

**DACA, DAPA, and Discretionary Executive Power:  
Immigrants Outside the Law**

Leti Volpp\*  
*University of California, Berkeley*

**Abstract**

In June 2012, President Barack Obama announced the creation of DACA, a program which instructed executive branch officials to exercise their administrative discretion to defer the deportation of eligible applicants. Two years later, in November 2014, President Obama announced the DAPA program, which expanded DACA and extended this exercise of discretion to parents of U.S. citizens or permanent residents. Both announcements were met by controversy. Critics charged that, by altering the legal regime from one in which undocumented immigrants were to be deported to one of “executive amnesty,” President Obama exceeded his authority, turning him into an “emperor” or a “king.” The President’s supporters insisted, rather, that President Obama was acting fully within his executive authority. Understanding this debate requires one both to delve into the complicated legal context, and to look beyond legal doctrine. The controversy reflected broader concerns about discretionary executive power and the law, linked to anxiety regarding the sovereign’s head of state as “he who decides on the state of exception.” It also derived from specific concerns about President Obama as the embodiment of the sovereign: his racialized body, depicted as illegitimate and foreign, furthered the perception of his policies as illegal. Lastly, the fact that undocumented immigrants are not perceived as members of the body politic helped to produce this vision of DACA and DAPA as lawless action. In this telling, the sovereign actor, the beneficiaries of his action, and the act itself were all cast as illegitimate through a mutually reinforcing logic; all were exceptions that stood “outside the law.”

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## Introduction

In June 2012, President Barack Obama announced the Deferred Action for Childhood Arrivals (DACA) program, authorizing eligible individuals to request temporary relief from deportation proceedings and the chance to apply for work authorization. President Obama emphasized that DACA was “not a permanent fix” or “a path to citizenship,” but only “a temporary stopgap measure.”<sup>1</sup> Two years later, in November 2014, President Obama announced the Deferred Action for Parents of Americans (DAPA) program, explaining that he was “offering the following deal” to an expanded group of qualifying immigrants: “You can come out of the shadows and get right with the law.”<sup>2</sup> Describing this as a “common-sense, middle-ground approach,” President Obama explained that this was no “amnesty,” and that his executive actions would “not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive . . . . All we’re saying is that we’re not going to deport you.”<sup>3</sup>

President Obama’s announcements were greeted with intense criticism, with many Republicans charging that he was exceeding his authority. In response to the 2012 announcement, Senator Charles Grassley characterized President Obama’s executive order as “an affront to the process of representative government by circumventing Congress . . . with a directive he may not have the authority to execute.”<sup>4</sup> In response to the 2014 announcement, Speaker of the House John Boehner asserted that President Obama had “cemented his legacy of lawlessness,” and, along with multiple other critics, castigated the President as acting like an “emperor” or a “king.”<sup>5</sup> Such characterizations suggested that President Obama, by inappropriately acting outside the bounds of Presidential authority, had somehow unilaterally changed the governmental system of the United States from a constitutional democracy to an autocracy. President Obama’s critics charged him with having exceeded his authority as President by “re-writing the law,” through altering the legal regime from one in which undocumented immigrants were to be deported to a new regime of “executive amnesty.” President Obama’s supporters insisted rather that President Obama was acting fully within his executive authority, and merely doing what presidents have always done.

Understanding the terms of this debate requires delving into the complicated legal context, which has resulted in both *United States v. Texas*, challenging the implementation of DAPA and

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<sup>1</sup> Transcript of President Obama’s Speech on Deferred Action, AILA Doc. 12061661, American Immigration Lawyers Association, June 15, 2012, <https://www.aila.org/infonet/wh-president-speech-deferred-action>.

<sup>2</sup> Remarks by the President in Address to the Nation on Immigration, Nov. 11, 2014, <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>3</sup> Id.

<sup>4</sup> Julia Preston & John H. Cushman, 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>.

<sup>5</sup> Scott Wong, Boehner: Obama Acting Like an “Emperor,” The Hill, Nov. 20, 2014, <http://thehill.com/homenews/house/224928-boehner-obama-acting-like-an-emperor>; see also Jaime Fuller, Obama Isn’t the First President to Be Called an “Emperor,” and He Won’t Be the Last, Wash. Post, Nov. 21, 2014, <https://www.washingtonpost.com/news/the-fix/wp/2014/11/21/obama-isnt-the-first-president-to-be-called-an-emperor-and-he-wont-be-the-last>.

the expansion of DACA, and several lawsuits challenging the rescission of DACA. I explain in some detail the doctrinal debate. Yet we must look beyond doctrine to understand what has shaped these different perceptions of DACA and DAPA. I mean this in three ways. First, it is apparent that the controversy reflects broader concerns about discretionary executive power and the law. Even though the exercise of discretion is inherent in all executive authority—from presidents to prosecutors to officers—such discretion routinely produces unease. Therefore, the apprehension about President Obama’s immigration announcements can be understood as reflecting a general anxiety that the sovereign is, in Carl Schmitt’s terms, “he who decides on the state of exception.”<sup>6</sup> The “state of exception” refers to the “paradoxical situation in which law is legally suspended by sovereign power.”<sup>7</sup> Examining President Obama’s immigration announcements through this lens, was President Obama placing undocumented immigrants—as well as himself—outside the rule of law? Or was he acting pursuant to the rule of law? Or both? Were these executive actions within the sphere of juridical order, outside the juridical order, or somewhere in between? Giorgio Agamben has suggested that the state of exception is neither external nor internal to the juridical order, but rather situated at a “threshold,” where inside and outside “blur with each other.”<sup>8</sup> The exercise of executive discretion is similarly located on the border of the law, in a malleable, interstitial zone. This permits executive acts such as pardons, amnesty, clemency, or President Obama’s immigration announcements, to be characterized as either inside/legal or outside/illegal, depending upon the observer’s position.

Second, it is also apparent that the firestorm of controversy resulted from specific and widely disseminated concerns about President Obama himself, as the living embodiment of the sovereign. Here we must look to ideology, and note that political or legal regimes are “regimes of truth” which exist in a constitutive relation to systems of power.<sup>9</sup> Presidential authority is both “lodged in” and “articulated through” bodies.<sup>10</sup> These bodies are, simultaneously, the natural body of the head of state, and what is termed the “body politic.” The idea of these twinned bodies emerged from the medieval political and theological notion of the “king’s two bodies,” allowing for the formulation that splits the natural body from the body representing the office and,

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<sup>6</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 5 (George Schwab trans., 1985) (1922) (“Sovereign is he who decides on the exception”).

<sup>7</sup> Bonnie Honig, *The Miracle of Metaphor: Rethinking the State of Exception with Rosenzweig and Schmitt*, 37 *diacritics* 78 (2007) (“[T]he state of exception is that paradoxical situation in which law is legally suspended by sovereign power.”).

<sup>8</sup> Giorgio Agamben, *State of Exception* 23 (Kevill Attell trans., 2005) (2003).

<sup>9</sup> See Michel Foucault, *Truth and Power*, in *The Foucault Reader: An Introduction to Foucault’s Thought* 51, 73 (Paul Rabinow ed., Colin Gordon trans., 1984) (1977):

Each society has its regime of truth, its “general politics” of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.

See also Daniele Lorenzini, *What Is a “Regime of Truth”?*, *Foucault Blog*, Oct. 28, 2013, <http://www.fsw.uzh.ch/foucaultblog/featured/28/what-is-a-regime-of-truth>.

