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Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals

Rachel F. Moran

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In 1994, California voters went to the polls to pass Proposition 187, a measure designed to deter unauthorized immigration by denying a range of public benefits to the undocumented.[1] Twenty-five years later, undocumented immigration remains a deeply polarizing issue in our country.[2] But if the political discourse seems similar, the civil rights toolkit is not. In an earlier era, equal protection arguments had pride of place, but today, advocates rely heavily on structural and institutional arguments to constrain official discretion.[3]

To illustrate this shift, I will begin by describing the United States Supreme Court's 1982 decision in *Plyler v. Doe*,[4] which declared unconstitutional a Texas statute that would have denied undocumented students access to public elementary and secondary schools.[5] There, the Justices emphasized the harm to our democracy that would result from dehumanizing innocent children and relegating them to a permanent underclass of illiterates.[6] I will then compare *Plyler* to recent lawsuits challenging executive action to protect undocumented youth from deportation as well as executive action to terminate this relief.[7] In these cases, questions of administrative procedure have been of central

[1] Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting (1994); Kenneth B. Noble, *The 1994 Elections: The Nation California*; *Gov. Wilson's Comeback Ends in Re-election Victory*, N.Y. TIMES (Nov. 9, 1994), https://www.nytimes.com/1994/11/09/us/1994-elections-nation-california-gov-wilson-s-comeback-ends-re-election-victory.html [https://perma.cc/PDW5-KWD8].

[2] LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 27-28 (2d ed. 2013).

[3] *See* Thomas A. Saenz, *One Advocate's Road Map to a Civil Rights Law for the Next Half Century: Lessons From the Latino Civil Rights Experience*, 38 N.Y.U. REV. L. & SOC. CHANGE 607, 608-12, 617 (2014).

[4] 457 U.S. 202 (1982).

[5] *Id.* at 208-09, 221-23. *See generally* MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 21 (2012) (describing deprivation that would have been inflicted on undocumented students).

[6] *Plyler*, 457 U.S. at 220-23.

[7] The plaintiffs in four cases have contended that the Trump administration's rescission of the program of Deferred Action for Childhood Arrivals is impermissible. Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 420 (E.D.N.Y. 2018); Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1037 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018); Casa de Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 771-79 (D. Md. 2018), *aff'd in part, rev'd in part*, 924 F.3d 684, 706-07 (4th Cir. 2019); Nat'l Ass'n for the Advancement of Colored People v. Trump, 298 F. Supp. 3d 209, 249 (D.D.C. 2018), *on motion for clarification*, 321 F. Supp. 3d 143 (D.D.C. 2018). In *Texas v. United States*, by contrast, the plaintiffs have insisted that DACA's rescission is required. 328 F. Supp. 3d 662, 677 (S.D. Tex. 2018).

importance, while constitutional concerns have been notably less salient.[8]

As I will show, the *Plyler* decision was a jurisprudential anomaly even at the time it was decided. In the intervening years, it has been narrowly limited to its facts, leaving resolution of the treatment of undocumented immigrants to the political process.[9] Because the Court has construed the constitutional entitlements of marginalized groups parsimoniously, the realm of discretionary decision-making has grown considerably. In response, advocates have been forced to focus on how much latitude officials enjoy before they abuse their discretion.[10] With no clear place in the polity, the undocumented are especially burdened by processes that depend heavily on striking political bargains to influence discretionary policies. In the absence of a right to vote and a robust set of constitutional rights, unauthorized immigrants are mainly able to bolster their claims to full inclusion through appeals to decency and desert.[11] The struggles of the Dreamers, undocumented immigrants who came to the United States as children, illustrate the limits of these calls for basic fairness.[12] The Dreamers' assertions of innocence, even though expressly legitimated in *Plyler*, have not allowed them to find a secure path to higher education, lawful employment, or American citizenship.[13]

These undocumented youth did receive temporary relief from the threat of deportation as well as access to a renewable authorization to work legally in the United States when President Barack Obama's administration established the Deferred Action for Childhood Arrivals ("DACA") program in 2012.[14] However, President Donald Trump's

[8] *See infra* note 163 and accompanying text.

[9] *See infra* notes 237–238 and accompanying text.

[10] *See* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 717 (2015); Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2128-29 (2019).

[11] *See infra* notes 74–86 and accompanying text.

[12] *See infra* notes 90–102 and accompanying text. It is worth noting that the term "Dreamers" and the deployment of a "politics of respectability" have come under scrutiny because they imply that other undocumented immigrants are undeserving. Strategies like these may leave the most vulnerable subject to increased abuse and exploitation. Angelica Chazaro, *Beyond Respectability: Dismantling the Harms of "Illegality*,*"* 52 HARV. J. ON LEGIS. 355, 357-58, 375-77 (2015).

[13] *See infra* notes 105–120 and accompanying text.

[14] *See* Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot. et al., 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.

administration rescinded the program just five years later.[15] In the ensuing litigation, lower courts have split on the permissibility of the rescission,[16] and the U.S. Supreme Court is reviewing the issues in the 2019-2020 term.[17] As the Justices deliberate about these questions, they must consider the unique situation that the Dreamers face. Beneficiaries of the DACA program have come out of the shadows to apply for driver's licenses and get jobs.[18] The program's abrupt termination has significantly destabilized their lives, and they cannot turn to the ballot box to rectify the situation.[19] Although the Dreamers have asked for the

[https://perma.cc/QP4C-Z7GW] [hereinafter Napolitano 2012 Memorandum]; *see also* President Barack Obama, Remarks on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/GDE3-UYXE] ("Now, let's be clear — this is not amnesty, this is not immunity. This is not a path to citizenship. It's not a permanent fix. This is a temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people.").

[15] Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship and Immigration Serv. et al., Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/RX6N-4PPT] [hereinafter Duke 2017 DACA Memorandum].

[16] The federal courts in California, the District of Columbia, Maryland, and New York have concluded that the rescission is impermissible or likely to be found impermissible. Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 420-34 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1037-46 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476, 520 (9th Cir. 2018); Nat'l Ass'n for the Advancement of Colored People v. Trump, 298 F. Supp. 3d 209, 249 (D.D.C. 2018); Casa de Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 758, 771-79 (D. Md. 2018), *aff'd in part, rev'd in part*, 924 F.3d 648, 706-07 (4th Cir. 2019). The Texas court has found that the rescission is authorized and appropriate. Texas v. United States, 328 F. Supp. 3d 662, 742-43 (S.D. Tex. 2018).

[17] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019) (consolidated with Nat'l Ass'n for the Advancement of Colored People v. Trump and McAleenan v. Vidal). The Trump administration previously had sought expedited review of the lower court decisions without success. Robert Barnes, *DACA Program That Protects Young Undocumented Immigrants Not Likely to get Supreme Court Review This Term*, WASH. POST (Jan. 22, 2019, 7:38 AM), https://www.washingtonpost.com/politics/courts_law/daca-program-that-protects-young-undocumented-immigrants-not-likely-to-get-supreme-court-review-this-term/2019/01/22/dd3ac11a-1db3-11e9-8e21-59a09ff1e2a1_story.html?utm_term=.0c99d2399548 [https://perma.cc/4XYH-LSTT]; Amy Howe, *Justices Reject Government's Request to Expedite DACA Petition,* SCOTUS BLOG (June 3, 2019, 2:38 PM), https://www.scotusblog.com/2019/06/justices-reject-governments-request-to-expedite-daca-petition/ [https://perma.cc/P3RW-MN2A].

[18] *See infra* notes 109–118 and accompanying text.

[19] *See* Kevin R. Johnson, Opinion, *By Playing Politics with DACA Trump is Toying with Immigrant Lives*, GLOBE POST (June 14, 2019), https://theglobepost.com/2019/

"right to have rights,"[20] the Court has not reinvigorated its equal protection jurisprudence to confer basic entitlements on persons or even citizens. Faced with these obstacles, undocumented youth instead have contended that they should at least have a right to settled expectations when they rely on benefits under federal programs.[21] By requiring administrative agencies to weigh reliance interests, the Court can make clear that more is at stake than mere deference to government officials' exercise of discretion. The Justices have an opportunity to remind agencies that program beneficiaries also have significant interests at stake that deserve recognition and respect.[22]

I. *PLYLER V. DOE*, THE PROMISE OF PERSONHOOD, AND PROPOSITION 187

In *Plyler*, the U.S. Supreme Court confronted restrictionist legislation[23] aimed at punishing children because their parents had entered the country without authorization. The Texas legislature passed a statute in 1975 that withheld state funds for the education of undocumented students and authorized school districts to charge them tuition and bar them from enrolling. The law was framed as a response to inadequate federal border enforcement, a way to deter the undocumented from migrating with their families to the state. Not all school districts implemented the statute, but some large districts and border districts did.[24] A state court challenge to the law failed, so in 1977, Peter Roos, an attorney with the Mexican American Legal Defense and Educational Fund, decided to try again, this time in federal court.[25]

06/14/daca-playing-politics/ [https://perma.cc/CL57-ZLWL] [hereinafter *By Playing Politics*].

[20] WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE 1 (2013).

[21] *See infra* note 172 and accompanying text.

[22] *See infra* notes 313–315 and accompanying text.

[23] *See* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2078 n.11 (2013) ("We use the terms 'restrictionist' and 'restrictive' to describe the range of policy positions arguing for greater immigration enforcement, increased state and local participation in enforcement, decreased ability of unlawfully present persons to access public goods, and fewer discretionary decisions to permit unlawful presence.").

[24] *See Plyler*, 457 U.S. at 205-06; OLIVAS, *supra* note 5, at 9-10.

[25] Hernandez v. Hous. Indep. Sch. Dist., 558 S.W.2d 121, 125 (Tex. Civ. App. 1977); OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, *supra* note 5, at 10. A total of seventeen lawsuits challenging the statutes eventually were filed, but they were ultimately consolidated into two cases. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 3 (2014).

Roos understood the climate of hostility towards the undocumented and took steps to protect his young clients from intimidation. First, he proactively prevented officials from taking steps to undermine his clients' willingness to be part of the lawsuit. Roos asked Judge William Wayne Justice to preserve the children's anonymity so that they would not become targets for harassment and deportation.[26] In addition, Roos learned that the U.S. Attorney planned to ask the Dallas director of the Immigration and Naturalization Service ("INS") to conduct immigration sweeps to force the plaintiffs to drop their suit. At the time, Leonel Castillo, a Houston native and progressive Mexican-American politician, was the INS commissioner, and he assured Roos that the raids would not take place.[27] Finally, Roos concluded that he had to wage his battle in the court of public opinion as well as in federal court. To that end, he mobilized amici curiae to submit briefs on his clients' behalf, and he urged community members to protest the state statute and demonstrate their support for his vulnerable clients.[28]

The complaint in *Plyler* relied on both preemption and equal protection doctrine.[29] Under preemption law, the plaintiffs contended that the statute improperly usurped federal authority over immigration law, while under equal protection, they asserted that the statute wrongly discriminated against undocumented students who were overwhelmingly of Mexican descent.[30] The trial court held for the plaintiffs on both counts. In his 1978 decision, Judge William Wayne Justice concluded that the state acted irrationally in "creat[ing] a distinct class of poor, undocumented children who are absolutely deprived of any education whatsoever."[31] The measure's irrationality in turn implicated preemption concerns because "[c]harging tuition to undocumented children constitutes a ludicrously ineffective attempt to stem the tide of illegal immigration" and so could not advance federal objectives.[32] The Fifth Circuit Court of Appeal affirmed on equal protection grounds two years later.[33]

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[26] MOTOMURA, *supra* note 25, at 3; OLIVAS, *supra* note 5, at 14-15.

[27] MOTOMURA, *supra* note 25, at 3; OLIVAS, *supra* note 5, at 14-15.

[28] OLIVAS, *supra* note 5, at 15.

[29] *Plyler*, 457 U.S. at 208-10, 210 n.8.

[30] *Id.* at 208-09, 208 n.5, 209 n.7; *see* OLIVAS, *supra* note 5, at 12 (stating that MALDEF "saw *Plyler* as the Mexican American *Brown v. Board of Education*").

[31] Doe v. Plyler, 458 F. Supp. 569, 580 (E.D. Tex. 1978), *aff'd*, 628 F. 2d 448, 454-58 (5th Cir. 1980), *aff'd*, 457 U.S. 202, 219-20 (1982); *see also* OLIVAS, *supra* note 5, at 21 (2012) (describing deprivation that would have been inflicted on undocumented students).

[32] Plyler v. Doe, 458 F. Supp. at 584-85.

[33] *Plyler*, 628 F. 2d 448, 454-58 (5th Cir. 1980).

The state of Texas successfully sought Supreme Court review,[34] and in 1982, the Justices ruled five-to-four in favor of the undocumented students.[35] Equal protection lay at the heart of the Court's analysis, while concerns about preemption were relegated to a brief footnote.[36] *Plyler* was noteworthy for its emphasis on undocumented children's underlying humanity. Writing for the majority, Justice William Brennan observed — as it turns out, accurately — that many of the affected children would remain in the United States.[37] Even though the children themselves had not chosen to enter illegally (these were their parents' decisions), the Texas statute would relegate them to a permanent underclass of illiterates unable to participate fully in economic or civic life.[38] As Justice Brennan explained, this manner of deterring undocumented immigration posed "most difficult problems for a Nation that prides itself on adherence to principles of equality under law"[39] and ultimately violated "fundamental conceptions of justice."[40] *Plyler*'s reasoning was criticized at the time. Because alienage was not a suspect classification and equal education was not a fundamental right, some commentators argued that the Court was bound to use a highly deferential standard of review. That is, the Justices should have confined themselves to evaluating whether the Texas statute was rationally related to a legitimate purpose. Yet, the Justices clearly had

[34] Plyler v. Doe, 451 U.S. 968 (1981) (probable jurisdiction noted). On appeal to the Supreme Court, *Plyler* was consolidated with another case that had reached a similar result. 457 U.S. 202, 206-10 (1982). The other case, *In re* Alien Children Education Litigation, 501 F. Supp. 544, 583-84 (S.D. Tex. 1980), had been summarily affirmed by the Fifth Circuit. *See generally* MOTOMURA, *supra* note 25, at 3 (describing MALDEF's initial reluctance to consolidate the cases and how the Supreme Court ultimately resolved the issue); OLIVAS, *supra* note 5, at 16-19 (same).

