so do those who properly acquire a visa document that later lapses, e.g. if they overstay or violate the terms of their visa. The breadth of these statutory violations relative to the immigration

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15. A U.S. Department of Justice Office of Legal Counsel memo focuses on congressionally-delegated power in its positive evaluation of DACA and DAPA. The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C., Nov. 19, 2014, <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter OLC Memo]; cf. Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015).

16. See Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. (forthcoming 2015); cf. Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L. J. ONLINE 96 (2015) [hereinafter Blackman Part I]; Michael W. McConnell, *Why Obama's Immigration Order Was Blocked*, WALL ST. J. (Feb. 17, 2015), <http://www.wsj.com/articles/michael-mcconnell-why-obamas-immigration-order-was-blocked-1424219904>.

17. Individuals are ineligible for citizenship if they are either inadmissible or deportable under the Immigration and Nationality Act, 8 U.S.C. § 1101 (2012). See Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101).

system's ability to keep pace creates a sizeable population of undocumented immigrants, currently estimated to be approximately 11.3 million.<sup>18</sup> While some of these individuals are eligible for relief from removal, most are subject to civil detention and removal. The DHS is largely responsible for deciding who belongs in which category, an essential part of their enforcement activities. Some call the post hoc system of sorting among those eligible for removal a de facto delegation of enforcement.<sup>19</sup>

Deportations of certain segments of the undocumented immigrant population have until recently been on the rise, with a historic high of about 400,000 deportations under President Obama in 2012.<sup>20</sup> But even at this high level of deportation, with current levels of funding sufficing only to deport four percent of the population each year, it would take more than thirty years to deport all 11.3 million undocumented immigrants—thirty years for the existing population and possibly longer once adjusting for inflows and outflows of undocumented immigrants during that thirty-year period.

Faced with a gap between the size of the undocumented immigrant population and the resources required to remove them all, the Department of Homeland Security sets enforcement priorities to guide its removal practices. Along with its predecessor agency, the Immigration and Naturalization Service, the DHS since the 1970s has issued a series of agency policy documents setting out criteria for prioritizing their

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18. Jeffrey S. Passel et al., *As Growth Stalls, Unauthorized Immigration Population Becomes More Settled*, PEW RES. CTR.: HISP. TRENDS (Sept. 3, 2014), <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/>; see also MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 3 (2012), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf) (11.5 million). In reality, estimates of the undocumented immigrant population are difficult because many of them evade government detection.

19. Cox & Rodríguez, *The President and Immigration Law*, *supra* note 13, at 511 (crediting the Congress-President mismatch said to produce de facto discretion over immigration enforcement); see also MOTOMURA, *supra* note 13. Deeper causes for such a large undocumented immigrant population may include historical patterns of U.S.-Mexico migration, economic conditions that prompt migrants to seek a better life elsewhere, and social conditions that sustain unauthorized migration or impede cyclical return-reentry. See, e.g., MAE M. NGAI, IMPOSSIBLE SUBJECTS (2004); Wayne Cornelius, *Controlling 'Unwanted' Immigration: Lessons from the United States, 1994–2003*, 31 J. ETHNIC & MIGRATION STUD. 775 (2005); Kevin Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 249 (2003).

20. *FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 17, 2011), <https://www.ice.gov/news/releases/fy-2011-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities#wcm-survey-target-id>; Passel et al., *supra* note 18.



enforcement activities.<sup>21</sup> These deferred action memoranda list positive and negative factors for evaluating the cases of individual immigrants facing deportation, generally *raising* the priority level for removable immigrants with criminal records or who pose a danger to the community, and *lowering* the priority for those without criminal records or who contribute positively to the community and demonstrate stakes in the community. While each of the DHS's deferred action memos varies in its particulars and its emphasis, the memos constitute a consistent set of agency priorities over several administrations.

Consistent with these longstanding priorities, President Obama's DHS Secretary, Janet Napolitano, issued a guidance document in 2012 that makes explicit the agency's discretionary considerations.<sup>22</sup> What changed in the guidance is the centralization of the process for considering applications from a subset of immigrants, those long-time residents who crossed the border at a young age and have since contributed positively to their communities. The DACA selection criteria track affirmative and negative criteria from prior memos, even though the applications remain subject to the individual determinations of DHS's Citizenship and Immigration Services (USCIS) officials. The DACA 2012 program made approximately 2.5 million people eligible for deferred action, with approximately 750,000 having received the benefit so far and eighty-three percent of those having renewed.<sup>23</sup> The primary justification for the program is that young immigrants who entered with their families should not bear responsibility for their actions.<sup>24</sup> DHS Secretary Jeh Johnson's 2014 memos on prosecutorial discretion and deferred action expand the qualifying criteria for deferred action. The

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21. See SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015).

22. See Napolitano Memo June 2012, *supra* note 11, at 1.

23. U.S. CITIZENSHIP & IMMIGRATION SERVS., *CONSIDERATION OF DACA BY FISCAL YEAR, QUARTER INTAKE, BIOMETRICS, AND CASE STATUS: 2012–2015*, at 1 (Dec. 31, 2014), [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d\\_performancedata\\_fy2015\\_qtr1.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr1.pdf); Angelo Mathay & Margie McHugh, *DACA at the Three-Year Mark: High Pace of Renewals, But Processing Difficulties Evident* (Aug. 2015), <http://www.migrationpolicy.org/research/daca-three-year-mark-high-pace-renewals-processing-difficulties-evident>.

24. Obama's Comments after Secretary Napolitano's announcement on June 15, 2012: They were brought to this 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.

Put yourself in their shoes. Imagine you've done everything right your entire life . . . only to suddenly face the threat of deportation to a country that you know nothing about, with a language that you may not even speak.

Barack Obama, President, U.S., Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

2014 DACA expansion lifted an age cap for immigrant youth and made an additional one million people eligible for deferred action, and the corollary DAPA program for parents of U.S. citizens and LPRs would make yet another two to three million people eligible.<sup>25</sup>

In addition to the temporary protection from deportation, deferred action furnishes lawful presence while remaining in the United States. While lawful *presence* falls short of lawful *status*,<sup>26</sup> it does make the recipient temporarily eligible for certain benefits. Among the advantages of DACA is the ability to obtain temporary work authorization.<sup>27</sup> The Employment Authorization Document (EAD) that accompanies work authorization renders the immigrant in compliance with laws that might otherwise impede employment. While the EAD does not undo laws prohibiting employers from knowingly hiring undocumented workers,<sup>28</sup> it makes it possible to obtain lawful work. Other benefits associated with lawful presence include: a social security number and the possibility of obtaining a state driver's license, in-state college tuition rates, and limited health care coverage, depending on the state laws where one resides.<sup>29</sup>

This background section depicts executive action as immigration law's pragmatic response to the undocumented population. The spare facts set up two frameworks for theorizing executive action: legality and legitimacy.

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25. See Johnson Memo Nov. 2014, *supra* note 12, at 3. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

26. Those with lawful presence are not undocumented in the conventional sense, nor do they possess the full benefits of lawful status. See Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1120 (2015) (explaining the "paradoxical middle ground between legality and illegality," and exploring the impact that living in nonstatus has on immigrants in the United States).

27. The DHS 2012 and 2014 deferred action memos rely on Immigration and Naturalization Act (INA) section 274A and its implementing regulations for DACA work authorization. Napolitano Memo June 2012, *supra* note 11; Johnson Memo Nov. 2014, *supra* note 12. INA section 274A grants the executive branch authority to determine which aliens are granted employment authorization, INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) (2012); the corresponding regulation CFR § 274A names those with deferred action as eligible for work authorization. 8 C.F.R. § 274a.12(c)(14) (2015). Subsequent forms such as the revised Form I-795 application for an EAD that includes a specific code for DACA beneficiaries and inclusion of a DACA EAD for verifying I-9 eligibility to work are used for implementation. See INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("[T]he term 'unauthorized alien' means, with respect to the employment of an alien . . . that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) *authorized to be so employed by this Act or by the Attorney General*." (emphasis added)); 8 C.F.R. § 274a.12(c)(14) (specifically authorizing USCIS to issue work permits to recipients of deferred action provided they demonstrate economic necessity).

28. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2012).

29. See *infra* Part III.

*B. Theoretical Frameworks for Understanding Executive Action*

Although this Article ultimately argues that legal arguments are inadequate for understanding the real controversy, some legal background is needed to define and distinguish legality from the alternative of legitimacy.

A primary source of legal controversy around deferred action concerns the constitutional sources of executive power and its constraints. Constitutional sources such as Article II's Vesting Clause state: "The executive power shall be vested in a President of the United States."<sup>30</sup> Article II's Take Care Clause states: "[The President] shall take care that the laws be faithfully executed"<sup>31</sup> and has been interpreted both to impose a duty on the President and to constitute a source of executive power to exercise discretion in the enforcement of law. Executive authority also extends from the "inherent power as sovereign to control and conduct relations with foreign nations."<sup>32</sup> As applied in the immigration context, the plenary power doctrine reinforces the strength of the executive by reserving immigration decisions to the "political branches,"<sup>33</sup> a proposition reaffirmed in the *Arizona v. United States* Supreme Court decision recognizing the federal government's broad enforcement discretion in immigration.<sup>34</sup>

President Obama's 2012 DACA and 2014 DAPA programs constitute executive action backed by implementing guidance from the USCIS. As the Obama Administration explains, DACA draws primarily on the executive branch's prerogative of setting enforcement priorities

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30. U.S. CONST. art. II, § 1.

31. *Id.* § 3. The tension between these two interpretations can be seen in the *Texas v. United States* challenge to DAPA. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257. See *infra* Part IV.A for more discussion of the litigation.

32. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

33. Foundational plenary power cases state that "over no conceivable subject is the legislative power of Congress more complete than it is over [immigration]." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Sea Nav. Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). The term "plenary power doctrine" was coined by Professor Stephen H. Legomsky in *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (describing the rise of the doctrine and rationales the Supreme Court has used to justify it, then critiquing those rationales). See also Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds. 2005). "Political branches" typically refers to Congress, though some say the term could also refer to the presidency.

34. See 132 S. Ct. at 2498. This interpretation also appears in the OLC Memo, *supra* note 15, at 5, in the immigration professor letters cited *infra* notes 54 and 248, and scholarship on presidential power in immigration *supra* note 3.

under *Heckler v. Chaney*.<sup>35</sup> The U.S. Department of Justice's Office of Legal Counsel (OLC) memorandum explains that the President was within his inherent powers in deciding on enforcement priorities that focus on criminals and gang members and safeguard the children of undocumented immigrants<sup>36</sup>—as President Obama put it in his November 2014 announcement—on “[f]elons, not families.”<sup>37</sup> The OLC brief acknowledges important limitations on the exercise of executive power, given that the “open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is ‘faithful[] to the law enacted by Congress’—does not lend itself easily to the application of set formulas or bright-line rules.”<sup>38</sup> Critics of the immigration executive actions claim that President Obama's use of executive authority exceeds these limits and instead constitutes a “sweeping” assertion of executive power that borders on breaking the law.<sup>39</sup>

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35. 470 U.S. 821 (1985).

36. OLC Memo, *supra* note 15, at 4. As the OLC Memo explains:

[T]he “faithful[]” execution of the law does not necessarily entail “act[ing] against each technical violation of the statute” that an agency is charged with enforcing. Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to “balanc[e] . . . a number of factors which are peculiarly within its expertise.”

*Id.* (alterations in original) (citations omitted).

37. Barack Obama, President, U.S., Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

38. OLC Memo, *supra* note 15, at 5 (alteration in original). The OLC memo says that, in general, limits on enforcement discretion are implied in the Constitution's allocation of governmental powers between the two political branches. The OLC memo offers four limiting principles based on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), governing the permissible scope of enforcement discretion: (1) The decision to decline enforcement should reflect factors peculiarly within the enforcing agency's expertise; (2) A program may not effectively rewrite the laws in the guise of exercising enforcement discretion; the action must be consonant with broad congressional policy underlying the regulatory statute; (3) The program cannot be so extreme as to amount to abdication of statutory responsibilities; and (4) Non-enforcement decisions are “most comfortably” sustained when they are done on a case-by-case basis. OLC Memo, *supra* note 15, at 5–6.

39. Price, *supra* note 14, at 760–62; see Delahunty & Yoo, *supra* note 14, at 784; Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105 (2013). Challenges to executive authority are also presented in Complaint for Declarative & Injunctive Relief at 2, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. Dec. 3, 2014) (No. 1:14-cv-00254), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257. The plaintiff-states in *Texas v. United States* characterized DAPA as a sweeping assertion and insinuated that it breaks the law during oral argument. See Oral Argument, *Texas v. United States*, No. 5-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015) (No. 15-40238); see also *Arpaio v. Obama*, 27 F. Supp. 3d 185, 190 (D. D.C. 2014) (challenging DAPA and DACA on similar grounds), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015); *Crane v. Johnson*,

The executive branch also enjoys delegated authority from Congress. The Immigration and Naturalization Act of 1952 (INA) established a comprehensive scheme governing immigration and naturalization that includes specific criteria for admission and deportation (or removal) of noncitizens.<sup>40</sup> For the enforcement of the statute, courts recognize that immigration statutes grant broad discretion over immigration enforcement to DHS. The Obama Administration's legal analysis locates its delegated authority for deferred action in section 103 of the INA, which authorizes the Secretary of Homeland Security to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."<sup>41</sup> The breadth of the statutory language also suggests implied delegation (or de facto delegation) provided that the executive's exercise of this delegated authority is consistent with Congress's priorities for enforcement.<sup>42</sup> The OLC and most legal experts agree that the programs fit within Congress's priorities,<sup>43</sup> although some critics claim that Congress's failure to enact Development, Relief, and Education for Alien Minors (DREAM) Act

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783 F.3d 244, 249–50 (5th Cir. 2015) (challenging DACA on similar grounds).

40. 8 U.S.C. § 1101 (2012); INA § 212, 8 U.S.C. § 1182; INA § 237, 8 U.S.C. § 1227; INA § 103, 8 U.S.C. § 1103; *see also* 6 U.S.C. § 202 (2012) (Homeland Security Act of 2005's general grant of discretion); OLC Memo, *supra* note 15, at 4–5.

41. INA § 103, 8 U.S.C. § 1103. The statutory language in the INA references the Attorney General, but these references are interpreted as being to the DHS Secretary following reorganization of the INS into the DHS. 8 U.S.C. § 1103(a)(1). Congress has recognized deferred action by name in several other immigration statutes as well. INA § 237(d)(2), 8 U.S.C. § 1227(d)(2) (saying that if a person is ordered removed, applies for a temporary stay of removal, and is denied, that denial does not preclude the person applying for deferred action); INA § 204(a)(1)(D)(i)(II), (IV), 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (2012) (authorizing deferred action for certain domestic violence victims and their children). It is also named in the REAL ID Act as a qualification for a driver's license. 49 U.S.C. § 30301 note (2012) (Improved Security for Drivers' Licenses and Personal Identification Cards); Memorandum from Stephen H. Legomsky, Professor, Wash. Univ. Sch. of Law, Legal Authorities for DACA and Similar Programs 1 (Aug. 24, 2014), <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/11/17/Editorial-Opinion/Graphics/executive%20action%20legal%20points.pdf>.

42. *See* Cox & Rodríguez, *Redux*, *supra* note 9, at 130–35. Implied delegation is a familiar principle of statutory construction. While it underlies the de facto delegation, Cox and Rodríguez say it is difficult to discern legislative intent from de facto delegation. *Id.* at 42.

43. For examples of Congress's priorities, consider that Congress states that enforcement should be directed at "identification and removal of aliens convicted of a crime by the severity of that crime" and the 2012 and 2014 DHS Secretary memos on enforcement priorities reflect this priority. OLC Memo, *supra* note 15, at 10 (citing DHS Appropriations Act, Pub. L. No. 113-76, 128 Stat. 247, 251 (2014)). Also, the INA expressly grants discretionary relief for a variety of humanitarian purposes, including family unity, and DACA and DAPA focus on childhood arrivals and parents for similar reasons. *Id.*

legislation indicates a contrary intention.<sup>44</sup>

A second area of legal inquiry concerns the DHS' adherence to administrative procedure in its exercise of rulemaking authority. The APA requires that an agency provide notice and accept comments on proposed rules and regulations that would be legally binding.<sup>45</sup> An exception exists for agency interpretations in the form of general statements of policy or interpretations, which do not by themselves constitute substantive rules.<sup>46</sup> The DACA memo expressly states that it is not subject to APA procedural requirements because it is a policy, consisting of longstanding criteria used to guide individualized determinations of applications even if DHS renders decisions on a case-by-case basis and reserves the ability to depart from the criteria if deemed in the federal interest.<sup>47</sup> DAPA is even more discretionary because its eligibility criteria include a proviso that applicants "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate."<sup>48</sup> Both memos contend that they rely on separate regulations for work authorization and associated benefits.<sup>49</sup> However, the legal standards for distinguishing nonbinding and binding agency interpretations are unclear,<sup>50</sup> and the judicial doctrines for determining deference to such agency interpretations are similarly "muddled."<sup>51</sup> Moreover, critics question whether the DACA program adheres to its stated limitations, noting the ninety-five percent grant rate,<sup>52</sup> and claim

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44. The DREAM Act refers to legislation that would provide relief from deportation and a pathway to citizenship for undocumented youth. Various bills containing DREAM Acts have been proposed in Congress from 2006 to 2010, but none have received bicameral support. Eligible youth have taken the name "DREAMer" in their social movements.

45. See Administrative Procedure Act (APA), 5 U.S.C. § 553 (2012).

46. *Id.* § 553(d).

47. OLC Memo, *supra* note 15, at 7, 11.

48. Johnson Memo Nov. 2014, *supra* note 12, at 4.

49. See *supra* note 27 (discussing INA § 274A, 8 U.S.C. § 1324a (2012), and its implementing regulations work authorization).

50. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 916–17 (2004); William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative and Legislative Rules*, 54 ADMIN. L. REV. 659, 662 (2002); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1324–25 (2001).

51. See generally Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005). Some scholars point out that DACA's binding effect is more questionable than a notice and comment regulation given the muddled doctrines for judicial deference to guidance post-*Mead* and contradictions between separation of powers and regulatory preemption analysis. Another issue is the presumptive non-reviewability for prosecutorial discretion.

52. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., DATA SET: FORM I821D DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2015), <https://www.ice.gov/news/releases/fy-2011-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities>

that the work authorization associated with DACA lawful presence is a “substantive benefit” inappropriate for promulgation via guidance.<sup>53</sup>

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Scrutiny of the legal foundations for the Obama Administration’s deferred action programs persists. Assuredly, rulings on the legality of deferred action matter for their own sake: they will be consequential for law and policy, and many experts have offered their legal analysis in support<sup>54</sup> or critique.<sup>55</sup> Yet the relationship between legality and legitimacy also merits close attention. Legal claims about executive authority give rise to analysis of the respect-worthiness of institutional authority, not just constitutional analysis. Legal claims about compliance with administrative procedure give rise to fairness and trustworthiness, not just APA analysis. In other words, the legality of DACA matters because it is interrelated with DACA’s legitimacy—in sometimes complementary, sometimes contradictory, and sometimes constitutive ways.

## II. FROM LEGALITY TO LEGITIMACY

In the context of this Article, the concept of legitimacy is defined as recognition that the executive branch’s authority to govern is appropriate, proper, and just. This definition is based on classical conceptions of legitimacy originating with Max Weber. Weber defines a legitimate social order as one where everyday citizens perceive an obligation to obey legal authorities.<sup>56</sup> In this formulation, the perception of the binding

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53. Whether or not work authorization constitutes a *substantive benefit* is subject to dispute in the *Texas v. United States* lawsuit challenging DAPA. *See, e.g.*, Margulies, *supra* note 15, at 1184; Cox & Rodríguez, *Redux*, *supra* note 9, at 206. In reply, Obama claims the high grant rate is due to the self-selection of DACA applicants. Obama also claims that work authorization is independently provided for by regulations that followed APA rulemaking procedures and have been traditionally recognized by Congress and the courts.

