REFLECTIONS ON THE DACA CASES IN THE SUPREME COURT—THE "ILLUSION OF FREEDOM"*

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*This essay explores the path that the DACA cases took to the Supreme Court, the dichotomy raised by the "good"-"bad" immigrant narrative—a narrative that President Trump has embraced—and how that narrative impacted the way the cases reached the Court. Although DACA recipients are the quintessential "good" immigrants, their fate is unlikely to be resolved by the Court's decision in the DACA cases. Congress should act to grant DACA recipients, the living embodiment of the American Dream, a path to permanent residency and citizenship. But Congress should also address reform for those "bad" immigrants who bear the responsibility for deciding to migrate to the United States, in particular, the parents of the U.S.-citizen and permanent resident children. The national conversation about immigrants should reflect the reality of human life and abandon simplistic views of choice about migration and work that render those choices, at the heart of the human experience, criminal.****

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INTRODUCTION

Deferred Action Childhood Arrivals ("DACA") recipients are the quintessential "ideal" immigrants. They are, in essence, the "best" of the tried and tested immigrant pool. DACA's requirements made it clear that only "good" immigrants qualified for its relief—those who were young at the time of entry and thus lacked "culpability" in their original undocumented entry, had worked hard to educate and improve themselves, had not made mistakes, and had lived near-perfect lives thus far.[1] The relief afforded by DACA was itself conditional, premised on continued good behavior. The relief was temporary but renewable.[2] While DACA promised nothing long-term, it did so in a way that arguably created reliance interests. DACA's language contained "doublespeak" often seen in immigration law: DACA did not confer legal status on the recipient, but the recipient was "permitted to be lawfully present in the United States" while maintaining DACA status.[3] DACA was not a path to legalization, but for some it appeared to legalize the presence of undocumented persons already in the United States.

The Obama administration implemented DACA as a transitional measure in 2012, in the absence of meaningful Congressional immigration reform.[4] Congress has been debating comprehensive immigration reform for at least the past two decades, with proposals from all sides of the political spectrum, including opponents of a path to legalization for undocumented immigrants. One of the controversies involved claims of a lack of enforcement at the border. Perhaps in response to those concerns, prior to adopting DACA, the Obama administration also devoted substantial resources to immigration enforcement measures, deporting more undocumented immigrants and permanent residents

1. *See* Memorandum Regarding Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children from Janet Napolitano, Sec'y U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r U.S. Customs & Border Prot., et al. 1 (June 15, 2012) [hereinafter Napolitano Memorandum], https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/DY5V-PJ7B].

2. *Id.* at 2.

3. Texas v. United States, 809 F.3d 134, 147–48 (5th Cir. 2015) (emphasis omitted) (quoting Memorandum Regarding Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of the U.S. Citizens or Permanent Residents from Jeh Charles Johnson, Sec'y. U.S. Dep't of Homeland Sec., to León Rodríguez, Dir. U.S. Citizenship & Immigration Servs., et al. 2 (Nov. 20, 2014) [hereinafter Johnson Memorandum], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [https://perma.cc/X7UT-22NQ]), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); *see also* Napolitano Memorandum, *supra* note 1, at 3. The term "doublespeak"—suggested by "doublethink" from George Orwell's *1984*—signifies language that means the opposite of what it says. GEORGE ORWELL, 1984 176 (1949).

4. *See* Napolitano Memorandum, *supra* note 1, at 3; 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, 474 (2012).

rendered deportable by criminal convictions than any prior administration.[5] Many of those deportations involved relatively minor criminal conduct or even no criminal conduct, and many resulted in the breakup of the families of U.S. citizens.[6] Parents lost children and children lost parents. Perhaps the administration sought to facilitate comprehensive legislative immigration reform through its heightened enforcement. Nevertheless, subsequent events made clear that despite record numbers of deportations and more aggressive criminal prosecution for entries and re-entries without authorization or after a prior removal, legislative reform was not forthcoming.

The U.S. Department of Homeland Security ("DHS") began accepting DACA applications on August 15, 2012. The policy was operationally successful despite some public opposition.[7] Two years later in 2014, the Obama administration announced an expansion of DACA and the Deferred Action for Parents of Americans ("DAPA").[8] DAPA provided deferral of removal and employment authorization, the relief available under DACA, but applied to the noncitizen parents of U.S. citizens and permanent residents.[9] Both DAPA and DACA reflected the value of long-term residence in the United States as the basis for relief: a value that is reflected in other legislative provisions as well as in constitutional norms like due process.[10] In some ways, DAPA was more in line than DACA with the values and norms that have been represented in U.S. immigration laws: the importance of family relationships, and, in particular, the parent-child relationship and the marriage relationship.[11] Constitutional law

5. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC, YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2018) https://www.dhs.gov/immigration-statistics/yearbook/2018/table39 [https://perma.cc/8H75-Q9KN] (showing a marked increase in deportations during the Obama administration years (2009–2015) over the Bush administration years (2001–2009)); *see also* Terri R. Day & Leticia M. Diaz, *Immigration Policy and the Rhetoric of Reform: "Deport Felons Not Families,"* Moncrieffe v. Holder*, Children at the Border, and Idle Promises,* 29 GEO. IMMIGR. L.J. 181, 197 (2015) (noting an increase from thirty-one percent to fifty-nine percent in deportations involving criminal convictions between 2008 and 2013); Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 345 (2018). *See generally id.* at 350–58 (describing the political backdrop against which the Obama administration enforced immigration measures).

6. *See* Day & Diaz, *supra* note 5, at 182.

7. Marcia Zug, *The Mirage of Immigration Reform: The Devastating Consequences of Obama's Immigration Policy*, 63 U. KAN. L. REV. 953, 959–60 (2015); *DACA (Deferred Action for Childhood Arrivals)*, IMMIGR. EQUALITY, https://www.immigrationequality.org/legal/legal-help/other-paths-to-status/deferred-action-for-childhood-arrivals-daca/#.Xsh5UzpKjlV [https://perma.cc/UW45-8WRJ].

8. Johnson Memorandum, *supra* note 3, at 1.

9. *Id.* at 3–4.

10. Federal immigration statutes provide relief from removal for certain long-term residents of the United States. *See* 8 U.S.C. § 1229b (2018).

11. Federal immigration statutes prioritize parents, spouses and minor children of U.S. citizens and permanent residents for immigrant visas. *Id.* § 1153. *See generally*, Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629 (2014) (recognizing the role that family values played in immigration law and developing the thesis that the law of determining parentage with regard to citizenship rules needs to be reformed to more adequately reflect modern family law norms).

also prizes highly intimate family relationships like those at the heart of DAPA.[12] While DACA rested on the conduct of individuals who had, in a sense, proved their employability or intellectual promise to be deserving of relief, DAPA rested on family relationships and the value of keeping American families whole. It was DAPA, however, that set off a public storm.[13]

Texas and several other states sued to prevent DAPA from taking effect, and convinced a federal district court—and, in turn, the Fifth Circuit Court of Appeals—that the program was unlawful and should be preliminarily enjoined.[14] The states argued that DAPA violated the Administrative Procedures Act ("APA")[15] because the DHS had failed to engage the notice and comment rulemaking requirements; that DAPA was unlawful because the DHS lacked authority under the APA and immigration statutes to adopt DAPA; and that DAPA violated the Take Care Clause of the U.S. Constitution.[16] The United States challenged the states' standing to bring the action, argued that DAPA was not subject to judicial review because it was an exercise of prosecutorial discretion, and defended the substance of DAPA in the context of a preliminary injunction and whether the states were likely to succeed on the merits of their claim.[17] The United States argued that DAPA was not subject to

12. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015) (recognizing the right of persons of the same sex to marry resting in part on considerations about parental responsibilities to children); Troxel v. Granville, 530 U.S. 57, 65, 67 (2000) (recognizing strong protection for the rights of fit parents to make decisions about their children: "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court"); Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) (plurality opinion) (recognizing the right of intimate and family associations beyond that of parent-child to live together); Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (recognizing strong parental right to consideration by the state prior to having those rights terminated in the context of biological children); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (recognizing that liberty in due process protects parent's right to decide whether to send their child to private schools); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) (recognizing that liberty in due process protects parent's right to decide whether to allow their child to learn a foreign language).