[35] *Plyler*, 457 U.S. at 230. The Justice Department under President Jimmy Carter's administration initially supported the plaintiff children, but when President Ronald Reagan was elected, his administration declined to take a position in the case. John Roberts, now Chief Justice and then a lawyer in the Justice Department, blamed the narrow margin of victory in *Plyler* on the administration's failure to support Texas. MOTOMURA, *supra* note 25, at 5-6.

[36] *Plyler*, 457 U.S. at 210 n.8.

[37] *Id.* at 229-30. In fact, a number of the plaintiffs in the case were able to become U.S. citizens after Congress passed immigration reform legislation in 1986. OLIVAS, *supra* note 5, at 7.

[38] *Plyler*, 457 U.S. at 202-03, 218-20, 226, 230.

[39] *Id.* at 219.

[40] *Id.* at 220. *See generally* Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 361-63 (2012).

applied a more exacting test, one that critics decried for elevating five Justices' policy preferences over those of the Texas legislature.[41]

After the *Plyler* decision, some restrictionists redirected their efforts to the ballot box. In 1994, California voters approved Proposition 187, a measure designed to prohibit the undocumented from attending public school and receiving other public benefits.[42] This time, the scope of national authority played a decisive role when immigration advocates challenged the measure in court. In *League of United Latin American Citizens v. Wilson*,[43] Judge Mariana Pfaelzer struck down nearly all of the provisions on preemption grounds. However, she relied on *Plyler* to invalidate the ban on enrolling undocumented students at California's elementary and secondary schools.[44] Notably, though, Judge Pfaelzer upheld Proposition 187's restrictions on admitting undocumented students to state colleges and universities.[45]

The same year that much of Proposition 187 was nullified in federal court, Congress considered a bill that would limit undocumented immigrants' access to public benefits nationwide.[46] Elton Gallegly, a Republican congressman from California, introduced an amendment meant to defy *Plyler* by again mandating that undocumented children be denied access to public elementary and secondary schools.[47] While Congress ultimately cut back on many public benefits for unauthorized immigrants, including access to higher education, the Gallegly

[41] *See, e.g.*, Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 184; Philip B. Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court, O.T. 1982*, 50 U. CHI. L. REV. 628, 650 (1983). Even contemporary news accounts that were supportive of the outcome expressed doubts about the opinion's analysis and influence. MOTOMURA, *supra* note 25, at 6.

[42] John SW Park, Note, *Race Discourse and Proposition 187*, 2 MICH. J. RACE & L. 175, 175 (1996).

[43] 908 F. Supp. 755, 764 (C.D. Cal. 1995) (granting preliminary injunction), *on motion for reconsideration*, 997 F. Supp. 1244 (C.D. Cal 1997) (reevaluating Proposition 187's provisions in light of subsequent congressional action on immigration policy).

[44] *See id.* at 774, 786-87.

[45] *See id.* at 774-75, 787.

[46] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2260-2276 (1996), codified at 8 U.S.C. §§ 1601-1645.

[47] *See* H.R. 4134, 104th Cong. § 1 (1996); H.R. 1377, 104th Cong. (1995). *See generally* María Pabón López & Diomedes J. Tsitouras, *From the Border to the Schoolhouse Gate: Alternative Arguments for Extending Primary Education to Undocumented Alien Children*, 36 HOFSTRA L. REV. 1243, 1245-46 (2008) (describing efforts to pass the Gallegly amendment); Jaclyn Brickman, Note, *Educating Undocumented Children in the United States: Codification of* Plyler v. Doe *Through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385, 391 (2006) (same).

amendment collapsed under a veto threat from President William Jefferson Clinton.[48]

Since then, there have been efforts at the state, local, and federal level to restrict undocumented immigration. Although a few initiatives have targeted access to public elementary and secondary schools, these generally have not been direct assaults on *Plyler*. Instead, educational administrators have tried to subvert the decision through residency requirements and demands for documentation of a child's immigration status.[49] Following Arizona's adoption of restrictionist immigration legislation in 2010, some states adopted laws that effectively limited undocumented students' access to education.[50] Alabama passed a statute that required public schools to verify and report on the immigration status of their pupils.[51] A coalition of immigrant and civil rights activists filed suit, and the Eleventh Circuit Court of Appeals

[48] *See* López & Tsitouras, *supra* note 47, at 1245; Brickman, *supra* note 47, at 391; Eric Schmitt, *G.O.P. Seems Ready to Drop Political Fight*, N.Y. TIMES (Sept. 18, 1996), https://www.nytimes.com/1996/09/18/us/gop-seems-ready-to-drop-political-fight.html [https://perma.cc/5NZH-4W5S]; Lynn Schnaiberg, *School Provision Stripped from Immigration Bill*, EDUC. WEEK (Oct. 2, 1996), https://www.edweek.org/ew/articles/1996/10/02/05immig.h16.html [https://perma.cc/TSY3-DNYG].

[49] *Public Education for Immigrant Students: Understanding* Plyler v. Doe, AM. IMMIGR. COUNCIL (Oct. 24, 2016), https://www.americanimmigrationcouncil.org/research/plyler-v-doe-public-education-immigrant-students [https://perma.cc/RF68-2YNR] (describing how public schools' demands for proof of immigration status deter students from enrolling); Tim Walker, *How Undocumented Students Are Turned Away from Public Schools*, NEA TODAY (Apr. 22, 2016), http://neatoday.org/2016/04/22/undocumented-students-public-schools/ [https://perma.cc/QX3Q-LY4C] (describing how districts discourage undocumented students from enrolling, for example, through application of residency requirements); *see also* OLIVAS, *supra* note 5, at 46-47, 97 (noting generally settled acceptance of *Plyler* in public elementary and secondary schools). *See generally* Udi Ofer, *Protecting* Plyler: *New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187, 204-22 (2012) (describing some state and local efforts to undermine *Plyler* by requiring proof of immigrant status and lawful residency).

[50] KEVIN LINDSEY, ACCESS TO EDUCATION: CHALLENGES AND OPPORTUNITIES FOR IMMIGRANT STUDENTS 1 (released 2013; updated 2014), firstfocus.org/wp-content/uploads/2013/12/Education-Access-for-Immigrant-Students-2014-06-10-2 [https://perma.cc/9QXF-XYEL]; Kevin R. Johnson, *The* Keyes *to the Nation's Educational Future: The Latina/o Struggle for Educational Equity*, 90 DENV. U. L. REV. 1231, 1238-42 (2013) [hereinafter *The* Keyes *to the Nation's Educational Future*]; María Pabón López et al., *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama's H.B. 56 and Other State Immigration Measures*, 6 FIU L. REV. 231, 234-40, 243, 245-48 (2011).

[51] 2011 Ala. Laws 535, § 28 (codified at ALA. CODE § 31-13-27).

eventually struck down the requirement as unconstitutional.[52] In response to restrictionist efforts like these, the Obama administration issued new guidelines advising schools that they were not permitted to inquire about immigration status.[53] More recently, in 2017, restrictionists were emboldened by the Trump administration's anti-immigrant rhetoric and sought to ban the undocumented from schools in San Bernardino County in California. The group also petitioned the district to charge tuition to the U.S.-born children of the undocumented, even though these students are citizens.[54] Despite these efforts, *Plyler*'s mandate has been widely accepted, perhaps because the estimated number of undocumented children in public schools remains relatively small and unobtrusive.[55]

Outside the realm of elementary and secondary education, *Plyler*'s call for fairness and inclusion has not repelled attacks on public benefits for the undocumented, including access to state colleges and universities.[56] As a result, undocumented students face a patchwork of approaches to

[52] Hispanic Interest Coal. of Ala. v. Bentley, 691 F.3d 1236, 1244-49 (11th Cir. 2012); *see also* United States v. Alabama, 691 F.3d 1269, 1297 (11th Cir. 2012).

[53] Letter from Catherine E. Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Philip H. Rosenfelt, Deputy Gen. Counsel, U.S. Dep't of Educ. & Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to U.S. Dep't of Educ. & U.S. Dep't of Justice (May 8, 2014), https://www2.ed.gov/ocr/letters/colleague-201405.pdf [https://perma.cc/TPN9-62TC]. This letter updated an earlier one circulated on May 6, 2011 in response to state initiatives ordering public schools to ask students about their immigration status. *Id.* at 1. For a discussion of the Alabama statute, the ensuing litigation, and the resulting federal guidance, see Sean Mussey, *Fixing Alabama's Public School Enrollment Requirements in H.B. 56: Eliminating Obstacles to an Education for Unauthorized Immigrant Children*, 2014 BYU EDUC. & L.J. 233 (2014).

[54] *See* LEO R. CHAVEZ, ANCHOR BABIES AND THE CHALLENGE OF BIRTHRIGHT CITIZENSHIP 39 (2017).

[55] A 2018 study by the Migration Policy Institute found that an estimated 98,000 undocumented students graduate from high school each year, with 27% from California and 17% from Texas. JIE ZONG & JEANNE BATALOVA, MIGRATION POL'Y INST., HOW MANY UNAUTHORIZED IMMIGRANTS GRADUATE FROM U.S. HIGH SCHOOLS ANNUALLY? 3-4 (2019), https://www.migrationpolicy.org/research/unauthorized-immigrants-graduate-us-high-schools [https://perma.cc/L3MP-Z69T]. By contrast, about 3.6 million students graduate from public and private high schools each year in the United States. *Fast Facts: Back to School Statistics*, NAT'L CTR. EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=372 [https://perma.cc/MPP3-N8PS].

[56] *See* MOTOMURA, *supra* note 25, at 9; Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of* Plyler v. Doe, 44 U. PITT. L. REV. 409, 429 (1983); Alaine Patti-Jelsvik, *Re-Educating the Court: Proposition 187 and the Deprivation of Education to Undocumented Immigrants*, 18 WHITTIER L. REV. 701, 716 (1997); Laura S. Yates, Plyler v. Doe *and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Immigrants Be Eligible for In-State College Tuition Rates?* , 82 WASH. U. L.Q. 585, 592 (2004).

eligibility. Some states, particularly those with large immigrant populations, have opened their public colleges and universities to undocumented students. Texas, for example, was the first to allow these students to pay in-state tuition.[57] Although undocumented youth are ineligible for federal financial aid, a small number of states permit them to receive state scholarships or to enroll in tuition-free programs.[58] Still other states charge the undocumented non-resident tuition and deny them state financial aid.[59] A few even ban undocumented students altogether from public colleges and universities.[60] This unsettled landscape of public higher education for unauthorized immigrants shows the limited reach of *Plyler*'s constitutional protections.

II. *PLYLER*'S PROGENY: THE TRANSITION FROM CHILDHOOD INNOCENCE TO ADULT ILLEGALITY

Plyler recognized that undocumented students are entitled to a meaningful opportunity to become capable adults.[61] This commitment in turn laid the foundation for ongoing contests over the "right to have rights"[62] critical to full participation in American life. For many

[57] *See* Diana Ali, *In-State Tuition for Undocumented Students: 2017 State-Level Analysis*, NASPA STUDENT AFFAIRS ADMIN. HIGHER EDUC. (July 21, 2017), https://www.naspa.org/rpi/posts/in-state-tuition-for-undocumented-students-2017-state-level-analysis [https://perma.cc/83F5-UHB6] (noting that Texas was the first state to adopt an in-state tuition policy for undocumented students and describing recent attempts to repeal the policy); *Keep In-State Tuition for Immigrants*, SAN ANTONIO EXPRESS NEWS (Mar. 23, 2019) https://www.mysanantonio.com/opinion/editorials/article/Keep-in-state-tuition-for-immigrants-13709960.php [https://perma.cc/7KH9-94CZ].

[58] Ashley A. Smith, *More States are Encouraging Undocumented Students to Pursue Tuition-Free Programs*, INSIDE HIGHER EDUC. (Mar. 12, 2019), https://www.insidehighered.com/news/2019/03/12/more-states-are-encouraging-undocumented-students-pursue-tuition-free-programs [https://perma.cc/YQ2W-7F2Z]; *Undocumented Student Tuition: Overview*, NAT'L CONF. ST. LEGIS. (Sept. 19, 2019) http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx [https://perma.cc/W44U-G9EW].

[59] *See Undocumented Student Tuition: Overview*, *supra* note 58.

[60] *See id.*; Bill Rankin & Eric Stirgus, *Atlanta Court Upholds University System Ban on Unauthorized Immigrants*, ATLANTA J. CONST. (Mar. 6, 2019), https://www.ajc.com/news/local/atlanta-court-upholds-university-system-ban-unauthorized-immigrants/IxwkDzIV8VAwjRHY76fPiK/ [https://perma.cc/3RS8-QXLQ] (upholding Georgia law excluding undocumented students from the state's three most selective colleges and universities).

[61] *See* Plyler v. Doe, 457 U.S. 202, 223 (1982) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954), which emphasized that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education").