<sup>10</sup> Joseph Lowndes, *Jackson, Lincoln, FDR, Obama: Presidential Bodies and the Contest over American National Identity* 4 (unpublished manuscript); see also Joseph Lowndes, *Barack Obama’s Body: The Presidency, the Body Politic, and the Contest over American National Identity*, 45 *Polity* 469 (2013).

thus, the statement: “The King is dead. Long live the King!”<sup>11</sup> As Michael Rogin notes, the splitting of these two bodies permitted the distinction between the realm and the person who governed it; the language “identified a body politic subject not to royal prerogative but to rule of law.”<sup>12</sup> At the same time, the “king’s two bodies” also gives us a language that shows how these two bodies can be, not separated, but re-joined: the office can be absorbed into the officeholder’s personal identity, conflating person, power, office, and state.<sup>13</sup> Thus, the perception of President Obama’s racialized body as illegitimate also shaped the impression of his policies as illegal.<sup>14</sup> A sizeable portion of the American electorate never accepted “Barack Hussain Obama” as a “natural born citizen” or as a legitimately elected head of state in the first place. Analyzing the legality of prosecutorial discretion without addressing this vitriolic and racially-charged context suppresses how the construction of Barack Obama as illegitimate, and, in particular, as foreign, shaped the assessment of his exercise of power as unlawful.

Lastly, we can only fully understand the casting of President Obama’s immigration announcements as illegitimate if we note that the beneficiaries of these programs are not perceived as members of the body politic. Although inside the national territory as a matter of physical presence, undocumented immigrants are still “outside the law.”<sup>15</sup> As such, President Obama faced difficulty in persuading critics that he could legally help undocumented immigrants “get right by the law,” particularly when his own legitimacy, as the nation’s “First Immigrant President,” was also at issue. In this telling, the actor, the beneficiaries of the act, and the act itself are all cast as illegitimate through a mutually reinforcing logic; all are “outside the law.”

## **A Dive into the Doctrine**

On June 15, 2012, President Obama announced the creation of the DACA program, which instructed executive branch officials to exercise administrative discretion to defer the deportation of undocumented immigrants who had arrived in the United States as children and who met other criteria.<sup>16</sup> Two years later, on November 20, 2014, President Obama announced the DAPA pro-

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<sup>11</sup> Ernst Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (1958).

<sup>12</sup> Michael Paul Rogin, *Ronald Reagan, the Movie, and Other Episodes in Political Demonology* 81 (1987).

<sup>13</sup> *Id.* at 82.

<sup>14</sup> For a discussion of the distinction between legality and legitimacy, see Ming Hsu Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 *Syracuse L. Rev.* 87 (2016).

<sup>15</sup> See Hiroshi Motomura, *Immigration Outside the Law* 4 (2014) (using the term in two senses: as referring to “migrants outside the zone of permission in US law” and as referring to the exercise of discretion in U.S. immigration law, which responds to fluctuating political and economic pressures, and can be understood as filling in the gap between “law in action” and “law on the books”).

<sup>16</sup> Criteria for eligibility were: arrival in the United States before the age of sixteen; being under the age of thirty-one as of the date that DACA was announced (June 15, 2012); residence in the United States since June 15, 2007; graduation from high school or enrollment in school or another educational program; and no conviction for a felony, significant misdemeanor, or three or more misdemeanors. After meeting these threshold eligibility requirements DACA approval required the favorable exercise of discretion. See Memorandum from Janet Napolitano, Secretary of Homeland Security, *Memo on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

gram, which would have extended this exercise of discretion to undocumented immigrants who were the parents of either U.S. citizens or legal permanent residents and who met other criteria.<sup>17</sup> Qualifying individuals under both DACA and DAPA would have been able to apply for “deferred action,” a mechanism through which immigration authorities would deprioritize their removal, thus placing a particular case upon the back burner. If granted deferred action under DACA or DAPA, the individual would have received a renewable but still revocable reprieve from deportation. Initially lasting two years for DACA applicants, President Obama’s 2014 announcement would have expanded this reprieve to three years for both DACA and DAPA applicants. President Obama’s 2014 announcement would also have changed the qualification criteria for DACA to allow more individuals to apply.<sup>18</sup> Under already existing regulations, a grant of deferred action would make the recipient eligible for authorization to legally work in the United States.

While DACA went into effect on August 15, 2012, DAPA and the expansion of DACA never went into effect, due to legal challenges.<sup>19</sup> DACA, presumably because its young recipients were conceptualized as more deserving and less culpable than DAPA beneficiaries, met with far less public opposition.<sup>20</sup> Nevertheless, opposition to DACA never fully abated and five years later, on September 5, 2017, President Donald Trump rescinded the original DACA program. As of September, 2017, 870,660 individuals had applied for DACA; 798,980 were approved and granted deferred action for a period of two years.<sup>21</sup> Following President Trump’s rescission of the DACA program, this number plummeted. As of August 2018, DACA recipients numbered at

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<sup>17</sup> Criteria required for eligibility included: continuous residence in the United States since January 1, 2010; having an existing U.S. citizen or LPR son or daughter as of November 20, 2014; physical presence in the United States as of November 20, 2014 and at the time of application; and a showing that the individual was not a priority for enforcement. See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, on Memo Exercising Prosecutorial Discretion with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents, Nov. 20, 2014, [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

<sup>18</sup> See National Immigration Law Center, *The Obama Administration’s DAPA and Expanded DACA Programs*, June 15, 2016, <http://www.nilc.org>.

<sup>19</sup> A Brief History of DACA, Immigrant Legal Resource Center, Apr. 30, 2018, <https://www.ilrc.org/sites/default/files/resources/daca-infographic-20180430.pdf>.

<sup>20</sup> The first legal challenge to the original DACA program, brought by the state of Mississippi and several ICE agents, failed. See *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015). On the relation of deservingness and DACA, see Shannon Gleeson, *Narratives of Deservingness and the Institutional Youth of Immigrant Workers*, 9 *Ass’n Mex. Am. Educators J.* 47 (2015).

<sup>21</sup> See Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017 (Sept. 30), U.S. Citizenship & Immigration Services, [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2017\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr4.pdf).

699,350 out of an estimated 1,302,000 eligible individuals.<sup>22</sup> It is estimated that 3.6 million individuals were eligible for DAPA.<sup>23</sup>

Two weeks after President Obama's DAPA announcement, Texas and twenty-five other states filed *United States v. Texas*, on December 3, 2014, suing the Obama administration to prevent the implementation of DAPA and the expansion of DACA. Their complaint, which described President Obama as having "unilaterally suspended the immigration laws" by "executive fiat," was filed in federal court in Brownsville, Texas, in a successful attempt to steer its assignment to U.S. District Judge Andrew Hanen, who had previously vocally criticized the administration's immigration policies.<sup>24</sup> Indicative of Judge Hanen's perspective was his statement at the hearing on the motion for a preliminary injunction: "I will say that talking not just to me, but to anyone in Brownsville about immigration is like talking to Noah about the flood, both in legal terms and in practical terms. So, I mean, we're the spearhead of the spear."<sup>25</sup> In February 2015, Judge Hanen enjoined DAPA as well as the expansion of DACA. He held that Texas and the other states had standing to sue because they would experience injury given the cost of issuing driver's licenses to noncitizens if they were approved for DAPA; he also held that the administration had failed to subject DAPA and expanded DACA to notice and comment, in violation of the Administrative Procedure Act ("APA").<sup>26</sup> Newly binding or "legislative" rules cannot be adopted without notice and comment, and Judge Hanen asserted that DAPA created binding rules.<sup>27</sup> While the Obama administration argued that this was erroneous, as any applicant who met threshold eligibility would not automatically be granted DAPA and that meaningful discretion would still be exercised, Judge Hanen disagreed. Although the administration pointed to past cases in which DACA applicants who met the threshold criteria had still been denied DACA, the

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<sup>22</sup> See DACA Recipients & Program Participation Rate, by State, Migration Policy Institute, Aug. 31, 2018, <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles>.

<sup>23</sup> Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children*, Migration Policy Institute Report, Feb. 2016, <http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families>.