13. *See, e.g.*, *Cruz Questions the Fairness of DAPA/DACA Programs to Legal Immigrants; President Obama's Amnesty is Hurting Legal Immigrants*, HOUS. CHRON. (March 5, 2015) https://www.chron.com/neighborhood/deerpark/opinion/article/Cruz-questions-the-fairness-of-DAPA-DACA-programs-9645919.php [https://perma.cc/8MUP-N2SS]; Jerry Markon, *Obama Administration Stops Work on Immigrant Program*, WASH. POST (June 7, 2015), https://www.washingtonpost.com/politics/obama-administration-ceases-preparation-for-immigration-program/2015/06/07/12a142e6-0ba4-11e5-95fd-d580f1c5d44e_story.html [https://perma.cc/N235-8VRY (dark archive)]; Cameron Langford, *Judge Blocks Obama's Orders on Immigration*, COURTHOUSE NEWS SERV. (Feb. 17, 2015), https://www.courthousenews.com/judge-blocks-obamas-orders-on-immigration/ [http://perma.cc/4LEQ-BPPZ]; Erica Grieder, *Texas's Case Against Obama*, TEX. MONTHLY (April 20, 2016), https://www.texasmonthly.com/burka-blog/texass-case-obama/ [https://perma.ccNM6H-JJDG].

14. Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex.), *aff'd*, 809 F.3d 134, 135 (5th Cir. 2015).

15. 5 U.S.C. § 706(2)(A) (2018).

16. Texas v. United States, 86 F. Supp. 3d at 614.

17. *Id.*; *see also* Texas v. United States, 809 F. 3d 134, 149 (5th Cir. 2015).

the APA's notice and comment requirement because it was a policy statement, not a substantive rule.[18] The district court found the states had standing; judicial review was proper because DAPA was not an exercise of prosecutorial discretion to refuse enforcement but affirmative action granting certain noncitizens benefits; and granted the preliminary injunction finding that DAPA was a substantive rule subject to the notice and comment requirements of the APA.[19] The court did not decide the likelihood of success on the substantive APA claim or the Take Care Clause claim.[20]

The Fifth Circuit affirmed the district court's rulings but went further than the district court in holding that the states had established a substantial likelihood of success on the merits of not just the procedural APA claims but the substantive claims as well.[21] The Fifth Circuit concluded that DAPA was "an unreasonable interpretation [of the statute] that is manifestly contrary to the INA."[22]

The Supreme Court, at the time composed of only eight justices, affirmed the preliminary injunction by an equally divided Court.[23] Under President Donald Trump, the DHS rescinded DAPA in June 2017.[24] Three months later, the DHS rescinded DACA.[25] Litigation followed, culminating in the case currently before the Supreme Court—*Department of Homeland Security v. Regents of the University of California* ("the DACA case").[26]

18. *Texas*, 809 F.3d at 170–71.

19. Texas v. United States, 86 F. Supp. 3d at 616–43, 644–62, 664–72.

20. *Id.* at 677.

21. Texas v. United States, 809 F. 3d at 146, 178–86.

22. *Id.* at 182.

23. United States v. Texas, 136 S. Ct. 2271, 2272 (2016); *see also* Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html [https://perma.cc/L3FC-64AY (dark archive)] (noting the Senate's refusal to consider Judge Merrick B. Garland, President Obama's nominee to fill the seat left vacant by the death of Justice Antonin Scalia on the Supreme Court).

24. *See* Memorandum Regarding Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") from John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r., U.S. Customs & Border Prot., et al. 1–2 (June 15, 2017), https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf [https://perma.cc/D9MU-NQDL].

25. Memorandum Regarding Rescission of June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017) [hereinafter Duke Memorandum], https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/YP2D-ZMB5].

26. 139 S. Ct. 2779, 2779 (2019) (granting petition of writ for certiorari).

This reflection piece explores the path that the DACA cases took to the Supreme Court,[27] the dichotomy raised by the "good"-"bad" immigrant narrative—a narrative that President Trump has embraced)[28]—and how that narrative impacted the way the cases reached the Court. Persons are seldom merely "good" or "bad." Many persons we describe as "good" may engage in bad or morally problematic conduct, and many persons described as "bad" engage in conduct we consider "good." The terms are morally simplistic and are not helpful in dealing with complicated human behavior, like migration decisions and decisions to work.[29] The national conversation about immigration should reflect the reality of human life and abandon simplistic views about migration and work that render these choices at the heart of human experience criminal.

Historically, the executive branch has enjoyed substantial discretion in exercising power in the area of immigration and foreign affairs. Congress's approach to legislating in the immigration sphere has featured vast delegation of discretionary powers to the executive—powers to which, for the most part, courts have deferred.[30] At the same time, courts have struggled to balance protection for basic individual human rights, including those of noncitizens,

27. "DACA cases" here refers also to *Trump v. NAACP*, No. 18-588, and *McAleenan v. Batalla Vidal*, No. 18-589, which were consolidated with *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, the title case argued before the Supreme Court.

28. *See* Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 254–56 (2017).

29. Many scholars have explored the "good"-"bad" immigrant narrative, which simplistically characterizes morally complicated human beings and the totality of their lives as being either of the two possibilities, rather than the complexity of unexamined persons, conduct, and lives. *See* Jennifer M. Chacón et al., *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 72–73 (2018); Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663, 675–89 (2018); Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 701–06 (2016). Gerald Neuman used the term "outlaw." *See* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1440–41 (1995). Stephen H. Legomsky, scholar and former Chief Counsel for U.S. Citizenship and Immigration Services, used a dialectic to explore undocumented immigrants as outlaws or residents. Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 67, 70 (2009).

30. *See generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (Ediberto Román 2015) (tracing the historical development of the use of prosecutorial discretion in immigration law and suggesting some avenues for reform); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (acknowledging the substantial discretion vested in the President by the immigration legislative scheme and arguing in the context of the Obama initiatives that efforts to constrain prosecutorial discretion by looking to Congressional enforcement priorities is likely to prove futile given the nature of the Congressional delegation); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458 (2009) (tracing Congressional delegation of power to the executive in the context of immigration law).

with the deference traditionally accorded federal regulation of immigration.[31] Historically the balance was not struck in favor of individual human rights.[32] There is an argument that the modern Court has considered immigration issues applying the established legal principles and standards of review under due process and equal protection that apply in a non-immigration context, but it is not clear that a majority of today's Court would do so.