[62] *See* NICHOLLS, *supra* note 20, at 1.

undocumented students, the significance of these protracted struggles, both legal and political, has been revealed only when they leave the safe haven of public elementary and secondary schools. *Plyler*'s protections permit these youth to become de facto Americans through their early educational experiences, but graduation brings home the harsh reality of their de jure denial of citizenship.[63] Take, for example, Eduardo, who moved to North Carolina at the age of seven. Even though the state's political climate for undocumented immigrants was hostile, Eduardo did not want to leave "because that's where I grew up . . . . Even though we're Mexican and Hispanic . . . we have nothing to do in our country 'cause this country is the country that's given us everything: food, shelter, education, everything."[64] At school, undocumented students like Eduardo shared common experiences with classmates that reinforced a sense of safety and belonging.[65] As Lilia explained,

> They say go back to your country, but I don't even know the Mexican national anthem. It's kind of embarrassing around my cousins from Mexico, but I didn't grow up there. I sure do know all of our national songs, 'My Country, 'Tis of Thee,' 'America the Beautiful.' We learned them in school. It's like every American kid knows those songs because we learn them in school. I think that means something. It says something about me, where I'm from. It connects us.[66]

As these stories show, *Plyler*'s safeguards have enabled undocumented students not only to mature into capable adults but to feel like Americans while doing so.

When undocumented students graduate from high school and *Plyler*'s protections come to an end, that sense of connection to the United States is abruptly broken. These youth encounter daunting barriers to obtaining higher education or a job. Sociologist Roberto G. Gonzales describes this coming of age as "itself a turning point: it begins the *transition to illegality*."[67] One youth, Rodolfo, described the shock of this transition: "I never actually felt like I wasn't born here. Because when I

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[63] Indeed, restrictionists who advocated for a zero-tolerance policy on immigration expressed fears that *Plyler* eventually would allow the undocumented "to accumulate a range of additional rights and privileges in a slow and incremental way." *Id.* at 24.

[64] *See* ALEXIS M. SILVER, SHIFTING BOUNDARIES: IMMIGRANT YOUTH NEGOTIATING NATIONAL, STATE AND SMALL-TOWN POLITICS 106 (2018).

[65] ROBERTO G. GONZALES, LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA 76 (2015).

[66] *Id.*

[67] *Id.* at 96.

came I was like ten and a half. I went to school. I learned the language. I first felt like I was really out of place when I tried to get a job."[68] That was because "I didn't have a Social Security number. Well, I didn't even know what it meant. You know — Social Security, legal, illegal. I didn't even know what that was. But when I actually wanted to get a job, I couldn't because I didn't have a Social Security number."[69]

Eventually, youth like Rodolfo came to realize that their adult lives would be marked by marginality and disadvantage, a return to the shadows cast by their illegal status. The upshot has been "disillusionment for undocumented students, many of whom [had] already internalized U.S. values that guarantee upward mobility for those who succeed academically."[70] According to Gonzales, "earlier experiences of inclusion and belonging provided some legitimate cause to question the overriding importance of illegality, [but] in adulthood exclusions far outnumbered inclusions."[71] In fact, these young adults found that they "were as limited as their parents,"[72] despite *Plyler*'s promise of full personhood.[73]

That dawning disappointment led some undocumented youth to mobilize, and the Dreamers movement was born. Although *Plyler* did not transform the rights of the undocumented outside of elementary and secondary schools, its recognition of the students' innocence became an important platform for demanding justice.[74] The Dreamers contended that despite their blamelessness, they were subject to punitive measures that prevented them from pursuing meaningful adult lives.[75] At the same time, immigrant rights organizations were looking for "'niche openings' for groups of immigrants, including students, youths, children, family members, and workers in certain sectors, who [might] be considered deserving of some form of legal residency status."[76] With that notion in mind, "[t]he phrase, 'no fault of their own' became a standard talking point" for the Dreamers,[77] one firmly rooted

[68] *See id.* at 97.

[69] *Id.*

[70] *See id.* at 101 (citing Leisy J. Abrego, *I Can't Go to College Because I Don't Have Papers: Incorporation Patterns of Undocumented Latino Youth*, 4 LATINO STUD. 212, 223 (2006)).

[71] *Id.* at 199.

[72] *Id.* at 200.

[73] *Id.*

[74] *See* MOTOMURA, *supra* note 25, at 17-18.

[75] *See* NICHOLLS, *supra* note 20, at 69.

[76] *See id.* at 10.

[77] *See id.* at 53.

in the Court's analysis in *Plyler*. Because undocumented youth's formal status and lived experience were at loggerheads, one college president described immigration reform as a "pathway to innocence" that would align the youth's legal classification with their de facto status as authentic Americans.[78]

The innocence of the Dreamers' arrival — as acknowledged by *Plyler* — was bolstered by their virtuous behavior after coming to the United States. The responsible exercise of freedom, including their outstanding performance in public schools, became a critical part of the Dreamers' narrative.[79] That carefully crafted message was reflected in President Obama's 2011 State of the Union address:

> Today, there are hundreds of thousands of students excelling in our schools who are not American citizens. Some are the children of undocumented workers, who had nothing to do with the actions of their parents. They grew up as Americans and pledge allegiance to our flag, and yet they live every day with the threat of deportation.[80]

When a group of undocumented youth posed for the cover of *Time* magazine in 2012, the headline read: "WE ARE AMERICANS," and the last line of the article asked, "When will you realize that we are one of you?"[81]

Importantly, this very exercise of voice was another way that the Dreamers demonstrated that they were part of the nation's democratic processes. As legal scholar Jennifer Gordon has noted, the conventional wisdom is that political power derives from "votes or money."[82] Undocumented youth could not readily command either of these resources, but instead they had to deploy "[s]trategic resourcefulness — the ability to recognize and leverage new opportunities."[83] By participating actively in the political process, the Dreamers committed themselves to acts of "noncitizen citizenship."[84] That is, they used talk about rights — undoubtedly inspired by *Plyler*

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[78] *Id.*

[79] *See id.* at 54.

[80] President Barack Obama, State of the Union Address (Jan. 25, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/25/remarks-president-state-union-address [https://perma.cc/J2FX-MW82].

[81] SILVER, *supra* note 64, at 128.

[82] JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 262 (2005).

[83] *Id.* at 263.

[84] *See id.* at 237.

— to "develop[] a vision of themselves as legitimate and capable actors in the political system."[85] In the process, they expanded "the boundaries of the law's definition of who was entitled to do the work of citizenship."[86]

Demonstrating their non-citizen citizenship through a message of exceptional virtue and moral desert could divide the Dreamers from other undocumented immigrants. Most importantly, their innocence tacitly implied their parents' guilt.[87] In addition, some students felt unable to participate in the movement because they were not model students who aspired to attend college. As Gustavo put it, "Isn't that for people with good grades?"[88] Other undocumented youth simply did not share their peers' faith in the political process. When Eduardo described posters for the Dreamers that said, "Believe," he asked, "Believe? I mean, that has been going on for so long. Who are you supposed to believe in?"[89] Despite doubts like Eduardo's, the Dreamers became a powerful voice for immigration reform, and the federal government began to take notice.

III. THE DREAMERS AND THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROGRAM

By the 1990s, the Dreamers had become a highly effective constituency in demanding changes to the nation's immigration laws. Even so, they faced significant obstacles in pursuing federal legislation that would end their transition to illegality and provide them with a path to citizenship. Ultimately, despite intense and sustained effort, the Dreamers had to settle for executive action by President Obama's administration, which afforded them temporary relief from the threat of deportation and the opportunity to apply for a renewable authorization to work legally in the United States. But without congressional action to create a path to citizenship, that protection ultimately proved to be highly unstable.

In 2001, Congress had addressed the Dreamers' demands by introducing the Development, Relief, and Education for Alien Minors

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85 *See id.* at 272.

86 *Id.*

87 *See* NICHOLLS, *supra* note 20, at 57; *see also* Chazaro, *supra* note 12, at 357-58 (describing the construction of deserving and undeserving immigrants as part of a politics of respectability).

88 *See* SILVER, *supra* note 64, at 137.

89 *Id.*

("DREAM") Act.[90] Over the years, various versions of the act proposed a path to permanent residency (and hence to citizenship) for those who entered the United States as minors; resided in the country for a specified period of time; completed high school, got a GED, or served in the military; were of good moral character and had no criminal record; and remained below a specified age threshold.[91] In 2007, one year before President Obama was elected, Congress once again failed to enact the DREAM Act.[92] On the campaign trail, Obama had promised to pass comprehensive immigration reform that would address the swelling ranks of undocumented immigrants.[93] However, when he arrived at the White House in January 2009, immigration took a back seat to other legislative priorities — among them, passing the landmark Affordable Care Act and battling the persistent and vocal opposition of the Tea Party.[94]

With congressional efforts on immigration reform at a standstill, Secretary of Homeland Security Janet Napolitano issued a policy statement in mid-November 2009. She described a "three-legged stool"

[90] *See* DREAM Act of 2001, S. 1291, 107th Cong. (2002) (introduced 2002); *see also* Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 UC DAVIS L. REV. 343, 360 (2018) [hereinafter *Lessons About the Future*].

[91] SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 89-90 (2015); Johnson, *Lessons About the Future*, *supra* note 90, at 360; *see also* OLIVAS, *supra* note 5, at 69-72. In June 2019, the House of Representatives passed the American Dream and Promise Act, which would grant Dreamers ten years of legal resident status if they meet specified eligibility requirements. After that, they would receive permanent green cards if they complete two years of higher education or military service or work for three years. H.R. 6, 116th Cong. (1st Sess. 2019). Similar legislation has been introduced in the Senate but is unlikely to be considered. Dream Act of 2019, S. 874, 116th Cong. (1st Sess. 2019); Felicia Sonmez, *House Passes Immigration Bill to Protect 'Dreamers,' Offer a Path to Citizenship*, WASH. POST (June 4, 2019), https://www.washingtonpost.com/powerpost/house-poised-to-pass-immigration-bill-that-would-protect-dreamers/2019/06/04/bac5cf98-86d7-11e9-a491-25df61c78dc4_story.html?utm_term=.19df0a3b3fc6 [https://perma.cc/S75X-8HFR].

[92] DREAM Act of 2007, S. 2205, 110th Cong. (1st Sess. 2007).

[93] Josh Hicks, *Obama's Failed Promise of a First-Year Immigration Overhaul*, WASH. POST (Sept. 25, 2012), https://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258_blog.html [https://perma.cc/JVQ6-6UFA].

[94] *Id.*; *see* Shikha Dalmia, *Obama Failed Immigrants. They're Paying for it Now*, WEEK (Jan. 10, 2018), https://theweek.com/articles/746663/obama-failed-immigrants-theyre-paying-now [https://perma.cc/YQ9G-Y4RV]; *see also* President Barack Obama, State of the Union Address (Jan. 27, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address [https://perma.cc/RF9Y-8Y2U] (emphasizing need for financial reform and clean energy to deal with climate change as well as health care). *See generally* NICHOLLS, *supra* note 20, at 77 (describing the political trade-offs that stymied comprehensive immigration reform).

that included "a commitment to serious and effective enforcement, improved legal flows for families and workers, and a firm but fair way to deal with those who are already here."[95] Just one year after Napolitano released her memorandum, the DREAM Act still languished in Congress.[96] These repeated setbacks were disheartening and even prompted the Dreamers to reconsider their image as innocent youth who played by the rules. One undocumented youth, Mariano, described how he and other activists responded to yet another defeat in Congress. Weeping as they congregated on the main floor of the congressional building, they chanted, "We are the DREAMers. The mighty mighty DREAMers."[97] When security asked them to leave, they refused, an experience that Mariano remembered as "really powerful."[98] Reflecting this newfound openness to civil disobedience, some dissident Dreamers rebelled against their conventional image and opted for more confrontational ways of expressing themselves. By 2010, they had occupied the Senate Office Building, shut down a major Los Angeles thoroughfare to protest in front of the federal building, and participated in hunger strikes and freedom rides.[99]

Rather than emphasize their exceptionalism, some Dreamers began to embrace a broader vision of reform under the rubric "Not One More" by protesting the deportation of all undocumented immigrants, not just the most deserving.[100] According to one Dreamer's manifesto, leading immigrant organizations no longer would "fram[e] our stories in ways that are damaging and contain[] our migrant bodies in neat boxes with pretty labels."[101] With that shift came an open challenge to simplistic distinctions between guilt and innocence. As one activist observed,

> A key talking point in the past was that we were brought here by "no fault of our own." . . . Now what we do is intentionally

[95] Janet Napolitano, U.S. Sec'y of Homeland Sec., Prepared Remarks on Immigration Reform at the Center for American Progress (Nov. 13, 2009), https://www.dhs.gov/news/2009/11/13/secretary-napolitanos-speech-immigration-reform [https://perma.cc/5MKT-PDWC].

[96] DREAM Act of 2010, S. 3992, 111th Cong. (2nd Sess. 2010).

[97] SILVER, *supra* note 64, at 135.

[98] *Id.*

[99] NICHOLLS, *supra* note 20, at 86.

[100] Walter Nicholls & Tara Fiorito, *Dreamers Unbound: Immigrant Youth Mobilizing*, NEW LAB. F.: CUNY SCH. LAB. & URB. STUD. (Jan. 2015), https://newlaborforum.cuny.edu/2015/01/19/dreamers-unbound-immigrant-youth-mobilizing/ [https://perma.cc/YV5X-PSHX].

[101] NICHOLLS, *supra* note 20, at 96 (emphasis omitted).

> let people know that we don't agree with that statement. We no longer say "through no fault of our own." We now say we were brought here by our parents who are courageous and responsible and would not let their children die and starve in another country.[102]

Despite this shift in strategy, the Obama administration eventually offered relief that was carefully crafted to reflect the Dreamers' powerful narrative of upward mobility and personal desert.