<sup>24</sup> See Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 U.C.L.A. L. Rev. 58, 63 (2015). Judge Hanen had, in a series of three prior cases, charged the government with "rewarding criminal conduct" instead of "enforcing our border security laws" and turning "Main Street America" into a "rogue's gallery," decrying "the failure of the Government to enforce the laws of this country." *Id.* at 78-80.

<sup>25</sup> *Id.* at 81.

<sup>26</sup> The basis for finding standing was that the federal government's grant of deferred action would make the recipients eligible for driver's licenses under preexisting legislation, which the state of Texas argued would cost more to process than the application fee; increasing the number of eligible drivers would thus have a negative fiscal impact on the state. The logic of this as a basis for standing seems to have no end, if courts are henceforth to find standing whenever states are to claim a net negative fiscal impact for any particular new federal policy.

<sup>27</sup> *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015). For a discussion of the notice and comment claim, see Jill Family, *DAPA and the Future of Immigration Law as Administrative Law*, 55 *Washburn L.J.* 89, 92-94 (2015).

court ignored this evidence, gesturing instead toward the high DACA approval rates, and calling the discretionary language in the guidance documents announcing DAPA “merely pretext.”<sup>28</sup>

Having based his injunction on the unexpected basis of notice and comment, Judge Hanen’s opinion also hinted that the argument that President Obama’s actions violated the Presidential duty imposed by Article II, Section 3 of the Constitution, to “take care that the Laws be faithfully executed” might ultimately prevail. The government appealed the preliminary injunction, moving to stay or narrow its scope, but lost before a divided Fifth Circuit panel, which subsequently affirmed the preliminary injunction on November 2015, additionally holding that DAPA extended eligibility for work authorization beyond executive branch authority.<sup>29</sup> In June 2016, a divided Supreme Court, missing its ninth member due to the death of Justice Antonin Scalia and the subsequent refusal of a Republican-controlled Senate to confirm President Obama’s nominated candidate, issued a one-sentence per curiam ruling, simply stating that “[t]he judgment is affirmed by an equally divided court.”<sup>30</sup> The 4-4 deadlock left in place the injunction issued by Judge Hanen, blocking DAPA and expanded DACA from implementation.

At this moment of writing, the fate of the DACA rescission remains unresolved. When the Trump Administration announced the rescission of DACA on September 5, 2017, it directed the U.S. Department of Homeland Security to reject all new DACA applications and to accept applications for renewal until October 5, 2017—from only those DACA recipients whose status expired between September 5, 2017 and March 5, 2018. This announcement spurred a wave of litigation and may ultimately lead to a Supreme Court ruling on DACA. Meanwhile, Congress has failed to pass legislation to either replace DACA in some form or to institute more permanent comprehensive immigration reform.

The first of the DACA rescission challenge lawsuits to bear fruit, *Regents of the University of California v. U.S. Department of Homeland Security*, resulted in a nationwide preliminary injunction on January 9, 2018, requiring the federal government to continue to accept renewal applications for DACA.<sup>31</sup> One month later, similar lawsuits in New York produced a parallel order. As a result of this litigation, as of this moment, the federal government is still accepting DACA renewal applications.<sup>32</sup> Meanwhile, on April 24, 2018, Judge John Bates issued an order in the

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<sup>28</sup> Judge Hanen stated that “the Government could not produce evidence concerning applicants who met the program’s [DACA’s] criteria but were denied.” For a similar argument, see Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 *Tex. Rev. L. & Pol.* 215 (2015). For contrary evidence, see Stephen H. Legomsky, *The John S. Lehmann University Professor*, Washington University School of Law, *Written Testimony Before the U.S. House of Representatives, Committee on the Judiciary*, Feb. 25, 2015, at 10-13; see also Kalhan, *supra* note 24, at 92 (explaining why DACA approval rates might be so high, given that anyone with a marginal application would have strong disincentives not to apply, given the high cost and potential consequences if an application was denied or deferred action was later revoked).

<sup>29</sup> *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (stating that DAPA would “dramatically increase” the number of aliens eligible for work authorization, undermining Congress’s goal of preserving jobs for those lawfully in the country).

<sup>30</sup> *United States v. Texas*, 579 U.S. \_\_\_ (2016).

<sup>31</sup> *Status of Current DACA Litigation*, National Immigration Law Center, May 16, 2018, <https://www.nilc.org/issues/daca/status-current-daca-litigation/>.

<sup>32</sup> See *A Brief History of DACA*, *supra* note 19.

District of Columbia case *NAACP v. Trump* requiring the federal government to begin accepting first-time DACA applications again, in a return to the pre-rescission status quo. After staying this order to give the federal government a chance to terminate DACA legally, in a manner that would not be arbitrary or capricious, Judge Bates on August 3, 2018, held that the government had failed to do so, and ordered the government to make DACA newly available to first time applicants, while staying this order till late August to give the government time to decide whether to appeal.<sup>33</sup>

Meanwhile, six states joined Texas in *Texas v. Nielsen* – not to challenge the rescission of DACA, but to challenge its initial creation. This case is not only reminiscent of *U.S. v. Texas*, which challenged DAPA and the expansion of DACA, but was assigned to the same arbiter, Judge Andrew Hanen, in the South District of Texas. The seven states in this suit argue that they can challenge DACA six years after its implementation because, following Trump’s September 2017 rescission of the program, the California and New York injunctions have effectively extended DACA indefinitely.<sup>34</sup> On August 31, 2018, Judge Hanen declined to issue an order to the federal government to stop accepting DACA renewal applications, while stating that the states were likely to succeed in their argument that the program was unlawful. Depending on the outcome of these cases, the Supreme Court may decide to hear one of the DACA cases, prolonging the uncertainty over DACA, and the tremendous precariousness DACA recipients and applicants are living with, through the summer of 2019.<sup>35</sup>

Those who have challenged DACA and DAPA argue that President Obama exceeded his legal authority. As Hiroshi Motomura suggested, critics “seem to believe that the President has taken the law into his own hands by doing unilaterally what only Congress can do through legislation.”<sup>36</sup> Taking the law into his own hands renders this a nation not of laws, but of men; thus, the charge that President Obama’s actions violated the rule of law, actions taken to reward “law-breakers,” no less.<sup>37</sup>

Yet, as many scholars have asserted, DACA and DAPA are well within a president’s legal authority. They are consistent with past exercises of prosecutorial discretion; non-enforcement is

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<sup>33</sup> DACA Litigation Timeline, National Immigration Law Center, July 23, 2018, <https://www.nilc.org/issues/daca/daca-litigation-timeline/>; Miriam Jordan, Judge Upholds Order for Trump Administration to Restore DACA, New York Times, Aug. 3, 2018, <https://www.nytimes.com/2018/08/03/us/federal-judge-daca.html>.

<sup>34</sup> See Status of Current DACA Litigation, supra note 31 .

<sup>35</sup> Vivian Yee, Can DACA Survive Its Latest Legal Attack in Texas? New York Times, Aug. 9, 2018, <https://www.nytimes.com/2018/08/09/us/daca-texas-courts-immigration.html>; Joel Rose, Texas Judge Says DACA Is Probably Illegal, But Leaves It in Place, NPR, Aug. 31, 2018, <https://www.npr.org/2018/08/31/643814735/texas-judge-says-daca-is-probably-illegal-but-leaves-it-in-place>.

<sup>36</sup> Hiroshi Motomura, The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law, 55 Washburn L.J. 1, 9 (2015).