Yet the DACA case is at the intersection of law, politics, race, and citizenship. The rescission of DACA has primarily impacted Brown persons, particularly persons of Mexican or Latinx origin, who comprise ninety-three percent of DACA recipients.[33] As such, the decision to rescind the program masks racial animus.[34] That racial animus rests in part on stereotypes about Black and Brown persons that portray those persons as stealthy thieves. For undocumented immigrants, the theft or stealth narrative is ultimately one of criminality. These are persons who have in essence attempted the theft of belonging, nationality, and citizenship.

Accordingly, the case is also about the morality of denying the right to continue residing in the United States to human beings who have been good citizens, and to do so because they were born on the wrong side of a border. The formality of citizenship as defined by legal rules ignores the reality of the functional or constructive citizenship practiced by long-term residents of the United States. Both of these themes are echoed in the Ninth Circuit's DACA opinion.[35]

The DACA case argued before the Supreme Court in November 2019 affords an opportunity for the Court to clarify constitutional norms that inform analysis concerning the extent to which judicial review ensures meaningful review of administrative action, the extent to which executive discretion is bound to express statutory grants of authority, and the extent to which human rights limit that discretion. But the opportunity is not one that the Court is bound to take. The case poses a question the Court is used to deciding in the context of immigration-related matters: the extent to which the Court itself has

31. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 767–68 (1950) (denying habeas relief to nonresident enemy combatants convicted by U.S. military tribunals abroad during a declared war, and rejecting a claim that "person" in the Fifth Amendment extends globally); Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding the President's authority to intern persons of Japanese Americans during World War II); Hirabayashi v. United States, 320 U.S. 81, 104–05 (1943) (upholding Congress's power to impose a curfew on Japanese Americans during World War II).

32. *See supra* note 31.

33. *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 518 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

34. *See* Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 628–30 (2017) (describing statements by President Trump that reflected animus while noting the use of executive orders to change and implement immigration policy).

35. *See Regents of the Univ. of Cal.*, 908 F.3d at 485–86, 518–20.

jurisdiction to review what the executive contends is a decision to rescind a policy of enforcement discretion that is committed to agency discretion by law,[36] and what the challengers contend is arbitrary, irrational, and capricious administrative decision-making.[37]

The Court is likely to find that it has jurisdiction to review the administrative cessation of the program, but such a review may yield a decision that leaves DACA recipients unprotected. The fate of the approximately 600,000[38] DACA recipients will be impacted by the Court's decision. Still, the Court may well reason that the Constitution places the fate of the DACA recipients in Congress's hands. Congress should act to grant these "good" immigrants who are the living embodiment of the American Dream its reality and replace DACA with a path to permanent residency and full citizenship.

I. WHY NOT DAPA FIRST?

The parent-child relationship is valued highly in American society. Constitutional law has long recognized the centrality of families and the parent-child relationship as one of the intimate relationships most deserving of protection by constitutional norms.[39] Federal and state statutes also prioritize and protect the parent-child relationship.[40] Approximately 4.5 million U.S.-citizen children in the United States have at least one unauthorized or

36. *See* Brief for the Petitioners at I, 14–15, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019) (mem.) (Nos. 18-587, 18-588, 18-589), 2019 U.S. S. Ct. Briefs LEXIS 3342, at *6, *24–25.

37. *See* Brief in Opposition for Respondents Dulce Garcia et al. at i, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019) (mem.) (No. 18-587), 2018 U.S. S. Ct. Briefs LEXIS 4863, at *7.

38. Gustavo López & Jens Manuel Krogstad, Key Facts About Unauthorized Immigrants Enrolled in DACA, PEW RESEARCH CTR. (Sept. 25, 2017), https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/ft_17-09-21_daca_status/ [https://perma.cc/FUK9-J6TH].

39. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) ("A[nother] basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The Court has recognized these connections by describing the varied rights as a unified whole: '[T]he right to "marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause.'" (second alteration in original) (citation omitted) (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)) (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923))).

40. *See, e.g.*, Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended at 42 U.S.C. § 667 (2018)) (providing for income withholding for child support); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.) (providing temporary support for needy families). All states require child welfare agencies to make reasonable efforts to preserve families prior to removing a child and placing in foster care. *See, e.g.*, ALA. CODE §§ 12-15-301 to -312 (Westlaw through 2020 legislation) (requiring reasonable efforts to preserve and reunify families before removing child from home); CONN. GEN. STAT. §§ 17a-111b, 46B-129 (Westlaw through 2020 legislation) (requiring reasonable efforts and services to be provided to the parents prior to removal of child from home).

undocumented parent.[41] Scholars have documented the harm to children caused by losing a parent through deportation or of having to live with the threat of a potential deportation.[42] Thus, one would expect a high degree of concern over a statutory and constitutional scheme that makes it easy to leave U.S.-citizen minor children without a parent simply because that parent is undocumented or is here without authorization.

One might expect that if the United States is going to provide relief—even temporary relief by way of deferral of removal (hence "deferred action") and of employment authorization for undocumented noncitizens—then there is a strong case that parents of U.S. citizens and permanent residents should receive the highest preference. The Fourteenth Amendment provides the constitutional norm for U.S. citizenship: birth in the territory.[43] As provided in the original Constitution and recognized in the Fourteenth Amendment, Congress may supplement citizenship by birth on U.S. soil through naturalization,[44] but citizenship through birth on U.S. territory is the explicit constitutional norm.[45] U.S.-citizen children should have rights grounded in their status as citizens that make their family relationships material to the removal or deportation decision concerning a parent.[46]

41. JONGYEON JOY EE & PATRICIA GÁNDARA, UNDER SIEGE: THE DISTURBING IMPACT OF IMMIGRATION ENFORCEMENT ON THE NATION'S SCHOOLS 2 (2020), https://immigrationinitiative.harvard.edu/files/hii/files/iih_issue_brief_2_final.pdf [https://perma.cc/8GDU-7ZAQ]; *see* RANDY CAPPS, MICHAEL FIX, & JIE ZONG, A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED IMMIGRANT PARENTS 3 (2016), https://www.migrationpolicy.org/research/profile-us-children-unauthorized-immigrant-parents [https://perma.cc/8GVR-Z5J9] (reporting on a study conducted during 2009–2013 finding the number to be 5.1 million U.S. children under age 18).

42. *See* EE & GÁNDARA, *supra* note 41, at 3–5; *see also* Brian Allen, Erica M. Cisneros & Alexandra Tellez, *The Children Left Behind: The Impact of Parental Deportation on Mental Health*, 24 J. CHILD & FAM. STUD. 386, 386–91 (2015).

43. *See* U.S. CONST. amend. XIV, § 1 ("All persons born . . . in the United States . . . are citizens of the United States and of the State wherein they reside.").

44. *See id.* art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *id.* amend. XIV, § 1.

45. *See* M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to Do With It?*, 28 GEO. IMMIGR. L.J. 391, 395–96 (2014). *See generally* Jennifer M. Chacón, *Citizenship and Family: Revisiting* Dred Scott, 27 WASH. U. J.L. & POL'Y 45, 64–69 (2008) (noting the importance of family to citizenship and immigration through the Fourteenth Amendment and the *Dred Scott* decision).