Caught between congressional inaction and intensifying protest, the Department of Homeland Security found itself in an increasingly untenable position. In 2011, John Morton, then Director of Immigration and Customs Enforcement ("ICE"), began to set the stage for systematic executive action by laying out the agency's enforcement priorities in light of limited resources.[103] According to Morton, ICE had the capacity to deport 400,000 individuals per year, which amounted to just 4% of the estimated undocumented population living in the United States at that time.[104] Building on Morton's memorandum, in mid-2012 Napolitano instructed David Aguilar, Acting Commissioner of U.S. Customs and Border Protection, to establish the DACA program as a way to protect "certain young people who were brought to this country as children and know only this country as home."[105] The memorandum made it a low priority to enforce immigration laws if an individual had arrived in the United States while under the age of sixteen; had

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[102] *Id.* at 127.

[103] Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to All ICE Employees, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [https://perma.cc/E37T-ZNM8] [hereinafter Morton March 2, 2011 Memorandum]; Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to All Field Officers, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf [https://perma.cc/67NB-MGDC]; Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to All Field Officers et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/8GN6-8KPQ].

[104] Morton March 2, 2011 Memorandum, *supra* note 103, at 1. After the Morton memoranda were issued, Immigration and Customs Enforcement officials conducted a pilot project to determine how criteria for designating low-priority cases would affect pending enforcement actions in Baltimore and Denver. Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL OF RTS. J. 463, 495-96 (2012).

[105] Napolitano 2012 Memorandum, *supra* note 14.

continuously resided in the United States for at least five years; was currently in school, had graduated from high school, had obtained a GED, or was an honorably discharged veteran; had not been convicted of a felony, a serious misdemeanor, or multiple misdemeanors and did not otherwise pose a threat to national security or public safety; and was not over the age of thirty.[106] The memorandum made clear that it "confer[red] no substantive right, immigration status or pathway to citizenship" because "[o]nly the Congress, acting through its legislative authority, can confer these rights."[107] After the DACA program was created, the House passed legislation to terminate it, but the bill died in the Senate. Just as Congress had failed to enact the DREAM Act, it was incapable of taking decisive steps to overturn DACA.[108]

DACA had an immediate effect on the lives of undocumented youth. Until the program was established, the Dreamers could not work their way through college or legally obtain jobs after graduation. This often meant that higher education was financially beyond their reach.[109] DACA's impact is evident in the story of Esperanza Rivas, who was a star at her Long Beach high school and eventually gained admission to the University of California.[110] Without DACA, she struggled to graduate from college because she was ineligible for federal and state financial aid and legally barred from applying for jobs.[111] Even when Rivas graduated with a prestigious college degree, she could not obtain steady employment commensurate with her credentials, had to perform menial work in the shadow economy, and remained subject to the threat of deportation.[112] After Rivas became a DACA beneficiary, she was able to find a stable job and get a credit card and driver's license.[113]

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106 *Id.* at 1.

107 *Id.* at 3.

108 *See* Emma Dumain, *Republicans Vote to End DACA After Tense Floor Debate,* ROLL CALL (Aug. 1, 2014, 9:58 PM), https://www.rollcall.com/news/republicans-vote-to-end-daca [https://perma.cc/YZ5J-KGVS]. President Obama had also threatened to veto the bill. *Id.* It is worth noting that no new funds were allocated to support the implementation of the DACA program, either. *See* Els de Graauw & Shannon Gleeson, An Institutional Examination of the Local Implementation of the DACA Program 1 (Ctr. for Nonprofit Strategy & Mgmt. Working Paper Series, 2016), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1186&context=workingpapers [https://perma.cc/XH3U-AM9N].

109 *See* SILVER, *supra* note 64, at 5-6, 90-99, 103, 157.

110 *See* GONZALES, *supra* note 65, at 3, 152.

111 *See id.* at 155.

112 *Id.* at 3-4.

113 *Id.* at 204.

For some Dreamers, DACA even made it possible to pursue legal careers, perhaps the ultimate rebuff to a transition to illegality. Jose Godinez-Samperio was a Dreamer from Florida who excelled in school, went to college, earned a law degree, and passed the state bar exam.[114] He received a work permit under DACA in 2012, but the Florida Supreme Court rejected his petition for admission to the bar in 2014.[115] That decision was especially dispiriting because only two months before, California had granted a law license to Sergio Garcia, who actually was ineligible for DACA due to his age.[116] Later, the Florida legislature approved Godinez-Samperio's admission to the bar, and he became the first undocumented person in the state's history to become a practicing lawyer.[117] In 2016, the New York courts allowed yet another Dreamer, Cesar Vargas, to join the state bar.[118]

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[114] Steve Bousquet, *Florida Supreme Court Rules Immigrant Cannot Join Bar*, MIAMI HERALD (Mar. 6, 2014, 2:07 PM), https://www.miamiherald.com/news/politics-government/article1961069.html; Lorelei Laird, *The Dream Bar: Some Children Illegally Living in the United States Grow Up to Want to Be Attorneys*, ABA J. (Jan. 1, 2013, 10:59 AM), http://www.abajournal.com/magazine/article/the_dream_bar_some_children_living_in_the_united_states_illegally [https://perma.cc/M8CX-ZG6A]; Katie Mettler, *Undocumented Immigrant Jose Godinez-Samperio Tells of Becoming Lawyer*, TAMPA BAY TIMES (Oct. 22, 2014), http://www.tampabay.com/news/courts/from-undocumented-immigrant-to-lawyer-jose-godinez-samperio-to-tell-his/2203066 [https://perma.cc/9VH3-F4CD].

[115] Fla. Bd. of Bar Exam'rs Re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Fla. Bar., 134 So. 3d 432, 434 (Fla. Sup. Ct., Mar. 6, 2014).

[116] Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. U. L. REV. 65, 84 (2017) [hereinafter *Within You Without You*]; *see In re* Sergio C. Garcia on Admission, 315 P.3d 117 (Cal. 2014); Jennifer Medina, *Allowed to Join the Bar, But Not to Take a Job*, N.Y. TIMES (Jan. 2, 2014), https://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html [https://perma.cc/R5XA-5SY8].

[117] Mettler, *supra* note 114.

[118] *In re* Application of Cesar Adrian Vargas for Admission to the Bar of the State of N.Y., 131 A.D. 3d 4, 5 (N.Y. App. Div. 2015); Liz Robbins, *An Immigrant's Four-Year Fight to Become a Lawyer Ends in Celebrations*, N.Y. TIMES (Feb. 3, 2016), https://www.nytimes.com/2016/02/04/nyregion/immigrants-4-year-legal-fight-to-become-a-lawyer-ends-in-celebration.html [https://perma.cc/Z6DA-EK7W]. A number of other states, including Arizona, Illinois, Nebraska, New Jersey, Oregon, Pennsylvania, and Wyoming, have now admitted undocumented law graduates to the bar, and two other states, New Mexico and Utah, are considering this possibility. Bruce Goldman, *How Unauthorized Immigrants Are Fighting to Practice Law*, LAW 360 (Aug. 11, 2019, 9:40 PM), https://www.law360.com/articles/1186579/how-unauthorized-immigrants-are-fighting-to-practice-law [https://perma.cc/F5TV-PNMT]. For a comprehensive treatment of states' approaches to occupational licensing of undocumented students, see generally Olivas, *Within You Without You*, *supra* note 116, at 82-163.

Despite these success stories, the Dreamers have been acutely aware of the precariousness of their achievements.[119] A number of them worried about turning personal information over to the federal government when submitting a DACA application:

> My understanding is that DACA isn't a law, so it could change. What if this president isn't happy with us having an opportunity and wants to take something away from us? You do get kind of scared. What if this next person wants us out? If they do want us out, then they have us on file, and we're ready to go.[120]

Eventually, when President Trump's administration rescinded DACA, these fears became more than hypothetical.

IV. POLITICAL VICISSITUDES AND THE PATH TO DACA'S RESCISSION

The Dreamers' anxieties about DACA's termination initially seemed unfounded. On the contrary, the Obama administration moved to expand the program in 2014. Napolitano's successor, Secretary Jeh Johnson, issued a memorandum that removed the age cap for eligible individuals, lengthened the renewal period from two to three years, and adjusted the date-of-entry requirement to include more arrivals.[121] More controversially, Johnson authorized the Deferred Action for Parents of Americans ("DAPA") program to protect "hard-working people who [like DACA recipients] have become integrated members of American society."[122] DAPA made enforcement a low priority for undocumented parents with a child who was a citizen or permanent resident if the parents had continuously resided in the United States since 2010; were physically present in the United States when the DAPA program was created and when they made a request for deferred action; had not otherwise been an enforcement priority; presented no other factors that

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[119] *See* Lorraine T. Benuto et al., *Undocumented, to DACAmented, to DACAlimited: Narratives of Latino Students with DACA Status*, 40 HISP. J. BEHAV. SCI. 259, 268-72 (2018).

[120] SILVER, *supra* note 64, at 90.

[121] Memorandum from Jeh Charles Johnson, U.S. Sec'y of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship and Immigration Servs. et al., 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 U.S. Citizens or Permanent Residents 3-4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [https://perma.cc/S2AX-Z56J] [hereinafter Johnson 2014 Memorandum].

[122] *Id.* at 3; *see also* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 163 (2015) (describing House Republicans' response to DAPA).

made deferred action inappropriate; and had no lawful status when the memorandum was issued.[123] The 2014 memorandum reiterated that it "confer[red] no substantive right, immigration status or pathway to citizenship."[124]

In response, Texas along with twenty-five other states filed suit to challenge DACA's expansion and DAPA's adoption.[125] The plaintiffs alleged that these efforts to broaden the scope of deferred action did not comply with requirements under the Administrative Procedure Act ("APA").[126] According to the plaintiffs, each program was not merely an exercise of prosecutorial discretion but instead created new administrative rules. As a result, the changes should have been adopted only after notice-and-comment rulemaking.[127] To bolster this claim, the plaintiffs pointed out that under the original DACA program, there had been few, if any, discretionary judgments in processing applications.[128] Instead, because DACA operated as a set of rules, nearly all applications were granted except those that failed on technical or clerical grounds.[129] The federal district court and the Fifth Circuit Court of Appeals both concluded that the plaintiffs were likely to succeed on the merits of this claim.[130]

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123 Johnson 2014 Memorandum, *supra* note 121, at 4.

124 *Id.* at 5.

125 Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016); *see also* Jeffrey Toobin, *American Limbo: While Politicians Block Reform, What Is Happening to Immigrant Families?* , NEW YORKER (July 20, 2015), https://www.newyorker.com/magazine/2015/07/27/american-limbo [https://perma.cc/D9M4-4JBW].

126 *Texas*, 86 F. Supp. 3d at 647.

127 *See id.* at 664-72.

128 During the program's early years, the denial rate was just 1%. Stephen Dinan, *DACA Denial Rate Doubles Under Trump Administration*, WASH. TIMES (Sept. 20, 2017), https://www.washingtontimes.com/news/2017/sep/20/daca-denial-rate-doubles-under-donald-trump-admini/ [https://perma.cc/T8GA-9HZ2]; *see also* Olivas, *Within You Without You*, *supra* note 116, at 81 (providing statistics on acceptances and denials of DACA requests from the program's inception in 2012 through 2016).

129 *See Texas*, 86 F. Supp. 3d at 609-10. In a pointed critique of the court's reasoning, Professor Anil Kalhan questioned the assumption that high approval rates implied that discretion was not being exercised. In his view, "given the high costs of applying and the severe potential consequences if applications are denied or deferred action is later revoked, one should fully expect approval rates to be high — since noncitizens with marginal applications have exceedingly powerful incentives not to apply in the first place." Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 92 (2015).

130 *See Texas*, 86 F. Supp. at 677; Texas v. United States, 809 F.3d 134, 171-83 (5th Cir. 2015).

In addition, the plaintiffs contended that DACA's expansion and DAPA's adoption exceeded the Department of Homeland Security's authority and so was substantively unlawful under the APA. According to the plaintiffs, the programs were "manifestly contrary" to the Immigration and Naturalization Act.[131] In particular, the program allowed undocumented immigrants to obtain the benefits of lawful presence without meeting stringent requirements for permanent residency and naturalization.[132] The Fifth Circuit concluded that the plaintiffs also were likely to succeed on this argument.[133] Finally, the plaintiffs invoked the Take Care Clause of the Constitution, which requires the President to faithfully execute the laws of the United States.[134] The lower courts did not reach this constitutional question because they were able to dispose of the case on statutory grounds.[135]

Concluding that the plaintiffs were likely to succeed on the merits, the district court issued a nationwide injunction enjoining implementation of the expanded DACA and DAPA programs, and the Fifth Circuit upheld the injunction.[136] The U.S. Supreme Court agreed to hear the case and asked the parties to brief both the constitutional and statutory questions.[137] As a result, some observers speculated that the Court would issue a sweeping decision based on the Take Care Clause as well as the Administrative Procedure Act.[138] With the death of Justice Antonin Scalia, however, that judicial calculus changed.[139] The Court simply affirmed the Fifth Circuit's ruling in a one-line, equally divided decision handed down on June 23, 2016.[140] Both the DACA expansion and the DAPA program were overturned,[141] but the

131 *Texas*, 809 F.3d at 186.

132 *See id.* at 179-80.

133 *See id.* at 186.

134 *See id.* at 149-50.

135 *See id.* at 146, 149.

136 *See Texas*, 86 F. Supp. 3d at 676, *aff'd*, 809 F.3d at 186-88.

137 *See* United States v. Texas, 136 S. Ct. 906 (2016).

138 *See* Garrett Epps, *Will the U.S. Supreme Court Tell Obama to 'Take Care'?* , ATLANTIC (Jan. 21, 2016), https://www.theatlantic.com/politics/archive/2016/01/supreme-court-united-states-texas/425031/ [https://perma.cc/9QHX-NBUG].