<sup>37</sup> See, e.g., then-Speaker of the House John Boehner’s declaration: “This executive overreach is an affront to the rule of law and to the Constitution itself.” “An Affront to the Rule of Law and to the Constitution Itself,” Speaker Ryan’s Press Office, Jan. 14, 2015, <http://www.speaker.gov/press-release/affront-rule-law- and-constitution-itself>.

essential to the functioning of the system.<sup>38</sup> As Michael Kagan put it, “[T]he Obama Administration did not invent prosecutorial discretion in immigration law.”<sup>39</sup> It is impossible for the government to apprehend and individually remove every non-citizen whose presence in the United States is unauthorized. Thus, there have always been exercises of discretion in determining whether particular individuals constitute a priority for removal, and this fact is reflected in legal authority.<sup>40</sup> The government first issued publicly available prosecutorial discretion guidelines in the 1990s, indicating when to refrain from initiating removal. Most recently, memos were issued in 2011 by then-head of Immigration and Customs Enforcement John Morton, which provided multiple criteria for officials involved in enforcement in determining whether to prioritize, delay, or stop enforcement proceedings.<sup>41</sup> With the announcement of DACA and DAPA, President Obama made prosecutorial discretion public, in two senses: he announced these programs as major initiatives of his administration, and members of the public, in the form of potentially eligible recipients, were invited to affirmatively apply. Affirmative application allowed individuals to “come out of the shadows” and apply at the “front end,” rather than wait until they faced removal proceedings, and then request prosecutorial discretion, at the “back end.”

While the highly public nature of President Obama’s June 2012 and November 2014 announcements gave rise to criticism, one could also see the programs’ high-profile and open quality as an attempt to shed light on executive discretion, and to give it more structure and render it “more rule-like, more centralized, and more transparent.”<sup>42</sup> In creating a policy to bring immigrants “out of the shadows,” President Obama also took “a significant step to bring immigration *policy* out of the shadows,” making very public the discretion that had been quietly at work in the bureaucratic institutions of the executive branch of government.<sup>43</sup> Because DACA

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<sup>38</sup> See generally Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* (2015). Deferred action is only one form of prosecutorial discretion in immigration law. Such discretion includes refraining from serving, filing, or issuing the charging document known as a notice to appear, choosing not to appeal a decision by an immigration judge that favors a noncitizen, and choosing to grant a stay of removal or parole (administrative permission to be inside the United States). See also Shoba S. Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority—Response to Hiroshi Motomura*, 55 *Washburn L.J.* 189, 192 (2015).

<sup>39</sup> Michael Kagan, *The New Era of Presidential Immigration Law*, 55 *Washburn L.J.* 117, 118 (2015).

<sup>40</sup> See, e.g., 6 U.S.C. § 202(5), whereby Congress expressly makes the Secretary of Homeland Security “responsible” for “establishing national immigration enforcement policies and priorities”; Congressional appropriations which have, in recent years, funded removal of less than four percent of the estimated 11 million undocumented immigrants; and language in *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012), whereby Justice Kennedy noted that “[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.” For a discussion of these points, see Testimony of Stephen H. Legomsky, *supra* note 28 at 2-4.

<sup>41</sup> The memo guidelines were implemented inconsistently, leading to erratic enforcement. See Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, *N.Y. Times*, Nov. 13, 2011, at A16. They also met with ICE agent resistance. See Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 *Law & Soc. Inquiry* 666 (2014).

<sup>42</sup> Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *Yale L.J.* 104 (2015).

<sup>43</sup> Kagan, *supra* note 39, at 120 (emphasis added).

and DAPA created a new, formal application-based system for administering discretion, many scholars have argued that, contrary to the charge that President Obama had violated the rule of law, in actuality both DACA and DAPA promote rule-of-law values such as transparency and accountability.<sup>44</sup> In other words, one can say that DACA and DAPA do not violate the rule of law but promote it, via a more “rational system” and a “prophylactic approach” that minimizes the occurrence of “discretion-cloaked discrimination,” particularly in a field “notorious for a substantial risk of racial profiling and discrimination.”<sup>45</sup>

At the same time, the “inject[ion] of discretionary immigration policy into national politics at the highest level” away from “the technocratic world of administrative agency operations”<sup>46</sup> could also be understood as President Obama’s attempt to build support among the Latinx electorate in a broader context where, having deported more noncitizens than any other previous president, he had been labeled the “Deporter-in-Chief.”<sup>47</sup> The pace of these deportations was apparently the product of a political calculus that, in order to pass comprehensive immigration reform, the Obama administration needed to demonstrate its commitment to heightened border enforcement.<sup>48</sup> This calculation failed.

Initially, given the perception that President Obama’s 2012 re-election in several key states was ensured through the Latinx electorate, it appeared that comprehensive immigration reform would pass, as the Republican Party also sought to court the Latinx vote. In June 2013, the Senate passed a bipartisan bill, Senate Bill 744, which included increased border security, a revision of lawful admission to the United States, and a program which would have regularized the status of currently undocumented immigrants. This last program had three separate streams: for young persons generally eligible for DACA; for agricultural workers; and for other undocumented immigrants.<sup>49</sup> But the House, dominated by newly elected Tea Party Republicans, balked. Congress

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<sup>44</sup> For a contrary view, see Zachary Price, *Enforcement Discretion and Executive Duty*, 67 *Vand. L. Rev.* 671 (2014). At the heart of Price’s concern is the idea that the president’s discretion has been made impermissibly “categorical,” functioning as categorical nonenforcement of the law. But see Cox & Rodriguez, *supra* note 42, noting the flaws with this reasoning (applications are still individually adjudicated, and *ex ante* rule-governed screening does not make the program an unconstitutional act of executive lawmaking). See also Motomura, *The President’s Dilemma*, *supra* note 36, at 27; Amanda Frost, *When Two Wrongs Make a Right: Response to Hiroshi Motomura*, 55 *Washburn L. J.* 101 (2015); Kagan, *supra* note 39, at 121 (all expressing the view that DACA and DAPA comport with the rule of law). One could also point to the fact that previous presidents have frequently granted discretionary relief on a class-wide basis to large numbers of undocumented immigrants. See Legomsky, *supra* note 28, at 22-25.

<sup>45</sup> Motomura, *The President’s Dilemma*, *supra* note 36, at 25, 28; Kagan, *supra* note 39, at 121.

<sup>46</sup> Kagan, *supra* note 39, at 121.

<sup>47</sup> See, e.g., Barack Obama, *Deporter-in-Chief*, *Economist*, Feb. 8, 2014, <http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama>.

<sup>48</sup> Gretchen Gavett, Cecilia Muñoz: “Even Broken Laws Have to be Enforced,” *Frontline*, Oct. 18, 2011, <http://www.pbs.org/wgbh/frontline/article/cecilia-munoz-even-broken-laws-have-to-be-enforced>; see also David Hernández, “My Fellow Citizens”: Barack Obama and Immigration Policy, 6 *J. Race & Pol’y* 1 (2010).

<sup>49</sup> See Muneer Ahmad, *Beyond Earned Citizenship*, 52 *Harvard Civil Rights and Civil Liberties Law Review* 258 (2017).

also considered, but never enacted, legislation known as the DREAM Act, which would have specifically regularized the status of young persons generally eligible for DACA.

The fact that Congress considered but did not pass this legislation benefitting undocumented immigrants was taken by some critics to mean that President Obama could not continue to engage in executive action on behalf of undocumented immigrants, because DACA and DAPA violated the “spirit” of the immigration laws.<sup>50</sup> Here critics invoked the idea of DACA and DAPA as an unlawful “executive amnesty” or “backdoor amnesty.”

“Amnesty” must be understood here as a reference to provisions of the 1986 Immigration Reform and Control Act, which enabled an estimated 2.7 million undocumented immigrants to become legal permanent residents.<sup>51</sup> More generally, amnesty also refers to a sovereign act of forgiveness, forgetting, or pardoning of illegal action via a kind of “legal alchemy” whereby the unlawful are made lawful.<sup>52</sup> Amnesty, clemency, and pardon are prerogatives that define a sovereign power. The term “executive amnesty” suggests that, while Congress foreclosed this possibility legislatively, President Obama through DACA and DAPA sought to create it through executive action. Further, “back-door amnesty” implies that this was amnesty created through furtive, illicit means. But the very idea that this was “amnesty” presumed that DACA and DAPA created legal permanent resident status, enabling undocumented immigrants to stay permanently as legal residents of the United States and to be given what is colloquially known as a “green card.”