54. Constitutional scholars who wrote to support the President’s exercise of executive discretion under the Take Care Clause include Lee Bollinger, Erwin Chemerinsky, Walter Dellinger, Harold Koh, Gillian Metzger, Eric Posner, Cristina Rodríguez, David Strauss, Geoffrey Stone, and Lawrence Tribe. *See, e.g.*, Letter from Lee C. Bollinger et al. (Nov. 20, 2014), [http://thehill.com/sites/default/files/scholars\\_letter\\_on\\_immigration\\_2\\_1.pdf](http://thehill.com/sites/default/files/scholars_letter_on_immigration_2_1.pdf). Immigration law professors wrote to the President on numerous occasions, beginning with Letter from Hiroshi Motomura et al., to Barack Obama, U.S. President (May 28, 2012), [www.nilc.org/document.html?id=754](http://www.nilc.org/document.html?id=754) (regarding executive authority to grant administrative relief for DREAM Act beneficiaries). For purposes of disclosure, I was one of 136 law professors who signed the initial letter outlining the President’s legal authority to take executive action on immigration.

55. Margulies, *supra* note 15; Blackman Part I, *supra* note 16; Blackman Part II, *supra* note 14.

56. *See* WEBER, *supra* note 1.

and obligatory quality of a law motivates citizens to obey: “Action . . . may be guided by the belief in the existence of a legitimate order. . . . Only . . . will an order be called ‘valid’ if . . . it is in some appreciable way regarded by the actor as in some way obligatory or exemplary for him.”<sup>57</sup> Socio-legal scholars extend this definition to the study of legal compliance. For example, numerous studies in law, sociology, and social psychology (frequently inspired by Tom Tyler, a social psychologist situated within a law school), begin with the premise that “legitimacy is the belief that the law and agents of the law are rightful holders of authority; that they have the right to dictate appropriate [behavior] and are entitled to be obeyed; and that laws should be obeyed simply because *that is the right thing to do*.”<sup>58</sup> Legal theorists also contextualize legitimacy within their more doctrinally-oriented studies, with the exemplary scholarship of Richard Fallon and Bruce Ackerman analyzing Supreme Court opinions for their social acceptance and not merely their operation in courts.<sup>59</sup> The next sections define legitimacy in greater detail. They first use Fallon’s tripartite definition and then operationalize the definition for empirical study using Tyler’s measures.

#### A. Defining Legitimacy

This Article substantially builds on Fallon’s tripartite disaggregation of the concept of “legitimacy” in order to forge its own definitional distinctions: legality, legitimacy, and morality.<sup>60</sup> The first view of law as legality, building on Fallon’s legal legitimacy, is a positivist one that asserts the mere existence of duly-enacted law compels obedience. The second concept of legitimacy, building on Fallon’s sociological legitimacy, is the one that this Article most focuses on. It is an internal definition that recognizes people require *more* than an assertion of legality to obey the law. Importantly, the willingness to voluntarily cooperate with trustworthy authorities and fair procedures is a *signal of perceived legitimacy* rather than an incontrovertible claim. The third concept of morality, building on Fallon’s moral legitimacy, requires that

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57. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 381–82 (1983) (quoting WEBER, *supra* note 1, at 31).

58. Jonathan Jackson et al., *Why Do People Comply With the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051, 1053 (2012); TOM TYLER, *WHY PEOPLE OBEY THE LAW* 25 (1990) [hereinafter TYLER, OBEY]; TOM TYLER, *WHY PEOPLE COOPERATE* 6 (2011) [hereinafter TYLER, COOPERATE].

59. See generally BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792 (2005).

60. Fallon, *supra* note 59, at 1794 (describing three concepts of legitimacy). For more discussion of the three uses and their relationships, see *infra* Part IV.



a law is respect-worthy according to an external, moral criterion. For reasons that will be explained later, in this Article, morality tracks substantive policy preferences, as opposed to partisan preferences.<sup>61</sup>

It is difficult to maintain sharp distinctions between these three senses of legitimacy in the presence of overlapping and mixed motivations.<sup>62</sup> For example, a person might view a policy as legitimate, at least in part, because a credible government authority issued it—for example, it came from a duly-elected president—or because a court with sound motives affirmed its lawfulness. That person may additionally believe that the policy is immoral, even if he accepts that it adheres to current law and was enacted under fair procedures. In this example, legality and legitimacy shore up one another, whereas legitimacy and morality are at odds. Each element is important so that neither legitimacy, legality, nor morality is enough to determine a state's rationale for adopting a policy. Still the concepts are analytically distinct from one another, even if they are related and sometimes intertwined.

Legitimacy is worthy of consideration in its own right and in relationship to the other strands of the concept. In its own right, legitimacy is integral and often submerged in discussions about legality. This is particularly true in studies of constitutional and administrative law, which have a rich heritage of investigating the theoretical foundations and normative justifications for their legal authority.<sup>63</sup> But legality sometimes matters even more for its effect on popular perceptions of legitimacy than for its own sake. This is because “sociological acceptance is a necessary condition for a constitution or legal system to exist at all.”<sup>64</sup> People must believe that the laws are fairly administered and that the authorities are trustworthy. Controversial

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61. See *infra* text accompanying notes 128–29.

62. Hyde, *supra* note 57, at 382.

63. Scholarship exposing the chronic legitimacy crisis of the regulatory state supports this analysis. See, e.g., JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 9–11 (1978); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). But see Adrian Vermeule, *No: Is Administrative Law Unlawful?*, 93 TEX. L. REV. 1547, 1547 (2015) (book review). A sample of Constitutional theory on the rule of law and the relationship and legality and legitimacy is contained in Bruce Ackerman's edited volume. See, e.g., Robert Post, *Sustaining the Premise of Legality: Learning to Live with Bush v. Gore*, in BUSH V. GORE, *supra* note 59, at 97–98 (describing Constitutional law as an effort to abstract stable and enduring principles from politics); Jack M. Balkin, *Legitimacy and the 2000 Election*, in BUSH V. GORE, *supra* note 59, at 214–15 (resting political legitimacy on trust and confidence and not merely on related but distinct “procedural niceties”). Importantly, these reflections on problems of legitimacy often presuppose an ideal of judicial independence, whereas the executive power I study emanates from a president who is not required to be independent in the sense of apolitical.

64. Fallon, *supra* note 59, at 1791 n.7.

decisions are followed by a process of “[a]nxious reappraisal, followed slowly by a consensus on how the system performed.”<sup>65</sup> If the decision is positive, the system is praised; if it is negative, “a gnawing sense of illegitimacy eats away at the fabric of mutual confidence.”<sup>66</sup> The point pertains as much to executive action as judicial decisions. Building on the point that legal contentions about the DHS’s executive authority “depends much more on [their] present sociological acceptance . . . than upon the legality of [their] formal ratification,”<sup>67</sup> this Article focuses on the reappraisal as a process of sociological acceptance. This acceptance can be seen in ordinary citizens or in state policymaking that responds to executive action. Examining deferred action through the lens of states prioritizes the bottom-up perceptions of those who interpret, implement, and abide by executive action.

### *B. Operationalizing Legitimacy*

An advantage of focusing on the sociological strand is that the choice lends itself to an empirical study of legitimacy. This empirical gain offsets the unavoidable losses of simplifying a complex concept. An empirical examination of legitimacy presupposes observable indicia of the beliefs and behaviors associated with legitimacy, once again defined as a willingness to follow the law. These signals are operationalized as attitudes of acceptance and cooperative behaviors. This Article substantially emulates the attitudinal measures associated with acceptance and cooperative behavior in Tom Tyler’s and his collaborators’ research in its efforts to place Fallon’s definitional distinctions within an empirical framework.

Tyler’s seminal work on legitimacy empirically examines the motivations of people who comply with the law. In *Why People Obey the Law*, Tyler interviewed more than 1500 people about their motivations for complying with a range of laws.<sup>68</sup> Contrary to conventional wisdom, Tyler finds that people obey laws for reasons beyond their instrumental fear of punishment or their desire to obtain a benefit.<sup>69</sup> They also factor in their normative beliefs about the legitimacy of the legal system that rendered the legal outcome.<sup>70</sup> The normative belief in legitimacy is

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65. Bruce Ackerman, *Introduction* to BUSH V. GORE, *supra* note 59, at vii.

66. *Id.* at viii.

67. Fallon, *supra* note 59, at 1792.

68. TYLER, OBEY, *supra* note 58, at 4–5, 40–56.

69. TYLER, OBEY, *supra* note 58, at 20–22 (explaining that traditional social theory assumes behavior is instrumentally motivated and challenging the view that it is the sole factor).

70. TYLER, OBEY, *supra* note 58, at 22–27, 57–62 (explaining the alternative idea that

influenced by their perception of fairness and procedural justice—whether the rule is duly enacted, is fairly administered and their sense that the officials involved are trustworthy.<sup>71</sup> Other normative motivations might also include a sense that the law corresponds to one's own values and substantive policy preferences.<sup>72</sup> The persistent finding in Tyler's and others' studies is that people are more willing to cooperate with the law if they believe the legal authorities are trustworthy and that it is administered fairly.<sup>73</sup> Policymakers must think about the procedures used to promulgate the law and the people called upon to implement it, not merely the substance of their policies.

The behavioral measure of legitimacy can be seen in conduct that conforms with the law's requirements—in this Article, state policymaking that incorporates federal requirements. These cooperative policymaking behaviors vary across a spectrum of compliance behaviors ranging from total commitment, to more reluctant or begrudging acceptance, to foot dragging and resistance. Voluntary cooperation extends the compliance spectrum. Going beyond compliance, Tyler, in subsequent work, identifies cooperation as a behavior linked with compliance.<sup>74</sup> As opposed to involuntary compliance, sometimes motivated by the threat of legal enforcement, *voluntary* cooperation is motivated by norms that operate apart from sanction or detection.<sup>75</sup> The extent of voluntary cooperation may even *exceed* legal requirements. For example, private organizations sometimes adopt even more rigorous

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legitimacy makes an independent contribution to compliance and presenting evidence for it).

71. *Id.* at 115.

72. *Id.*

73. *Id.* Major empirical studies of legitimacy have been conducted in: policing, Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. SCI. & SOC. SCI. 84, 84 (2004); criminal law, Tom R. Tyler & Jonathan Jackson, *Future Challenges in the Study of Legitimacy and Criminal Justice*, in LEGITIMACY AND CRIMINAL JUSTICE 2 (Justice Tankebe & Alison Liebling eds., 2013); tax law, Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 615 (2007); immigration law, Ryo, *Deciding to Cross*, *supra* note 7, at 590. *See generally* Neil Gunningham, *Enforcement and Compliance Strategies*, in THE OXFORD HANDBOOK OF REGULATION (Robert Baldwin et. al. eds., 2010) (outlining a range of regulatory strategies, including the attributes of “smart” regulation essential for voluntary cooperation).

74. TYLER, COOPERATE, *supra* note 58, at 6–7.

75. Scholars who write about the involvement of states in immigration law—sometimes termed immigration federalism—often fail to differentiate whether traditional, sovereignty-laden federalism or cooperative federalism is in operation. The distinction is important because signals of legitimacy are clearest in situations where states *voluntarily* cooperate—where the threat of sanction is insignificant, or where cooperation may be against self-interest—as opposed to situations where federal preemption may dictate the terms of state policymaking such that states do not have a genuine choice. DACA's operation in the states constitutes a case study of state cooperation within a voluntary regime.

standards for themselves than is required by law.<sup>76</sup> Their explanation for this behavior, termed over-compliance, is that the organizations respond to a social license, generated by a desire to maintain positive relationships within the community and a reputation for doing the right thing (or at least to avoid a negative reputation). While the threat of enforcement can be present and intertwined with social license, this research shows that social motivations for cooperation supplement and sometimes overshadow self-interested considerations of cost, efficiency, or public accountability and lead to cooperation beyond what legal enforcement and institutional authority can compel. Of course, institutions can also choose *not* to cooperate, to cooperate partially, or to cooperate involuntarily under promise of sanction or reward. The state cooperation continuum models the decision-making process that translates beliefs into behaviors and the policy outcomes that result. Although empirical studies of legitimacy and compliance typically study attitudes and behaviors quantitatively, this Article adapts empirical approaches toward studying legitimacy for qualitative, case study analysis.<sup>77</sup>

In addition to operationalizing legitimacy for empirical study, this Article builds on the concept of legitimacy in another way. It shifts the unit of analysis from individual to institutional cooperation with laws, using states' decisions to incorporate elements of federal law into their own policymaking as evidence of cooperation. Like individuals, institutions decide whether or not to cooperate with federal laws based partly on their perceptions of the legitimacy of the federal law or their belief in the institutional authorities that issued the laws. The cross-sectional analysis of state motivations for adopting their driver's license policies corresponds to individual motivations. Some of the state motivations and justifications for following federal rules are instrumental or self-serving ones—for example, obtaining funds from the federal government for necessary state programs. Other state motivations are driven by normative commitments, both to procedural and substantive ideals. A notion of procedural justice entails recognition of the federal government's authority to issue commands or to fairly administer a program, notwithstanding independently-held and even contrary

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76. NEIL GUNNINGHAM ET AL., *SHADES OF GREEN: BUSINESS, REGULATION, AND ENVIRONMENT* 1 (2003).

77. For more information about the comparative case study method, see generally Andrew Bennett, *Process Tracing and Causal Inference*, in *RETHINKING SOCIAL INQUIRY* 207 (Henry E. Brady & David Collier eds., 2d ed. 2010) (endorsing case study methods such as process tracing and within-case analysis as legitimate means of social scientific explanation and advancing or evaluating alternative explanations for policy developments). Comparisons between survey and case study analysis of legitimacy in immigration law is further discussed at *infra* notes 91–93.

substantive policy preferences. It also entails recognition of the officials' trustworthiness and good faith motives. Substantive policy concerns can complement these procedural grounds for accepting a federal policy. Public safety is key among them in driver's license policies. Facilitating a sense of community belonging is another, seen in driver's licenses, access to health care, and access to higher education.

While legitimacy and state cooperation have not typically been studied together, combining the two literatures generates important insights. Cooperation in the states might include policies that embrace elements of federal policy and or even over comply with federal requirements—for example, with states promulgating state legislation to protect undocumented immigrants in ways that go beyond what the federal executive can accomplish. Uncooperative state policymaking sits at the other end of the spectrum—within constraints, states may choose not to cooperate or not to cooperate fully, with federal laws in the enactment of their own state policies. Some states enact contrary immigration laws or directly challenge federal laws that conflict with their policy preferences. Others reluctantly acquiesce to federal policy, express doubt while taking cooperative actions, or only technically comply.

Admittedly, the correspondence between individual decision-making and institutional decision-making is not perfect. It is not always clear who speaks for the state as a public actor when the state's value preferences are internally divided.<sup>78</sup> Moreover, elected officials such as governors and state legislators face pressure to get re-elected and can use public statements strategically to appeal to their constituents, rather than straightforwardly explaining their own policy preferences.<sup>79</sup> Yet the

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78. Political scientists routinely confront this challenge when examining Congress. *See, e.g.,* Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992) (pointing out collective action problems in entities comprised of multiple actors and conditions of divided government). Legal scholars and courts encounter reliability problems when using legislative history as a guide to legislative intent, though the use of legislative history in courts and scholarship is well-established even if it is contested. *See, e.g.,* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RESERVE L. REV. 179, 189 (1986–87), *quoted in* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 137–38 (2012). While these concerns are important, policy narratives and public statements capture the official justification for policy. They also provide more information than text alone.

79. Public choice theory posits that public officials are rational actors whose actions are guided by their pursuit of re-election. While an important theory of political behavior, the critique is not universally accepted and its force is no more present in the study of state cooperation than the study of Congressional behavior. *See generally* Tom Ginsburg, *Public Choice and Constitutional Design*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 261–78 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

process-tracing analysis used in this Article emulates the methods commonly used for policy development and diffusion analysis. The analysis also contains confirmatory evidence that mitigates the limitations of public statements, such as sworn statements or stipulations in litigation and personal correspondence.

A few more cautionary notes on measuring legitimacy empirically. First, the observable beliefs associated with legitimacy derive from an internal point of view; they are signals of what ordinary people and public officials believe to be valid, rather than external or exogenous judgments of what is moral or legitimate.<sup>80</sup> Second, the combination of attitudes and behaviors referred to as voluntary cooperation relies on the relational logic used in comparative case studies. Standing alone, the existence of state policies as signals of behavioral acquiescence can only convey a weak sense of legitimacy. People have not overtly resisted a law's claims of authority for undetermined reasons that may or may not explain their behavior. A stronger sense of legitimacy would rest on evidence of attitudes of acceptance apart from self-interest, custom, and other motivations. It would also show a link between attitudes and behaviors. Case studies of state policymaking reveal inferences that a particular set of policymakers believe a federal policy is legitimate. Case studies cannot prove a causal connection. Still the methods of comparative case study, process tracing, and in-depth policy analysis have advantages over other methods for investigating state policymaking: counting and coding state policies that incorporate or reject DACA as proof of policymakers' beliefs, reporting on public reception to executive action through public opinion polls, or conducting regression or event history analysis.<sup>81</sup>

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80. Use of the internal viewpoint is cognizant of H. L. A. Hart's *The Concept of Law*. Hart sets out the proposition that problems of normative uncertainty are resolved with rules of recognition—rules about rules—that determine which rules are binding. H. L. A. HART, *THE CONCEPT OF LAW* 8–11 (1961); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1157 (2006). This distinction is also captured by socio-legal scholars such as Roscoe Pound and others who refer to “law on the books” and “law-in-action.” See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12, 15 (1910); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55, 57 (1963); David Nelken, *Law In Action or Living Law? Back to the Beginning in Sociology of Law*, 4 *LEGAL STUD.* 157, 159, 166 (1984). Ed Rubin commends studying “signals” of consent to authority as a meaningful way of understanding compliance in modern government. EDWARD L. RUBIN, *BEYOND CAMELOT* 148, 160–65 (2005).

81. Bennett, *supra* note 77 (endorsing case study methods such as process tracing and within-case analysis as legitimate means of social scientific explanation and advancing or evaluating alternative explanations for policy developments).

### III. STATE COOPERATION WITH EXECUTIVE ACTION

As federal policy, DACA relies on states for its implementation only indirectly. States do not have to implement DACA. Rather, states can choose to incorporate the federal lawful presence designation in their own policymaking. This Part provides some illustrations, beginning with state policies issuing driver's licenses to undocumented immigrants with DACA and then moving to state policies conditioning receipt of public benefits on lawful presence, specifically access to higher education and access to health care insurance. The comparative case studies examine two issues: first, why states cooperate with DACA in their establishment of local policies and, second, how those decisions translate into state policies. Despite the variations across policies, as a whole, the case studies show that the states that enact policies supportive of DACA signal that they do so because they accept DACA's legitimacy, either alone or in combination with legality and morality. Those that resist DACA doubt its legitimacy above all.

#### *A. Driver's Licenses for DACA Recipients*

While DACA is a federal policy, driver's licenses are traditionally regulated by states. Many states rely on DACA's lawful presence designation when setting driver's license requirements, even if DACA does not *compel* state cooperation in the way that a federal statute might under a regulatory preemption framework. That is because DACA is an executive action administered through nonbinding agency guidance.<sup>82</sup> In the absence of a legally-binding federal mandate, states can elect to cooperate or not—presumably on their estimations of the federal policy's legitimacy and also other independently-held values. By comparison, a legal framework involving a federal law that mandates state participation might compel cooperation out of respect for the rule of law, even if states do not believe the federal policy to be legitimate, or by federal

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82. Some scholars contend that DACA could have preemptive effect and note that it is an unresolved legal issue. Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 717 (2014) (arguing that executive immigration policies that are subject to accountability, transparency and deliberation mechanisms, including DACA, have the same preemptive effect as official agency decisions promulgated pursuant to procedural formalities); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 83–84 (2013) (noting contradictory claims about whether DACA carries the force of law and should have preemptive effect given that it is considered law for separation of powers purposes and non-law for the APA). This issue is raised indirectly in *Texas v. United States* in connection with the states' standing to sue the federal government. *Texas v. United States*, 86 F. Supp. 3d 591, 614 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 at \*3 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

preemption of state law.