139 Jared Meyer, *Did Scalia's Death Just Win the Texas Immigration Case for Obama?* , FORBES (Feb. 16, 2016), https://www.forbes.com/sites/jaredmeyer/2016/02/16/did-scalias-death-just-win-the-texas-immigration-case-for-obama/#7c617dda8261 [https://perma.cc/DX6R-JHBB].

140 *See* Texas v. United States, 136 S. Ct. 2271 (2016) (per curiam).

141 *See* Memorandum from John F. Kelly, U.S. Sec'y of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et al., Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") (June 15, 2017).

Justices provided no guidance on precisely why the programs were impermissible. Although the Court's decision unsettled immigrant rights advocates, at least the original DACA program remained intact.

President Trump's election provided new cause for concern about DACA's future. When Trump was on the campaign trail, he promised to crack down on illegal immigration by securing the borders and deporting the undocumented.[142] At a rally in August 2016, he announced that he would "immediately terminate President Obama's two illegal executive amnesties [DACA and DAPA] in which he defied federal law and the Constitution to give amnesty to approximately 5 million illegal immigrants."[143] In January 2017, shortly after Trump was inaugurated, his administration issued an Executive Order on "Enhancing Public Safety in the Interior of the United States" that made clear that "[m]any aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety."[144] Far from assuming that some undocumented immigrants might be deserving, Trump's edict treated the entire population as presumptively dangerous. In fact, the Trump administration vowed to end enforcement exemptions for specified categories of immigrants.[145] Even so, just one month later, the President expressed ambivalence about the Dreamers and their vulnerability to deportation. He recognized that many were "absolutely incredible kids," and he wanted to treat them "with heart."[146]

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[142] JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION 25-26, 37-39 (2019); Mary Romero, *Trump's Immigration Attacks, in Brief*, 17 CONTEXTS 34, 35-36, 39 (2018), https://journals.sagepub.com/doi/full/10.1177/1536504218766549 [https://perma.cc/5V8R-KQP9]; Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), http://time.com/4473972/donald-trumpmexico-meeting-insult/ [https://perma.cc/6SVF-8MPJ]; *What Did Donald Trump Say About Immigrants?* , BOSTON GLOBE (June 29, 2015, 4:44 PM), https://www.bostonglobe.com/arts/television/2015/06/29/what-did-donald-trump-say-about-immigrants/ForaqpQHjwgeKRdVUdYrdM/story.html [https://perma.cc/RR86-7SVS].

[143] Katie Reilly, *Here's What Trump Has Said About DACA in the Past*, TIME (Sept. 5, 2017), https://time.com/4927100/donald-trump-daca-past-statements/ [https://perma.cc/5BS9-WF6W]. In fact, a transition team had already drafted an executive order to end DACA before Trump took office. DAVIS & SHEAR, *supra* note 142, at 53-54.

[144] Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

[145] *See id.*

[146] *See* Alan Gomez, *What is President Trump's Policy on DREAMers? It Keeps Changing*, USA TODAY (Feb. 7, 2018, 9:55 AM), https://www.usatoday.com/story/news/politics/2018/02/07/what-president-trumps-policy-dreamers-keeps-changing/

Despite those reservations, the Trump administration rescinded the original DACA program in early September 2017. The process began with a letter from Attorney General Jeff Sessions to Acting Secretary Elaine Duke at the Department of Homeland Security.[147] That letter stated that "DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result."[148] Sessions concluded that DACA was the product of "an unconstitutional exercise of authority" and was at risk of being struck down by the courts, just as the DAPA program had been.[149] The next day, the Department of Homeland Security released its "Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)," which echoed these concerns and terminated DACA.[150] Apparently, Duke was a reluctant messenger. As a result, the rescission memorandum simply recited the legal justifications in Sessions' letter and refrained from adding any new policy rationales.[151] The memorandum made clear that the department would not accept new applications or renewal requests but would address pending applications on a case-by-case basis and would not revoke prior grants of deferred action.[152] Unsurprisingly, a series of federal lawsuits ensued, challenging the rescission's legality.[153] Interestingly, once these cases wended their way to the Supreme Court, Trump's sympathies for DACA recipients largely evaporated. In fact, he

312783002/ [https://perma.cc/25WK-7BW3] (quoting President Trump's remarks at a February 2016 White House ceremony). *See generally* DAVIS & SHEAR, *supra* note 142, at 21-22, 156-57, 159-62, 173-77 (describing Trump's ambivalence about DACA and aides' concerns that he would not terminate the program).

147 *See* Letter from Attorney Gen. Jefferson B. Sessions III to Acting Sec'y Elaine Duke (Sept. 4, 2017), https://www.justice.gov/opa/speech/file/994651/download [https://perma.cc/LV7D-HPXK].

148 *Id.*

149 *See id.*

150 *See* Duke 2017 DACA Memorandum, *supra* note 15, at 2-4.

151 DAVIS & SHEAR, *supra* note 142, at 170-72, 174.

152 *See* Duke 2017 DACA Memorandum, *supra* note 15, at 4-5.

153 *See, e.g.*, Alan Neuhauser, *In Ending DACA, Trump Trades a Lawsuit From the Right for Lawsuits From the Left*, U.S. NEWS & WORLD REP. (Sept. 5, 2017, 8:42 PM), https://www.usnews.com/news/national-news/articles/2017-09-05/in-ending-daca-trump-trades-a-lawsuit-from-the-right-for-lawsuits-from-the-left [https://perma.cc/U5N3-6R8B]; Nicola Ai Ling Prall, *Lawsuits Over Rescission of DACA*, NAT'L L. REV. (Sept. 14, 2017), https://www.natlawreview.com/article/lawsuits-over-rescission-daca [https://perma.cc/ZU89-W2PV].

tweeted that many of them are "no longer very young, are far from 'angels,'" and that "[s]ome are very tough, hardened criminals."[154]

V. FIGHTING BACK IN THE COURTS: LITIGATION OVER DACA'S RESCISSION

Following DACA's rescission, plaintiffs filed suit in federal court in California (*Regents of the University of California v. Department of Homeland Security*),[155] the District of Columbia (*National Association for the Advancement of Colored People v. Trump*),[156] Maryland (*Casa de Maryland v. Department of Homeland Security*),[157] New York (*Battalla Vidal v. Nielsen*),[158] and Texas (*Texas v. United States*).[159] The California, District of Columbia, Maryland, and New York cases challenged the rescission under the APA as well as the Equal Protection Clause.[160] By contrast, the Texas lawsuit claimed that the U.S. government failed to live up to its obligations under a stipulation mandating an end to the original DACA program as well as the expanded DACA and DAPA programs.[161] The Supreme Court has granted certiorari to resolve issues related to the termination under the APA and equal protection law.[162]

As with the prior challenge to DACA's expansion and DAPA's creation, litigants primarily have focused on whether the rescission

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[154] Adam Liptak, *Supreme Court Appears Ready to Let Trump End DACA Program*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/11/12/us/supreme-court-dreamers.html [https://perma.cc/DAU8-V4BG].

[155] 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (granting preliminary injunction); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 298 F. Supp. 3d 1304 (N.D. Cal 2018) (sustaining APA and equal protection claims), *aff'd*, 908 F.3d 476 (9th Cir. 2018).

[156] 298 F. Supp. 3d 209 (D.D.C. 2018) (vacating DACA's rescission), *order partially stayed pending appeal*, 321 F. Supp. 3d 143 (D.D.C. 2018).

[157] 284 F. Supp. 3d 758 (D. Md. 2018) (denying motion for preliminary injunction).

[158] Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) (granting motion for preliminary injunction); Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018) (upholding APA and equal protection claims).

[159] Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (denying motion for preliminary injunction to enjoin DACA program).

[160] *See Batalla Vidal*, 279 F. Supp. 3d at 407-09; *Batalla Vidal*, 291 F. Supp. 3d at 269-72, 274-79; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1027-28; Nat'l Ass'n for the Advancement of Colored People v. Trump (*NAACP*), 298 F. Supp. 3d 209, 223 (D.D.C. 2018); Casa de Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 762-63 (D. Md. 2018).

[161] *See Texas*, 328 F. Supp. 3d at 672-73.

[162] *See* 139 S. Ct. 2779 (2019) (granting certiorari in the federal cases in the District of Columbia, New York, and California).

violates the APA.[163] One argument is procedural, alleging that DACA cannot be rescinded without notice-and-comment rulemaking.[164] Of course, DACA itself was adopted without the benefit of such a process.[165] Generally, the lower courts have concluded that both DACA's adoption and its rescission were exercises of prosecutorial discretion that did not require notice and comment.[166] Only the federal district court in Texas found that DACA itself should have been subject to this process.[167]

The other argument under the APA is substantive, contending that the Trump administration's justifications for rescinding DACA were so poorly supported as to be arbitrary and capricious.[168] The district courts have rejected the administration's claim that DACA had to be terminated because it was an illegal usurpation of congressional authority under the Immigration and Nationality Act. On the contrary, DACA offered no pathway to citizenship and expressly deferred to Congress's prerogatives.[169] Nor was DACA impermissible simply because Congress repeatedly failed to enact the DREAM Act. Legislative inaction did not preclude the exercise of prosecutorial discretion through deferred action.[170]

The California, District of Columbia, and New York district courts also rejected Attorney General Sessions' and Acting Secretary Duke's claims about the risk of litigation should the DACA program continue. As the judges explained, the Trump administration had wrongly

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163 *See* Glenn C. Smith, *DACA on the Docket*, JURIST (Dec. 5, 2018, 9:26 AM), https://www.jurist.org/commentary/2018/12/glenn-smith-daca-docket/ [https://perma.cc/4LEV-AHD6] (noting how the APA has been used to challenge the DACA rescission in ways that narrow the analysis and deflect constitutional concerns).

164 *See Batalla Vidal*, 291 F. Supp. 3d at 270; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1027; *NAACP*, 298 F. Supp. 3d at 236; *Casa de Md.*, 284 F. Supp. 3d at 762-63; *Texas*, 328 F. Supp. 3d at 727.

165 *See Batalla Vidal*, 291 F. Supp. 3d at 273; *NAACP*, 298 F. Supp. 3d at 237; *Texas*, 328 F. Supp. 3d at 727.

166 *See Batalla Vidal*, 291 F. Supp. 3d at 272-73; *Casa de Md.*, 284 F. Supp. 3d at 772-73, *aff'd*, 924 F.3d at 702-03; *Regents of the Univ. of Cal.*, 908 F.3d at 507; *NAACP*, 298 F. Supp. 3d at 234-37; *Texas*, 328 F. Supp. 3d at 729-34.

167 *See Texas*, 328 F. Supp. 3d at 735 (reaching this result "[d]espite the less-than-convincing evidence regarding discretion and given the overwhelming evidence concerning the rights conferred and the obligations imposed . . .").

168 *See Batalla Vidal*, 279 F. Supp. 3d at 420; *Batalla Vidal*, 291 F. Supp. 3d at 269-70; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1027; *NAACP*, 298 F. Supp. 3d at 237-43; *Casa de Md.*, 924 F.3d at 703-05.

169 *Batalla Vidal*, 279 F. Supp. 3d at 425-27; *NAACP*, 298 F. Supp. 3d at 238-39.

170 *See Batalla Vidal*, 279 F. Supp. 3d at 423; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1039-40, *aff'd*, 908 F.3d at 508-10.

concluded that DACA's adoption was illegal, so officials likely overestimated the danger that the program would be overturned in a court challenge.[171] In addition, the California, District of Columbia, and New York courts noted the Trump administration's failure to weigh DACA beneficiaries' reliance interests when phasing out the program. This lack of attention to the rescission's disruptive impact further weakened the official decision-making process.[172] Based on these findings, the three courts concluded that at least some of the plaintiffs' claims were likely to succeed; as a result, the judges issued nationwide injunctions requiring that the federal government process pending DACA applications and renewals until the lawsuits were resolved.[173] Initially, the District of Columbia court extended the injunction to new applications but it later retreated from this position.[174]

In reaching its conclusions about the arbitrary nature of the DACA rescission, the District of Columbia district court sought additional input from Duke's successor, Secretary of Homeland Security Kirstjen M. Nielsen.[175] Nielsen responded by reiterating the justifications in Duke's memorandum, that is, the Attorney General's conclusion that DACA was unlawful and that there was an ongoing risk of litigation.[176] Citing the Fifth Circuit's decision invalidating the DAPA and expanded DACA programs, Nielsen asserted that the courts found "such a major non-enforcement policy" to be incompatible with the Immigration and Naturalization Act's "comprehensive scheme" and that the original DACA program suffered from "the same statutory defects."[177]

Importantly, Nielsen added a policy rationale for the rescission, one that did not turn on DACA's presumed illegality. According to her memorandum, the Department of Homeland Security "should not adopt public policies of non-enforcement of [immigration] laws for broad classes and categories of aliens under the guise of prosecutorial

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171 *See Batalla Vidal*, 279 F. Supp. 3d at 429-31; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1043-44, *aff'd*, 908 F.3d at 506-07, 517; *NAACP*, 298 F. Supp. 3d at 241-42. *But cf. Casa de Md.*, 284 F. Supp. 3d at 772-73.

172 *See Batalla Vidal*, 279 F. Supp. 3d at 431-32; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1044-45; *NAACP*, 298 F. Supp. 3d at 240.

173 *Batalla Vidal*, 279 F. Supp. 3d at 437; *Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1049, *aff'd*, 908 F.3d at 520; *NAACP*, 298 F. Supp. 3d at 243.

174 *See NAACP*, 298 F. Supp. 3d at 245-46, 249, *modified on motion for clarification*, 321 F. Supp. 3d at 150.