Yet, in truth, DACA and DAPA do no such thing. The ruling by Judge Hanen is in part responsible for this erroneous assumption; it repeatedly mistakenly stated that DAPA and DACA “confer legal status” upon their recipients.<sup>53</sup> Not only do DACA and DAPA not create permanent resident status, they do not confer any lawful immigration status whatsoever, nor do they provide any pathway toward legality. They only proffer temporary relief from removal, which can be revoked at any point, for any reason whatsoever—as President Trump’s swift action to rescind DACA illustrates.

What DACA and DAPA do is to confer “legal presence,” meaning that recipients remain technically removable but that removal is temporarily held in abeyance. “Legal presence” is a term readily understood as distinct from “legal status” by immigration scholars, but these two

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<sup>50</sup> See, e.g., Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 *Geo. L.J. Online* 96 (2015). As Stephen Legomsky notes, congressional inaction tells us nothing about Congress’s intentions; if it did “the failed attempt of the 113th Congress to block DACA and DAPA would be at least as indicative of Congress’s intentions as Congress’s failure to enact the DREAM Act or comprehensive immigration reform.” Legomsky, *supra* note 28, at 20.

<sup>51</sup> Then-President Ronald Reagan expressed support for “amnesty for those who have put down roots and lived here, even though some time back they may have entered illegally.” See *A Reagan Legacy: Amnesty for Illegal Immigrants*, Nat’l Pub. Radio, July 4, 2010, <http://www.npr.org/templates/story/story.php?storyId=128303672>. For a description of how the term amnesty shifted in its valence to its use as a derogatory term, see Ahmad, *supra* note 49.

<sup>52</sup> See Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 *Crit. Rev. Int’l Soc. & Pol. Phil.* 344 (2013).

<sup>53</sup> See Kalhan, *supra* note 24, for an enumeration of these statements.

terms are conflated by the public, and they even caused confusion during the oral arguments in *United States v. Texas* before the Supreme Court: Chief Justice Roberts and Justice Alito repeatedly asked the Solicitor General how someone can be both “lawfully present” and present in violation of the law.<sup>54</sup>

Even though DACA and DAPA grant only revocable legal presence and not permanent legal status, is it possible that they grant or facilitate acquisition of most of the benefits of legal status, such as freedom from removal and work authorization? So claims Peter Margulies, who argues that DACA and DAPA can be understood as offering the “equivalent” of legal status, at least over the “short to intermediate term.”<sup>55</sup>

The underlying presumption here is that immigration status, like property in general, can be separated into a kind of bundle of sticks, and that access to two of the sticks (temporary freedom from removal plus work authorization) should be understood as identical to a temporally limited possession of the whole bundle, particularly because “[u]ndocumented immigrants, like most human beings, make decisions based on the short term.”<sup>56</sup> But there are a number of problems with this argument.<sup>57</sup> DAPA and DACA are utterly revocable at the government’s discretion. The “short term” may be exceedingly short. Revocation can happen for any reason, which may have nothing to do with one’s personal merits. In fact, President Trump’s swift move to rescind DACA within the first year of his presidency only highlights how vulnerable DACA recipients were to the prospect of deportation all along. Even as legal challenges have prevented the complete dissolution of DACA, many individuals have lost DACA status and face an imminent risk of removal.<sup>58</sup> And it is also the case that by looking myopically only at the very near term, one fails to see that the key fact that distinguishes legal status from lawful presence is the possibility of permanent residence and aspirational immunity from deportation.<sup>59</sup>

Sociologists Roberto Gonzales, Veronica Terriquez, and Stephen Ruszczyk, who have been studying a national sample of DACA recipients, have found that while DACA recipients experienced a pronounced increase in economic opportunities through DACA, such as getting a new job, opening their first bank account, or obtaining their first credit card, it is also the case that they continue to suffer from the constant threat of deportation that hangs over themselves, their

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<sup>54</sup> See Linda Greenhouse, *When Smart Supreme Court Justices Play Dumb*, N.Y. Times, Apr. 28, 2016 (“It turns out that the phrase ‘lawful presence,’ understood as a term embedded in the labyrinth of statutes, regulations and practice of immigration law, doesn’t have the obvious meaning it would have in everyday speech, namely that someone is in the country legally and has the right to remain here. Is that really so hard for two of the top lawyers in the United States to understand?”).

<sup>55</sup> Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 Washburn L.J. 143 (2015).

<sup>56</sup> *Id.* at 171 n.135. Margulies points to data summarized by George Loewenstein and Ted O’Donoghue indicating that “humans are inherently myopic.”

<sup>57</sup> Margulies does note one concern with this analogy, which is that lawful permanent residency carries with it the ability to sponsor close relatives for immigration admissions; no such benefit comes with DAPA or DACA. He thinks of this as the only material short- or intermediate-term immigration difference between a DAPA grant and legal status. *Id.* at 171-72 n.136.

<sup>58</sup> See *DACA Recipients & Program Participation Rate*, *supra* note 22.

<sup>59</sup> Even as a lawful permanent resident, one can still be deported if one does something which renders one deportable under the Immigration and Nationality Act.

parents and siblings.<sup>60</sup> DACA also does not overcome the steepest barrier to postsecondary education, namely federal aid, which is unavailable to all undocumented immigrant students, including those on DACA.<sup>61</sup>

Accordingly, it is simply incorrect to say that deferred action is functionally equivalent to legal status. Because these two are not equivalent, the relationship between the undocumented immigrant who would receive DACA or DAPA and the regime of immigration law remains unchanged; she remains unlawfully in the United States. Thus, the claim that President Obama was actually a monarch who engaged in an impermissible “change in legal regime” through illegally making law via “backdoor amnesty” is patently incorrect.

### **Discretionary Executive Power Outside the Law**

Stepping back from the immediate context of DACA and DAPA, it becomes apparent that the programs perturbed critics, not only because they purportedly grant “executive amnesty” to “illegal aliens,” but because of more general concerns about discretionary executive power. How is the president’s ability to act bounded? What are the legal limits?

One useful analogy to DACA and DAPA is executive clemency, with the power to pardon lodged in the president or head of state. The Pardon Clause of the U.S. Constitution declares that the president “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in cases of Impeachment.”<sup>62</sup> Exercises of executive discretion—pardon, clemency, amnesty—perennially raise the question of whether they should be considered a kind of exceptional sovereign act, whereby executive officials decide who shall be offered mitigation from the full force of the law, or whether they should be understood to function within and in accord with the rule of law.

Consider the relationship between pardon and DACA or DAPA. Could we conceptualize DACA or DAPA to be a form of pardon? Not really. In contrast to a pardon, neither DACA nor DAPA wipes away the offending act—the criminal act, in the case of pardon; the immigration violation, in the case of DACA or DAPA. DACA and DAPA merely provide that the state will defer action for a specified period of time. There is thus no wiping of a slate clean or starting over, no forgetting or forgiving.<sup>63</sup>

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<sup>60</sup> See Roberto G. Gonzales et al., *Becoming DACAmended; Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 *Am. Behav. Sci.* 1852 (2014); see also Roberto Gonzales & Veronica Terriquez, *How DACA Is Impacting the Lives of Those Who Are Now DACAmended: Preliminary Findings from the National UnDACAmended Project*, Aug. 15, 2013, <http://www.immigrationpolicy.org/just-facts/how-daca-impacting-lives-those-who-are-now-dacamended>.

<sup>61</sup> The majority of states do not give undocumented students access to in-state tuition or state financial aid. See National Immigration Law Center, *Toolkit: Access to Postsecondary Education*, May 2016, <https://www.nilc.org/issues/education/eduaccesstoolkit2a/#tables>.

<sup>62</sup> U.S. Const. art. II, § 2.