46. *Cf.* Susan Hazeldean, *Anchoring More than Babies: Children's Rights After* Obergefell v. Hodges, 38 CARDOZO L. REV. 1397, 1451 (2017) (arguing that *Obergefell* implies children have a right to be raised by their own parents and that, accordingly, deportation of an American child's parents threatens that child's fundamental due process rights); Laura A. Hernández, *Anchor Babies: Something Less than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331, 333 (2010) (arguing that citizen children are a suspect class and that housing ordinances designed to evict undocumented immigrants must be reviewed under strict scrutiny); Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 284–85 (2014) (arguing that derivative citizenship statutes improperly define parent-child relationships based on biology alone, which results in noncitizen children of citizens); Patrick Glen, *The Removability of Non-Citizen Parents*

Legal norms, however, tend to emphasize the parent, rather than the child, as the source of citizenship rights.[47] Thus, transmission-of-citizenship rules emphasize the parent as the transmitter of citizenship, not the child. In terms of immigrant visa preferences, a child may petition on behalf of a noncitizen parent, but not until the child is twenty-one years of age.[48] The specter of unprincipled parents strategizing over the birth of their child in order to obtain the long-term possibility of an immigrant visa has generated substantial resistance to recognizing the right of children to matter in the question of whether their parent is going to be deported. Although children are entitled to a determination of their best interests in custody disputes or when parental abuse places their wellbeing at issue,[49] U.S. immigration law mandates no such inquiry when determining whether to remove a parent.[50] While permanent residents or undocumented noncitizens who fit into certain categories may be entitled to relief from deportation if they can establish extreme hardship to their U.S.-citizen or permanent resident children, this form of relief is discretionary with immigration authorities.[51] The simple fact that the child will be deprived

and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings, 30 BERKELEY J. INT'L L. 1, 4 (2012) (comparing U.S. and U.K. immigration law to build a framework for "weighing the interests of citizen children confronted with removal of a non-citizen parent"; Lori A. Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605, 608–09 (2019) (analyzing the de facto deportation of American children when their parents are deported and arguing for reform to protect those families' constitutional rights).

47. *Cf.* Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 755–56 (2016) (arguing that more focus should be given to children and their relationships to advance advocacy for children). *See generally* Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313 (1998) (arguing for a child-centered, rather than a parent-centered, perspective on rights, while acknowledging that the parent-centered perspective flows from early views of children as the property of the parent); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (arguing for a view of the parenting relationship that recognizes the rights of the child as an individual).

48. U.S. CITIZENSHIP & IMMIGR. SERVS., I AM A U.S. CITIZEN: HOW DO I HELP MY RELATIVE BECOME A U.S. PERMANENT RESIDENT? 1 (2013), https://www.uscis.gov/sites/default/files/USCIS/Resources/A1en.pdf [https://perma.cc/EYL2-GQB8].

49. Troxel v. Granville, 530 U.S. 57, 67–73 (2000) (acknowledging the role of the best interest of the child standard in custody and visitation determinations and holding that the Fourteenth Amendment Due Process Clause limits the power of the states to vest visitation rights in any person based solely on a best interest of the child analysis). Scholars have criticized the "best interests of the child" standard––see, for example, Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child,* 54 U. CHI. L. REV. 1, 4–5, 7 (1987)––but its use in this piece acknowledges the fact that state jurisdictions rely on it when determining custody matters.

50. *See* Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 120 (2009).

51. 8 U.S.C. § 1229b(a)–(b) (2018) (providing for cancellation of removal for noncitizens who have been admitted for permanent residence for at least five years; have resided continuously in the United States for seven years; and who have not been convicted of any aggravated felony, as defined under immigration law, and for cancellation of removal for noncitizens who have been physically

of the parent's physical presence and emotional support in the United States is not alone sufficient to merit the relief.[52]

If the United States prizes citizenship and values a unified parent-child relationship, one would expect that the deportation decision-making process would take material note of whether the deportation of an individual is going to deprive a U.S.-citizen child of a parent. Yet, American society has grown used to the continued and persistent image of young U.S.-citizen children left behind when a parent is deported or forced to leave their native country when the noncitizen parent opts to take the U.S.-citizen child with them.

Is it that the noncitizen parent bears the burden of guilt in making the original decision to enter without documentation or to overstay their visa? Has the national dialogue cast the parent as a "bad" immigrant or "outlaw," willing to engage in conduct that is perceived as criminal (whether criminal under the law or not), dishonest, and almost morally evil?

Professor Lori Nessel offers a portrait of the "bad" or "outlaw" immigrant in her recent Article, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*:

> Take for example, Adolfo Mejia, who was apprehended by Immigration and Customs Enforcement . . . agents after dropping off two of his children at school. Although he had lived in the United States for 26 years and was married with six American children, he was targeted for detention and deportation on the basis of a Class A misdemeanor that resulted in a suspended sentence and community service, completed 25 years ago. In prior administrations, a man like Mr. Mejia would have benefitted from discretion as to whom to target for deportation. However, under the current administration, Mr. Mejia, like countless other parents of American children, was arrested and placed in removal proceedings without regard for the dire consequences for his American children or the fact that he has been a fit parent and primary income earner for his family.[53]

present in the United States for ten years; have good moral character; have not been convicted of certain criminal offenses; and who establish that their removal would result in exceptional and extremely unusual hardship to their U.S.-citizen or permanent resident spouse, parent, or child). This relief is discretionary in nature. Prior administrations have established enforcement policies that allow agency officials to exercise discretion in removal cases involving parents of U.S.-citizen children by allowing for administrative closure of those cases. The current administration, however, has eliminated this discretion. Nessel, *supra* note 46, at 613–14.

52. Even under prior administrations that provided for the discretionary consideration of the presence of U.S.-citizen children, the prior administration did not stop the frequent deportation of parents of U.S.-citizen children. *See* Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437, 439–41 (2013).

53. Nessel, *supra* note 46, at 607 (internal citations omitted).

The public outrage that greeted the announcement of DAPA, in contrast to the reception of the announcement of DACA, suggests an unwillingness to value the parent-child relationship when it involves noncitizen parents and U.S.-citizen children.[54] It also displays an aversion to "rewarding" persons who entered the United States without authorization or overstayed their visas (even decades ago) by allowing their relationship to their U.S.-citizen child to lead to a more lenient treatment in the deportation decision.[55] The reaction to DAPA reflected dehumanization and demonization of adult noncitizens, and a form of second-class citizenship for U.S.-citizen children.

II. THE ROAD TO DACA

The case at the heart of the push to reform immigration laws to provide a path to legalization for the children of undocumented noncitizens also contains the seed of the "good"-"bad" immigrants' story. In *Plyler v. Doe*,[56] the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment limited the power of the states to deny public education to the children of undocumented noncitizens.[57] The *Plyler* Court held that a Texas statute allowing local school districts to deny enrollment in public schools to children of undocumented persons violated the Equal Protection Clause despite not recognizing the children as being members of a suspect class and not recognizing the right to a public education as fundamental.[58] As such, *Plyler* joined other equal protection cases that apply a higher degree of judicial scrutiny than rational review—the type of review normally applied to cases involving non-suspect classes and cases involving activities that are not encompassed within the "fundamental rights or liberties" doctrine.[59] The case has received extensive

54. *See* Eyder Peralta, *Obama Goes It Alone, Shielding up to 5 Million Immigrants from Deportation*, NPR (Nov. 20, 2014), https://www.npr.org/sections/thetwo-way/2014/11/20/365519963/obama-will-announce-relief-for-up-to-5-million-immigrants [https://perma.cc/C62E-SHQE] (outlining former President Obama's response to DAPA).