175 *Id.* at 249.

176 Memorandum from Kirstjen M. Nielsen, U.S. Sec'y of Homeland Sec., at 2 (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [https://perma.cc/H6RR-G8S5].

177 *Id.*

discretion — particularly a class that Congress has repeatedly considered but declined to protect."[178] Although Congress could mandate such sweeping changes, the department was obligated to exercise its prosecutorial discretion on a "truly individualized, case-by-case basis."[179]

As for reliance interests, Nielsen concluded that "clear, consistent, and transparent enforcement of the immigration laws" was imperative.[180] Under the circumstances, DACA's "questionable legality" along with other policy considerations outweighed "the asserted reliance interests" of DACA recipients.[181] Those reliance interests were weak, according to the memorandum, because DACA was "a temporary stopgap measure, not a permanent fix; it was expressly limited to two-year renewal periods, it expressly conferred no substantive rights, and it was revocable at any time."[182] Because the court found Nielsen's legal assertions conclusory and her treatment of reliance interests cursory, its view that the rescission was arbitrary and capricious remained unaltered.[183]

In addition to claims under the APA, the California and New York district courts allowed plaintiffs to mount an equal protection challenge to the rescission's constitutionality.[184] The claim was based on the disproportionate impact on Latinos, especially those of Mexican origin, and the allegedly discriminatory motives evinced by candidate and then President Trump's hostile statements.[185] In particular, the plaintiffs cited: (1) candidate Trump's assertion that Mexican immigrants are not Mexico's "best" but instead are "people that have a lot of problems," "the bad ones," and "criminals, drug dealers, [and] rapists," (2) his statement at a campaign rally that protestors were "thugs who were flying the Mexican flag," (3) his assertion that a Mexican-American federal judge could not rule impartially in a suit against Trump

178 *Id.*

179 *Id.* at 3.

180 *Id.*

181 *Id.*

182 *Id.*

183 Nat'l Ass'n for the Advancement of Colored People v. Trump (*NAACP*), 315 F. Supp. 3d 457, 471-474 (D.D.C. 2018).

184 *See* Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 274-79 (E.D.N.Y. 2018); *Regents of the Univ. of Cal.*, 279 F. Supp. 3d 1011, 1028 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476, 518-20 (9th Cir. 2018).

185 *Batalla Vidal*, 291 F. Supp. 3d at 274-75 (noting that between 2012 and June 30, 2017, more than 78% of DACA applications originated from Mexico and 93% from Latin America); Regents of the Univ. of Cal. v. U.S. Dep't Homeland Sec., 298 F. Supp. 3d 1304, 1314 (N.D. Cal. 2018), *aff'd*, 908 F.3d at 518.

University because he was of Mexican origin and would be prejudiced by Trump's plan to build a wall at the Mexican border, and (4) statements both before and after the inauguration that Latino immigrants are criminals, "animals," and "bad hombres."[186] The government moved to dismiss the equal protection claim because most of the statements were made while Trump was a candidate and because Duke, rather than Trump himself, officially ended the program.[187]

The judges in California and New York allowed the equal protection claim to proceed, albeit with real trepidation about the jurisprudential consequences.[188] As the federal court in New York noted, its ruling could lead to an "evidentiary snark hunt" and would "raise[] difficult questions of whether — and, if so, for how long — any Executive action disproportionately affecting a group the President has slandered may be considered constitutionally suspect."[189] Though the court saw "good reasons to tread lightly," it did "not see why it must or should bury its head in the sand when faced with overt expressions of prejudice."[190] In a brief paragraph that cited a presidential tweet as evidence, the district court in California noted that plaintiffs were entitled to have an opportunity to demonstrate that the rescission was motivated by racial prejudice and "contrived to give the administration a bargaining chip to demand funding for a border wall in exchange for reviving DACA."[191] In later decisions, the district court in California and the Ninth Circuit Court of Appeals expanded on the equal protection analysis. In addition to noting the disparate impact on Latinos and the President's inflammatory rhetoric, these opinions described both the abrupt nature of the rescission and the irregular history surrounding it.[192]

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[186] *Batalla Vidal*, 291 F. Supp. 3d at 276-77; *Regents of the Univ. of Cal.*, 298 F. Supp. 3d at 1314, *aff'd*, 908 F.3d at 518-19. Although the lawsuits have focused on Trump's comments, other members of his administration have made statements that favor European immigration over immigration from other parts of the world. *See* CHAVEZ, *supra* note 54, at 38-39.

[187] *Batalla Vidal*, 291 F. Supp. 3d at 277-79; *see Regents of the Univ. of Cal.*, 298 F. Supp. 3d at 1315, *aff'd*, 908 F.3d at 519.

[188] By contrast, the United States District Court for the District of Columbia deferred any consideration of the constitutional issues, including both the Take Care Clause and the equal protection arguments, because it had decided to issue a preliminary injunction wholly on statutory grounds. *NAACP*, 298 F. Supp. 3d at 246.

[189] *Batalla Vidal*, 291 F. Supp. 3d at 278.

[190] *Id.*

[191] Regents of the Univ. of Cal. v. U.S. Dep't Homeland Sec., 279 F. Supp. 3d 1011, 1047 (N.D. Cal. 2018).

[192] *Regents of the Univ. of Cal.*, 298 F. Supp. 3d at 1314-15, *aff'd*, 908 F.3d at 518-19.

The district court in Maryland viewed the statutory and constitutional issues in a light far more favorable to the Trump administration. Like other courts, the Maryland district court held that DACA's rescission did not require notice-and-comment rulemaking.[193] However, the judge rejected the plaintiffs' argument that the rescission was arbitrary and capricious, finding instead that the rescission was "a carefully crafted decision supported by the Administrative Record."[194] As the opinion explained, "[r]egardless of whether DACA is, in fact, lawful or unlawful, the belief that it was unlawful and subject to serious legal challenge is completely rational."[195] On appeal, however, the Fourth Circuit aligned itself with the courts in California, the District of Columbia, and New York, holding that the rescission was irrational.[196] According to the Fourth Circuit, the Trump administration's proffered legal reasons were inadequate, contradicted an Office of Legal Counsel memorandum concluding that the DACA program was valid, and failed to account for beneficiaries' reliance interests.[197]

The trial judge in Maryland also addressed the plaintiffs' equal protection argument, but the Fourth Circuit did not reach the issue.[198] The district court "reject[ed] Plaintiffs' reliance on the President's misguided, inconsistent, and occasionally irrational comments made to the media to establish an ulterior motive."[199] As the court explained, the President's "statements have frequently shifted but have moderated since his election. He has referred to the Dreamers as 'terrific people;' he has pledged to 'show great heart;' and he has referred to Dreamers as 'incredible kids.'"[200] In light of these comments and the President's request that Congress pass legislation to protect the Dreamers, the court found that the plaintiffs' allegations of animus lacked merit.[201]

In reaching this conclusion, the Maryland district court distinguished a Fourth Circuit decision that had overturned a travel ban based on

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193 Casa de Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 772 (D. Md. 2018), *aff'd in part, rev'd in part*, 924 F.3d 684, 701-03 (4th Cir. 2019).

194 *Id.* at 772, *aff'd in part, rev'd in part*, 924 F.3d at 704-05.

195 *Id.*

196 *See* Casa de Md. v. U.S. Dep't of Homeland Sec., 924 F.3d 684, 701-05 (4th Cir. 2019).

197 *Id.* at 703-05.

198 *Casa de Md.*, 284 F. Supp. 3d at 773-75. In overturning the rescission, the Fourth Circuit concluded that it had adequate statutory grounds and therefore did not evaluate the equal protection claim. *Casa de Md.*, 924 F.3d at 706.

199 *Casa de Md.*, 284 F. Supp. 3d at 774.

200 *Id.* at 775.

201 *Id.*

Trump's invidious remarks about Muslims.[202] The district court judge found that there was indisputable proof of bias in the travel ban case because of a clear connection between the President's rhetoric and the administration's executive action.[203] By contrast, the judge determined that Trump's comments about the Dreamers were ambivalent, going so far as to express a hope that Congress would provide them with a pathway to citizenship.[204]

The Maryland judge's refusal to entertain an equal protection claim has since received additional support from a 2018 U.S. Supreme Court decision upholding a revised version of the travel ban.[205] That ban covered not only Muslim countries but also two non-Muslim countries, Venezuela and North Korea.[206] In challenging the revised ban, the plaintiffs offered evidence that the President had said, among other things, that "Islam hates us" and that his administration needed to effect a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[207] Even so, the Justices declined to find discriminatory intent.[208] The Court observed that "[t]he President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf."[209] Although presidents had not always expressed themselves in the most tolerant way, the Justices concluded that "the issue before us is not whether to denounce the statements."[210] Rather, the Court tasked itself with evaluating their constitutional significance when the ban was "neutral on its face" and "address[ed] a matter within the core of executive responsibility."[211] Moreover, because the directive dealt with immigration and national security, the Court applied a highly deferential rational basis test. Under that lenient standard, the travel ban passed muster.[212]

In considering the decision's implications for the DACA rescission cases, the Ninth Circuit drew a distinction between securing the border through the travel ban and dealing with undocumented residents

202 *See id.*
203 *Id.*
204 *Id.*
205 *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).
206 *Id.* at 2405-06.
207 *Id.* at 2417.
208 *See id.* at 2417-21.
209 *Id.* at 2417-18.
210 *Id.* at 2418.
211 *Id.*
212 *Id.* at 2420-21.

through deportation.[213] That analysis built on an earlier district court decision addressing the termination of temporary protected status for immigrants from El Salvador, Haiti, and Honduras. There, the district court judge rejected an analogy to the travel ban case because there was no reason to presume that undocumented immigrants, many of whom had lived in the country for years without incident, raised national security concerns.[214] If this analysis is persuasive, the Court can more closely scrutinize the motives for DACA's rescission than it could the motives for the travel ban. Even so, the odds of a successful equal protection challenge to DACA's rescission seem long.

Of the lawsuits addressing the rescission, the Texas lawsuit stands apart because it grows out of the earlier successful challenge to DACA's expansion and DAPA's adoption.[215] To enforce that ruling, the plaintiffs entered into a stipulation that would dismiss the lawsuit voluntarily if the United States phased out not only DAPA and the expansion of DACA but also the original DACA program.[216] Federal officials did act to eliminate all of the programs, but nationwide injunctions prevented the Trump administration from ending the original program.[217] Eight states, including Texas, and two governors therefore returned to court and demanded a declaratory judgment that this program violated the APA and Take Care Clause just as the expanded DACA and DAPA programs had.[218] Based on that judgment, the plaintiffs sought an injunction to prohibit the processing of all DACA applications.[219]

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213 *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 520 (9th Cir. 2018).

214 *See* Centro Presente v. U.S. Dep't of Homeland Sec., 332 F. Supp. 3d 393, 410 (D. Mass. 2018). *See generally* Cristina M. Rodríguez, Trump v. Hawaii *and the Future of Presidential Power Over Immigration*, AM. CONST. SOC'Y, https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/ (last visited Mar. 17, 2020) [https://perma.cc/CND9-6Z2Z]. This debate has longstanding roots going back to the late 1800s and early 1900s when the Supreme Court struggled with whether decisions to deport should be subject to different constitutional protections than decisions to deny entry to the United States. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Yamata v. Fisher, 189 U.S. 86 (1903). *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 553-54 (1990) [hereinafter *Immigration Law After a Century of Plenary Power*] (describing normative tensions in early history of immigration law).

215 *See* Texas v. United States, 328 F. Supp. 3d 662, 672-73 (S.D. Tex. 2018).

216 *Id.* at 672.

217 *See supra* notes 173–174 and accompanying text.

218 *Texas*, 328 F. Supp. 3d at 671, 673.

219 *Id.* at 672.

Because both the plaintiffs and the defendants in the Trump administration were committed to discontinuing DACA, twenty-two beneficiaries and the state of New Jersey intervened to ensure that the lawsuit was truly adversarial.[220] Although the district court in Texas mostly agreed with the plaintiffs' claims that the original DACA program was invalid, the judge ultimately denied the request for a preliminary injunction due to the plaintiffs' substantial delay in seeking relief.[221] The original DACA program had been adopted in 2012, but the plaintiffs did not challenge it until 2018, six years later. During that time, a growing number of beneficiaries had come to rely on the program's protections. As a consequence, the judge concluded that the plaintiffs' demand for injunctive relief was not timely.[222]

As the U.S. Supreme Court considers the lower court rulings in the California, District of Columbia, and New York cases, it seems most likely that it will reach a decision based on the APA's requirements. There is little reason to think that the Justices will find that the rescission required notice-and-comment rulemaking.[223] Instead, the outcome is likely to turn on how deferential the Court is to the Trump administration's reasoning. If the Justices put some bite into the APA's rational relation test, particularly by considering the administration's failure to weigh the DACA beneficiaries' reliance interests, the rescission could be overturned on statutory grounds. The Court then would not need to reach the equal protection claim, nor would it have to decide whether to distinguish the travel ban case.

The oral argument before the Court suggests that the deference due to agency decision-making and reliance interests were very much on the Justices' minds.[224] With respect to the deference to be paid to agency decision-making, members of the Court grappled with the weight that should be given to the Nielsen memorandum. Although it elaborated on policy as well as legal reasons for rescinding DACA, it was not issued

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220 *See id.* at 671-73.

221 *Id.* at 742-43.

222 *Id.* at 741-42.

223 *See* Emerson, *supra* note 10, at 2151.