<sup>63</sup> Another difference is that the pardon power is vested only in the president in federal law (and the governor in state law), whereas the authority to engage in deferred action under DACA or DAPA is vested in the executive branch (and, specifically in the Secretary of Homeland Security and in US Citizenship

Peter Markowitz makes the fascinating argument that, in the wake of the Supreme Court’s 4-4 deadlock in *United States v. Texas*, President Obama should have used his pardon power on behalf of the individuals who now cannot benefit from DAPA. Thus, pardon appeared here not as an *analogy* to DAPA or DACA, but as an *alternative remedy* to undocumented presence. As Markowitz notes, the pardon power includes the ability to grant broad categorical amnesties in the public interest.<sup>64</sup> He points to the historical large-scale actions of President Lincoln’s categorical amnesty to all former supporters of the Confederate States, and President Carter’s pardon to around one half million men who had violated draft laws to avoid service during the Vietnam War.<sup>65</sup>

An undocumented immigrant is a person engaged in a civil infraction, not a criminal offense.<sup>66</sup> While the pardon power is often presumed to exist only for criminal violations, the Supreme Court has in fact twice considered its application outside criminal contexts, in both cases reading the clause to reach beyond criminal boundaries.<sup>67</sup> There thus appears to be potentially applicable (although quite old) legal precedent. Like DACA or DAPA, a pardon would leave the undocumented immigrant with the same legal status as before, undocumented. The immigrant would also not receive work authorization. But the immigrant would be shielded from future deportation based upon the immigration violation that would now be pardoned, a protection unavailable through DACA or DAPA.

Regardless of whether the presidential pardon power is an apt analogy or an alternative remedy, this comparison helps illuminate some of the anxiety surrounding the legitimacy of DAPA and DACA. Austin Sarat writes that “acts of clemency are quintessentially sovereign acts in that they are authored by law as moments when officials can decide who shall be removed from the purview of the law.”<sup>68</sup> Thus, clemency exists in a kind of liminal borderland, as emblematic of sovereignty, being both a product of the law and also an exception to the law. The pardon power is legally created, but, once pardoned, the subject granted clemency is given an exception from punishment. An act of discretion by the sovereign official—whether a pardon or a program like DAPA or DACA—troubles the presumption of regularity of the rule of law, which is that there is no border or end to the rule of law, as the sovereign is entirely contained within the law which

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and Immigration Services). At the same time, DACA and DAPA, perhaps because of the public nature of the November 2014 announcements, have been called by their critics “Obamigration,” as if vested in President Obama personally.

<sup>64</sup> Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 B.U.L. Rev. 489 (2017).

<sup>65</sup> *Id.*

<sup>66</sup> The only immigration violations which are also criminal violations are illegal entry, illegal reentry, alien smuggling, and document fraud. Unlawful presence in the United States is a civil, and not a criminal, offense. The possibility that it might become a criminal offense helped spur the mega-marches of 2006 when millions of noncitizens took to the streets, in part invoking the slogan “We are not criminals.”

<sup>67</sup> Markowitz, *supra* note 64; see also Peter L. Markowitz, *Can Obama Pardon Millions of Immigrants?* N.Y. Times, July 6, 2016. One case, *Ex parte Grossman*, 267 U.S. 87 (1925), involved imprisonment pursuant to a finding of contempt; the Court maintained in that case that the reach of the pardon power turned on whether the wrong was considered an offense against the state. In the other case, *The Laura*, 114 U.S. 411 (1885), in dicta the Court affirmed the use of pardons in non-criminal contexts.

<sup>68</sup> Austin Sarat, *At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality*, 57 Am. Q. 611, 614 (2005).

produces his or her authority. Because of this presumption, sovereign discretion—deciding upon the exception, removing a subject from the purview of regular law—can become equated with illegitimacy and illegality.<sup>69</sup>

Thus, at the root of the articulated concern that President Obama violated the rule of law with DAPA or DACA is an anxiety about the idea of discretion and about the fact that the boundaries of legality are not entirely fixed or stable. The conventional terms of the debate presume the contrary, in asking whether DAPA and DACA are entirely inside the law and legal; or outside the law and illegal.

The idea that there is a clear inside and a clear outside is not a presumption unique to how the law is imagined. There is a spatio-territorial backdrop to the law that similarly presumes there are clear borders, with a seamless relationship between territory and governance.<sup>70</sup> But borders can be fuzzy, and the jurisdiction of the sovereignty is not always coterminous with territorial borders.<sup>71</sup>

The notion of an apparent inside or outside also tracks the rhetorical location of the immigrants who would be benefitted by DACA and DAPA: according to supporters of these programs, they are (future) members who are already inside a political community or, according to DACA and DAPA's critics, they are "illegal aliens," which in fact locates them "outside the law."<sup>72</sup> This is a framing which precisely tracks the majority and dissenting opinions' dissonant visions of undocumented immigrants in the 1982 Supreme Court decision *Plyler v. Doe*, one placing undocumented immigrant children inside, as future members of society, and the other placing "illegal alien" children outside, with no right to belong.<sup>73</sup> Yet the undocumented immigrants whom DACA and DAPA sought to aid exist in a kind of contradictory space; physically present over time, with roots and stakes that suggest belonging, at the same time that they dwell in the United States without legal authorization. We could consider this kind of ambiguous existence as life in a gray zone, or as a form of "liminal legality."<sup>74</sup>

Spatial metaphors also shape how scholars have conceptualized discretion. Discretion can function as a "flexible shock absorber," or as "the hole in the doughnut" which remains an area

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<sup>69</sup> See Rachel Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332, 1335 (2008) (describing how legal culture has come to view with suspicion the exercise of mercy as meted out by unreviewable legal power, with the rise of the administrative state).

<sup>70</sup> For a discussion of the disjuncture between territorial space and governance and of how spatial metaphors operate in immigration law, see Leti Volpp, *Imaginings of Space in Immigration Law*, 9 Law, Culture & Human. 456 (2013).

<sup>71</sup> See Leti Volpp, *The Indigenous as Alien*, 5 U.C. Irvine L. Rev. 289 (2015).

<sup>72</sup> See Motomura, *Immigration Outside the Law*, supra note 15.

<sup>73</sup> In *Plyler v. Doe*, the majority held that undocumented schoolchildren, as "innocent children" who otherwise faced a caste of illiteracy, were entitled to attend public elementary and secondary school. The dissent disagreed, noting: "Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation." 457 U.S. 202, 242 n.1 (1982) (Burger, C.J., dissenting).

<sup>74</sup> Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 Am. J. Soc. 999 (2006); see also Jennifer Chacón, *Producing Liminal Legality*, 92 Denv. Univ. L. Rev. 709 (2015).

“left open by a surrounding belt of restriction,” thus providing an important space for equitable remedies.<sup>75</sup> But discretion always also occupies the marginal space of “law’s borderland.”<sup>76</sup> This clarifies that executive discretion does not always make itself available as a tool of leniency or equity. The same discretionary sovereign prerogative that enables clemency, as in DAPA and DACA, also enables states of emergency, military tribunals on Guantánamo, and killings by drone strikes.<sup>77</sup> Any assessment as to the legality of these acts by the executive will be shaped, not only by their merits, but also by the perception of the executive actor’s legitimacy.

### “Barack Obama, American Caudillo”

In a column chastising President Obama for “issuing an executive amnesty for illegal immigrants based on blatant contempt for the constitutional order that he is sworn to uphold,” Rich Lowry labeled President Obama an “American Caudillo.”<sup>78</sup> Similarly, New York Times columnist Ross Douthat, also writing about DAPA, charged: “President Obama is pursuing . . . domestic Caesarism.”<sup>79</sup> Both of these descriptions conjured up a chimera intended to provoke fear, conjoining a hybridization of United States democracy with an illegitimate governmental form that is both foreign and antidemocratic, practiced by Latin American dictators or the Roman empire. Yet the issue was not just a governmental term or form that sounds presumptively foreign, and therefore an antidemocratic exercise of presidential power, rather it was the body of President Obama himself. Thus, we can see how the notion that President Obama’s executive immigration actions amounted to a “political regime change” expressed fears, here not about the bounds of sovereign power more generally, but very particularly about President Obama’s person.