Rather than being fully in the state or federal domain, driver's licenses come into a zone of shared governance under the federal REAL ID Act of 2005. The REAL ID Act responded to security lapses that permitted the September 11th terrorist attackers to obtain valid licenses. Faced with pressure to heighten security and fear of an intrusive national identity card, the federal government resisted the temptation to create a uniform national identity card and instead channeled calls for increased security into their passage of a federal statute setting standards for state licenses. The standards apply if states opt to issue driver's licenses to immigrants and then seek to use those licenses for federal purposes.<sup>83</sup> Among other requirements, the state-issued license must bear distinctive markings so that it is not confused with an ordinary license when being used for federal purposes such as accessing federal buildings, identification for airline travel, and proof of identity for accessing federal benefits. States may choose to provide licenses that fail to meet the minimum federal standard with the understanding that such licenses may not be acceptable for federal purposes.<sup>84</sup> There is some dispute about whether this governing scheme constitutes true cooperative federalism, in which the federal government permits states an option to govern according to its specifications lest the federal government occupy the field or impose conditions on acceptance of federal grant money for the achievement of federal objectives. Yet the federal-state governance scheme retains an element of state voluntariness during the period of study, when they were not yet required to comply with REAL ID, making it a suitable case study for cooperation.<sup>85</sup>

Until DACA was issued in 2012, most states were initially reluctant to issue licenses to undocumented immigrants, and many of those who

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83. See REAL ID ACT, 49 U.S.C § 30301 (2012).

84. See TODD B. TATELMAN, CONG. RESEARCH SERV., RL34430, THE REAL ID ACT OF 2005: LEGAL, REGULATORY, AND IMPLEMENTATION ISSUES 3 (2008), <http://www.fas.org/sgp/crs/misc/RL34430.pdf>.

85. The REAL ID Act example of cooperative federalism is used in Charlton Copeland, *Beyond Separation in Federal Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, 15 U. PA. J. CON. L. 91, 151–53 (2012) (“[T]he national government has attempted to leverage its authority in one area—its authority to determine what identification is acceptable by federal agencies—to impose obligations on state governments to meet nationally-articulated requirements.”); cf. Doris Marie Provine & Monica W. Varsanyi, *Immigration Federalism in the Shifting Political Sands of Two Neighboring States* 7–9 (2015) (unpublished paper presented at Law & Society Association Annual Meeting) (on file with author) (characterizing REAL ID as an “unfunded mandate” because state driver's licenses would be practically meaningless without federal compliance, notwithstanding the initial phase-in period and temporary waiver).



did resist REAL ID Act requirements.<sup>86</sup> The release of DHS memos clarifying that the federally-issued EAD is sufficient documentation of lawful presence for a REAL-ID compliant license led to an increased number of states granting to undocumented immigrants driver's licenses.<sup>87</sup> As of August 2015, the national landscape evinces a trend toward states' issuing driver's licenses that incorporate DACA's lawful presence designation. Depending on how you count, forty-eight states voluntarily recognize DACA's legitimacy in their driver's license policies and litigation lifted the remaining bans so that all fifty states now offer them.<sup>88</sup> The virtual consensus among states granting licenses to DACA recipients after 2012—in addition to the timing of those state policies—speaks to the states' broad acceptance of DACA as a legitimate source of lawful presence and valid evidence of work eligibility.

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86. States lagged in their compliance with REAL ID conditions for noncitizen driver's licenses to such a great extent that the DHS has repeatedly delayed their implementation and enforcement efforts. For a review of state implementation of the REAL ID Act, see *Countdown to REAL ID*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/transportation/count-down-to-real-id.aspx> (last updated Oct. 29, 2014); Priscilla M. Regan & Christopher J. Deering, *State Opposition to REAL ID*, 39 PUBLIUS: J. FEDERALISM 476, 481 (2009) (twenty-one states enacted legislation opposing REAL ID in 2007, same year that the rule released); JIM HARPER, CATO INST., REAL ID: A STATE-BY-STATE UPDATE 2 (2014), [http://object.cato.org/sites/cato.org/files/pubs/pdf/pa749\\_web\\_1.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/pa749_web_1.pdf) (REAL ID is "moribund").

87. The DHS reports that forty-one states are compliant in 2013. Press Release, Dep't of Homeland Sec., DHS Releases Phased Enforcement Schedule for REAL ID (Dec. 20, 2013), <http://www.dhs.gov/news/2013/12/20/dhs-releases-phased-enforcement-schedule-real-id>.

88. See *Deferred Action for Childhood Arrivals: Federal Policy and Examples of State Actions*, NAT'L CONF. ST. LEGISLATURES (Nov. 18, 2014), <http://www.ncsl.org/research/immigration/deferred-action.aspx>; Gulasekaram & Ramakrishnan, *supra* note 13, at 43–44 (using statistical analysis to show that DACA rather than political factors such as Democratic control over state government and growing Latino populations "catalyzed" issuance of licenses to undocumented immigrants). The categorization of state policies depends on the specific elements of state law being tracked and measured. A National Immigration Law Center (NILC) report breaks out states granting licenses to DACA beneficiaries into categories: states where officials have confirmed that DACA beneficiaries are eligible for licenses through statements or simply through granting licenses; state laws explicitly including DACA or deferred action documents as proof of lawful presence to obtain a license; states mentioning the EAD in a law or document list; I-797 communication regarding immigration benefits. *Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?*, NAT'L IMMIGR. L. CTR. (June 19, 2013), <http://www.nilc.org/dacadriverslicenses.html>. Scholars Pratheepan Gulasekaram and Karthick Ramakrishnan point out that forty-six states have affirmatively stated that they would provide DACA recipients with driver's licenses, however, only two states actively withheld driver's licenses from DACA recipients. See Gulasekaram & Ramakrishnan, *supra* note 13. Other reports focus on states extending driver's licenses to all undocumented immigrants. See PEW CHARITABLE TRS., DECIDING WHO DRIVES: STATE CHOICES SURROUNDING UNAUTHORIZED IMMIGRANTS AND DRIVER'S LICENSES (2015), <http://www.pewtrusts.org/~media/Assets/2015/08/Deciding-Who-Drives.pdf>.

What the nearly unanimous uniform count of state policies obscures is the variety of attitudes and justifications for going along with DACA. To illustrate the complex and dynamic thought process behind state cooperation, this Article engages in qualitative analysis of a critical sample of states where attitudes toward licenses was clearly influenced, if not altered, by DACA.<sup>89</sup> The states include a range of immigrant population sizes, proximity to border, inclusive immigration policies, and political climates—all factors shown to matter in statistical studies of state immigration policy.<sup>90</sup> In most situations, the states were initially unclear or opposed to issuing licenses to immigrants and gradually changed their policies or practices in recognition of DACA. Evidence of these shifting attitudes and DACA's influence can be found in legislative histories, executive memoranda, public statements, and other informal communications about state policy; the states that engaged in litigation left behind a useful paper trail of their views and positions. Evidence of shifting behaviors can be found through a process of tracing documents showing cooperative state policymaking.

### *1. Attitudes Toward DACA and Rationales for Cooperation*

State policymakers' rationales for adopting state policies supportive of DACA help explain their willingness to cooperate with nonbinding federal policy. Three decision-making factors identified in other sociological studies of legitimacy include legality, legitimacy, and morality. Legality is an instrumental concern encompassed by calculations of legal incentives and the threat of sanction for noncompliance.<sup>91</sup> Legitimacy is a normative view of institutional authority often premised on procedural justice—for example, belief in the

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89. The sampled states exclude those who adopted driver's licenses prior to DACA or pursuant to state decision-making that is independent of the 2012 federal policy. Thanks to David Martin and Hiroshi Motomura for making the distinction.

90. For more on the factors associated with state immigration policies, see S. Karthick Ramakrishnan & Tom Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 73, 74–76 (Monica W. Varsanyi ed., 2010); Graeme Boushey & Adam Luedtke, *Immigrants Across The U.S. Federal Laboratory: Explaining State Level Innovation in Immigration Policy*, 11 *ST. POL. & POL'Y Q.* 390, 392 (2011); PRATHEEPAN GULASEKARAM & KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 87 (2015); Monica Varsanyi & Doris Marie Provine, *Divergent States: Explaining Immigration Policy Trajectories in New Mexico and Arizona* 19–25 (2015) (unpublished manuscript) (on file with author); see also *infra* notes 254 and 259.

91. In legitimacy studies involving survey data, the question most closely associated with legality is whether respondent agrees with the statement: "In general, people should obey the law, even if it goes against what they think is right." See, e.g., Ryo, *Deciding to Cross*, *supra* note 7, at 582–83; Ryo, *Less Enforcement*, *supra* note 7, at 638.

trustworthiness of federal executives or the fairness of their policy administration.<sup>92</sup> Morality, or substantive policy preferences, constitute another type of normative evaluation focused on whether states' substantive policy preferences align with or deviate from federal policy.<sup>93</sup> States can and do offer multiple reasons for enacting cooperative policies, but this brief summary disaggregates the three main reasons.

*Figure 1: State Policymakers' Attitudes toward DACA and Rationales for Cooperation*

Legality and Legal Threat	<ul style="list-style-type: none"> <li>• Presence of binding state legislation</li> <li>• Presence of state litigation ("legal threat")</li> </ul>
Legitimacy (Procedural Justice or Respect for Institutional Authority)	<ul style="list-style-type: none"> <li>• Respect for executive authority to issue DACA (PD, USCIS guidance, non-legislation)</li> <li>• Respect for immigration enforcement authority (fed problem, ICE)</li> </ul>
Morality and Substantive Policy Preferences	<ul style="list-style-type: none"> <li>• Pro/anti-immigration climate (e.g. pro-DREAMer attitudes)</li> <li>• Public safety, cost, and other pragmatic considerations</li> </ul>

92. The relevant institutional authority here would be President Obama and the DHS agency (USCIS) that administers DACA.

93. This cluster of motivations refers to substantive policy preferences or normative commitments around immigration enforcement and can be distinguished from exogenous senses of morality. A survey methodology might ask whether the respondent thinks crossing the border without authorization is moral or whether children should be held responsible for unlawfully crossing the border with their parents. Multiple studies score state climate toward immigrants based on external assessments of state policies toward immigrants. *See, e.g.,* MICHAEL A. RODRÍGUEZ ET AL., CREATING CONDITIONS TO SUPPORT HEALTHY PEOPLE: STATE POLICIES THAT AFFECT THE HEALTH OF UNDOCUMENTED IMMIGRANTS AND THEIR FAMILIES 1, 12–13 tbl. (2015), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2015/immigrantreport-apr2015.pdf> (immigrant integration scores shown in Table: scoring of policies related to undocumented immigrants' health, total and policy area scores); Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21, 32 tbl.1.2 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014) (immigrant climate index).

*A. Legality and Legal Threat*

Once again, legality is an instrumental concern encompassed by calculations of legal incentives and the threat of sanction for noncompliance. A state's concern for legality can be seen in the presence of binding state legislation or litigation.

In general, states respecting the rule of law will feel constrained by existing state laws as they enact policies cognizant of federal policy. A state that enacts its own driver's license legislation benefitting DACA recipients is supportive of the federal policy, if not overly compliant with it. California, for example, a state known for its activism on DREAMer legislation in other policy arenas, incorporated DACA's lawful presence requirements into its repeal of a restrictive driver's license law in 2013<sup>94</sup> and also expressly included DACA recipients in its vehicle code.<sup>95</sup> The legislative history of the bill urges the President to go beyond DACA in suspension of non-criminal immigrant deportations.<sup>96</sup> Also, California Governor Jerry Brown made pro-DREAMer statements when signing the bill.<sup>97</sup>

In contrast to the supporting role that California's pro-immigrant state law played by incorporating DACA into its policies, Texas's and Florida's pro-immigrant state laws exposed friction in support for DACA. Both states' laws permit DACA recipients to receive driver's licenses.<sup>98</sup>

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94. See Act of Oct. 3, 2013, ch. 524, 2013 Cal. Stat. 4306, 4306, 4307 (West) (codified as amended in scattered sections of the California Vehicle Code) (explaining that California's law at the time of the bill's enactment denied undocumented immigrants access to licenses, requiring the Department of Motor Vehicles to issue licenses to individuals unable to submit proof of authorized presence under federal law if they meet certain residency requirements, and stating that the law went into effect January 1, 2015).

95. Act of Oct. 5, 2013, ch. 571, sec. 3, 2013 Cal. Stat. 4654, 4655, (codified as amended at CAL. VEH. CODE § 13001 (West Supp. 2015)) (amending state vehicle code by adding section relating to childhood arrivals); CAL. VEH. CODE § 12801.6 (West Supp. 2015) ("Any federal document demonstrating favorable action by the federal government for acceptance of a person into the deferred action for childhood arrivals program shall satisfy the requirements of [California law].").

96. See *Hearing Relative to Immigration on S.R. 40 Before the S. Judiciary Comm.*, 2013 Leg., Reg. Sess. 3, 4 (Cal. 2013) (introduced by Sen. Lou Correa), [http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140SR40#](http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SR40#) (follow "05/05/14- Senate Judiciary" hyperlink).

97. Gov. Jerry Brown signed a law permitting DACA licenses in October 2013. Patrick McGreevy, *DMV Prepares to Issue Driver's Licenses to Those People Who Are Here Illegally*, L.A. TIMES (Dec. 11, 2014), <http://www.latimes.com/local/politics/la-me-pol-immigrant-licenses-20141211-story.html>.

98. Texas law simply provides that "[a]n applicant who is not a citizen of the United States must present to the department documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license." TEX. TRANSP. CODE ANN. § 521.142(a) (West 2013 & Supp. 2014). In October 2012, the Texas Department of Public Safety amended their administrative

However, both states' governors vetoed some form of the legislation and expressed disapproval of DACA while acknowledging the need to follow state authority.<sup>99</sup> The position, labeled "compliance *dubitante*," is exemplified by Texas Governor Perry's statement (after acknowledging Texas's state law provides licenses): "In Texas, our legislature passed laws that . . . are right for Texas."<sup>100</sup> He makes it clear that his state's policy was a product of its sovereign authority and not deference to the federal government.<sup>101</sup> The clarification is important, if not prescient, as Texas became the lead plaintiff in the *Texas v. United States* lawsuit challenging the federal government's authority to enact DAPA and expand DACA.<sup>102</sup>

Apart from binding legislation, states may be motivated by the presence or threat of litigation. While states may fear litigation even when the threat is somewhat speculative, direct entanglement with the courts heightens this anxiety and strengthens the states' instrumental motivations for cooperating with federal policy. In North Carolina, the Department of Transportation's Department of Motor Vehicles (DMV) first issued, then suspended, and then reinstated thirteen licenses to DACA recipients while seeking clarification of legal requirements.<sup>103</sup> Specifically, officials within the North Carolina DMV questioned whether the issued licenses conformed with North Carolina law after DACA, and they made the decision to suspend the licenses pending their

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regulation listing documents acceptable for proof of eligibility to include those with lawful presence and began issuing licenses to qualifying immigrants. See Helene N. Dang, *Texas DPS Implements New Verification Process for Driver's Licenses*, TEX. IMMIGR. LAW BLOG (Oct. 25, 2012, 11:52 AM), <http://sinelson.typepad.com/susan-i-nelson-immigrat/2012/10/texas-dps-implements-new-verification-process-for-drivers-licenses-.html>; H.B. 235, 2013 Sess. (Fla. 2013).

99. Governor Scott vetoed the Florida bill H.B. 235 in June 2013. See Veto Message from Rick Scott, Governor of Fla., to Kenneth W. Detzner, Sec'y of State of Fla., on H.B. 235, <http://www.flgov.com/2013/06/04/governor-rick-scott-vetoes-hb-235/>. In Texas, Governor Perry vetoed H.B. 396. See H.B. 396, 77th Reg. Sess. (Tex. 2001), <http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=77R&Bill=HB396>; see also Proclamation of Rick Perry, Governor of Tex., Vetoing H.B. 396 (Jun. 17, 2001), <http://www.lrl.state.tx.us/scanned/vetoes/77/hb396.pdf#navpanes=0>.

100. Letter from Rick Perry, Governor of Tex., to Greg Abbott, Tex. Att'y Gen. (Aug. 16, 2012), [http://s3.amazonaws.com/static.texastribune.org/media/documents/O-AbbottGreg20120817\\_1.pdf](http://s3.amazonaws.com/static.texastribune.org/media/documents/O-AbbottGreg20120817_1.pdf).

101. *Id.*

102. See *infra* Part IV.

103. See Press Release, N.C. Dep't of Transp., NCDOT to Issue Driver Licenses for Those Who Qualify under DACA (Feb. 14, 2013), <http://www.ncdot.gov/download/dmv/DACA/PressReleaseDACA.pdf> (reinstating driving privileges to thirteen qualified individuals whose licenses were suspended pending N.C. Attorney General's opinion).

request for an official opinion from the state's Attorney General.<sup>104</sup> In a 2014 response letter to the Acting Commissioner for the Division of Motor Vehicles, Chief Deputy Attorney General Grayson Kelley confirmed that the DMV should issue driver's licenses to immigrants that have documentary proof that they received DACA's lawful presence designation pursuant to North Carolina General Statutes section 20-7(s).<sup>105</sup> According to the response letter, although DACA recipients do not receive lawful immigration status, they are entitled to driver's licenses because they are lawfully present for a certain period of time.<sup>106</sup> The response letter adopts the reasoning expressed in President Obama's executive action and Janet Napolitano's subsequent DHS guidance to reach this conclusion.<sup>107</sup> It states:

Based on our review of the historical background and legal concepts applicable to prosecutorial discretion and deferred status in the enforcement of immigration laws, we believe that individuals who present documentation demonstrating a grant of deferred action by the United States government are legally present in the United States and entitled to a drivers [sic] license of limited duration.<sup>108</sup>

While the Attorney General's letter stops short of instigating litigation, it contemplates the possibility of litigation by seeking an authoritative legal interpretation in advance of making its own policies.

The threat of litigation is realized in Arizona and Nebraska, the two states most reluctant to cooperate with DACA in the enactment of their state driver's license policies. Arizona waged a long war on the legality of DACA beginning with Governor Jan Brewer's executive order barring DACA recipients from receiving driver's licenses despite permitting others with deferred action to receive them.<sup>109</sup> The state executive order, which was subsequently codified by the state legislature, was stayed by the Ninth Circuit and then eventually struck down by the federal district

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104. See Letter from Michael Robertson, Comm'r, N.C. Dep't of Transp., Dep't of Motor Vehicles, to Roy Cooper, N.C. Attorney Gen. (Sept. 10, 2012) (requesting written opinion clarifying legal requirements).

105. Letter from Grayson G. Kelley, N.C. Chief Deputy Att'y Gen., to Eric Boyette, Acting Comm'r, N.C. Div. of Motor Vehicles 1-2 (Jan. 17, 2013), <http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Related-Information/Boyette,-Eric-1-17-2013.aspx> (referencing 2012 DMV request letter and explaining that the state should offer driver's licenses to undocumented, DACA-eligible immigrants based on Janet Napolitano's DACA guidance memo).

106. *Id.*

107. *Id.* at 2.

108. *Id.* at 2.

109. Ariz. Exec. Order. No. 2012-6, 18 Ariz. Admin. Reg. 2237 (2012).

court.<sup>110</sup> Arizona's lackluster implementation thereafter demonstrates that the state reluctantly conceded in litigation. In Nebraska, litigation threatened a similar law denying driver's licenses to DACA recipients until the Nebraska state legislature passed a new law that mooted the lawsuit.<sup>111</sup>

### *B. Legitimacy*

Legitimacy is a normative view of institutional authority premised on fairness or trust. It shows itself in the narratives of state policymaking as respect for executive authority to issue DACA and respect for immigration enforcement authority.