224 Reviewability issues, which also reflected the Court's concerns about second-guessing agency actions, also generated considerable discussion during oral argument. Transcript of Oral Argument at 6-19, 44-55, 66-78, U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., No. 18-587 (U.S. Supreme Court argued Nov. 12, 2019). For a discussion of how Congress's plenary power over immigration initially seemed to immunize this area of the law from review and how the federal courts eventually found grounds to scrutinize executive action, see Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 214, at 551-53, 580-83.

until after the rescission took place.[225] Some Justices suggested that the concerns about illegality standing alone might suffice to sustain the agency's decision, given the Court's earlier decision striking down the DAPA and expanded DACA programs.[226] Yet, others questioned whether DACA could be illegal when immigration authorities necessarily set enforcement priorities due to limited resources.[227] Members of the Court also worried that asking the government to give more and better reasons could prove an exercise in futility that would merely delay DACA's inevitable demise.[228] As Justice Stephen Breyer warned, there are dangers when the Court "play[s] ping pong with the agency."[229] Yet, several of his colleagues noted the importance of holding agencies accountable by demanding that they give authentic reasons and "own" their decisions.[230]

As for reliance, the government argued that so long as the Department of Homeland Security did not completely overlook beneficiaries' interests, it had discharged its obligation.[231] Duke's original memorandum rescinding DACA did not mention these concerns, but Nielsen's memorandum addressed them in a brief paragraph.[232] Again, there were doubts about how much weight to accord Nielsen's analysis.[233] In addition, Justice Breyer asked whether it was enough to weigh only program beneficiaries' reliance interests when a number of other stakeholders, including health care organizations, labor unions, educational associations, businesses, religious organizations, and state and local governments, had asserted interests of their own.[234] Perhaps most significantly, the Justices inquired about how substantial the program beneficiaries' reliance interests were. The United States asserted that they were extremely limited because DACA was just "a

[225] Transcript of Oral Argument, *Regents of the Univ. of Cal.*, No. 18-587, at 39-41.

[226] *Id.* at 78.

[227] *Id.* at 33-37.

[228] *Id.* at 57-58, 83.

[229] *Id.* at 82. These concerns echo Professor Motomura's worry that "abuse of discretion" analysis can cause courts "to succumb to the temptation to define 'legitimate' so broadly that they in effect try to run the agency." Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 214, at 606.

[230] Transcript of Oral Argument, *Regents of the Univ. of Cal.*, No. 18-587, at 63-64, 88-89.

[231] *Id.* at 22.

[232] *Id.* at 20-23, 26, 56-63.

[233] *Id.* at 30, 59-61.

[234] *Id.* at 22.

temporary stop-gap measure,"[235] while Justice Sonia Sotomayor observed that the rescission was "about our choice to destroy lives."[236]

VI. *PLYLER* AS JURISPRUDENTIAL ANOMALY

With a likely focus on deference and reliance under the APA, the Court's decision in the DACA rescission cases may appear to have little to do with its holding in *Plyler* over thirty-five years ago. In fact, however, *Plyler*'s ghost haunts today's cases, bringing into sharp relief how far our nation's jurisprudence has strayed from claims of constitutional personhood and how little remains of democratic regard for human dignity. *Plyler*'s endorsement of personhood has largely been confined to the facts of the case, that is, protection of access to a public elementary and secondary education. Even when the Court handed down the decision, it was a jurisprudential anomaly — narrowly construed, normatively eclipsed by other decisions, yet never overruled. Nothing in the intervening years has altered that reality. Indeed, scholars sometimes express their surprise at *Plyer*'s longevity.[237] Still, that long life has been a cloistered one: because *Plyler* is perceived as an outlier, it has not led to other significant constitutional safeguards for undocumented immigrants based on their personhood. As a result, the stirring rhetoric in that opinion exists side-by-side with restrictionist legislation that severely limits the Dreamers' opportunities as adults. With *Plyler*'s normative power tightly constrained, the evolution of constitutional personhood has been stunted — at least for the most vulnerable among us.[238]

A. Personhood, Equality, and the Construction of Identity

One reason for *Plyler*'s limited force is its poor fit with the Court's contemporary treatment of personhood and protected identity categories under the Fourteenth Amendment. Race is the defining example, and it has been characterized as an immutable trait ascribed at birth.[239] Because race is presumptively irrelevant to individual desert,

[235] *Id.* at 20.

[236] *Id.* at 31.

[237] OLIVAS, *supra* note 5, at 92 (describing "how tenuous the *Plyler* decision was in the first place, with a substantial dose of luck and persistence and a powerful backstory of innocent children").

[238] *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 358-70 (2018) (describing the success of a longstanding campaign for constitutional rights for corporations based on their legal personhood).

[239] *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 9 (2015).

government officials are constitutionally bound to ignore it when distributing public benefits and burdens.[240] They therefore can consider race only when crafting remedies for past discriminatory acts.[241] A strictly colorblind approach means that race generally has no place in government policymaking, even when officials' motives are benign and the initiatives are designed to enhance opportunities for underrepresented minorities.[242] The notable exception is voluntary affirmative action in higher education, itself a jurisprudential anomaly.[243]

Plyler is a notable departure from this race-based account of protected traits. In addressing the plight of undocumented schoolchildren, the Justices treated immigration status as necessarily mutable and highly relevant to matters of personal responsibility. That said, however, young children could not be held accountable for choices that their undocumented parents made in coming to the United States.[244] To punish children as a way to control their mothers' and fathers' conduct was both ineffective and unjust.[245] As a consequence, the Court refused to allow Texas to saddle undocumented youth with the stigma of illiteracy based on circumstances beyond their control.[246] In the Court's view, such cruel subordination was profoundly at odds with the nation's core democratic values.[247]

Significantly, *Plyler* went well beyond an analysis of the mutability of immigration status and the innocence of the children by affirming a right to some meaningful opportunity to mature into capable adults. The decision construed the students' identities not as fixities, but as

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[240] *See id.* at 16.

[241] *See, e.g.*, Adarand v. Pena, 515 U.S. 200, 223-27 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

[242] Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?* , 43 CONN. L. REV. 1059, 1063-66 (2011) (arguing that in recent years, the Court has moved away from a concern with substantive equality to focus on formal equality). *But cf.* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* , 58 U. MIAMI L. REV. 9, 12-14 (2003) (contending that the indeterminacy of an anti-classification principles allows room for a norm of anti-subordination to influence judicial practice); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Struggles Over* Brown, 117 HARV. L. REV. 1470, 1533 (2004) (noting that anti-classification rhetoric has sometimes been used to combat status harms and at other times has been used to obscure them).

[243] *See* Rachel F. Moran, Bakke*'s Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Right Law*, 52 UC DAVIS L. REV. 2569, 2606, 2610 (2019).

[244] Plyler v. Doe, 457 U.S. 202, 219 (1982).

[245] *See id.* at 220.

[246] *Id.* at 223.

[247] *See id.* at 218-19.

dynamic constructs that the government itself could influence. As a result, the Court's equal protection analysis was inverted. Rather than assume that undocumented status must be presumptively irrelevant to school policy, the Justices considered the policy's impact on the unfolding of children's identities and their capacity to grow into the fullness of their being. Building on *Plyler*'s notion of a fluid identity, the Dreamers have since called for their recognition as authentic Americans, defined not by their country of origin but by their attachment to a nation that is the only home many of them have ever known. Far from accepting the formalism of de jure categories, these youth have laid claim to being de facto Americans in all respects but on paper.[248]

Unfortunately for the Dreamers, *Plyler*'s recognition of malleable identities has become a bridge to nowhere in the formalistic universe of contemporary equal protection doctrine. For that very reason, the equality claims in the DACA rescission cases have nothing to do with the Dreamers' desert and everything to do with official animus in rescinding DACA. The critical question has been whether the Trump administration acted with discriminatory intent, rather than how the rescission will transgress undocumented youth's emerging personhood as adults. That approach treats the Dreamers' identities as analogous to a racial status, one that is unchanging from birth. For instance, judges have noted that nearly all DACA beneficiaries are Latino, a fixed trait, and that this ethnic group is disproportionately affected by the rescission.[249] The Latino make-up of DACA recipients is then linked to dangers of negative stereotyping.

Applying this framework, judges have evaluated President Trump's derogatory statements regarding immigrants, particularly Mexicans, and then weighed these comments against his more tempered remarks, especially those about undocumented youth being "incredible kids."[250] As the courts have acknowledged, there are serious obstacles to finding discriminatory intent. For one thing, it is unclear how significantly the President's negative views about immigrants in general and Mexicans in particular figured in the rescission.[251] In addition, there is the matter of deference to the executive branch in matters that implicate national security.[252] Whatever the outcome, however, the emphasis is on the government's obligation to refrain from acting on hostile attitudes

[248] NICHOLLS, *supra* note 20, at 50-52.

[249] *See supra* note 185 and accompanying text.

[250] *See supra* note 200 and accompanying text.

[251] *See supra* notes 189, 199–201 and accompanying text.

[252] *See supra* notes 212–214 and accompanying text.

toward Latinos. *Plyler*'s resounding affirmations — of the promise of youthful immigrants' identities, the central role that government policy has in shaping that promise, and the implications for full personhood — are but a distant memory.

B. Personhood and the Necessity of Protected Liberties

That brings us to the second and related reason that *Plyler*'s influence is limited: the decision explicitly links personhood to a liberty interest, the freedom of undocumented children to attend public elementary and secondary schools. Emphasizing an affirmative right to learn departs from traditional equal protection analysis, which focuses on the right to be free of discrimination. In 1973, nearly a decade before *Plyler* was decided, the Court rejected any fundamental right to equal educational opportunity in *San Antonio Independent School District v. Rodriguez*.[253] In *Rodriguez*, students challenged a property tax system that produced substantial disparities in per-pupil spending in the Texas public schools.[254] The Justices refused to apply a searching level of review to the school finance system, instead asking whether that system was at least a rational means of raising and allocating revenue.[255] In upholding the property tax system, the Court concluded that redressing disparities in per-capita school funding should be left to the political process, although the Justices acknowledged that there might be a constitutional right to minimum access to schooling.[256]

Rodriguez is consistent with other decisions that have rejected affirmative entitlements to safeguard the dignity of personhood. In 1970, the Justices flirted with the possibility of a right to welfare assistance in *Goldberg v. Kelly*.[257] There, the Court considered a challenge to the practice of cutting off a person's benefits while an

[253] 411 U.S. 1 (1973). Legal scholar Rick Su contends that *Rodriguez* was one of two cases that limited *Plyler*'s reach. As he explains, *Rodriguez* ensured that undocumented students would remain in underfunded, segregated school districts. At the same time, the Court's decision in *Martinez v. Bynum*, 461 U.S. 321 (1983), upheld residency requirements that barred a citizen from attending a neighborhood school because he was living with his sister, who was not his legal guardian, while his noncitizen parents resided in Mexico. Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 415-22 (2010).

[254] 411 U.S. at 8-16.

[255] *Id.* at 40-44, 54-55. As a result, Professor Mark Tushnet describes this as a "weak substantive right" because judicial review, though available, is highly deferential. Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1902-03 (2004).

[256] *See Rodriguez*, 411 U.S. at 35-38.

[257] 397 U.S. 254 (1970).

appeal from termination was still pending.[258] In striking down the policy, Justice Brennan wrote that "[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."[259] Just months later, however, *Goldberg* was relegated to the status of jurisprudential anomaly. In *Dandridge v. Williams*,[260] the Court addressed the constitutionality of a welfare program that capped benefits, regardless of family size.[261] The Justices found that the cap was a rational way to manage the state's limited resources, even if it produced disparities in the level of per-capita support for needy families.[262] Only two years later, the Court held that there was no fundamental right to basic shelter, either.[263] In refusing to recognize these rights, the Justices sidestepped concerns about a judicially mandated redistribution of wealth by deferring to the political branches and focusing on "a procedural mandate of guaranteeing an even-handed administration of a state-created good among those who qualify."[264]

Precisely because *Plyler*'s recognition of a protected liberty interest has been a jurisprudential anomaly, the Dreamers have few prospects to vindicate their right to have rights, a battle that even citizens lost in the welfare cases. Because affirmative entitlements have been relegated to the realm of politics, these youth have turned to advocacy and activism at the federal, state, and local levels to interrupt their transition to illegality. Even as the Dreamers mobilize for reform in the court of public opinion, they have been true to *Plyler*'s fundamental insight that personhood without basic liberties is a chimera. In addition to lobbying

258 *Id.* at 255.

259 *Id.* at 265.

260 397 U.S. 471 (1970).

261 *Id.* at 473-75.

262 *Id.* at 485.

263 *See* Lindsey v. Normet, 405 U.S. 56 (1972).

264 Elizabeth Bussiere, *The Failure of Constitutional Welfare Rights in the Warren Court*, 109 POL. SCI. Q. 105, 126 (1994); *see also* Martha Albert Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13-14, 17 (Martha Albertson Fineman & Anna Grear eds., 2013) (describing how neoliberalism has promoted an ethic of self-reliance without state assistance); Elisabeth Zoller, *Citizenship After the Conservative Movement*, 20 IND. J. GLOBAL LEG. STUD. 1-2 (2013) (same).

for the DREAM Act and DACA, undocumented youth have pushed for access to public colleges and universities.[265]

Moreover, the Dreamers have fought recent laws that reflect the kind of restrictionist impulse that once animated Proposition 187.[266] In the South, for example, legislators responded to a rapid growth in the immigrant population by limiting access to public benefits.[267] After the DACA program was created in 2012, states like North Carolina actively resisted the full inclusion of Dreamers.[268] Most notably, DACA recipients in the state initially could not apply for driver's licenses. Only after a contentious political debate did the North Carolina legislature alter its position, and even then, the licenses were specially marked in bright red letters with the words: "LEGAL PRESENCE NO LAWFUL STATUS."[269] As a result, undocumented youth in the state whose licenses marked them as interlopers "felt a deepening sting of rejection," while those in more welcoming destinations "felt enhanced state loyalty."[270]

Plyler's account of personhood has been confined to elementary and secondary education as a legal matter, but it continues to inspire the Dreamers on a grander scale as a political matter. Themes of human dignity and liberty are central to the narratives that inspired DACA and were rebuffed by its rescission. Those stories may not have a formal place in the Court's current equal protection jurisprudence, but they have figured prominently in the rhetorical framing of legal challenges to the Trump administration's action. In addressing DACA's rescission, the Ninth Circuit Court of Appeals opens with the story of Dreamer Dulce Garcia:

> 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

[265] *See, e.g.*, Johnson, *The* Keyes *to the Nation's Educational Future*, *supra* note 50, at 1246-47 (2013) (describing recent political conflicts over access to public higher education for undocumented students).