This anxiety about Barack Obama’s putative foreignness and foreign loyalties was long expressed through particular racial logics. Starting in 2008, many commentators had claimed that President Obama “transcended race,” and that his election signified a new, post-racial era in American history.<sup>80</sup> President Obama himself had attempted to assert such an ideal, stating in his 2004 address at the Democratic National Convention, “There’s not a black America and white America and Latino America and Asian America; there’s the United States of America.”<sup>81</sup> Despite these assertions, as “America’s first black President,” and as the son of an African immigrant father, whose mother had raised him in Indonesia and Hawai’i, Barack Obama could not

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<sup>75</sup> Elizabeth Keyes, *Deferred Action: Considering What Is Lost*, 55 *Washburn L.J.* 129, 131 (2015); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 *Tul. L. Rev.* 703, 711 (1997).

<sup>76</sup> Sarat, *supra* note 68, at 613 (“In the jurisprudence of clemency we find law’s borderland.”)

<sup>77</sup> See John E. Owens, *Rivals Only Sometimes: Presidentialism, Unilateralism, and Congressional Acquiescence in the U.S. “War on Terror”* (2009).

<sup>78</sup> Rich Lowry, *Barack Obama, American Caudillo*, *Politico*, Nov. 19, 2014. A *caudillo* is a term for a Spanish or Latin American dictator. See “caudillo,” *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/caudillo>.

<sup>79</sup> Ross Douthat, *Obama’s Impeachment Game*, *N.Y. Times*, Aug. 2, 2014, at SR9.

<sup>80</sup> For critiques of the idea that the United States is “post-racial,” see David D. Troutt, *Barack Obama, “Post-Raciality” and Mythic-Rhetorical Regime Change*, 22 *Nat’l Black L.J.* 1 (2009); Devon Carbado & Mitu Gulati, *Acting White? Rethinking Race in “Post-Racial” America* (2013).

<sup>81</sup> Judith Weisenfeld, *Post-Racial America: The Tangle of Race, Religion, and Citizenship*, *Religion & Politics* (Oct. 24, 2012), <http://religionandpolitics.org/2012/10/24/post-racial-america-the-tangle-of-race-religion-and-citizenship>.

help being read through a tense racial otherness, an otherness which repeatedly reiterated his illegitimacy for the office.<sup>82</sup>

During his campaign for president in 2008, a group associated with the Tea Party known as “birthers” began claiming that his birth certificate had been falsified, that Obama was not a “natural-born citizen,” and that he was thus ineligible to be President of the United States under Article II of the Constitution. Various theories circulated underlying this claim.<sup>83</sup> Some birthers alleged that Obama had actually been born in Kenya, not Hawai’i. There were those who recognized that he had been born in Hawai’i, but did not acknowledge Hawai’i as part of the United States.<sup>84</sup> Others claimed that Obama had become a citizen of Indonesia as a child, thereby losing his U.S. citizenship. Still others argued that he was born a British subject and was thus not a “natural-born citizen.” One group, known as “Vattel birthers,” asserted that “natural born citizen” was to be interpreted according to the writing of international law theorist Emer de Vattel, who had written in *The Law of Nations* in 1758 that a “natural-born citizen” referred to “those born in the country, of parents who are citizens.”<sup>85</sup> According to the Vattel birthers, since only Obama’s mother was, at his birth, a U.S. citizen, President Obama could not be a “natural-born citizen.”<sup>86</sup>

By the summer of 2009, one-quarter of Americans polled doubted President Obama’s birth in the United States.<sup>87</sup> Polls showed that 58 percent of Republicans and 53 percent of Southerners polled either believed that he was born outside of the United States or were unsure.<sup>88</sup> In response to lingering birther rumors, in 2011 President Obama released a certified copy of his original Certificate of Live Birth along with contemporaneous birth announcements published in newspapers in Hawai’i.

These birther claims about President Obama never completely subsided, even after two elections. In 2013, Donald Trump appeared in an interview on ABC where he questioned whether the released birth certificate was in fact valid, stating, “Well, I don’t know. Was that a birth certificate? I don’t know.” As Vincent Pham notes, Trump then quickly pivoted to change the sub-

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<sup>82</sup> Barack Obama was the first black president, the first nonwhite president, the first president born not in the contiguous United States but in Hawai’i, and the first president with an immigrant parent since Herbert Hoover. See Hernández, *supra* note 48.

<sup>83</sup> See Barack Obama Citizenship Conspiracy Theories, [https://en.wikipedia.org/wiki/Barack\\_Obama\\_citizenship-conspiracy-theories](https://en.wikipedia.org/wiki/Barack_Obama_citizenship-conspiracy-theories); Matthew W. Hughey, Show Me Your Papers! Obama’s Birth and the Whiteness of Belonging, 35 Qual. Soc. 163 (2012).

<sup>84</sup> Ross Douthat, “Birthers,” Polls and Public Ignorance, N.Y. Times, June 29, 2010, <http://douthat.blogs.nytimes.com/2010/06/29/birthers-polls-and-public-ignorance>.

<sup>85</sup> See The Birthers, Vattel’s Influence on the Term a Natural Born Citizen, 2016 (<http://birthers.org/USC/Vattel.html>); see also John Ira Jones IV, Natural Born Shenanigans: How the Birther Movement Exacerbated Confusion Over the Constitution’s Natural Born Citizen Requirement, 27 Regent U.L. Rev. 155 (2014) (promoting Vattel birtherism).

<sup>86</sup> For an examination of what, exactly, is meant by “natural born citizen,” see Gabriel J. Chin, Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship, 107 Mich. L. Rev. First Impressions 1 (2008).

<sup>87</sup> Vincent J. Pham, Our Foreign President Barack Obama: The Racial Logics of Birther Discourses, 8 J. Int’l & Intercultural Comm. 86, 86 (2015).

<sup>88</sup> Clare Jean Kim, President Obama and the Polymorphous “Other” in U.S. Political Discourse, 18 Asian Am. L.J. 165, 172 (2011).

ject to “China,” asserting, “But my issue is economic. Our country is being ripped apart by China.” As Pham points out, Trump’s invocation of China can be understood to subliminally associate Obama with China as a foreign threat.<sup>89</sup> (Trump, in a statement which falsely accused Hillary Clinton of having started the birther movement, finally declared in September 2016 that “President Obama was born in the United States—period.”)<sup>90</sup>

At the same time that birthers began questioning whether Obama was a “natural-born citizen,” his political opponents began to suggest that he was “Muslim,” disidentifying Obama as a citizen, and identifying him as a terrorist.<sup>91</sup> He was challenged for not wearing a flag pin on his lapel and for not placing his hand on his heart during the national anthem at Tom Harkin’s Iowa steak fry in 2007.<sup>92</sup> Hillary Clinton, asked by an interviewer in 2008 whether she thought Obama was a Muslim, replied “No, as far as I know.” John McCain, responding in 2008 to a woman expressing fear of Barack Obama because she thought he was “an Arab,” stated, “No, ma’am, he’s a decent family man,” a formulation suggesting an antagonistic relationship between the terms “Arab,” and “decent family man.”<sup>93</sup> Others deliberately called him “Osama,” or emphasized his middle name, Hussein.<sup>94</sup>

A 2015 poll found that 29 percent of those polled identified President Obama as Muslim, with 43 percent of Republicans so describing him.<sup>95</sup> The terms “Muslim,” “terrorist,” and “foreign” now travel in sync in North American English. We could note that Timothy McVeigh must be qualified as a “domestic terrorist,” as though the default meaning of the terrorist is a foreign threat, contrary to the U.S. historical record of Ku Klux Klan activity dating back to the post-Civil War era. We could also observe how the identity of the perpetrator in cases of mass violence, as Muslim or not, routinely shapes whether the person is labeled “the terrorist,” or “the shooter.” And we could also consider how “Christian” is presumptively American, while “Muslim” is presumptively foreign.