States cooperate with DACA if they believe the federal policy issues from legitimate and trustworthy authority, whether that authority is the President's immigration enforcement discretion or the USCIS's use of guidance to exercise it. This belief in a federal policy's "respectworthiness" takes on a procedural cast. Since a validly-elected president or a validly-appointed agency head enacted this federal policy, I will support it due to my sense of obligation to voluntarily obey and notwithstanding my substantive policy preferences.<sup>112</sup> In Nevada, one of the states whose views on immigration are internally divided, belief in DACA was clearly influential in its adoption of an inclusionary driver's license policy. Prior to DACA, Nevada regulations established by the DMV required proof of legal presence with two documents, an identification card, and proof of a Social Security number.<sup>113</sup> Once President Obama announced the DACA program in 2012, the DMV and Governor Brian Sandoval rearticulated that the state would accept the EAD provided to DACA recipients as proof of lawful presence for the

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110. *Ariz. Dream Act Coal. v. Brewer (Ariz. Dream Act Coal. II)*, 757 F.3d 1053, 1068 (9th Cir. 2014), *remanded to* 81 F. Supp. 3d 795 (D. Ariz. 2015).

111. *Hernandez v. Heineman*, No. CI 13-2124, slip op. at 1 (Neb. Dist. Ct. June 11, 2015) (voluntarily dismissed). The new Nevada law overrode a Governor's veto to alter the original prohibition and mooted the litigation. L.B. 623, 140th Leg., 1st Sess. (Neb. 2015).

112. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW* (2002) (breaks out "motive based trust" from procedural justice).

113. Nevada Revised Statutes section 483.290(3) (2014) requires the Department of Motor Vehicles to adopt regulations providing for the issuance and other details of driver's licenses. The Department of Motor Vehicles required two documents to prove identification (other license, passport, or birth certificate or certificate of naturalization or green card) and one document to prove Social Security number (pay stub with Social Security number, tax return, W-2, Social Security card). *See Proof of Identity & Address*, NEV. DEP'T MOTOR VEHICLES <http://www.dmvnv.com/dlresidency.htm> (last visited Oct. 4, 2015) (explaining the documents required for each of a REAL ID compliant license, a standard driver's license (substantially the same) and a driver authorization card).

purpose of obtaining a state-issued driver's license.<sup>114</sup> Although DACA recipients would have been eligible for driver's licenses already (the EAD is listed as an acceptable document to establish proof of identity), Nevada officials nevertheless took DACA as an opportunity to clarify their position publicly. Nevada's senate leadership announced their party's support for Obama's executive action in November 2012; Republican and Democratic state senators cited the positive benefits that DACA would have on the state's education system and economy and public safety for drivers in declaring their support for the program.<sup>115</sup> In light of the bipartisan support,<sup>116</sup> the state passed a new law extending the driver's license benefit to all undocumented immigrants—going beyond DACA recipients—within six months.<sup>117</sup> Revealing sensitivity to the plight of undocumented immigrants, the Nevada bill “requires that a driver authorization card and an instruction permit obtained in accordance with [this law] be of the same design as a driver's license with only the minimum number of changes necessary to comply with the federal Real ID Act of 2005,”<sup>118</sup> to balance the goals of cooperating with the federal government and protecting immigrants who bear the distinguishing cards by letting them “feel safe enough with the application process.”<sup>119</sup> The belief in DACA's legitimacy manifests itself substantively in the adoption of state law that over-complies with federal policy and also in the large number of licenses subsequently issued.

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114. *State Senate GOP Leadership Endorses Drivers' Licenses For Deferred Action Program*, NEV. NEWS BUREAU (Nov. 30, 2012, 3:08 PM), <http://www.nevadanewsbulletin.com/2012/11/30/state-senate-gop-leadership-endorses-drivers-licenses-for-deferred-action-program/>.

115. *Id.*

116. The Senate passed the bill by a vote of twenty to one, and the General Assembly passed it by thirty to nine. *S.B. 303 Votes*, NEV. ELEC. LEGIS. INFO. SYS., <https://nelis.leg.state.nv.us/77th2013/App#/77th2013/Bill/Votes/SB303> (last visited Oct. 10, 2015).

117. Senate Bill 303 was introduced March 18, 2013, and signed into law May 31, 2013. *S.B. 303 Overview*, NEV. ELEC. LEGISLATIVE INFO. SYS., <https://nelis.leg.state.nv.us/77th2013/App#/77th2013/Bill/Overview/SB303> (last visited Oct. 10, 2015); *see also* S.B. 303, 77th Reg. Sess. (Nev. 2013) (codified at NEV. REV. STAT. § 481.850 (2014)). Interestingly, just six months prior, the Nevada Supreme Court denied a driver's license to man who claimed that he was entitled to one and brought suit under state law. *See* Ed Vogel, *Nevada Justices Reject Immigrant's Driver's License Request*, LAS VEGAS REV. J. (June 18, 2013, 3:43 PM), <http://www.reviewjournal.com/news/crime-courts/nevada-justices-reject-immigrants-drivers-license-request>. The Nevada Supreme Court denied the undocumented immigrant's writ without explanation. *Schoka v. Nev. Dep't of Motor Vehicles*, No. 58537, 2013 WL 3227732 (Nev. June 14, 2013).

118. Nev. S.B. 303 (emphasis added).

119. *Meeting of the Assembly Transportation Committee Regarding S.B. 303*, 77th Reg. Sess. (Nev. 2013) (testimony of Senator Mo Denis, D-2d Dist.).



The absence of respect for federal executive authority in Florida presents a clear contrast to Nevada's thought process. Florida's governor made public statements explaining his decision to veto legislation that would make DACA recipients expressly eligible for driver's licenses in terms of his lack of respect for executive action.<sup>120</sup> Governor Scott admonished that his state would continue to grant driver's licenses to DACA recipients, but that he was making a symbolic statement against the practice by vetoing the bill.<sup>121</sup> To him, the President's policy was adopted "without legal basis"—it was not "passed by Congress, nor . . . a promulgated rule"—and so the legislature should not have done it "by relying on . . . federal government policy."<sup>122</sup> He would instead permit the practice only as a matter of the original state law, without incorporating President Obama's nonbinding federal policy. Similar statements could be made about Arizona, whose persistent doubts about DACA's legitimacy resulted in lackluster compliance and contributed to the low number of licenses sought out by immigrants notwithstanding a judicial opinion clarifying and mandating Arizona's cooperation as a matter of legal compliance.<sup>123</sup>

Underlying states' respect for executive authority to issue DACA is a more general concern for the federal government's credibility on immigration enforcement. Perhaps the only unifying issue among states enacting inclusionary or exclusionary driver's license policies is their dissatisfaction with the federal government's handling of immigration enforcement. California believes that DACA is an inadequate fix to the broken immigration system—preferring a comprehensive immigration reform bill with a DREAM Act that would provide relief from deportation and a pathway to legalization through legislation—and seeks to go farther than the Obama Administration is willing to through the provision of a state safety net extending driver's licenses among other benefits. Texas and Nebraska, until recently, believed that the federal government was exacerbating the problem of under-enforcement that had produced the large undocumented population DACA seeks to redress. As an example, Nebraska Governor Dave Heineman announced a broad policy of excluding DACA recipients from licenses, welfare, and public benefits. Governor Heineman claimed that Nebraska is a "welcoming

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120. See Press Release, Rick Scott, Gov. of Tex., Governor Rick Scott Vetoes HB 235 (June 4, 2013), <http://www.flgov.com/2013/06/04/governor-rick-scott-vetoes-hb-235/>.

121. *Id.*

122. *Id.*

123. Arizona's driver's license policies and the resulting litigation are described as "involuntary cooperation" and further described in the next section on cooperative behaviors, *infra* notes 160–167.

state” and that “we’re glad to have [DACA immigrants] in our state, but do it legally.”<sup>124</sup> “When you don’t secure the border, have a speedier, technological way to legal immigration and you won’t address the issue that we have 15 million illegal immigrants in the country right now, we end up with these situations,” Heineman said.<sup>125</sup> Texas hinted at the same problem when it described the cost burden that it bears to absorb large numbers of undocumented immigrants inside its borders as the result of a federal policy it does not support.<sup>126</sup> In a middle ground, Illinois’ Kankakee County sheriff stated that, “the issues of illegal immigration and obtaining a driver’s license need to be considered separately. The safety of the driving public should be the issue.”<sup>127</sup>

*C. Morality: Policy, Politics, Partisanship*

A state’s sense of morality shows in its values and substantive policy preferences. This style of normative evaluation focuses on whether states’ substantive policies align with federal immigration policy. It also entails the states’ values with regard to other policy goals.

Morality refers to substantive policy preferences such as the states’ stance on federal immigration policy generally and DACA specifically.<sup>128</sup> Put simply, if in somewhat reductionist terms, a pro-immigrant stance would be favorable toward DACA and discretionary immigration enforcement whereas an anti-immigrant stance would be more skeptical of DACA and selective immigration enforcement. Politics and partisanship refers to the official or unofficial positions adopted by elected representatives from the two-major political parties. Also put

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124. Brent Martin, *Nebraska to Defy Obama Administration Deferred Action Program*, NEB. RADIO NETWORK (Aug. 20, 2012), <http://nebraskaradionetwork.com/2012/08/20/nebraska-to-defy-obama-administration-deferred-action-program-audio/>. His successor, Governor Ricketts, vetoed a state law for DACA licenses “on principle” before being overridden by the state legislature in May 2015. *See* Act of May 28, 2015, 2015 Neb. Laws L.B. 623.

125. Martin, *supra* note 124.

126. *See Driver’s Licenses for All Immigrants: Quotes from Law Enforcement*, NAT’L IMMIGR. L. CTR. (Oct. 2004), [http://v2011.nilc.org/immspbs/DLs/DL\\_law\\_enfrmnt\\_quotes\\_101404.pdf](http://v2011.nilc.org/immspbs/DLs/DL_law_enfrmnt_quotes_101404.pdf) [hereinafter NILC Quotes] (quoting thirteen law enforcement officers from a variety of states supporting universal licensing). This is essentially the same argument that Texas advances as proof of injury in the *Texas v. United States* lawsuit against DAPA and the DACA expansion in November 2014. No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015).

127. NILC Quotes, *supra* note 126.

128. This Article reports on *signals* of states’ subjective beliefs that DACA is moral in the sense of substantively and normatively desirable. It does not make the argument that DACA is moral in an objective sense or suggest that a state’s belief in its morality makes it so. On morality in the latter sense, I defer to specialists in jurisprudence engaged in a deeper and enduring conversation on morality that goes beyond the scope of this Article.

simply for immediate purposes, Republicans would be challengers to the closely related DAPA program by virtue of their participation in the *Texas v. United States* litigation and bills to roll back immigration-related executive action; Democrats would be deemed as supporters.<sup>129</sup> Morality is distinguished from strategic politics and partisanship in this discussion.

One competing explanation for state acquiescence is that states use driver's license policies to express their predispositions toward undocumented immigrants rather than anything particular to the DACA program or the use of executive action. This explanation could be offered for California's statements of support given that they emphasize pro-immigrant feelings and recognize driver's licenses in connection to a range of benefits that go beyond licensing. It also explains Nebraska's statement of opposition to driver's licenses, in which Nebraska Governor Heineman groups together the "continu[ing] . . . practice of not issuing driver's licenses, welfare benefits or other public benefits to illegal immigrants."<sup>130</sup> While predispositions cannot be discounted, they are not a persuasive explanation ultimately because nearly every state provides licenses, regardless of the wide variation in immigrant climate indexes, immigrant integration scores, and partisanship.

Apart from policy preferences for immigration enforcement, a state could instead adopt their policies on the basis of independent policy goals. Some policy goals might be a concern for the specific DACA population's tenuous situation as long-time residents vulnerable to removal or for public safety concerns. Nevada, a moderate state with mixed support for immigrants generally, provides a solid example in its supportive statements that DACA youth are working hard and trying to "improve their and the lives of their families."<sup>131</sup> Other policy goals might pertain more to the general population, including pragmatic goals such as driver safety, insurance, and economic benefits produced by facilitating immigrant workers. A number of moderate and even conservative states adopt these policy rationales for supporting driver's licenses. For example, Texas Governor Perry deferred to the state legislature's "policy choices,"<sup>132</sup> such as the Texas legislature's concern

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129. For more discussion of the legal and political discourse surrounding DAPA, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Litigation Over Administrative Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 64 (2015) (distinguishing legal and policy discourse). See also Part IV.B.

130. Martin, *supra* note 124. The Nebraska state legislature subsequently adopted a pro-immigrant driver's license policy in May 2015. Act of May 28, 2015, 2015 Neb. Laws L.B. 623.

131. NEV. NEWS BUREAU, *supra* note 114.

132. Letter from Rick Perry to Greg Abbott, *supra* note 100.

for public safety at the time it adopted its policy.<sup>133</sup> Austin's Assistant Chief of Police expressed a similar view on driver safety:

[W]e strongly believe it would be in the public interest to make available to these communities the ability to obtain a drivers license. In allowing this community the opportunity to obtain drivers licenses, they will have to study our laws and pass a driver's test that will make them not only informed drivers but safe drivers.<sup>134</sup>

Another version of the public safety rationale comes from Kansas, where the Kansas City Chief of Police credits driver's licenses with enhancing security by promoting positive identification: "Expanding opportunities to obtain drivers' licenses is not incongruent with homeland security considerations; on the contrary, allowing law enforcement to positively identify individuals within our state will help law enforcement to identify potential threats and reduce vulnerability and raise the feeling of security of citizens and non-citizens alike."<sup>135</sup> Cost considerations are another reason to license undocumented immigrant drivers.<sup>136</sup> Park City, Utah's Chief of Police wagered that the ability to obtain driver's insurance with a license would reduce cost burdens: "having drivers able to purchase insurance is a benefit which cannot be overstated. The number of cases involving uninsured, unlicensed drivers without current registration place[s] an enormous burden on our court system."<sup>137</sup>

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133. H.B. 396, 77th Reg. Sess. (Tex. 2001).

134. NILC Quotes, *supra* note 126.

135. *Id.* This statement preceded DACA and may partially reflect the post-9/11 concern for national security through identification that similarly influenced passage of the REAL ID Act requirements.

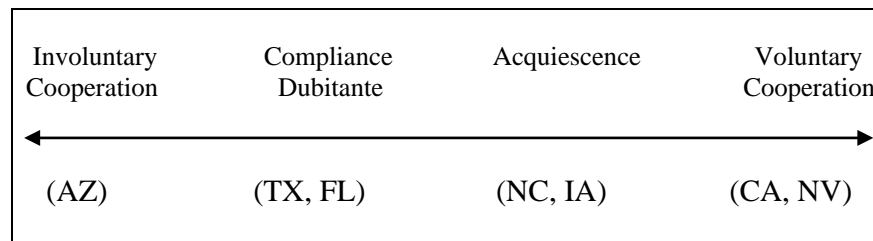
136. Indeed, the plethora of pragmatic benefits and low costs associated with driver's licenses might be one reason for the overwhelming support for driver's licenses, as opposed to more division in other state policies such as higher education and health care. *See* Part III.B and Part III.C.

137. NILC Quotes, *supra* note 126. In *Texas v. United States*, Texas cites to the preemptive effect of DAPA on states' driver's license policies as evidence that states will suffer concrete injury and will unfairly bear the cost of issuing additional licenses at a deficit if DAPA is implemented. No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015). Although Texas's claim conflates the cost of licenses issued in association with the 2012 DACA program with the speculative costs of licenses associated with the not-yet-implemented DAPA program, their sharply contrasting cost arguments are worth noting as an expression of Texas's shifting rationale for opposing the extension of state driver's licenses—arguments that play an important role in the litigation over DAPA. More discussion of the litigation is in Part IV.A.

## 2. Cooperative Behaviors

How a state translates its attitudes toward a nonbinding federal policy into cooperative policymaking behaviors also requires close examination. The case studies posit that acceptance of a law's legitimacy falls along a spectrum of cooperative behavior and that changing attitudes influence changing levels of cooperation. They find that states engage in a dynamic process of decision-making as they formulate policies on driver's licenses and craft eligibility criteria that include or exclude DACA recipients—based on changing understandings of DACA's legality, legitimacy, and policy desirability among other factors. Figure 2 shows that states have been generally willing to accept DACA's legitimacy and to acquiesce to its lawful presence designation as valid documentation for driver's licenses; it also shows that there is a spectrum of cooperative behavior. For each of the fifty states that could be plotted on the spectrum, four types of behaviors are noted in this discussion: voluntary cooperation, acquiescence, compliance *dubitante*, and involuntary cooperation. An exemplar of each type is narrated below.<sup>138</sup>

Figure 2: Spectrum of Cooperative Behaviors



### A. Voluntary Cooperation

Together with California,<sup>139</sup> Nevada strongly supported DACA with its driver's license policies. Prior to DACA, Nevada regulations established by the DMV required proof of legal presence with two documents, an identification card, and proof of a Social Security

138. The measures of this cooperation "spectrum" differ across studies surveying immigration policies in fifty states. See, e.g., RODRÍGUEZ ET AL., *supra* note 93; Pham & Van, *supra* note 93.

139. California is a pioneer in pro-immigrant policies such as the issuance of driver's licenses to undocumented immigrants and often over-complies with federal requirements regarding DACA recipients. See generally S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS, Spring 2015, at 1, 3.

number.<sup>140</sup> Once DACA was announced, the Nevada DMV and Governor Brian Sandoval announced that the state would accept the EAD provided to DACA recipients as proof of lawful presence for the purpose of obtaining a state-issued driver's license.<sup>141</sup> Although DACA recipients would have been eligible for driver's licenses already because the state listed the EAD as an acceptable document to establish proof of identity (no legality concern), state officials nevertheless articulated support for extending driver's licenses to DACA recipients based on their perception of DACA's legitimacy.<sup>142</sup> In keeping with their strong support, the state passed a new law extending the driver's license benefit to all undocumented immigrants within two months of the bill's introduction.<sup>143</sup> This heightened both legality and legitimacy. Furthermore, the bill requires that the license "be of the same design as a driver's license with only the minimum number of changes necessary to comply with the federal Real ID Act of 2005" to "ensure that people feel safe enough with the application process to apply for a driver's privilege card."<sup>144</sup> The enactment of additional safeguards and state law demonstrate robust cooperation that results from an alignment of legality and legitimacy over moderate policy preferences.

*B. Gradual Acceptance and Acquiescence*

Iowa moved gradually toward acceptance of DACA on the basis of legal clarifications that influences its perceptions of legitimacy and legality. Prior to DACA, Iowa's state law required a Social Security number or proof of lawful presence for the issuance of a driver's license.<sup>145</sup> Iowa residents challenged Iowa's law under the Equal Protection Clause.<sup>146</sup> They argued that state law unfairly authorized the Iowa Department of Transportation to waive this requirement for legal temporary residents (e.g., foreign students), but not undocumented immigrants or others falling short of lawful status.<sup>147</sup> The Iowa Supreme Court upheld the state law as rationally related to state interests of reserving services to those with legal status and discouraging illegal

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140. See *supra* note 113 and accompanying text.

141. NEV. NEWS BUREAU, *supra* note 114.

142. *Id.*

143. See *supra* note 116 and accompanying text.

144. S.B. 303, 77th Reg. Sess. (Nev. 2013) (codified as Nev. Rev. Stat. § 481.850 (2014)); see *supra* notes 117–18 and accompanying text.