55. *See* Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html [https://perma.cc/5M8F-AUA6 (dark archive)] (outlining former President Obama's response to DACA).

56. 457 U.S. 202 (1982).

57. *Id.* at 230.

58. *Id.* at 223–24 (holding that, although neither a suspect class nor a fundamental right, the statute is invalid because it imposes a lifetime hardship on a discrete class of children not accountable for their disabling status). The Court further reasoned that children are special members of the underclass of undocumented workers, and therefore, are not in the United States as the "product of their own unlawful conduct." *Id.* at 216–20. Ultimately, although the Court acknowledged that education is not a fundamental right, the Court reasoned that it is "'perhaps the most important function of state and local governments.'" *Id.* at 221–23 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

59. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635–36 (1996) (applying rational basis scrutiny but holding invalid a Colorado constitutional amendment prohibiting all units of state or local governments

scholarly treatment, and the narratives the case generates may reflect the political realities of Supreme Court decision-making.[60]

In the *Plyler* narrative, "good" immigrants deserve relief, whereas "bad" immigrants do not.[61] Under this narrative, it does not matter that many of the character traits or elements that render the children "ideal" immigrants also describe their parents. *Plyler*'s narrative is that undocumented adult noncitizens do not deserve heightened constitutional protection because they are present in the United States in defiance of U.S. law.[62] The Court took care to make clear that even undocumented noncitizens were "persons," and as "persons," they are entitled to the protection of the Due Process and Equal Protection clauses.[63] But, the Court concluded, "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[64]

Their children, however, are differently situated—they are blameless and are thus entitled to some constitutional protection, specifically public primary and secondary education.[65] The *Plyler* opinion thus facilitates the idea of the "good" immigrant who is not culpable and the "bad" immigrant who is. But this narrative actually bears a different reading: the Court recognized that the Fourteenth Amendment protects all noncitizens—whether in the United States with or without documentation or authorization. They are all "persons." The concerns that the *Plyler* Court identified are as true and accurate for adults as they are for children: concerns about the creation of a permanent underclass of persons destined to hide in the shadows, deprived of even basic English literacy.[66] The Court could have extended its reasoning that state targeting or discrimination on the basis of alienage or immigration status is suspect because

to institute policies designed to protect persons who are gay, lesbian or bisexual because the illegitimate purpose was based on animus toward the group); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (holding that the denial of a permit for the operation of a group home for mentally disabled people was invalid because an illegitimate purpose of bias toward those who are mentally disabled formed the basis for denial); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534, 538 (1973) (holding invalid a federal statutory provision designed to exclude "hippies" and "hippie communes" from the food stamp program because its illegitimate purpose rendered the policy arbitrary and irrational).

60. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2042–43 (analyzing how Justice Brennan's opinion emphasized the innocence of children and the importance of education to enlist Justice Powell's vote).

61. This Article is not attempting to impugn the legacy of *Plyler*, but rather to note its duality and problematic nature. *See generally* MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN (Ediberto Román ed. 2012) (tracing the development of the case from early stages of the litigation to the Supreme Court decision and its aftermath).

62. *See Plyler*, 457 U.S. at 219–20.

63. *See id.* at 210.

64. *Id.* at 223.

65. *See id.* at 219–20.

66. *See id.* at 218–20.

it tends to reflect animus and racial bias, and thus such measures should be given heightened scrutiny. But the Court ultimately rested its ruling on drawing distinctions between parents and their minor children:

> Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation . . . . [B]ut the children . . . "can affect neither their parents' conduct nor their own status." Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.[67]

There are shortcomings to both of those alternative narratives; neither answers the question of limits when the federal government does the targeting. Ultimately, this may be one of the defining questions facing Americans in the twenty-first century—the extent to which fundamental rights and liberty norms limit the power of the federal government in its treatment of immigrants (documented or not)—and it is one of the questions at the heart of the DACA case.

The image of parents who enter in stealth ignores the reality of the case for many: the majority of undocumented immigrants enter the United States to work, desperate to escape severe poverty and to provide a better life for their children.[68] Further, in many cases, children, even those of young age, enter the United States on their own, often to join a parent.[69] Children also may be

67. *Id.* at 219–20 (citation omitted) (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

68. *Cf.* Maryanne Buechner & Sarah Ferguson, *Why Migrants Flee Central America*, UNICEF USA (Oct. 16, 2018), https://www.unicefusa.org/stories/why-migrants-flee-central-america/34545 [https://perma.cc/EAP7-28ZD] (describing how poverty, among other factors, causes millions of immigrants to flee Central America and enter the United States); Daniel Costa, David Cooper & Heidi Shierholz, *Facts About Immigration and the U.S. Economy: Answers to Frequently Asked Questions*, ECON. POL'Y INST. (Aug. 12, 2014), https://www.epi.org/publication/immigration-facts/ [https://perma.cc/7BQC-B2LH] (providing additional information regarding immigration statistics in the United States).

69. *See* Amelia Cheatham, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/us-detention-child-migrants [https://perma.cc/CMN8-RPD8]; *Current Research & Policy, Rising Child Migration to the United States,* MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/us-immigration-policy-program/rising-child-migration-united-states [https://perma.cc/JW28-TM7X] (granting access to multiple charts and tables that outline various "push and pull factors driving child and family migration from Central America to the United States"); *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/sw-border-migration [https://perma.cc/9X4B-T6WH] (last modified May 7, 2020) (noting apprehension of unaccompanied children at U.S. Mexico border in

trafficked into the United States without their parent. The *Plyler* narrative masked the complexity of undocumented migration into the United States, even as it extended protections to undocumented children.

In any case, the Court's *Plyler* narrative facilitated the idea upon which the Development, Relief, and Education for Alien Minors Act ("DREAM Act")[70] rested. The DREAM Act was first introduced in Congress in 2001 as a bipartisan measure to provide deferred action and a path to citizenship and lawful permanent resident status to young persons brought into the United States by their (implicitly culpable) parents.[71] Senators Richard Durbin (D-Illinois) and Orrin Hatch (R-Utah) introduced the bill on August 1, 2001.[72] A little over a month later, on September 11, an attack on the United States resulted in a devastating loss of life when hijacked commercial airplanes flew into the World Trade Center and the Pentagon. The nation's attention turned away from meaningful immigration reform and toward national security and terrorism.[73] Notwithstanding the focus on national security, there has been a continual effort to enact the DREAM Act. Versions of the DREAM Act have been introduced in Congress regularly, but each version has always failed to pass.[74]

Plyler's importance in establishing a framework through which to view undocumented or unauthorized migration is mirrored in the district court's decision in the original DAPA litigation.[75] The DAPA district court opinion used *Plyler* to describe "the genesis of the problems presented by illegal immigration."[76] *Plyler*'s particular contribution to human rights, that noncitizens in the United States are persons protected by the Fourteenth Amendment, is lost in the court's narrative. For the DAPA court, the narrative that is retained is closely linked to the "specter of terrorism and the increased

2020); *see also* Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 287, 293–94 (2000) (discussing the intersection of child smuggling or trafficking rings and family decisions concerning migration and critiquing governmental responses, including criminalization, to the migration of unaccompanied children). Pulitzer Prize winning journalist and author Sonia Nazario memorialized one child's journey to the United States to reunite with his mother. *See generally* SONIA NAZARIO, ENRIQUE'S JOURNEY: THE STORY OF A BOY'S DANGEROUS ODYSSEY TO REUNITE WITH HIS MOTHER (Random House Trade Paperback ed. 2007) (detailing a young boy's hardships throughout his journey from Honduras to reunite with his mother in the United States).

70. Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001).

71. *Id.*

72. *Id.*

73. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18, 28, and 50 U.S.C.).

74. *See, e.g.*, Dream Act of 2019, S. 874, 116th Cong. (2019); DREAM Act of 2011, S. 952, 112th Cong. (2011).

75. Texas v. United States, 86 F. Supp. 3d 591, 604–05 (S.D. Tex. 2015).

76. *Id.* at 604.

need for security."[77] Good immigrants are those that are admitted lawfully and live perfect lives, and all others are "bad."

The image of the "good" immigrant is echoed and reinforced in the Ninth Circuit's opinion in the consolidated California cases challenging the DHS's rescission of DACA:

> It is no hyperbole to say that Dulce Garcia embodies the American dream. Born into poverty, Garcia and her parents shared a San Diego house with other families to save money on rent; she was even homeless for a time as a child. But she studied hard and excelled academically in high school. When her family could not afford to send her to the top university where she had been accepted, Garcia enrolled in a local community college and ultimately put herself through a four-year university, where she again excelled while working full-time . . .Today, Garcia maintains a thriving legal practice in San Diego, where she represents members of underserved communities in civil, criminal, and immigration proceedings.
>
> On the surface, Dulce Garcia appears no different from any other productive . . . young American. But one thing sets her apart. Garcia's parents brought her to this country in violation of United States immigration laws when she was four years old.[78]

The narrative that emerges—perhaps unwittingly—pits the child against the parent. It glorifies one at the expense of the other, whose primary culpable act appears to have been to escape grinding poverty and obtain a better life for their child. The "culpable" parent could emerge ultimately as the more adventurous, disciplined, and courageous individual—all traits generally valued and respected in American mythology and society. However, in the context of modern-day attitudes toward undocumented migration, these worthy and valued traits are buried underneath the narrative of criminality.

III. DACA IN THE 2020 COURT

DACA's rescission prompted challenges in several fora: district courts in California and New York preliminarily enjoined the rescission, and the United States District Court for the District of Columbia held the rescission to be unlawful.[79] In the District of Columbia case, the district court concluded that the rescission was reviewable and that the reasons given to support it were

77. *Id.* at 605.

78. Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 485–86 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

79. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 243 (D.D.C. 2018), *cert. granted*, 139 S. Ct. 2779 (2019); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *cert. granted*, 139 S. Ct. 2773 (2019); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

inadequate.[80] The court granted the DHS ninety days to remedy the inadequacy,[81] and the DHS provided a new memorandum justifying the rescission.[82] The court subsequently concluded that the additional justifications were nothing more than "repackage[d] legal arguments" and a single post hoc rationalization that DACA's rescission rested on the DHS's conclusion that the program was unlawful.[83] The court thus held that the DACA rescission was unlawful because it lacked a rational explanation.[84] A district court in Maryland dismissed a challenge to DACA's rescission, but the United States Court of Appeals for the Fourth Circuit reversed the dismissal.[85] In California, the Court of Appeals for the Ninth Circuit affirmed the district court's decision dismissing some of the plaintiffs' claims, allowing the due process and equal protection claims to proceed and finding the rescission reviewable.[86] The Supreme Court granted certiorari, consolidated the three cases, and scheduled oral arguments for November 12, 2019.[87]

The DACA case joins a relatively short list of cases featuring expedited process to the U.S. Supreme Court. Previous cases on this list include *United States v. Nixon*,[88] *New York Times Co. v. United States*,[89] *Reid v. Covert*,[90] *Kinsella v. Krueger*,[91] *Youngstown Sheet & Tube Co. v. Sawyer*,[92] and *A. L. A. Schechter Poultry Corp. v. United States*[93]—all major Supreme Court cases. Many of these cases bypassed federal appellate review and most involved expedited hearings. In the DACA litigation, the DHS filed a petition for mandamus in various district courts in response to court orders to supplement the administrative record before the court, which consisted solely of "256 publicly available pages, roughly three-quarters of which are taken up by the three published judicial opinions [in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015)]."[94] The

80. *See NAACP*, 298 F. Supp. 3d at 249.

81. *Id.*

82. NAACP v. Trump, 315 F. Supp. 3d 457, 460 (D.D.C. 2018).

83. *See id.* at 460–61.

84. *See id.* at 473.

85. Casa de Maryland v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758 (D. Md. 2018), *rev'd in part*, 924 F.3d 684 (4th Cir. 2019) (agreeing with the district court that the matter was reviewable but rejecting its holding that the rescission was valid).

86. Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 520 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

87. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019); Transcript of Oral Argument at 2, Dep't of Homeland Sec. v. Regents of the Univ. of Cal. (2019) (No. 18-587) 2019 WL 5893724, at *1.

88. 418 U.S. 683 (1974).

89. 403 U.S. 713 (1971).

90. 354 U.S. 1 (1957).

91. 351 U.S. 470 (1956).

92. 343 U.S. 579 (1952).

93. 295 U.S. 495 (1935).

94. Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Security, 908 F.3d 476, 492–93 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

Supreme Court granted mandamus relief and instructed lower courts to rule on the government's threshold arguments prior to requiring the government to provide additional documents.[95] After the Ninth Circuit ruled in the California case, the DHS petitioned for certiorari. The Court granted that petition and consolidated the remaining cases prior to judgment.[96]

The Court will decide the case, thus, on an incomplete record and lacking the benefits that full appellate review in all of the cases would have yielded. The Court has tended to intervene in immigration-related cases in the early stages of their litigation,[97] and the DACA cases are no exception—involving the Court early in various challenges. The DACA cases, in particular, would have benefited from having a more complete record of the government's considerations and decision-making process with regards to the Trump administration's assessment of DACA and its rescission.

Recently, in a different case, Justice Sotomayor noted the Court's willingness to intervene at early stages of litigation in immigration cases in her dissent from the grant of a stay of a preliminary injunction granted by a district court in Illinois.[98] The case involved a challenge to the Trump administration's rule interpreting the "public charge" inadmissibility provision more expansively than prior administrations and, litigants argued, than the statute.[99] The stay applied only in Illinois. Justice Sotomayor's dissent stated:

> Today's decision follows a now-familiar pattern. The Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not. The Government insists—even though review in a court of appeals is imminent—that it will suffer irreparable harm if this Court does not grant a stay. And the Court yields.
>
> . . . .
>
> . . . [T]he Government has come to treat "th[e] exceptional mechanism" of stay relief "as a new normal." . . .
>
> . . . [T]his Court is partly to blame for the breakdown in the appellate process. . . . Such a shift in the Court's own behavior comes at a cost.
>
> Stay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower

95. *In re* United States, 138 S. Ct. 443, 444, 445 (2018) (per curiam).

96. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019).

97. *See* Maryellen Fullerton, 'DHS v. City and State of New York'*: SCOTUS Doesn't Trust the Court System*, LAW.COM (Feb. 3, 2020), https://www.law.com/newyorklawjournal/2020/02/03/dhs-v-city-and-state-of-new-york-scotus-doesnt-trust-the-court-system/?slreturn=20200508132638 [https://perma.cc/4484-MDK9 (dark archive)].