Thus, President Obama was the object of overlapping racialization discourses of xenophobia, anti-blackness, and Islamophobia, creating a complicated constellation of political illegitimacy. In the words of Ta-Nehisi Coates, “The irony of Barack Obama is this: he has become the most successful black politician in American history by avoiding the radioactive racial issues of yes-

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<sup>89</sup> Pham, *supra* note 87, at 98. Trump of course went on to question whether his opponents for the Republican nomination for president, Ted Cruz and Marco Rubio, were “natural-born citizens.”

<sup>90</sup> Michael Barbaro, Donald Trump Clung to “Birther” Lie for Years, and Still Isn’t Apologetic, *N.Y. Times*, Sept. 16, 2016, <http://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html>.

<sup>91</sup> For a discussion of how those who “appear Arab, Muslim or Middle Eastern” have been strongly subject post 9/11 to a racialization process which disidentifies them as citizens and identifies them as putative terrorists, see Leti Volpp, *The Citizen and the Terrorist*, 49 *U.C.L.A. L. Rev.* 1575 (2002); see also Leti Volpp, *Citizenship Undone*, 75 *Fordham L. Rev.* 2579 (2007); Leti Volpp, *The Boston Bombers*, 82 *Fordham L. Rev.* 2209 (2014).

<sup>92</sup> Kim, *supra* note 88, at 168.

<sup>93</sup> John Bentley, McCain Booed for Telling Audience to Be Respectful of Obama, *CBS NEWS*, Oct. 10, 2008, <http://www.cbsnews.com/news/mccain-booed-for-telling-audience-to-be-respectful-of-obama>.

<sup>94</sup> Kim, *supra* note 88, at 168.

<sup>95</sup> Louis Jacobson, Do 59% of Americans Believe Barack Obama is Muslim? *PunditFact*, Nov. 23, 2015, <http://www.politifact.com/punditfact/statements/2015/nov/23/arsalan-iftikhar/do-59-percent-americans-believe-barack-obama-musli>.

teryear, by being ‘clean’ (as Joe Biden once labeled him)—and yet his indelible blackness irradiates everything he touches.”<sup>96</sup> President Obama has been subjected to specifically anti-black discourse, depicted as an “ape,” a “thug,” a “welfare recipient,” and a “drug addict.” Yet at the same time he was also racialized as foreign. This was accomplished both via xenophobic racial logics historically directed at Asian Americans and Latinxs who remain perpetually foreign bodies who are presumptively never citizens, as well as via newer racial strategies directed at Muslims, whose identity is cast as essentially oppositional to American citizenship.

The relationships among these three different discourses bear examining. Vincent Pham suggests that both anti-black and “forever foreigner discourses via yellow peril” were mobilized, in parallel and in concert, to create “a web of racist discourse” casting President Obama as foreign; this, he argues is a “relational racialization.”<sup>97</sup> According to Neil Gotanda, racializing President Obama as “Muslim” turned his body from an “African American body” which “would clearly be American” to a body tied to more recent immigration, classifying him as foreign.<sup>98</sup> In contrast, Clare Jean Kim asserts that President Obama’s blackness, carrying with it a “trace of unremitting otherness,” made him more susceptible to being racialized as an Arab/Muslim/suspected terrorist than was, say, John Kerry or John Edwards.<sup>99</sup> Yet perhaps blackness might not only be the original source of President Obama’s putative illegitimacy; perhaps in a society which is founded on anti-black racism, blackness is the ultimate problem. Moustafa Bayoumi thus writes about Arabs and Muslims becoming the “new blacks,” in other words, as a social problem to be dealt with, as—in Gunnar Myrdal’s words—an “American dilemma.”<sup>100</sup> However we theorize the particular relationships among these racial logics, we saw them converging to create a “regime of truth” for too many Americans, in constructing Barack Obama as constitutionally unable to exercise legitimate power. As such, his executive acts will always be suspected of overstepping the bounds of legality.

### **Immigrants Outside the Law**

Of course, given the malleable zone of executive discretion, whether a president’s acts do overstep such bounds can always be in question. Yet we must recognize that the idea that President Obama engaged in political regime change by changing the legal regime of immigration law through DAPA and DACA reflects the widely-shared perception that both the actor and those on whose behalf he sought to act are foreign and illegitimate.

The undocumented immigrants who would be beneficiaries of DAPA or DACA are physically present among us, and thus they are arguably deserving of what Linda Bosniak has named “ethical territoriality,” which is the idea that rights and recognition should extend to all persons

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<sup>96</sup> Ta-Nehisi Coates, *Fear of a Black President*, *The Atlantic*, Sept. 2012, <http://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064>.

<sup>97</sup> Pham, *supra* note 87, at 86.

<sup>98</sup> Neil Gotanda, *The Racialization of Islam in American Law*, 637 *Annals Am. Acad. Pol. & Soc. Sci.* 184, 194 (2011).

<sup>99</sup> Kim, *supra* note 88, at 172.

<sup>100</sup> Moustafa Bayoumi, *The Race Is On: Muslims and Arabs in the American Imagination*, Mar. 2010, <http://www.merip.org/mero/interventions/race>.

who are territorially present by virtue of that physical presence.<sup>101</sup> If there is dissonance between physical presence inside and the legal status of an outsider, ethical territoriality would thus align presence and status as both *inside*.

Yet those who criticize President Obama's DAPA and DACA policies would seek to align the physical location and status of undocumented immigrants as both *outside*. As undocumented, they are "outside the law," and their bodies should be cast outside the spatial territory of the nation-state as well, where these critics argue "illegal aliens" belong. This expulsion is perceived to be necessary for the health and welfare of the body politic.

As Michael Rogin observed, the role of the throne "transformed rational independent citizens into limbs of the body politic, governed by their head."<sup>102</sup> This vision of a body's limbs being directed by their head is a depiction of monarchy, as opposed to a political body made up of autonomous individuals governed by the rule of law. Critics of President Obama thus suggest that the body politic can only achieve appropriate self-governance through a simultaneous purging, both of the body's "illegal" non-members and the illegal acts of its putatively monarchical political head, who acted as if he were a king.<sup>103</sup>

This purging can be considered a kind of dual dismemberment. President Obama's critics seek to disconnect the head from the political body. They also seek to remove from membership persons we should perceive as integral parts of the body politic, regardless of their immigration status. Susan Coutin describes *dismembering* as encompassing several discrete concepts: the separation of persons from history, the literal injury or destruction of bodies, the embodied nature of structural violence, and the denial of membership.<sup>104</sup> Deportation can thus be considered a form of dismemberment.

President Obama was rhetorically thrust outside the territorial space of the United States as the "first foreign president," and as the "first immigrant president," as an "anti-American racist," and as a "disloyal terrorist sympathizer." Like the undocumented immigrants whom he sought to help through DACA and DAPA—as well, it must be acknowledged, as the many undocumented immigrants deported by his administration—President Obama was thus cast "outside the law."

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<sup>101</sup> Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 *Theoretical Inquiries L.* 389 (2007).

<sup>102</sup> Rogin, *supra* note 12, at 82.

<sup>103</sup> See John Eastman, *Symposium: Barack Obama Is Not King*, SCOTUSblog, Feb. 2016, <http://www.scotusblog.com/2016/02/symposium-barack-obama-is-not-king>.

<sup>104</sup> Susan Bibler Coutin, *Exiled Home: Salvadoran Transnational Youth in the Aftermath of Violence* 3-4 (2016).