145. IOWA CODE § 321.196(1) (2014).

146. Sanchez v. State, 692 N.W.2d 812, 815, 817 (Iowa 2005) (citing IOWA CODE § 321.182(1)(a)).

147. *Id.* at 818–19.

immigration among other things.<sup>148</sup> This raised the threat of legality, demonstrating policy preferences contrary to DACA. In December 2012, the Iowa Department of Transportation decided not to issue driver's licenses to DACA recipients because the DACA guidance explicitly stated that DACA conferred no legal status.<sup>149</sup> However, the Iowa Department of Transportation subsequently revised its policy in response to USCIS' clarification that DACA furnishes lawful presence, even if not lawful status.<sup>150</sup> This lessened legality and legitimacy concerns. Iowa based its policy on a gradual recognition of DACA's legality and legitimacy over its shifting substantive policy preferences, and yet it exhibits cooperative behavior nonetheless.

North Carolina similarly moved toward acceptance in incremental, sometimes halting, steps. In the absence of relevant state law, the North Carolina DMV issued and then suspended thirteen licenses to DACA recipients while questioning whether DACA conformed to North Carolina law.<sup>151</sup> In response to the DMV's request for an official opinion, the state Attorney General's Office confirmed that the DMV should issue driver's licenses to those with documentary proof of DACA lawful presence using the reasoning expressed in President Obama's executive order and DHS guidance, and the DMV reinstated the licenses.<sup>152</sup>

### C. Compliance Dubitante

The widespread acceptance of DACA's legitimacy in states is neither unanimous nor uncontested. Texas, for example, provides licenses to DACA recipients, but it does so with skepticism of the federal executive's legitimate authority (compliance *dubitante*) and instead relies on its state sovereign authority to make law. Both prior to DACA and currently, Texas law simply provides that "an applicant who is not a citizen of the United States must present to the department documentation

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148. *Id.* at 819.

149. See *Iowa DOT Will Not Issue Driver's Licenses or Nonoperator IDs to Persons Granted Deferred Action for Childhood Arrivals Status*, IOWA DEP'T TRANSP. (Dec. 27, 2012), <http://www.news.iowadot.gov/newsandinfo/2012/12/iowa-dot-will-not-issue-drivers-licenses-or-nonoperator-ids-to-persons-granted-deferred-action-for-c.html>.

150. *Iowa Reverses Itself on Driver's Licenses for DACA Recipients*, NEW AMERICA MEDIA (Jan. 24, 2013), available at <http://newamericamedia.org/2013/01/iowa-reverses-itself-on-drivers-licenses-for-daca-recipients.php>.

151. See Press Release, N.C. Dep't of Transp., NCDOT to Issue Driver Licenses for Those Who Qualify under DACA (Feb. 14, 2013), <http://www.ncdot.gov/download/dmv/DACA/PressReleaseDACA.pdf> (reinstating driving privileges to thirteen qualified individuals whose licenses were suspended pending the North Carolina Attorney General's opinion).

152. See Letter from Grayson G. Kelley to Eric Boyette, *supra* note 105; *supra* notes 105–08.

issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license."<sup>153</sup> In 2001, Texas's legislature attempted to pass a statute providing licenses to *all* undocumented immigrants, but Governor Perry vetoed it.<sup>154</sup> In October 2012, the Texas Department of Public Safety amended their administrative regulation listing documents acceptable for proof of eligibility to include those with lawful presence and began issuing licenses to qualifying immigrants, citing the need to ensure public safety through verification of driving ability and insurance coverage.<sup>155</sup> It made no reference to DACA, but around the time of the administrative change, Governor Perry made a public statement that DACA is a "slap in the face to the rule of law."<sup>156</sup> Governor Perry expressed his reservations about DACA in a letter stating: "I am writing to ensure that all Texas agencies understand that Secretary Napolitano's guidelines . . . do not change our obligations under federal and Texas law to determine a person's eligibility for state and local public benefits."<sup>157</sup> Acknowledging that Texas does issue driver's licenses, Perry made clear that they do so because of the state's sovereign authority and that the "secretary's directive does not undermine or change our state laws."<sup>158</sup> Texas's skepticism of the lawfulness of the executive action conditions its willingness to cooperate. It likely contributes to Texas's subsequent enlistment as lead plaintiff in the *Texas v. United States* litigation.

#### *D. Involuntary Cooperation*

Until January 2015, Arizona was one of only two states that declined to offer driver's licenses to DACA beneficiaries and defended its state policy in several rounds of litigation that reached the Supreme Court before being permanently enjoined in federal district court.<sup>159</sup> In direct response to DACA's announcement in 2012, Arizona Governor Jan Brewer issued her own executive order stating that Arizona would not issue driver's licenses to DACA recipients for reasons similar to North

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153. TEX. TRANSP. CODE ANN. § 521.142(a) (West 2013).

154. See sources cited *supra* note 98.

155. See Helene N. Dang, *supra* note 98.

156. Letter from Rick Perry to Greg Abbott, *supra* note 100. Governor Perry is presumably referring to the same Texas state law extending licenses that he tried to veto by proclamation.

157. *Id.*

158. *Id.*

159. The other uncooperative state is Nebraska, which has a similar law barring DACA recipients from licenses that was challenged in state court. The passage of new legislation permitting driver's licenses, over a veto from the Nebraska Governor, mooted the state court litigation. Act of May 28, 2015, 2015 Neb. Laws L.B. 623.



Carolina's for reaching the opposite conclusion that executive action necessitated the DMV's acceptance of DACA documentation.<sup>160</sup> Governor Brewer argued that Secretary Napolitano's memorandum could have no preemptive effect on Arizona state law.<sup>161</sup> Brewer's announcement was codified in Arizona state law that allowed noncitizens to use EAD's as proof of eligibility for driver's licenses while specifically denying DACA recipients.<sup>162</sup>

The federal district court initially agreed with Governor Brewer, holding that the Arizona laws did not violate the Equal Protection Clause and were not preempted by DACA<sup>163</sup>:

The memorandum does not have the force of law. Although the Supreme Court has recognized that federal agency regulations 'with the force of law' can preempt conflicting state requirements, federal regulations have the force of law only when they prescribe substantive rules and are promulgated through congressionally-mandated procedures such as notice-and-comment rulemaking. Secretary Napolitano's memorandum does not purport to establish substantive rules (in fact, it says that it does not create substantive rights) and it was not promulgated through any formal administrative procedure. As a result, the memorandum does not have the force of law and cannot preempt state law or policy.<sup>164</sup>

The Ninth Circuit disagreed, ruling that Arizona's state law violated the Equal Protection Clause,<sup>165</sup> and on remand, the federal district court ordered the Arizona Department of Transportation to stop denying licenses to DACA recipients.<sup>166</sup> Once the federal courts chimed in on the

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160. Ariz. Exec. Order No. 2012-06, *Re-Affirming Intent of Arizona Law in Response to the Federal Government's Deferred Action Program* (Aug. 15, 2012); see also Letter from Grayson G. Kelley to Eric Boyette, *supra* note 105.

161. Defendants' Answer to Plaintiffs' September 17, 2013 Complaint for Declaratory Relief and Injunctive Relief and Demand for a Jury Trial, *Ariz. Dream Act Coal. v. Brewer* (*Ariz. Dream Act Coal. I*), 945 F. Supp. 2d 1049, 1054 (D. Ariz. 2013), (No. CV-12-02546-PHX-DGC), *rev'd*, 757 F.3d 1053 (9th Cir. 2014), *remanded* 81 F. Supp. 3d 795 (D. Ariz. 2015).

162. *Ariz. Dream Act Coal. I*, 945 F. Supp. 2d at 1054 (citing ARIZ. REV. STAT. ANN. § 28-3153(D) (2013) ("[T]he department shall not issue . . . or renew a driver license . . . for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law.")).

163. *Id.* at 1057–60.

164. *Id.* at 1059 (citations omitted).

165. *Ariz. Dream Act Coal. v. Brewer* (*Ariz. Dream Act Coal. II*), 757 F.3d 1053 (9th Cir. 2014). The Ninth Circuit left open the question of DACA's preemptive legal effect. *Id.* It is difficult to say that the courts vindicated DACA's legality over Arizona law. It requested supplemental briefing on preemption on July 23, 2015. *Id.*

166. *Ariz. Dream Act Coal. v. Brewer* (*Ariz. Dream Act Coal. III*), 81 F. Supp. 3d 795, 811 (D. Ariz. 2015), *appeal filed*. On remand, the district court in Arizona granted relief for

legality of the program, Arizona permitted DACA recipients to receive licenses. However, its lackluster program implementation, continued ban on driver's licenses to non-DACA deferred action recipients, and its participation as a plaintiff in the *Texas v. United States* litigation suggests that a declaration of legality has not led to voluntary cooperation so much as involuntary cooperation with the law.<sup>167</sup> Absent a true sense of legitimacy, it is not surprising that Arizona only barely complied—following the letter of the law, but circumventing its spirit of cooperation. Cooperation following direct legal challenge is a stark test for the extent to which legality constrains cooperation in the face of continuing dissent. It suggests that legality is a serious obstacle to cooperation (especially when legal pronouncements encroach on legitimacy perceptions), even if it is not insurmountable. It also suggests that legitimacy has continuing effects on cooperation even after legality is resolved.

The case study of driver's licenses is merely one example of state policymaking that voluntarily incorporates federal immigration policy, a far reaching phenomenon that could be extended to other state policies. Other than granting proof of personal identity and driving ability, driver's licenses serve a host of practical and equally important symbolic purposes. Driver's licenses allow immigrants to get registered and insured so that they can get to work and conduct their affairs, e.g., opening bank accounts, paying taxes, obtaining library cards, and cashing checks.<sup>168</sup> Some call driver's licenses "breeder documents" because the document becomes the basis for so many other proofs.<sup>169</sup> Consequently, the driver's license case study is an entrée into states' voluntary incorporation of federal lawful presence designations to administer a variety of public benefits to undocumented immigrants. Similar support for DACA recipients exists in many state policies that reference DACA, as seen in the brief case study of states policies providing access to higher education to DACA recipients. State policies on health care contrast

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the plaintiffs, and ordered the state's Department of Transportation to issue driver's licenses to DACA beneficiaries. *Id.*

167. Associated Press, *Low Turnout for DREAMers Driver's Licenses in Arizona*, WASH. TIMES (Apr. 3, 2015), <http://www.washingtontimes.com/news/2015/apr/3/low-turnout-for-dreamers-drivers-licenses-in-arizo/>.

168. See Kari E. D'Ottavio, *Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931, 964 (2013); María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 92 (2005); Kevin Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 222–24 (2004).

169. See Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 830 (2015); CRAIG ROBERTSON, *PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT* (2010).

sharply, with only a handful of states incorporating DACA recipients. Put together, the vignettes of state policies on driver's licenses, higher education, and health care show that cooperative state policymaking varies along a spectrum. These "shadow case studies" merit additional attention because the plaintiff-states in *Texas v. United States* cite the economic burden of administering driver's licenses and other benefits as reasons to enjoin the related DAPA program from taking effect.<sup>170</sup>

### *B. Higher Education for DACA Recipients*

Congress in 1996 enacted two laws that limit states' ability to offer higher education to undocumented immigrants. The welfare reform bill restricts the award of a public benefit such as a tuition subsidy *unless* states enact laws that "affirmatively provide" eligibility to undocumented immigrants.<sup>171</sup> Many states exercise this option.<sup>172</sup> Doing so requires states to enact policies that abide by an additional constraint from a federal immigration law, the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA), which expressly restricts access to postsecondary education benefits for undocumented students on the basis of their *residency* in the state.<sup>173</sup> States turn to eligibility requirements other than residency per se, such as DACA's "lawful presence" (which includes a durational residence requirement), to enact state policies to benefit undocumented immigrant students.<sup>174</sup> Most colleges admit

170. *Texas v. United States*, 86 F. Supp. 3d 591, 616–17 (S.D. Texas 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 at \*3 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257. ("The States allege that the DHS Directive will directly cause significant economic injury to their fiscal interests.").

171. The Personal Responsibility and Work Opportunity Reconciliation Act says that any alien who is not legally in the country "is not eligible for any State or local public benefit" and defines public benefit defined to include tuition subsidies. 8 U.S.C. § 1621(a), (c)(1)(B) (2013). However, § 1621(d) offers an exception: it permits states to offer benefits to unlawful immigrants *if* they enact a state law that "affirmatively provides" for such eligibility. 8. U.S.C. § 1621(d).

172. See generally 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 (2012); Stephen L. Nelson et al., *Administrative DREAM Acts and Piecemeal Policymaking: Examining State Higher Education Governing Board Policies Regarding In-State Tuition for Undocumented Immigrant Students*, 28 GEO. IMMIGR. L.J. 555 (2014); *Institute for Higher Education Law and Governance*, UNIV. HOUS. L. CTR., <http://www.law.uh.edu/ihe/g/> (last visited Nov. 28, 2015) (tracking legislative changes and litigation on in-state tuition for undocumented and DACA students at this website); *Table: Laws & Policies Improving Access to Higher Education for Immigrants*, NAT'L IMMIGR. L. CTR., <http://www.nilc.org/eduaccesstoolkit2a.html#tables> (last updated June 6, 2015).

173. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8, 18, and 28 U.S.C.).

174. See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

undocumented immigrants with lawful presence under at least some circumstances.<sup>175</sup> A large number of states permit undocumented students with lawful presence to pay in-state tuition rates.<sup>176</sup> A handful of states make undocumented students with lawful presence eligible for state financial aid.<sup>177</sup>

Just because a state *can* rely on the DACA lawful presence proxy in this way, though, does not mean that it will. Two brief examples demonstrate the point. Virginia permits DACA recipients to obtain in-state tuition under its general tuition classification policies.<sup>178</sup> Its rationale is based on two normative commitments. Procedurally, existing state guidance extends to those with Temporary Protected Status (TPS), a federally-issued designation comparable to deferred action that qualifies the recipient for in-state tuition. Substantively, DACA recipients are “already Virginians in some important ways.”<sup>179</sup> The analogy between DACA and TPS underscores Virginia’s concern with fair and consistent administration of the law. North Carolina took the opposite approach and interpreted its general tuition classification statute to exclude DACA recipients from its residency requirements upon clarifying that tuition was a matter of state policy, not federal mandate.<sup>180</sup>

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175. Alabama, Georgia, South Carolina do *not* admit undocumented immigrants to at least some of their state college systems, regardless of lawful presence or DACA status. *Maps: State Laws and Policies on Access to Higher Education for Immigrants*, NAT’L IMMIGR. L. CTR., <http://www.nilc.org/eduaccesstoolkit2.html#maps> (last visited Nov. 28, 2015).

176. As of July 2014, twenty states classify DACA recipients as in-state residents through their tuition policies: sixteen by state legislation and four by university policy. Gilberto Mendoza, *Tuition Benefits for Immigrants*, NAT’L CONF. ST. LEG. (July 15, 2014), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx>; NAT’L IMMIGR. L. CTR., *supra* note 161.

177. California and Texas offer state financial aid. *See* CAL. EDUC. CODE § 68130.5 (West 2012); TEX. EDUC. CODE ANN. § 54.052 (West 2012); NAT’L IMMIGR. L. CTR., *supra* note 175.

178. On April 29, 2014, the Virginia Attorney General advised the state’s public colleges that DACA recipients may receive in-state tuition. Letter from Mark Herring, Att’y Gen. of Va. (Apr. 29, 2014), <http://www.schev.edu/finaid/DACAAGAdviceLetter.pdf>. The Attorney General elaborated that “no provision of state or federal law precludes individuals approved under DACA from . . . establishing domicile and qualifying for in-state tuition in accordance with Virginia Code § 23-7.4.” *Id.* According to this interpretation, DACA furnishes evidence of “intent to stay indefinitely,” which is relevant to establishing domicile, even if it is not a residency determination. *Id.*

179. Esther Yu-Hsi Lee, *Undocumented Immigrants in Virginia Can Now Qualify for In-State Tuition*, THINKPROGRESS (Apr. 30, 2014, 9:00 A.M.), <http://thinkprogress.org/immigration/2014/04/30/3432220/daca-recipients-virginia-in-state-tuition/>.

180. Letter from Hon. Marcus Brandon, Representative, N.C. Gen. Assembly, to Roy Cooper, Attorney Gen. of N.C. (Dec. 18, 2013) (requesting written opinion on eligibility for in-state tuition for undocumented students who graduated from North Carolina schools with and without DACA.).

North Carolina's Attorney General preferred to not unfairly displace U.S. citizen residents with undocumented students as a matter of its own executive discretion, preferring to instead defer to state laws that do not affirmatively provide such benefits.<sup>181</sup> But this interpretation of tuition rates as a state legislature's prerogative obviated the need to consider consistency across federal designations.<sup>182</sup> Given that Virginia and North Carolina interpreted similarly-worded statutes differently, legal analysis is insufficient to explain their divergent policy outcomes. Legitimacy, premised on a sense of fairness and consistency across federal law, played a part as well.

### *C. Health Care for DACA Recipients*

In contrast to state policies permitting DACA recipients access to driver's licenses and higher education, state policies provide less health care coverage for undocumented immigrants. The reason is that undocumented immigrants are excluded from nearly every form of federally-funded health care.<sup>183</sup> Under the Affordable Care Act (ACA), undocumented immigrants are not permitted to purchase insurance from the state insurance exchanges unless they are lawfully present.<sup>184</sup> Even then, the ACA generally provides care to undocumented immigrants only in extreme circumstances such as emergency care or for low-income pregnant women and children.<sup>185</sup> Moreover, a 2012 U.S. Department of

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181. The North Carolina Attorney General advised that legislative changes to the state's residency laws were a preferable way to change residency requirements, if desired. Letter from Roy Cooper, Attorney Gen. of N.C., to Hon. Marcus Brandon, Representative, N.C. Gen. Assembly (Jan. 22, 2014), <http://www.wral.com/asset/news/state/nccapitol/2014/01/23/13322333/Brandon-Rep-Marcus-1-22-2014.pdf>.

182. Although the Attorney General's opinion is not binding on the university system, it is influential.

183. Generally, noncitizens have been ineligible for federal health care other than emergency care since the 1996 welfare reforms in PRWORA. Clarissa A. Gomez, Note, *The Paradox Between U.S. Immigration Policy and Health Care Reform: "Deferred Action For Childhood Arrivals"*, 38 SETON HALL LEGIS. J. 99, 103, 110 (2013). Qualified immigrants could receive health care in qualified health plans within the state insurance exchanges, Medicaid the Children's Health Insurance Program (CHIP), and federally qualified health clinics but the definition of qualified includes only LPRs, refugees, asylees, parolees, and victims of certain human rights abuses. *Id.* at 104.

184. See 42 U.S.C. § 18001(d)(1) (2012) (defining eligible individual as a citizen or national who is lawfully present).

185. The general background of low-income health insurance under Medicaid and Children's Health Insurance Program and emergency care under the Emergency Medical Treatment and Active Labor Act is summarized in *Key Facts on Health Coverage for Low-Income Immigrants Today and Under the Affordable Care Act*, KAISER COMM'N ON MEDICAID & UNINSURED (March 2013), <https://kaiserfamilyfoundation.files.wordpress.com/2013/03/8279-02.pdf>.

Health and Human Services (HHS) regulation carved out from those lawfully present and thus potentially eligible, those who received deferred action through the DACA program.<sup>186</sup> The unconventional regulation means that DACA recipients receive less health care coverage than other similarly-situated undocumented immigrants and the same coverage as if they had no documentation at all.<sup>187</sup>

States have limited avenues to serve DACA recipients and undocumented immigrants due to these legal constraints, but a few states with large immigrant populations do offer care. As a classic example of cooperative federalism, the federal government sets the basic terms for Medicaid and then states have an opportunity to alter the eligibility requirements for “qualified immigrants” provided they use state funds to cover care.<sup>188</sup> Although the HHS regulation excludes DACA recipients from the Permanently Residing in the United States Under Color of Law (PRUCOL) definition of “qualified,” three states use alternative avenues to render them eligible.<sup>189</sup> California, through its state HHS, issued a letter clarifying that DACA recipients *are* eligible for full-scope Medi-Cal if they meet all other requirements because their deferred action status is listed among California’s existing PRUCOL categories.<sup>190</sup> This state definition circumvents the federal definition of PRUCOL and

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186. 45 C.F.R. § 152.2(8) (excepting from lawfully present individuals with deferred action under DACA).