98. Wolf v. Cook Cty., 140 S. Ct. 681, 681–82 (2020).

99. Cook Cty. v. McAleenan, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019) (granting a preliminary injunction to enjoin the rule). The Supreme Court stayed the preliminary injunction pending appeal. *Wolf*, 140 S. Ct. at 681.

> courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay. . . .
>
> . . . .
>
> . . . I fear that [the Court's recent disparate treatment between stay applications sought by the Government and those sought by other litigants] erodes the fair and balanced decisionmaking process that this Court must strive to protect.[100]

At oral argument in the DACA case, the question of whether the agency had considered reliance interests in deciding to rescind was informed not by the record evidence but by the many amicus briefs filed in the Court in support of the DACA recipients.[101] In short, the posture of the litigation deprives the Court of a complete record on which to base its decision, as well as a full and thorough airing of the arguments on all sides, as would be available after full appellate review (by several federal circuit courts of appeals), had it not been halted by the Court's early intervention.

The Trump administration rescinded DACA on the grounds that it was unlawful. In announcing the decision, the DHS referred to a communication from then-Attorney General Jeff Sessions concluding that DACA was unlawful, as well as to the DAPA litigation and threats by states attorneys general to file suit against DACA if the federal government did not rescind it.[102] Thus, the DHS premised its rescission on DACA's unlawfulness because of the alleged lack of executive branch authority to adopt and implement DACA as an exercise of prosecutorial discretion.

Subsequently, on June 22, 2018, the DHS issued further justifications for the rescission, and contended that DACA was categorical non-enforcement relief, not a general statement of policy that left the decision as to relief to agency decision-makers, and as such "should be enacted legislatively" rather than "under the guise of prosecutorial discretion."[103] But the DHS continued to maintain that the original DACA policy was unlawful.

Challengers contended that the rescission was invalid because it rested on an incorrect understanding of the lawfulness of the original DACA adoption,

100. Order Granting Stay of Preliminary Injunction at *1–7, Wolf v. Cook Cty., 589 U.S. ___ (2020) (No. 19A905) (Sotomayor, J., dissenting) (second alteration in original) (citation omitted) (quoting Order Granting Stay of Preliminary Injunction, Barr v. E. Bay Sanctuary Covenant, 588 U.S. ___ (2019), 140 S. Ct. 3, 6 (2019) (Sotomayor, J., dissenting)).

101. *See* Transcript of Oral Argument at 23–25, Dep't of Homeland Sec. v. Regents of the Univ. of Cal. (2019) (No. 18-587) 2019 WL 5893724, at *23–25.

102. *See* Duke Memorandum, *supra* note 25.

103. In the District of Columbia litigation, the DHS provided a memorandum by then-Secretary Kirstjen Nielsen. *See* NAACP v. Trump, 315 F. Supp. 3d 457, 470 (D.D.C. 2018). Brief for the Petitioners *supra* note 36, at 12–13 (discussing the Nielsen Memorandum).

and thus it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[104] in violation of the APA.[105] Moreover, challengers maintained that the rescission violated the APA's notice and comment requirement. The DHS defended on the grounds that the decision was not subject to judicial review, and that even if it was, it was a valid exercise of discretion.[106] Full discussion of the arguments on both sides are beyond the purview of this brief piece, but the DHS's self-created problem was its original position with regard to DACA rescission: DACA itself was unlawful and thus rescinding it was necessary. At oral argument before the Supreme Court, the Solicitor General repeated the assertion that the DHS's decision to rescind DACA was "based on its belief that the policy was illegal."[107]

The DACA challengers also asserted due process and equal protection challenges. In particular, the DACA challengers claimed that the DHS's rescission of DACA was motivated by racial animus toward persons of Mexican or Latinx origin, established by the overwhelming number of DACA recipients of Mexican and Latinx origin and by the administrative and executive actions leading up to the rescission.[108] This claim presents the question left to some degree unanswered in *Plyler*: what happens when it is the federal government discriminating on the basis of a status that reflects race or ethnicity? The straightforward answer should be that heightened scrutiny applies when the federal government makes decisions motivated by racial animus toward a group of persons who reside in the United States. The Court's adherence to the constitutional prohibition against the use of race to target persons in the United States has been steadfast since the adoption of the Fourteenth Amendment.[109] Because the rescission is a facially neutral policy, however, the challengers

104. 5 U.S.C. § 706(2)(A) (2018).

105. *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 492 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019); NAACP v. Trump, 298 F. Supp. 3d 209, 223, 238 (D.D.C. 2018), *cert. granted*, 139 S. Ct. 2779 (2019); Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 269 (E.D.N.Y. 2018), *cert. granted*, 139 S. Ct. 2773 (2019).

106. *See Regents of the Univ. of Cal.*, 908 F.3d at 486, 493–94, 505 (9th Cir. 2018); NAACP v. Trump, 298 F. Supp. at 215, 223–24, 238.

107. Transcript of Oral Argument, *supra* note 101, at 4.

108. For a discussion of the challengers' Equal Protection claim in the California case, see *Regents of the Univ. of Cal.*, 908 F.3d at 518–20. For the same discussion in the New York case, see *Batalla Vidal*, 291 F. Supp. 3d at 274–79 ("[T]he court concludes that [Plaintiffs'] allegations are sufficiently racially charged, recurring, and troubling as to raise a plausible inference that the decision to end the DACA program was substantially motivated by discriminatory animus."). In the District of Columbia case, the district court did not reach the plaintiffs' equal protection and due process claims. *NAACP*, 298 F. Supp. 3d at 246.

109. *See, e.g.*, Buck v. Davis, 137 S. Ct. 759, 778 (2017) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979))); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (applying strict scrutiny to race-based decision-making in schools); Johnson v. California, 543 U.S. 499, 505–06 (2005) (applying the same strict scrutiny standard to race-based decision-making in state prisons).

needed to establish that the decision to rescind was motivated by racially discriminatory animus.[110]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[111] the Court identified relevant and material factors to determine when a governmental decision is the result of racial animus.[112] One avenue toward challenging facially neutral policies involves establishing that the neutral policy was administered in a selective manner.[113] One of the earliest cases recognizing that immigrants or noncitizens are persons and protected by the Equal Protection Clause of the Fourteenth Amendments involved such a claim: a claim of discriminatory enforcement against persons of Chinese ancestry in the administering of a city's permitting scheme for laundries.[114] But in a more recent case, *Reno v. American-Arab Anti-Discrimination Committee*,[115] the Court seemed to foreclose the possibility of selective enforcement claims "as a defense against . . . deportation."[116] As the Ninth Circuit noted, the DACA case does not involve deportation hearings;[117] thus, the applicability of *Reno* to the DACA litigation appears doubtful and would require the Supreme Court to expand protection for governmental measures that reflect racial animus.[118]

In *Trump v. Hawaii*[119]—a challenge to the Trump administration's visa ban that impacted primarily Muslim countries—the Court applied rational basis review to reject a racial animus claim.[120] But the policy at issue there directly regulated admission into the United States[121]—the issuance of visas. The DACA case involves the treatment of persons who have been long-term residents of the United States. In the DACA case, examination of the *Arlington*

110. *See* Washington v. Davis, 426 U.S. 229, 238–39 (1976) (establishing the Court's formal rejection of disproportionate racial impact policies as meriting strict scrutiny unless plaintiffs can establish discriminatory intent).