187. *Id.* § 152.2(4)(vi). The HHS regulation clarified that individuals granted deferred action through DACA were not considered “lawfully present” under the law. *Id.* at § 152.2(8); see 26 U.S.C. § 5000A(d)(3) (2013).

188. “Qualified” immigrants can receive non-emergency forms of federal health care if they are LPRs or those with enumerated humanitarian relief—such as refugees, veterans, active duty military, pregnant women, and children—and meet entry date, low-income, and durational residency requirements. See Vinita Andrapalliyal, “*Healthcare for All*”? *The Gap Between Rhetoric and Reality in the Affordable Care Act*, 61 UCLA L. REV. DISCOURSE 58, 63–64 (2013). States use PRUCOL (persons residing under color of law) to alter the designation.

189. California, New York, and Illinois offer DACA health care. Michael K. Gusmano, *Undocumented Immigrants in the United States: U.S. Health Policy and Access to Care*, HASTINGS CTR. (Oct. 3, 2012), <http://www.undocumentedpatients.org/issuebrief/health-policy-and-access-to-care>; Laurel Lucia et al., *Health Insurance and Demographics of California Immigrants Eligible for Deferred Action*, UCLA CTR. FOR HEALTH POL’Y RES. (March 2015), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2015/immigrants-policy-brief-mar2015.pdf>.

190. Letter from Tara Naisbitt, Chief of Medi-Cal Eligibility Div., to All Cty. Welfare Dirs. and All Cty. Medi-Cal Program Specialists/Liaisons (Aug. 6, 2014), <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/MEDIL%20113-04.pdf> (“Deferred action status is listed among the existing Permanently Residing in the United States Under Color of Law (PRUCOL) categories that are eligible for state-funded full scope Medi-Cal (See Title 22, California Code of Regulations (CCR) § 50301.3(I)).”).

renders DACA recipients eligible for some state-funded programs.<sup>191</sup> California's efforts to cover DACA recipients, *despite* federal law, stem from its strong normative commitments and substantive policy criticism that the federal health care law is too harsh. New York similarly covers undocumented immigrants through Medicaid via a state redefinition of PRUCOL and the use of state funds.<sup>192</sup> While New York may share some of California's pro-immigrant views, New York's policy is supported by longstanding legal precedent dictating that denying health care coverage to immigrants violates the state constitution's provision of "aid, care and support of the needy" and notions of fairness and equal protection.<sup>193</sup> The ability of California and New York to enact state policies that help DACA recipients despite important differences in their legal conditions suggests that law is not functioning alone to explain their policy outcomes. Compared to the national landscape of state health care policies for undocumented immigrants, these anomalies illustrate that legitimacy and morality are equally important in determining state policymaking outcomes.

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Systematic comparison of how and why states rely on or restrict DACA in their own policymaking is beyond the scope of this Article. However, some preliminary observations can be shared based on a comparison of case studies. The case studies suggest parallels between states' normative motivations, both procedural and substantive, for cooperating with DACA on state driver's licenses and state higher education and tuition policies. Given a compelling reason, states are willing to take affirmative steps to overcome the apparent legal constraints presented by REAL ID, Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), and IIRIRA. The studies also reveal the exceptional status of state health care policies. The scarcity of state health care policies benefitting DACA recipients is derived from the legal constraint of the federal ACA's exclusion of DACA recipients. The anomalous states that provide health care to DACA recipients in this constrained legal environment strain to do so without federal support.

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191. *Medi-Cal Eligibility and Covered California—Frequently Asked Questions*, CAL. DEP'T HEALTH CARE SERVS., <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Medi-CalFAQs2014b.aspx> (last modified June 24, 2015, 9:30 AM).

192. N.Y. IMMIGRANT COAL., MAXIMIZING HEALTH CARE REFORM FOR NEW YORK'S IMMIGRANTS 2 (Feb. 2013), [http://www.thenyic.org/sites/default/files/NYSHF\\_Immigration Coalition%20final%20Feb%202013%20%282%29.pdf](http://www.thenyic.org/sites/default/files/NYSHF_Immigration%20Coalition%20final%20Feb%202013%20%282%29.pdf).

193. Due to *Aliessa v. Novello*, New York's health insurance for immigrants pre-existed DACA and the ACA. See 754 N.E.2d 1085, 1098–99 (N.Y. 2001). In *Aliessa*, New York's highest court found that denying care to undocumented immigrants violates Article XVII of the New York State Constitution and the federal and state equal protection clause. *Id.*

Thus, state cooperation depends on a combination of perceived legitimacy, legal opportunity, and moral commitment. The ability to overcome legal constraints is an important factor, partly because it helps to legitimize the policy, but legality is neither decisive nor automatic as a factor unto itself.

#### IV. LIMITATIONS ON LEGITIMACY

Most of this Article has discussed legal, sociological, and moral legitimacy as separate strands of a broader phenomenon for analytical purposes. The case studies of state driver's licensing focused extensively on sociological legitimacy in a policy domain where relatively few legal challenges have been raised in the states. Where challenges have been raised, nearly all resolved in favor of DACA. Part IV extends the core analysis to reflect on the limits of legitimacy as revealed in ongoing litigation over DAPA, the executive policy expanding DACA to a broader class of immigrants in November 2014 that is awaiting Supreme Court review. Because the DAPA program was enjoined before taking effect, a case study of on-the-ground acceptance equivalent to state driver's licenses is not possible. However, this Part uses hypotheticals and counterfactual analysis to examine differences and similarities in legitimacy arguments applied to a program under serious legal challenge as compared to one with relatively uncontested legality. Part IV.A examines the relationship between legitimacy and legality in the legal arguments over DAPA in *Texas v. United States*; Part IV.B examines the relationship between legitimacy and morality using the contemplated but never adopted version of DAPA, which would have benefited the parents of DACA recipients and not merely LPRs and citizens.

##### A. *Texas v. United States and Legal Challenges to DAPA*

The November 2014 expansion of the DACA program includes a DAPA program that provides temporary protection from deportation and lawful presence during the period of protection to parents of U.S. citizens and LPR children.<sup>194</sup> The program relies on the same sources of legal authority as the 2012 DACA: the President's executive authority to exercise enforcement discretion and congressionally-delegated authority under the INA and immigration regulations.<sup>195</sup> DAPA is similar to DACA in its purpose. Its eligibility requirements benefit a broader group of

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194. See Johnson Memo Nov. 2014, *supra* note 12, at 3. While the November 2014 executive action entails both an expansion of DACA to a broader class of childhood arrivals and the creation of DAPA for parents, the focus of this section is on DAPA.

195. See *supra* Part I.B.



undocumented immigrants who crossed the border as adults. The OLC and the White House, during the announcement of the 2014 programs, invoked the policy goal of promoting family unity by providing temporary protection from deportation for the parents.<sup>196</sup> The application process for both programs is similarly centralized in the USCIS, with guidance enumerating criteria for case-by-case decisions, although the DAPA application leaves more discretion to federal officials.<sup>197</sup>

Shortly after the DAPA program's announcement in November 2014, a coalition of states filed a lawsuit seeking to block implementation of the DAPA program that they deemed both illegitimate *and* illegal.<sup>198</sup> The issue in *Texas v. United States* was whether DAPA violates the Constitution's Take Care Clause and the APA's rulemaking requirements.<sup>199</sup> Primarily on the basis of the APA procedural claim, a Texas federal district court judge temporarily enjoined the Administration from accepting new applications on February 16, 2015, less than two days before the program's planned start.<sup>200</sup> After resolving standing and reviewability in favor of the plaintiff-states, the district court focused on the plaintiff-states' claim that DAPA exceeds its delegated authority because it accomplishes its goals in violation of the APA rulemaking requirements.<sup>201</sup> The district court rejected the Obama Administration's reply that DAPA is "not a rule, but a policy that 'supplements and amends . . . guidance'" and therefore is subject to an APA exemption.<sup>202</sup> The 123-page memorandum opinion accompanying the nationwide preliminary injunction against implementation of DAPA provided a detailed discussion of the legal tests used to determine whether an agency action is "substantive," rendering it ineligible for the

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196. OLC Memo, *supra* note 15 at 26.

197. *See* Part I.A.

198. *Texas v. United States*, 86 F. Supp. 3d 591, 603 (S.D. Tex. Feb. 26, 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 at \*3 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257. While *Texas v. United States* challenges both the DHS memo containing both 2014 DACA and 2014 DAPA, the focus here is on DAPA because the reasoning in the memorandum opinion and order is almost entirely on DAPA. *See id.* at 606–07. Also, the memorandum opinion states in a section titled "issues before and *not* before the court," "with three minor exceptions, this case does not involve the Deferred Action for Childhood Arrivals ('DACA') program." *Id.* at 606 (emphasis added).

199. *Id.* at 607, 614 (describing three discrete legal issues: standing, Take Care Clause violation, and APA rulemaking violation).

200. *Id.* at 616–44 (standing), 664–72.

201. *Texas*, 86 F. Supp. 3d at 665–66; *see also supra* Part I.B.2 (discussing delegated authority and APA section 553(b) rulemaking requirements, also known as notice and comment procedures).

202. *Texas*, 86 F. Supp. 3d at 665 n.86; *see supra* Part I.B.2 (analyzing legal aspects of delegated authority and APA).

rulemaking exemptions,<sup>203</sup> before concluding that DAPA was procedurally invalid as enacted.<sup>204</sup> Obama sought an emergency stay of the district court injunction pending resolution of the merits in the Fifth Circuit. A motions panel denied the stay.<sup>205</sup> A second panel, reviewing the district court's order, affirmed the injunction on the merits primarily emphasizing the USCIS's noncompliance with APA rulemaking procedures; it essentially conceded the executive's enforcement discretion to administer deferred action.<sup>206</sup> The dissents in the Fifth Circuit merits proceeding concluded that the DAPA Guidance involved non-reviewable matters of agency discretion and would not be subject to the APA rulemaking requirements if implemented in the manner prescribed by the USCIS.<sup>207</sup> The Obama Administration appealed, and it is now awaiting review in the U.S. Supreme Court.<sup>208</sup> Meanwhile, in related lawsuits, *Crane v. Johnson* and *Arpaio v. Obama*, Immigration and Customs Enforcement (ICE) officials and an Arizona sheriff respectively challenged the DACA program and were dismissed by the Fifth Circuit and D.C. Circuit respectively for lack of standing.<sup>209</sup> These lawsuits make it critical to examine the limits of legitimacy in situations where legitimacy abuts challenges to a federal policy's legality.

The premise of the Part III case studies is that states granting driver's licenses or in-state tuition rates to DACA recipients accept the legitimacy of DACA as having been fairly and respectably enacted. Part of the reason why, is that they also presume the program is lawful and that the legality *legitimizes* the policy, even if this additional grounds for acceptance is not immediate or automatic. In contrast, the lawfulness of its legacy program, DAPA, is more hotly contested. The Article is not deciding on the DAPA program's legality so much as thinking through

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203. *Texas*, 86 F. Supp. 3d at 670 (finding that DAPA has a binding effect on the agency).

204. *Id.* at 671–72. The district court issued an order declining to lift the injunction on Apr. 7, 2015. *Texas v. United States*, Civ. No. B–14–254, 2015 WL 1540022, at \*8 (S.D. Tex. Apr. 7, 2015).

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

206. *Texas v. United States*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015). Supplementing the reasoning of the district court, the Fifth Circuit added that the DAPA Guidance is “manifestly contrary” to the INA. *Id.* at \*22–23.

207. *Id.* at \*27–28 (King, J. dissenting). The dissent considered the court's rulings on substantive violation of the APA improvidently reached and wrong on the merits.

208. *Texas v. United States*, 86 F. Supp. 3d 591, 603, 677 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

209. *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (DACA challenge dismissed because the state of Mississippi and ICE officers lacked standing); *Arpaio v. Obama*, 797 F.3d 11, 15 (D.C. Cir. 2015) (DAPA challenge dismissed because the plaintiff, the sheriff of Maricopa County, Arizona, lacked standing).

the consequences of a finding that it is or is not. The litigation raises issues that are *analytically prior* to the states whose policies permit licensing, tuition, or health care for DACA recipients.

All in all, the Fifth Circuit majority raises doubts about DAPA that center on legality without needing to invoke deeper issues of legitimacy. First, the majority complains of APA procedural defects that would ultimately be curable if the Obama Administration utilized the notice and comment rulemaking procedures.<sup>210</sup> The insinuation that the DAPA program operates on pretext questions the motives of the Obama Administration and impugns its legitimacy, though the factual foundation for these assertions is shaky.<sup>211</sup> Second, the Fifth Circuit's *sua sponte* finding of a substantive APA violation *might* invoke deeper legitimacy concerns, but it requires some clarification. The court could be saying that the use of a statutory exception to effectuate a "nonstatus" that is accompanied by a substantive benefit is a legal loophole; this is not an affront to the rule of law.<sup>212</sup> If instead DAPA is a misuse of that exception to reclassify a group that Congress has defined, there is a stronger claim of circumventing Congressional will.<sup>213</sup> Third, the Constitutional challenge to the Obama Administration's executive authority to defer deportations invokes the most serious challenge: it is the kind of foundational claim that abets grave doubt and intertwines legality with legitimacy. However, it is possible to read the Fifth Circuit as acknowledging the President's executive discretion to defer deportation, even if the means used to exercise that discretion were deficient.<sup>214</sup> Although it listed the issue as a question for review, the Supreme Court seems unlikely to reverse that interpretation of executive discretion over

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210. *Texas*, No. 15-40238, 2015 WL 6873190, at \*19–21.

211. *Id.* at \*28, 41–42 (King, J. dissenting) ("the district court concluded on its own—prior to DAPA's implementation, based on improper burden-shifting, and without seeing the need even to hold an evidentiary hearing—that the Memorandum is a sham, a mere 'pretext' for the Executive's plan 'not [to] enforce the immigration laws as to over four million illegal aliens.' That conclusion is clearly erroneous. The majority affirms and goes one step further today.") (citing *Texas v. United States*, 86 F. Supp. 3d 591, 638 (S.D. Tex. 2015)).

212. *Id.* at \*22–23. The Government defends the work permit as being independently authorized by regulations. Petition for A Writ of Certiorari, *Texas, et al. v. United States, et al.*, No. 15-674 (Nov. 20, 2015) at 26.

213. The dissent forcefully rejected the substantive APA violation as nonjusticiable and improvidently reviewed. It also argued that, if reviewable, the violations were wrongly found. *Texas*, No. 15-40238, 2015 WL 6873190, at \*47–50 (King, J., dissenting).

214. Petition for Writ of Certiorari at 25, *Texas*, No. 15-40238, 2015 WL 6873190 (*petition for cert. filed* Nov. 20, 2015) (No. 15-674) ("The court of appeals majority acknowledged that the Secretary has discretion to decide to forbear from removing every alien who could benefit under the Guidance, even though the majority questions the Secretary's authority to confer work authorization without following notice and comment procedures.").

immigration enforcement given its recent decisions.<sup>215</sup>

Court watchers are mistaken if they assume that the Fifth Circuit settled DAPA's legitimacy in the states. A win most critically would have provided the opportunity for states to implement DAPA—setting up the empirical test of the program's legitimacy, rather than furnishing the results. But a loss in the Fifth Circuit did not necessarily delegitimize the program, even if it prevented the states from having an opportunity to enact voluntary policies in response to DAPA implementation. Legal losses will only delegitimize contested policies in distinctive circumstances. Even those who disagreed with the Supreme Court's decision in *Bush v. Gore* acknowledged President Bush as president for two presidential terms and obeyed his laws.<sup>216</sup> For similar reasons, a tangle in the appeals courts will not by itself render DAPA illegitimate. Every policy taken up for Supreme Court review is not illegitimate, even if the litigation delays program implementation and impedes states from formulating their on-the-ground response.<sup>217</sup>

If the Supreme Court finds Obama's DAPA program deficient *and* suggests a procedural fix that permits the DAPA program to be eventually implemented, state cooperation may follow despite initial doubts about the legal or moral rightness of the program. For example, the Court could find illegality that turns on a procedural defect that can be cured by publishing the existing guidance memo in the *Federal Register* and accepting public comments as prescribed by APA section 553(b) or by revisiting the legal foundation of the benefits that accompany it.<sup>218</sup> Only if the Court perceives a grave problem—such as lacking executive authority or an incurable substantive APA violation—would President Obama confront the conceptual quandary of delegitimization. A future executive action could alter the parameters in a way that satisfies the

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215. *Texas v. United States*, 86 F. Supp. 3d 591, 603, 677 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257. The Supreme Court upheld broad powers of federal immigration enforcement in *Arizona v. United States*.

216. The example of those who disagree with *Bush v. Gore* will still acknowledge the President and follow his laws, unless they believe them to be a grave injustice, comes from Fallon, *supra* note 59, at 1794. An edited volume uses a similar analogy between *Bush v. Gore* and the legitimacy vs. legality distinction. BUSH v. GORE, *supra* note 59, at 36–37.

217. This is roughly the sequence of events in *Texas v. United States*, in which a federal judge issued a temporary injunction of the 2014 DACA extension and 2014 DAPA program on Feb. 16, 2015, which is being reviewed. *Texas v. United States*, 86 F. Supp. 3d 591, 603, 677 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

218. These policy prescriptions are not required by law, even if they might be advisable. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (quoting 5 U.S.C. § 553(b), (c) (2014)); see *infra* notes 264–267.

Court or Congress could intervene. Even without intervention, the Court could pronounce DAPA unsound without causing states to disrespect the lawful presence component of DAPA that serves as an eligibility criteria in the fashioning of many other state policies. Lawful presence is not unique to DAPA, even if it is made famous by it. And states can choose to recognize it or not within cooperative federalism schemes that leave the specifics of state policy to the states.

The temptation to equate legality with legitimacy is understandable, but the two terms are not co-extensive. Even if the two terms seem intertwined in a system of judicial precedent that considers past legal interpretations as one source of legitimate authority,<sup>219</sup> it is certainly not always or automatically the case. And the intertwining is not assured under these circumstances. Presumably this is why the Obama Administration characterizes DAPA's delays in court as being a bump in the road over a mere technicality.<sup>220</sup> In a Florida town hall, defending his executive action shortly after Judge Hanen enjoined the DAPA program in the district court, President Obama spoke directly to immigrants, reassuring them that those who would have qualified for DAPA should remain confident that they will not be deported given that DHS Secretary Johnson's Memo on Enforcement Priorities remains in effect.<sup>221</sup> Immediately after the district court injunction President Obama said, "Even with legal uncertainty . . . they should be in a good place."<sup>222</sup> He has continued to make similar statements at each stage of litigation.<sup>223</sup>

219. Fallon explains this partly as the product of a tradition of precedent/stare decisis in which past legal interpretations constitute a source of legitimate authority. Fallon, *supra* note 59, at 1793. It is also partly a product of strategic uses of illegitimacy. *Id.* at 1818 ("[W]hereas an ascription of legal legitimacy often claims *less* than that a judicial judgment was correct, an allegation of illegitimacy almost invariably implies *more* than that a legal judgment was merely incorrect.") (emphasis added).

220. Jethro Mullen & Jeremy Diamond, *Obama Vows to Abide by Immigration Court Order*, CNN (Feb. 17, 2015, 5:04 PM), <http://www.cnn.com/2015/02/17/politics/texas-obama-immigration-injunction> (DHS Sec'y Jeh Johnson: "We fully expect to ultimately prevail in the courts, and we will be prepared to implement DAPA and expanded DACA once we do."). Then Attorney General Eric Holder referred to the ruling as an "interim step." Reuters, *Holder: Tex. Judge's Decision on Immigration 'An Interim Step'*, WASH. POST (Feb. 17, 2015, 6:56 PM), [http://www.washingtonpost.com/posttv/politics/holder-tex-judges-decision-on-immigration-an-interim-step/2015/02/17/a17523d4-b6ef-11e4-bc30-a4e75503948a\\_video.html](http://www.washingtonpost.com/posttv/politics/holder-tex-judges-decision-on-immigration-an-interim-step/2015/02/17/a17523d4-b6ef-11e4-bc30-a4e75503948a_video.html).

221. Johnson Memo Nov. 2014, *supra* note 12; Press Release, The White House, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

222. Julie H. Davis, *Visiting Miami, Obama Presses Republicans on Homeland Security Funding*, N.Y. TIMES (Feb. 25, 2015), [http://www.nytimes.com/2015/02/26/us/politics/obama-hopes-to-score-points-in-miami-on-immigration.html?\\_r=1](http://www.nytimes.com/2015/02/26/us/politics/obama-hopes-to-score-points-in-miami-on-immigration.html?_r=1).

223. The day after the Fifth Circuit ruling, the White House announced its intention to

His projected confidence indicates that he believes, at the end of the day, that his programs will be declared not only legal but legitimate so that immigrants will be willing to participate and states will continue to voluntarily cooperate on-the-ground. Given that “most people obey most laws, most of the time,” he is probably right.<sup>224</sup> And while there is always the possibility that a future president can overturn the program “with the stroke of a pen,” there is the political difficulty of rolling back an established program, once it is in place.<sup>225</sup>

It is certainly possible that protracted litigation will raise doubts about DAPA so grave as to trigger a cascade of noncooperation in the states. For example, a Supreme Court decision permitting DAPA to be implemented without affirming its Constitutional merit (i.e. because the states lack standing or the courts lack reviewability) could cast the DAPA program in a shroud such that states do not voluntarily go along with it. The cascade could indirectly extend to state support for DACA if the legal issues implicate issues common to both programs.<sup>226</sup> So far, this has not happened during lower court review. States continue to issue licenses to DACA recipients and have in increasing numbers expanded eligibility to all undocumented immigrants.<sup>227</sup>

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appeal to the Supreme Court and proclaimed: “The immigration ruling is not consistent with the values of our country.” David Nakamura & Pamela Constable, *Obama Administration to Seek Supreme Court Involvement in Immigration Case*, WASH. POST (Nov. 10, 2015). In the government’s petition for certiorari, the White House maintains: “A divided court of appeals has upheld an unprecedented nationwide injunction against implementing a federal immigration enforcement policy of great national importance, and has done so in violation of established limits on the judicial power.” Petition for Writ of Certiorari at 2–3, *Texas v. United States*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015) (*petition for cert. filed* Nov. 20, 2015) (No. 281).

224. Ben Bradford, Jonathan Jackson, & Mike Hough, *Police Futures and Legitimacy: Redefining ‘Good Policing’*, in *THE FUTURE OF POLICING* 79, 85 (Jennifer M. Brown ed., 2014).

225. See *A Guide to the Immigration Accountability Executive Action*, AM. IMMIGR. COUNCIL (Mar. 13, 2015), <http://www.immigrationpolicy.org/special-reports/guide-immigration-accountability-executive-action> (describing thirty-nine instances of presidential executive actions that remained in place despite changes in administration). *But cf.* *Texas v. United States*, 86 F. Supp. 3d 591, 610, 677 (S.D. Tex. 2015), *aff’d*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257. (Judge Hanen’s order retracting DACA’s three-year renewals after they were prematurely granted).

226. DACA 2012 is not under the preliminary injunction, so changes would not be legally compelled. However, states who acquiesced to DACA by incorporating DACA’s lawful presence designation into their state driver’s license policies could withdraw their support in light of *Texas*’s specific mention of driver’s licenses, higher education, and health care as proof of injury by DAPA. *Texas*, 86 F. Supp. 3d at 617, 672.

227. *Deciding Who Drives: State Choices Surrounding Unauthorized Immigrants and Driver’s Licenses*, Pew Charitable Trusts (Aug. 2015), <http://www.pewtrusts.org/~media/assets/2015/08/deciding-who-drives.pdf>.

Just as importantly, public doubt could undermine the DACA and DAPA programs in another way. Indeed, some who want the program to succeed, and many who do not, interpret the intense scrutiny of DAPA's legality and skepticism of the Obama Administration's good faith as the undoing of the program. The Fifth Circuit's characterization of the USCIS's claims that they review DACA applications case-by-case as "pretext"<sup>228</sup> and Judge Hanen's court order rebuking the Administration for proceeding prematurely with three-year renewals of DACA work permits<sup>229</sup> may not be legally fatal, but they undermine public confidence. This kind of doubt may fester notwithstanding President Obama's reassurance or community organizers exhorting immigrants eligible for DAPA to be patient, keep faith, and prepare their documents through the *Si Se Puede Con DAPA* (Yes We Can with DAPA) campaign.<sup>230</sup> The mere fact of delay and the disruption in the program's planned implementation is already shaping individual attitudes among those who might be eligible to apply. To some extent, all government programs rely on public participation for success.<sup>231</sup> That is true to an even greater extent in DAPA, where applicants assume certain risks for disclosing to the federal government sensitive personal information, knowing that their lack of formal immigration status leaves them vulnerable to deportation at several junctures—if their application is denied, if their two-year protective period expires, or if the important elements of the program are withdrawn.<sup>232</sup> Those who send in their applications exchange the risk of self-disclosure for the promise that they will be better off once the government grants them deferred action. In other words, they accept the

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228. *Texas*, No. 15-40238, 2015 WL 6873190, at \*19.

229. Judge Hanen ordered the Obama Administration to withdraw three-year renewals of the 2012 DACA applications following revelations that USCIS had prematurely issued the three-year renewals while judicial proceedings on the 2014 executive actions were still pending. Order, *Texas*, 86 F. Supp. 3d at 591 (filed July 7, 2015) (No. 14-254), <http://www.aila.org/File/Related/15070802a.pdf>. DHS claimed the renewals were a misunderstanding, and required DACA recipients to return their work permits by July 31, 2015. *DACA Recipients Who Received 3-Year Work Permit Post-Injunction: Quick Facts*, U.S. CITIZENSHIP & IMMIG. SERVS., <http://www.uscis.gov/humanitarian/daca-recipients-who-received-3-year-work-permit-post-injunction-quick-facts> (last visited Nov. 28, 2015).

230. See generally Suzanne Gamboa, *Hopes on Hold: Dreamers Vent Anger Over Immigration Ruling*, NBC NEWS (Feb. 17, 2015, 3:11 PM), <http://www.nbcnews.com/news/latino/hopes-hold-dreamers-vent-anger-over-immigration-ruling-n307516>.

231. TYLER, COOPERATE, *supra* note 8, at 81–89 (Chapter Five on Cooperation with Political Authorities discusses public participation).

232. During the Fifth Circuit hearing on the preliminary injunction, Judge Higginson stated, "The first step toward removing them is getting them into the database. . . . It is scary for them. It is precarious to identify . . . They're even telling us where they are. We're finding the fugitives." Oral Argument, *Texas*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), [http://www.ca5.uscourts.gov/OralArgRecordings/15/15-40238\\_7-10-2015.mp3](http://www.ca5.uscourts.gov/OralArgRecordings/15/15-40238_7-10-2015.mp3).

trade-off once the USCIS and community organizations earn their trust and confidence that their personal information is safe and the program is stable, even if its permanence cannot be guaranteed. The trade-off is harder to make when the promised benefits are shrouded in doubt. Similar chilling effects might instill doubt and quell cooperation among the states that so far cooperate with DACA in their decisions to accept new EADs for the purpose of driver's licenses and other benefits. However, informal pressure to maintain already-granted benefits might be strong enough that legality might not swallow legitimacy. Whether intentional or not, the *Texas* lawsuit draws attention to the risk of impermanence inherent in executive action and, for that matter, executive authority. Fixating on these features of the program makes it harder to accept the institutional legitimacy of the program on-the-ground. In that sense, judicial pronouncements that DHS violated procedural norms and the issuance of a preliminary injunction that disrupts the program's stability could shape the program's legitimacy on-the-ground.

Still, if public confidence in the expanded DACA and DAPA programs begins to unravel, it will not likely be the result of a judicial pronouncement of illegality. It will instead be the result of the legitimacy concerns unveiled by the argument about the executive branch as a legitimate, fair, and trustworthy source of institutional authority. In this sense, whether or not the district court's preliminary injunction withstands appeal and whether or not the procedural defect can be cured, the challenge is important—just not for the reasons assumed. By emphasizing procedural norms for agency rulemaking, the legal discussions surrounding the *Texas* litigation activate beliefs and conduct about the respect-worthiness of executive action accomplished *in this way and for these purposes*. Understood this way, the Administration's claimed failure to abide by APA procedures gives rise to a foundational challenge on the legitimacy of the administrative state that issued DAPA—hardly a technicality, but also not an issue that necessarily dooms the program.<sup>233</sup> The *Texas* lawsuit brings the legality and legitimacy frameworks into close relationship, even if the two cannot be equated. But more than justifying their conflation, the lawsuit sharpens the legitimacy framework presented as the lynchpin of executive action garnering acceptance on-the-ground. It does so by amplifying the relationship between law and legitimacy rather than by altering the

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233. Cass R. Sunstein, *Texas Misjudges Obama on Immigration*, BLOOMBERG VIEW (Feb. 17, 2015, 12:56 PM), <http://www.bloombergvew.com/articles/2015-02-17/what-the-judge-got-wrong-about-obama-s-immigration-plan> (arguing Judge Hanen was right to focus on technical requirements of the law, but that he got the technical argument wrong).



primary analysis advanced in this Article: legality matters because of the effect it has on perceptions of legitimacy, rather than for its own sake.

*B. OLC and Policy Challenges to DAPA and Deferred Action for DACA Parents*

The DAPA executive action also surfaces the relationship between legitimacy and morality. As previously described, morality refers to substantive policy preferences such as a state's stance on federal immigration policy.<sup>234</sup> Moral and policy commitments are distinguished from political and partisan commitments that take positions on these and other issues for strategic reasons.<sup>235</sup>

Notwithstanding the heated political discourse that has surrounded President Obama's use of executive action in immigration law, the district court in *Texas v. United States* claimed that "the issues before the Court do not require the Court to consider the public popularity, public acceptance, public acquiescence, or public disdain for the DAPA program."<sup>236</sup> This Article largely agrees with the district court on the technical irrelevance of public popularity, though it parts ways on the relevance of acquiescence on-the-ground. Cooperation and acquiescence turn on *more* than substantive policy preferences just as it turns on more than legality. Among other things, cooperation turns on perceptions of legitimacy. Substantive policy preferences are not determinative in most cases, even if a correspondence between individual policy preferences and the content of a federal policy make it easier to accept the policy.

The relationship between legitimacy and morality peeks through the DACA case studies of state cooperation. However, they are even more salient in the context of DAPA. DAPA is a more challenging policy to accept than DACA for most individuals. Unlike the childhood arrivals who benefit from DACA, the parents who benefit from the DAPA program, or the contemplated alternative, knowingly violated immigration law upon their entry. Many migrated for work, often without legal authorization, and garnered a reputation for accepting low wages and poor conditions that can lower the standards for U.S. citizen workers in similar jobs. Many sent for their children or began families after they arrived, with those children (pejoratively named anchor babies) becoming eligible for public benefits. Some used fraudulent documents

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234. See *supra* note 128 and accompanying text.

235. Anil Kalhan provides thoughtful analysis of the conflation of political and legal in his essay, *supra* note 129, at 64.

236. *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

or falsified identities to evade detection from immigration authorities for many years. And living in the shadows makes many of them seem shadowy or enigmatic, as compared with DACA youth who have openly advocated for a federal DREAM Act in their graduation gowns, generating significant public support and enjoying some legal protection—notably, educational access to K-12 schools under *Plyler v. Doe*<sup>237</sup> and state laws. In other words, unlike their children, DAPA recipients' hands are not clean and their profile is not entirely sympathetic. Supporting the DAPA program without harboring sympathy for DAPA recipients is harder to do than supporting undocumented youth. Maintaining support for the federal program despite a personal distaste for the program's recipients is even harder. On the other hand, being able to support the DAPA program, despite strong substantive disagreement, is an exemplar of how legitimacy independently facilitates voluntary cooperation.

At an institutional level, it is similarly easier for a state to support a nonbinding federal policy when the policy goals overlap with the state's autonomous goals rather than when they depart from them. Again, this Article assumes that states maintain choice and that their laws are not preempted or mandated by the federal policy.<sup>238</sup> State support is also easier when the President aligns his executive actions with Congress's intentions, both to minimize the scope of conflict and to make apparent the path of delegated authority. When the President does the same thing that Congress would do, the President is engaging in a straightforward use of delegated authority. When the President strikes out on his own or fills gaps in legislation, it is harder to trace the source of executive authority. The executive's exercise of authority might actually be fine, but the straightforward delegation is easier to see and accept—and perceptions matter a great deal. The OLC memo defending Obama's DAPA program emphasizes the legal arguments supporting the DAPA programs *where the executive's preferences align with Congress*.<sup>239</sup> The Obama Administration elaborates on this argument in subsequent briefings in *Texas v. United States*, claiming under the precedent of *Heckler v. Chaney* and *Reno v. American-Arab Anti-Discrimination Commission*, the DAPA program constitutes a valid exercise of enforcement discretion that is within the scope of congressional

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237. 457 U.S. 202, 230 (1982) (ruling that a state statute denying funding for K-12 education to undocumented immigrant children violates the Equal Protection Clause).

238. Kim, *supra* note 82, at 702, 732; Rubenstein, *supra* note 82, at 114–15.

239. OLC Memo, *supra* note 15, at 10 (“The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress.”).

delegation and the INA.<sup>240</sup> Though the Administration relies on resource limitations as a partial justification for executive enforcement discretion, it is not the only justification. Presidents may advance their substantive policy preferences as well—for example, for humanitarian relief or for prioritization of “felons, not families” over other categories of immigrants.<sup>241</sup> In the instances of executive policymaking through enforcement discretion, state support for DAPA is easiest to justify when the DAPA policy is supported by both Congress’s and the executive’s substantive policy preferences.

States have the greatest difficulty accepting the legitimacy of executive action when the executive’s priorities appear to depart from Congress’s clearly-expressed preferences. Where the executive is exercising delegated authority and takes actions conflicting with that authority, the departure is clearly too much to withstand a legitimacy test; where the executive is relying on implied authority it is likely okay. What is less clear, *Youngstown*’s twilight zone, is when the executive enters territory where Congress is silent about its preferences.<sup>242</sup> The Obama Administration (through OLC) argues Congress has either authorized or acquiesced that this would be the case in DAPA. They underscore the point by explaining their rejection of a contemplated policy of deferred action for DACA parents, precisely because it would stray too far from Congress’s expressed intent.<sup>243</sup> The abandoned alternative version of DAPA would have expanded the beneficiary class to include DACA parents who lacked an independent basis for obtaining immigration-related benefits, even after paying penalties and crediting multi-year delays. By way of contrast, the DAPA-eligible parents of U.S. citizens and LPRs would already be eligible for normalization of their status under enacted immigration statutes, though they would have to wait until their sponsoring child reached the age of eighteen. Under advisement from the OLC, the Obama Administration only adopted the more limited

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240. Petition for Writ of Certiorari at 2–3, *Texas v. United States*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015) (*petition for cert. filed* Nov. 20, 2015) (No. 15-674); Brief for Appellants at 5–6, *Texas*, No. 15-40238, 2015 WL 6873190 (No. 15-40238); Defendant’s Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 31, *Texas*, 86 F. Supp. 3d 591 (Document 38).

241. Barack Obama, President, U.S., Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

242. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (setting forth broad three-pronged test of the boundaries of executive power, wherein the president may act in a twilight zone where executive authority is neither clearly present nor absent).

243. OLC memo, *supra* note 15, at 9–11 (applying *Youngstown* and progeny to the President’s exercise of enforcement discretion in DACA).

DAPA program that more closely matched congressional priorities.<sup>244</sup> OLC cautioned that *policy* precedents prohibit the grant of deferred action based on family ties *unless* those family members are “legally entitled to live in the United States.”<sup>245</sup> Plaintiff-states in *Texas v. United States* disagree with the Obama Administration’s characterization of DAPA falling into the zone of twilight, arguing instead that Congress expressly laid out its charge to the DHS for immigration enforcement and that deviations from this charge—essentially, full enforcement—violate congressional intent.<sup>246</sup> Moreover, the plaintiff-states argue that the INA’s lack of pathways to legalization for the parent of a child who possesses only temporary protection (in the form of deferred action) suggests that DAPA is out of sync with the design of the INA and contrary to Congress’s expressed intent.<sup>247</sup> These legal objections are worthy of consideration. Still, they fail to acknowledge that the plaintiff-states do not trust Obama’s motives for taking unilateral action, especially if they think the President is trying to circumvent Congress and undermine the rule of law. This is what Congress means when it says the President is usurping its power or thwarting the will of the people. The states *might* mean that the President’s theory of the Take Care Clause or APA rulemaking requirements is flawed (a legality argument), but more likely they mean that they do not trust a President who does alone what they believe could or should be done together (a legitimacy argument). It seems to them that President Obama is getting away with something. Following this logic, states given the option to enact policies supportive of DAPA would resist doing so if they felt the program was illegitimate, even if declared legal in court.

In response to OLC and the White House defenses of DAPA, four influential immigration law professors penned a letter disagreeing with the OLC conclusions on the availability of relief for parents of DACA recipients *as a legal matter* and additionally asserting that the Family

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244. *Id.* at 25–33 (discussing deferred action for parents of U.S. citizen or lawful permanent resident children).

245. OLC Memo, *supra* note 15, at 32 (OLC reads the INA to encompass Congress’s general concern for not separating individuals who are legally entitled to live in the United States from their immediate family members and then infers that such a reading precludes discretionary relief based on relationships to other family members). Some scholars disagree with this assessment, and argue that extending relief is permitted as an exercise of executive authority.

246. Supplemental Brief for Appellees at 16, *Texas*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015) (No. 15-40238) (“[W]e would expect to find an explicit delegation of authority to implement DAPA—a program that makes 4.3 million otherwise removable aliens eligible for lawful presence, work authorization, and associated benefits—but no such provision exists.”).

247. *Id.*

Fairness program accompanying the 1986 Immigration Reform and Control Act (IRCA) legalization constitutes a historical and policy precedent from another administration.<sup>248</sup> The letter states that an undocumented immigrant who is the parent of a DACA recipient is not prohibited from obtaining deferred action by “law or history,” even if Congress has not expressed a clear preference for their protection.<sup>249</sup> “Any decision by the Administration to include or exclude certain groups will be a *policy choice not a legal one*.”<sup>250</sup> The implication that administrative priorities must be consonant with congressional ones ignores valid constraints that operate independently of Congress’s priorities: administrative convenience, resource constraints, and respect for executive judgment among others. Professors Rodriguez, Cox, and Metzger refute this false syllogism and also note how strange it would be to inquire with Congress about prosecutors’ individual exercises of discretion in the criminal context.<sup>251</sup> There is space for the President to express substantive policies, within a permissible range, while interpreting and enforcing immigration law. Obama chose not to reach the outer bounds of executive enforcement discretion when he adopted DACA and the more limited DAPA program rather than its contemplated alternative. This self-limitation displeased immigrant advocates who support humanitarian relief for long-time residents of the United States who lack status and who feel impatient with a Congress that has been slow to enact immigration reforms that would help undocumented youth.

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248. Letter from Shoba Sivaprasad et al., Samuel Weiss Faculty Scholar & Clinical Professor of Law, Pa. State Dickerson Sch. of Law, to Barack Obama, President, U.S. (Nov. 3, 2014), <http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/WHLetterFinalNovember20142.pdf> [hereinafter Sivaprasad Nov. 3 Letter] (clarifying that “there is no legal requirement that the executive branch limit deferred action or any other exercise of prosecutorial discretion to individuals whose dependents are lawfully present in the United States”) (emphasis omitted). Several online symposium comments also address this point. In his Balkanization blog post, Stephen Legomsky also disputes the lack of precedent argument and observes that there is nothing in the INA that requires the conditions for permanent discretionary relief to match the Administration’s criteria for temporary relief. Stephen Legomsky, *Why Can’t Deferred Action Be Given to the Parents of the Dreamers?*, BALKINIZATION (Nov. 25, 2014, 6:30 PM), <http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html>. He also observes that there are INA grounds for discretionary relief independent of family relations altogether. *Id.*

249. Sivaprasad Nov. 3 Letter, *supra* note 248.

250. *Id.* at 3.