111. 429 U.S. 252 (1977).

112. *See id.* at 266–68.

113. *See id.* at 266 ("The impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." (citation omitted) (quoting *Davis*, 426 U.S. at 242).

114. *See* Yick Wo v. Hopkins, 118 U.S. 356, 358–59 (1886).

115. 525 U.S. 471 (1999).

116. *See id.* at 488 (involving actual deportation proceedings and First Amendment-based challenges and stating that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation").

117. *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 519 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

118. *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018) (applying rational basis scrutiny and rejecting a race-based animus claim to the visa ban that adversely impacted Muslims).

119. 138 S. Ct. 2392 (2018).

120. *See id.* at 2420–21. Professor Jessica Clarke finds the visa ban to be an example of overt, explicit, and blatant racial bias. *See* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 508–10 (2018).

121. *See Trump*, 138 S. Ct. at 2405–06.

Heights factors to determine whether the rescission is motivated by racial animus would require further discovery—the same discovery halted by the Court's early intervention in the case. Application of rational basis scrutiny to racial discrimination against long-term residents of the United States, regardless of their immigration status, would be a substantial abandonment of the long-standing constitutional barrier erected by the Fourteenth Amendment to invidious racial discrimination against persons in the United States.

The DACA case furthers the conversation about immigration between the legislative, executive, and judicial branches of the federal government and the states. Increasingly, voters and other members of the United States community are joining the conversation in a variety of ways: marches, petitions, demonstrations, and direct action (for example, some nonprofit groups provide water and food for immigrants crossing the desert, while paramilitary groups organize to enforce border restrictions).[122]

Further, the DAPA litigation should be irrelevant in informing the Court's approach to the DACA cases. The Fifth Circuit opinion about DAPA, on which the Supreme Court split 4-4, decided that the states had standing to bring the litigation and that DAPA was reviewable because it was not an exercise of prosecutorial discretion (among other things).[123] Further, the Fifth Circuit ruled that the states had established a likelihood of success on the merits sufficient to warrant a preliminary injunction because DAPA was a substantive rule that required notice and comment and because DAPA was inconsistent with the Immigration and Nationality Act. [124] Because the Trump administration rescinded DAPA prior to its implementation, no court actually decided the merits of the claims raised. Moreover, in the DACA litigation, it is the DACA challengers who argued that the rescission of DACA is subject to judicial review and to the requirement of notice and comment.[125] It is likely that a majority of the Court will find that it has power to review the rescission. What a majority of the Court is likely to decide regarding the merits of the dispute, which are being litigated in the context of a motion to dismiss and a preliminary injunction, is much more difficult to predict. The Court must be conscious of

122. *See* Manny Fernandez, *She Stopped to Help Migrants on a Texas Highway. Moments Later, She Was Arrested*, N.Y. TIMES (May 10, 2019), https://www.nytimes.com/2019/05/10/us/texas-border-good-samaritan.html [https://perma.cc/7J4P-D97M (dark archive)]; Simon Romero, *Cross-Border Patrols, Mercenaries and the K.K.K.: The Long History of Border Militias*, N.Y. TIMES, (April 25, 2019) https://www.nytimes.com/2019/04/25/us/border-militia-mexico.html [https://perma.cc/4SYQ-FDQS (dark archive)].

123. *See* Texas v. United States, 809 F.3d 134, 150, 167 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2771 (2016).

124. *See id.* at 176, 186.

125. *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F. 3d 476, 492 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019) (providing the Attorney General's position that DACA should be discarded because it "has the same legal and constitutional defects that the courts recognized as to DAPA").

the potential impact of a decision that may exacerbate the politicization of the Supreme Court and inflict even greater damage on its image as a neutral arbiter of constitutional norms, an image that this Court may have all but abandoned.

IV. THINKING BEYOND THE DACA CASES

Family is at the center of American immigration policy. It has been at the center of American immigration policy throughout the twentieth and into the twenty-first centuries.[126] European and other non-indigenous newcomers to the land now known as the United States came with families, and when they came alone, they soon brought families to join them or started families to establish their hold on the land. This central value of American life and American immigration policy should not be abandoned or surrendered to values centered around market-needs, market-worthiness, and individual affluence. Individual worth should reflect character traits, including the willingness to work hard, exercise discipline and self-deprivation, and undergo trials and tribulations in an effort to transcend or escape grinding poverty and violent communities. When human beings cross a border to escape violence and severe economic deprivation, they should not be deemed to have committed a crime, so as to preclude their belonging, in a legal sense, to the political and social community they have joined.

Congress has opted to vest extensive discretion in the executive branch in its immigration statutes. In particular, Congress has vested extensive discretion in the executive branch in its power to remove not only persons who have entered without inspection, and thus are here without authorization, but also of persons who have been granted permanent residence with the expectation that they would be allowed to live out their lives in the United States. Discretion is a double-edged sword; it may be exercised in ways that are humane and just, but it may be exercised in ways that are manifestly unjust. Although there is an implicit guarantee that the discretion will not be exercised at whim—that is the essence of tyranny and what the Constitution was designed to prohibit—this implicit guarantee is seldom realized for most immigrants caught in removal proceedings.

Neither DACA, DAPA, nor the proposed DREAM Act are a perfect response to the problems posed to the United States community by a population of approximately 11 or 12 million undocumented residents.[127] It is easy to forget,

126. *See* M. Isabel Medina, *In Search of the Nation of Immigrants: Balancing the Federal State Divide*, 20 HARV. LATINX L. REV. 1, 2–3 (2017).

127. Approximately one-third to one-half of undocumented residents are visa overstays, not persons who came across the southern border. *See* Robert Warren, *U.S. Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, CTR. FOR MIGRATION STUD. (2010), https://cmsny.org/publications/essay-2017-undocumented-and-overstays/ [https://perma.cc/8NZS-85L3]; *see also* Kevin R. Johnson, *Possible*

in fact, how meager DACA relief was. For persons who are here in the shadows, the ability to work without worrying about the possibility of immediate removal makes a substantial difference in their day-to-day lives, even if only temporarily. Ultimately, DACA may have provided the executive with a list of potential persons to be deported. The Supreme Court will have an opportunity to inform that issue as one of the remaining claims in the litigation is a Due Process claim based on the understanding that, under the DACA program, information provided would not be used subsequently for enforcement purposes.[128]

Perhaps DACA and its fate suggest the problems with vesting too much discretion in the executive branch of government—which, by its nature, is susceptible to dramatic change of policies every four years—something which the Constitution primarily assigns to Congress, not the executive.[129] But it is an ongoing dialogue and process, not stasis, that the Constitution creates and envisions; the Supreme Court has yet to speak.

Reforms of the U.S. Immigration Laws, 18 CHAP. L. REV. 315, 319 & n. 17 (2015) (citing JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 16 (2006), http://pewhispanic.org/files/reports/61.pdf [https://perma.cc/R8QC-NPZ9]).

128. *Regents of the Univ. of Cal.*, 908 F.3d at 516–18.

129. *Compare* U.S. CONST. art. I, § 1 ("*All legislative Powers* herein granted shall be vested in a Congress of the United States . . . .") (emphasis added), *with id*. art. II, § 1 ("The *executive Power* shall be vested in a President of the United States of America.") (emphasis added).