251. Cox & Rodríguez, *Redux*, *supra* note 9; see Gillian Metzger, *Must Enforcement Discretion Be Exercised Case-by-Case?*, BALKINIZATION (Nov. 24, 2014, 1:30 PM), <http://balkin.blogspot.com/2014/11/must-enforcement-discretion-be.html>; Recent Executive Opinion: Immigration Law, *Office of Legal Counsel Issues Opinion Endorsing President Obama’s Executive Order on Deferred Action for Parental Accountability*, 128 HARV. L. REV. 2320, 2324–25 (2015); Peter Shane, *The Presidential Statutory Stretch*, 87 COLO. L. REV. (forthcoming 2016); *supra* Part I.B.

These immigration advocates sought for the President to do everything in his power to fix immigration law, even if it meant acting alone. Based on the legitimacy framework, Obama's self-limitation was a prudent way to reduce opposition and encourage willing cooperation among those who do not necessarily share his substantive policy preferences. In other words, self-limitation is a way to bolster the legitimacy of a contested policy.

States enacting supportive policies acknowledge the legitimacy of DACA more easily when their substantive preferences correspond to the moral values embedded in the federal executive action. And states supporting DAPA in litigation have an easier time if supportive of the content of the executive action. However, the substantive correspondence is not necessary. The willingness to cooperate *despite* contrary substantive preferences is the paradigmatic case that illustrates legitimacy operating.<sup>252</sup> The logic in this paradigmatic case is why this Article seeks to highlight variation within the fifty states that offer driver's licenses to DACA recipients before showing how they come to cooperate. These case studies of states adopting cooperative policies despite their doubts (compliance *dubitante* and involuntary cooperation), represent clearer tests of legitimacy. It is also why the Article focuses more attention on the non-intuitive litigants in *Texas v. United States*: plaintiff-states with moderate views of immigration enforcement or supporters of Obama's policies who would not typically favor immigrants.<sup>253</sup>

Partisanship is distinct from morality in the sense of substantive policy preferences. Partisanship relates to the influence of political conditions and electoral incentives. In the Texas-led challenge to DAPA, twenty-six of the twenty-seven plaintiff-states have Republican governors.<sup>254</sup> Most have both Republican governors and attorney generals. The telling exception is Nevada. Nevada's Attorney General

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252. For further discussion between the convergence of substantive and procedural norms in the social scientific study of legitimacy, see TYLER, OBEY, *supra* note 58, at 25; TYLER, COOPERATE, *supra* note 58, at 34–35; see also Fallon's three strands of legitimacy and theoretical debates, *supra* Part II.

253. State-by-state rankings of immigrant policy climate are summarized in independent analysis and the published studies. See RODRÍGUEZ ET AL., *supra* note 93, at 12; Pham & Van, *supra* note 93, at 32; *infra* note 253–256.

254. The party line-up in a single lawsuit should not be overly parsed since some states refrain from filing suit based on arbitrary considerations (such as missed deadlines), but other research validates that partisanship matters to immigration policy. See Alex Rogers, *Partisan Lines Drawn in Congress Over Immigration*, TIME (Jan. 27, 2015), <http://time.com/3684956/congress-immigration-funding/>; Ramakrishnan & Wong, *supra* note 90, at 73, 74–76; S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L. J. 1431, 1440, 1469 (2012).

and Governor are both Republicans, though the Governor is more moderate. The Attorney General signed on to the lawsuit against the Governor's wishes. The overt partisanship in *Texas v. United States* is troubling because, unlike substantive policy differences, it crowds out legality and legitimacy entirely. It is naked politics, not policy. There should be space for a President to express policies consistent with his party's positions—that is, for President Obama to affirm Democratic policies on immigration. States with opposing views can disagree, but their disagreement should not automatically impede their cooperation as it may in partisan politics. The plaintiff-states should be able to cooperate with DAPA if they believe the President is acting in good faith and the policy is respectable, even if they disagree with its substance and even with the political climate in Congress and the campaign for a new president.

Some concluding observations about the complex interrelationship of legitimacy, legality, and morality emerge from comparing *Texas v. United States* with driver's licenses and the shadow case studies of higher education and health care. First, legality operates alongside legitimacy. It can sometimes be such a strong constraint that it forestalls variations in states' perceptions of legitimacy. This seems to be true for both the ACA's express exclusion of DACA and the constitutional dimensions in the *Texas v. United States* challenge that raise concerns about process for enacting DAPA or the motives of the President. But legality usually assists or erodes legitimacy without deciding it. Second, a state's substantive policy preferences are not an insurmountable barrier to cooperation, nor is substantive agreement a guarantee of state cooperation. States' openness to immigrants varies along multiple measures, but there is overwhelming state acceptance of DACA for driver's licenses (forty-eight to two), modest state support for access to higher education (twenty to three or eighteen to three), and less state support for state-run health care (California/Medi-Cal). The twenty-six states who signed up to be plaintiffs in *Texas v. United States* are not all anti-immigrant, nor are the fifteen states who signed the amicus curiae brief in favor of the Obama Administration pro-immigrant, according to independent measures of state immigration policies. A third observation is that the opposition to DAPA in *Texas v. United States* skews strongly by partisanship (twenty-six Republican-led plaintiff-states and fifteen Democrat-led states as amicus curiae for the Obama Administration),<sup>255</sup>

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255. Again, it is important not to make too much of the imbalance of state representation, even if the plaintiff-states outnumber the states who have supported the Obama Administration by filing amicus briefs. *Some States Stay Silent on Lawsuit Over Obama's*

whereas the states implementing DACA through their policies on higher education, health care, and driver's licenses are not nearly as partisan.<sup>256</sup> The contrast of the litigation with the state policy studies distinguishes morality in the sense of policy from partisanship and politics.

Comparing state reception to a wider array of executive actions would further parse the influence of procedural legitimacy, substantive policy preferences, and partisanship. For example, deferred action programs that offer relief from removal to non-priority immigrants represent only one side of the proverbial coin in immigration enforcement. The other side of the coin is the prioritization of immigrants for removal.<sup>257</sup> The 2014 Johnson priorities memo elevates the risk of removing criminal aliens and recent border-crossers; it does not only lower the risk for DACA and DAPA eligible immigrants. The Secure Communities program and its successor Priority Enforcement Program (PEP) target law enforcement resources toward practices that raise deportation rates for jailed immigrants who meet the high priority categories. The linkages between the ability to prioritize some deportations by preserving resources dedicated to the removal of non-priority cases are being emphasized in the wake of a public outcry over an undocumented immigrant killing an innocent bystander shortly after being released into the community rather than transferred to ICE for priority deportation.<sup>258</sup> Although comparisons of state support for executive action in these very different enforcement regimes is preliminary, given the research design used in this comparative case study, the foundation for a more robust comparison of state reception to

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*Immigration Actions*, HUFFINGTON POST (Feb. 11, 2015, 11:00 PM), [http://www.huffingtonpost.com/2015/02/11/states-lawsuit-obama-immigration\\_n\\_6653274.html](http://www.huffingtonpost.com/2015/02/11/states-lawsuit-obama-immigration_n_6653274.html) (listing non-meaningful reasons states have *not* joined the amicus in support of the U.S. government, e.g., missing filing deadlines).

256. Based on a comparison of the three case studies in this Article, the states at the extreme ends of the spectrum (California, Texas, and Arizona) exhibit stable compliance behaviors across policies; these compliance behaviors also accord with independent indices of "immigrant climate" and suggest partisan influence. States in the middle of the spectrum (Florida and Nevada) fluctuate across the policies in this study and the immigrant climate index, suggesting weaker partisan influence. See RODRÍGUEZ ET AL., *supra* note 93, at 12; Pham & Van, *supra* note 93, at 32. These empirical findings can be considered alongside the theoretical claims in Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081 (2014) (states check federal government by channeling partisan conflict).

257. See David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 432 (2015).

258. Rose Cuison Villazor & Kevin R. Johnson, *The Problem is Federal Immigration Policy, Not Local Sanctuary Laws*, N.Y. TIMES (Aug. 19, 2015, 3:22 PM), <http://www.nytimes.com/roomfordebate/2015/07/09/should-immigrant-sanctuary-laws-be-repealed/the-problem-is-federal-immigration-policy-not-local-sanctuarylaws>.



pro- or anti-immigrant executive actions is laid in research studying state reception to Secure Communities across a critical sample of states who supported or opposed it and made similar findings.<sup>259</sup>

The litigation over DAPA sharpens the distinctions between legitimacy, morality, and its related forms: policy, politics, and partisanship. A state's legitimacy concerns and its substantive beliefs intertwine. For example, a state can incorporate its sense that humanitarian relief such as DACA or DAPA is "the right thing to do" into its state policies, thereby merging the influences of policy, morality, and legality and blurring the distinctive contributions of each. This conflation characterizes much of the politicized rhetoric around DAPA. It should not be conflated in court. Legitimacy and morality can also counter each other. The district court in the *Texas v. United States* litigation maintains that legality alone explains its opposition to DAPA.<sup>260</sup> This seems implausible.<sup>261</sup> Their legal argument might *include* legitimacy insofar as they doubt the validity of executive authority or morality insofar as they believe the President is faithfully exercising good policy judgment on immigration. Legitimacy matters in combination with morality-based considerations, just as it matters in combination with legality. State mistrust of the President's motives for using executive action rather than waiting on legislative reform constitutes a breach of trust that might by itself account for their opposition.

Summing up Part IV.A on legitimacy's relationship to legality and Part IV.B on legitimacy's relationship to morality: all three considerations matter, in complicated ways, but the importance of legitimacy as a factor in state cooperation is evident throughout. This scholarly finding offers lessons for policymakers, which are pursued in the Article's conclusion.

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259. Chen, *supra* note 197. Other research suggests that additional considerations for these comparisons might include the cost to the state for the program, the size of the immigrant population and other demographics, presence of Latino voters, and state proximity to the border. Rogers, *supra* note 254; Ramakrishnan & Wong, *supra* note 90, at 74, 77–78; Ramakrishnan & Gulasekaram, *supra* note 254, at 1433, 1484.

260. *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

261. The Fifth Circuit's dissent shares the view that the lower court conflates law and politics. *Texas*, No. 15-40238, 2015 WL 6873190, at \*50–51.

## CONCLUSION

Executive action in immigration law will persist, regardless of whether President Obama's deferred action programs are eventually ruled lawful by the Supreme Court and even if Congress or the next presidential administration acts to roll back the programs. This Article urges a focus on legitimacy, including its complex relationship to legality, rather than unrelenting concern for legality. While challenges to the legality of Obama's executive actions in immigration law proceed in court, this Article has presented evidence that states generally deem federal policy legitimate when they voluntarily enact state policies that incorporate DACA lawful presence designations, even though *Texas v. United States* paints a portrait of vehement skepticism of DAPA. If experience holds, it will take a lot to overcome states' willingness to cooperate with the DACA and DAPA executive actions once given the opportunity.

So far we know that the general trend of state support for DACA is enduring. Fifty of fifty states offer driver's licenses to DACA recipients, notwithstanding Texas's contention that driver's licenses impose unwelcome costs on the state. Empirical evidence of the diffusion of state driver's license policies shows that the adoption is neither uniform nor monolithic: despite the seeming consensus, the state policies providing driver's licenses to DACA recipients vary over a spectrum of attitudes and cooperative behaviors. While some states eagerly embrace DACA's lawful presence designation, others accept it provisionally and some begrudgingly, only under the threat of legal sanction. But the trend is toward embracing DACA in state policies. Versions of the same trend arise from a shadow case study of state higher education policies. The shadow case study of health care shows the limits of state acceptance, with only a handful of states finding ways to enact inclusionary policies for DACA recipients under the ACA's legal constraints. Yet across the policy arenas, in-depth case studies reveal that cooperative policymaking is a dynamic process motivated by a sense of DACA as being legitimate despite contention about legality, morality, and politics.

The *Texas* challenge to DAPA does not by itself change the analysis suggested by experience. *Texas v. United States* amplifies the complicated relationship between legitimacy and legality. It does so by raising a critical test case involving more legal contestation and stronger policy objection, where legality abuts legitimacy. States are tasked with sorting out their perceptions of the continuing legitimacy of the program in the face of legal contestation. Similarly, the policy design decisions surrounding DAPA's more expansive contemplated alternative (deferred action for parents of DACA recipients, beyond parents of U.S. citizens

and LPRs) illustrates that policy, politics, and legitimacy are also related. Still, the paramount importance of legitimacy remains for these programs of executive action—especially if they rely on a scheme of cooperative policymaking that involves voluntary state cooperation—unless and until the legal dispute becomes grave enough to overcome the presumption of institutional legitimacy. The relationship between legitimacy, legality, and morality is more complex and interrelated. Sometimes legitimacy is bounded by legality; other times legitimacy trumps legality. Sometimes legitimacy and legality become intermingled.

Once the dust settles on the legality of the newly-created DAPA program, a few outcomes are possible: (1) DAPA is found legal, and states cooperate with its implementation because it is legitimate; (2) DAPA is found legal, and states choose not to cooperate once it is implemented because it is not legitimate; (3) DAPA is found illegal for curable reasons such as an APA procedural violation, and states cooperate because they believe the program remains legitimate once these defects are cured; or (4) DAPA is found illegal for curable reasons such as an APA procedural violation, and states choose not to cooperate even once the defects are cured. States might also follow the law involuntarily, as did Arizona, following the federal court's insistence after *Brewer*.<sup>262</sup> Of course, if DAPA is found illegal on constitutional grounds or for reasons that provoke grave doubt over its procedural fairness, states will lack the opportunity to cooperate since DAPA will not go into effect. Based on legitimacy research and this study of state cooperation, the Article finds the cooperative outcomes more likely than their non-cooperative counterparts.

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262. *Ariz. Dream Act Coal. II*, 757 F.3d 1053, 1068 (9th Cir. 2014), *remanded to* 81 F. Supp. 3d 795 (D. Ariz. 2015).

Figure 3: Outcomes following DAPA litigation

	<i>Legitimate</i>	<i>Not Legitimate</i>
<i>Legal</i>	State Cooperative	States Not Cooperative
<i>Not Legal</i>	State Cooperative (if curable)	States Not Cooperative (if curable)

However, state cooperation is not assured even if the DAPA program is found lawful and permitted to be implemented. State decisions will turn on their attitudes toward the legal authorities granting recognition to deferred action recipients and administering the applications. Those seeking to preserve the executive action must build public support for their policy to survive on-the-ground.<sup>263</sup> It might not be necessary to roll back DAPA to preserve DACA in the states (as a matter of voluntary cooperation), but it *might* be necessary to change the implementation *procedures* to demonstrate procedural legitimacy even if not legally required to do so. Some ideas to shore up legitimacy after the shake-up of litigation include gathering community input, following APA rulemaking procedures,<sup>264</sup> enforcing the high priority categories for removal,<sup>265</sup> or publicizing discretionary departures from the guidance criteria and other sincere efforts to enforce immigration law.<sup>266</sup> A

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

264. Rulemaking is not required after *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citing 5 U.S.C. § 553(b)(A)(2014)), even if it might be advisable.

265. The Obama Administration's defenses of deferred action have been coupled with its overall removal rates and especially high-priority removals under programs such as Secure Communities for this reason. Falling rates of deportation since the November 2014 prosecutorial discretion memo or high-profile refusals to deport (e.g., the Kathryn Steinle murder by a felon released in San Francisco after repeated removals and re-entries), which have been noted by some critics, could weaken the credibility of the DACA and DAPA program. See e.g., Martin, *supra* note 257, at 424, 426–27.

266. The American Immigration Lawyers' Association and American Immigration

symbolic but potentially significant move that would parallel Obama's efforts to build legitimacy for Secure Communities might be to revise the parameters or replace the underlying program under the banner of a new name—for example, by revisiting and clarifying the benefits associated with DAPA.<sup>267</sup> These research-backed proposals reflect that, beyond eliciting legal compliance, the President should set his sights high by cultivating voluntary cooperation with his executive actions. He should do so in the places that trust him least and even if it is not legally required.

The President's initial reticence about moving forward with executive action and his continuing exhortation for Congress to take the next step by enacting comprehensive legislation that promotes legalization and ameliorates the longstanding undocumented population—even as he consistently asserts the legality of his executive actions in court—reveals his keen understanding of the vulnerability of relying on executive action. Executive action is quick to enact; it is also quick to undo or alter and vulnerable to challenge. Most obviously, executive actions can be overturned by Congress or a future president. Executive action through agency guidance is also burdened by a chronic legitimacy crisis<sup>268</sup> that is exacerbated by acute partisan divides. Challenges to executive actions in other areas of immigration law as well as environmental law, consumer protection law, and health law suggest that these vulnerabilities are not peculiar to DACA or immigration law at large. For all of these reasons, executive action is a second- or third-best means for crafting immigration law—second to Congress, and third to notice and comment rulemaking—even if it does have advantages. H. L. A. Hart once stated that “law” consists of a range of practices that have become normatively binding in the affected community, whether their source be in legal text, judicial decisions, or behavioral conventions that have achieved general acceptance.<sup>269</sup> In other words, general acceptance legitimates the law. Even if executive action on immigration is not the preferred means of policy-making, it is a viable means of advancing policy and it can be an effective one, provided that it can obtain on-the-ground acceptance of its legitimacy and voluntary cooperation.

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Council have issued calls for examples of these discretionary departures.

267. Secure Communities, a federal program whereby ICE requests local law enforcement to detain immigrants believed to be removable for transfer of custody to ICE, was replaced by a milder Priority Enforcement Program in November 2014 because Secure Communities had lost legitimacy in communities.

268. FREEDMAN, *supra* note 63, at 11–12; *see also* Part I.C.

269. HART, *supra* note 80, at 48–49 (described in HAROLD BRUFF, UNTRODDED GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 7 (2015)).

Figure 4: State Policies and Texas v. United States Parties

<i>State</i> <sup>270</sup>	<i>Driver Licenses for DACA Recipients</i> <sup>271</sup>	<i>Higher Education for DACA</i> <sup>272</sup>	<i>Health care/public benefit for DACA</i> <sup>273</sup>	<i>Texas v. United States lawsuit (DAPA)</i> <sup>274</sup>
Arizona	●	●	●	●
California	○	○	○	○
Colorado	○	○	●	◐
Connecticut	○	○	●	○
Florida	◐	○	●	●
Georgia	○	●	●	●
Illinois	○	○	○	○
Iowa	○	◐	●	○
Maryland	○	○	●	○
Michigan	○	◐	◐	●
Nebraska	○	○	●	●
Nevada	○	◐	●	●
New Jersey	○	○	●	●
New York	○	○	○	○
North Carolina	○	●	●	●
Oregon	○	○	◐	○
Rhode Island	○	◐	◐	○
Texas	◐	○	◐	●
Virginia	○	◐	●	○
Washington	○	○	○	○

270. States chosen for top 10 population DACA-eligible and within-case considerations.

271. Empty circle indicates a state with inclusive license policy toward DACA recipients; mixed circle is ID with doubt about their policy; closed circle indicates resistance or involuntary cooperation.

272. Empty circle indicates state laws granting in-state tuition; mixed circle indicates admission but no state law granting in-state tuition; closed circle indicates no admission or bar on in-state tuition.

273. Empty circle indicates state support for DACA recipients (despite restrictive federal law); mixed circle indicates support for pregnant women or children; closed circle indicates no non-emergency support.

274. Empty circle indicates that the state filed as amicus curiae on behalf of the US government; mixed circle indicates split leadership or no legal affiliation (neutral); closed circle indicates joining as plaintiff.