[266] NICHOLLS, *supra* note 20, at 25-26.

[267] SILVER, *supra* note 64, at 7, 30-35; *see also* Raymond A. Mohl, *The Politics of Expulsion: A Short History of Alabama's Anti-Immigrant Law, HB 56*, 35 J. AM. ETHNIC HIST. 42, 43-51 (2016); Sophia Rodriguez & Timothy Monreal, *"This State is Racist . .": Policy Problematization and Undocumented Youth Experiences in the New Latino South*, 32 EDUC. POL'Y 764, 778-85 (2017).

[268] SILVER, *supra* note 64, at 5, 32, 141.

[269] *Id.* at 8-9.

[270] *Id.* at 144.

> 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 as a legal assistant. She then was awarded a scholarship that, together with her mother's life savings, enabled her to fulfill her longstanding dream of attending and graduating from law school. 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 — indeed, inspiring — 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. Though the United States of America is the only home she has ever known, Dulce Garcia is an undocumented immigrant.[271]

This passage reads like an homage to the promise of personal transcendence that *Plyler* found so compelling. For the Ninth Circuit, past could be prologue, but it remains unclear whether *Plyler*'s reasoning will have any normative sway, even if indirect and implicit, in the Supreme Court's resolution of the DACA rescission cases.

VII. THE LIMITS OF EQUAL PROTECTION, THE RISE OF DISCRETION, AND THE PATH TO PROCEDURALISM

The withering of personhood has meant the widening of discretion in the administrative state. The Court's parsimonious interpretation of equal protection law leaves government officials — whether federal, state, or local — with considerable leeway to determine which public benefits the undocumented can enjoy. As Geoffrey Heeren notes, "if an immigration lawyer wants to win an immigration appeal, she should not argue that her client has rights; she should assert that the immigration judge is incompetent, the Board [of Immigration Appeals] indifferent, the bureaucracy inefficient, and the regulations irrational."[272] Today, then, the critical question for advocates has become what constraints, if

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[271] Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 485-86 (9th Cir. 2018).

[272] Geoffrey Heeren, *Persons Who are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 372 (2013).

any, there are on broad institutional authority. For that reason, challenges focus on the official exercise of discretion, rather than the individual exercise of a right. If anything, the rubric of civil rights has become something of a misnomer, as personal entitlements play at most a secondary role in current litigation over the fate of undocumented youth.

Wide-ranging prosecutorial discretion "has been a main ingredient of the immigration system since its creation."[273] As the Morton memoranda made clear, federal authorities deport only a tiny fraction of undocumented immigrants each year.[274] Applying a cost-benefit analysis therefore is essential to target enforcement resources efficiently.[275] In setting priorities, federal officials have relied on "a compassion-based formula" that acknowledges "a judgment by society that some people are morally deserving and more likely to contribute to society in the future."[276] Under the Obama administration, DACA became a way to discipline the use of discretion and make it transparent. With relief predicated on humanitarian grounds, DACA reflected the Dreamers' success both in invoking *Plyler*'s trope of innocence and in demonstrating their desert by converting educational opportunity into academic achievement.[277]

The transparency that DACA brought was critical to any effort to constrain prosecutorial discretion in immigration matters. Until the 1970s, that discretion was shrouded in secrecy, and there was little public awareness of the factors influencing deportation decisions.[278] A high-profile case involving The Beatles' John Lennon led to significantly greater transparency in deportation actions.[279] DACA has gone even further in regularizing discretion. Indeed, legal scholar Shoba Sivaprasad Wadhia has lauded the Obama administration for "creat[ing] a program that is transparent," taking "a political risk," and "with[standing] the costs for showcasing its position on prosecutorial discretion and creating DACA."[280] Based on concerns about changing circumstances, INS officials traditionally have resisted demands to promulgate administrative rules for adjusting immigration status, but

[273] WADHIA, *supra* note 91, at 7.

[274] *See supra* notes 103–105 and accompanying text.

[275] WADHIA, *supra* note 91, at 8.

[276] *Id.*

[277] *Id.* at 57.

[278] That changed with a famous case involving efforts to deport John Lennon, a musician who had achieved celebrity as a member of The Beatles. *Id.* at 14.

[279] *Id.* at 17-18.

[280] *Id.* at 146.

some form of accountability is essential as the scope of prosecutorial discretion grows in the face of sustained congressional inaction.[281] DACA has provided one model for managing that sprawling administrative authority.[282] The program has promoted accountability not only by regularizing the application process but also by generating data on how applications are handled.[283]

With the weakening of civil rights protections and the growth in discretionary governmental decision-making, institutional accountability is now a critical tool for immigrant advocates to use in safeguarding the disadvantaged, including undocumented immigrants, from official abuse. As Mexican American Legal Defense and Educational Fund ("MALDEF") President and General Counsel Thomas Saenz observes, civil rights practice has been transformed in the years since *Plyler*. When Saenz went to law school, he believed that he would rely on equal protection, due process, and federal civil rights laws to vindicate his clients' claims.[284] Instead, after graduation, he used structural provisions like preemption doctrine to protect vulnerable immigrants against restrictive measures like Proposition 187.[285] In a 2014 speech, Saenz said that he could not "remember the last case that MALDEF has pursued all the way through to conclusion involving an Equal Protection Clause claim. We often include equal protection claims in our cases, but generally do not end up litigating those claims through to resolution, as other claims inevitably come to the fore."[286] According to Saenz, this shift in civil rights practice demonstrates that Latinos must be "at the forefront of a new civil rights jurisprudence, which we might call Civil Rights 2.0."[287] That jurisprudence, he contends, requires "a comprehensive theory of the Constitution,"[288] one that sees all of its provisions as potential predicates for reform. Given the DACA cases, one essential component of that holistic approach would appear to be an appropriate system of checks and balances to constrain government overreaching and abuse.

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[281] *See id.* at 153-54 (describing the Immigration and Naturalization Service's reluctance to promulgate rules under the Administrative Procedure Act due to concerns about changing circumstances that affect decisions about immigrant status).

[282] *Id.* at 146, 152-54 (praising DACA as a first step toward transparency in the exercise of prosecutorial discretion but also calling for notice-and-comment rulemaking).

[283] *Id.* at 141-42.

[284] Saenz, *supra* note 3, at 608.

[285] *See id.* at 609-12.

[286] *Id.* at 617.

[287] *Id.* at 621.

[288] *Id.* at 622.

This profound shift in civil rights strategy has moved legal scholar Michael A. Olivas to ask whether *Plyler* itself should have been decided on preemption rather than equal protection grounds.[289] As Olivas explains, "*Plyler* was always a close call" and "is widely understood to be one of a kind, perhaps moral high ground, iconic but limited in its application."[290] Olivas speculates that had *Plyler* been decided on preemption grounds, it would remain "timely and relevant, reaffirming it as the robust and supple decision that it has revealed itself to be."[291] But he is ambivalent, noting that the decision's "communitarian seeds" simply could not take root in "sterile nativistic and restrictionist soil."[292] In light of the significant expansion of agency authority, one great difficulty with resolving *Plyler* on preemption grounds is that this approach would do nothing to constrain the exercise of federal discretion in immigration cases. Although preemption could curtail some state and local restrictionist legislation, it would not place any normative checks on federal officials. *Plyler*'s equal protection analysis, by contrast, makes clear that personhood limits government incursions on the dignity of the undocumented — at least of innocent children — and protects their right to grow into the fullness of adulthood.

As the DACA rescission cases await Supreme Court review, it seems safe to assume that *Plyler*'s normative commitments will not be an explicit part of the analysis; the Justices are likely to rely on statutory rather than constitutional grounds.[293] If the Court upholds the program's rescission under a lenient rational review standard, it will send a message that administrative discretion can grow largely free of judicial oversight.[294] That approach is not consistent with a vision of Civil Rights 2.0 that requires checks and balances on state power. With limited avenues for political engagement, the undocumented are especially vulnerable to official overreaching. Procedural guarantees against government abuse therefore should be enforced with increased rigor. One such guarantee must be transparency in the decision-making process. Otherwise, there will be no way for advocates to hold

289 OLIVAS, *supra* note 5, at 102.

290 *Id.* at 97.

291 *Id.* at 103.

292 *Id.*

293 *See* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 488, 498-501 (2018) (describing strong judicial norm of constitutional avoidance immigration cases, including those involving DACA).

294 *See* Emerson, *supra* note 10, at 2145-49, 2188-92.

administrators accountable for the exercise of their expansive authority.[295]

One source of transparency and accountability for administrative agencies is the notice-and-comment requirement for rulemaking. That requirement was designed in part to address a "democracy deficit" because regulators are not directly accountable to the people.[296] Public comments can provide agencies with much needed information about a proposed rule's impact on affected individuals.[297] Unfortunately, the comment process does not necessarily serve these goals effectively when it is captured by well-organized and well-heeled special interest groups. According to Senator Elizabeth Warren, corporate constituents have "buried [agencies] in an avalanche of detailed, well-funded, well-credentialed comments from industry insiders and their highly-paid allies."[298] The lopsided nature of the process has prompted calls to "democratiz[e] administrative law" by "mobilizing communities of 'grass roots' experts."[299] Advocates hope that these efforts will "create a public record — an archive — of the human toll of governmental choices."[300] That record is especially important to "marginalized people — people whose voices are often diluted or excluded in the realm of formal electoral politics."[301] Notice-and-comment rulemaking could offer the Dreamers an important forum in which to engage in non-citizen citizenship. However, this forum is unlikely to be readily

[295] WADHIA, *supra* note 91, at 143-45.

[296] BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 128, 172 (2019); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2059-61 (2011); Cass Sunstein, *Democratizing Regulation, Digitally*, DEMOCRACY J. (2014), https://democracyjournal.org/magazine/34/democratizing-regulation-digitally/ [https://perma.cc/ZG42-DS97]. These claims build on earlier foundational work by administrative law scholars and leading jurists. *See, e.g.*, Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027-28 (2d Cir. 1977) (McGowan, J.) (noting that rulemaking promotes "openness, explanation, and participatory democracy"); KENNETH CULP DAVIS, ADMINISTRATIVE LAW 142 (3d ed. 1972) (describing notice-and-comment rulemaking as "democratic and efficient"); WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 122 (1941) (stating that the APA could "democratize" our governmental processes).

[297] *See* Sunstein, *supra* note 296.

[298] Elizabeth Warren, Opinion, *Corporate Capture of the Rulemaking Process*, REG. REV. (June 14, 2016), https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/ [https://perma.cc/4K2G-UA5Y].

[299] Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, LAW & POL. ECON. (July 31, 2019), https://lpeblog.org/2019/07/31/reclaiming-notice-and-comment/ [https://perma.cc/Q63B-CEG7].

[300] *Id.*

[301] *Id.*

available, given immigration officials' strong resistance to a rule-based approach and their preference for flexible guidelines and case-by-case adjudication.[302]

In fact, much of the exercise of institutional authority takes place outside the realm of notice-and-comment rulemaking. In the DACA cases, courts have overwhelmingly found that agencies can manage their vast discretion through non-binding statements of policy and interpretive guidance like DACA.[303] When officials dispense with rulemaking, courts need not afford the same amount of deference to their actions.[304] As administrative law scholar Blake Emerson argues, courts should not adopt a hands-off approach but instead should determine "how 'fair' and 'considered' an agency's position is before granting deference."[305] He hopes that this approach will "foster a public discourse on regulatory law that is more clearly normative than technocratic."[306] By applying a standard of review with some bite, Emerson makes room for courts to weigh the very concerns about the exclusion and marginalization of undocumented youth that *Plyler* acknowledged.

Enhanced scrutiny that makes room for *Plyler*'s communitarian seeds as well as for procedural even-handedness is especially appropriate in the DACA rescission cases. In protecting undocumented elementary and secondary students, the Justices recognized that immigration status is mutable[307] and that government policy — whether federal, state, or local — sets the terms of recognition.[308] Jennifer M. Chacón has elaborated on this insight, explaining that undocumented youth like the Dreamers inhabit a world of "liminal legality"[309] in which they ask "for inclusion in the form of an act of administrative grace, rather than ask[] an adjudicator to enforce a right."[310] As a result, beneficiaries are

302 *See supra* note 281 and accompanying text.

303 *See* Emerson, *supra* note 10, at 2150-51.

304 *Id.* at 2145-47; *see* Berger, *supra* note 296, at 2071-72.

305 Emerson, *supra* note 10, at 2191.

306 *Id.* at 2192. In calling for this discourse about collective values, Emerson draws on Professor Motomura's seminal insight that an evaluation of whether agency action is an abuse of discretion can permit courts to develop phantom constitutional norms in immigration law. Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 214, at 583.

307 *See supra* note 244 and accompanying text.

308 *See* Chacón, *supra* note 10, at 716-18; *see also* Rachel F. Moran, *Terms of Belonging*, *in* THE CONSTITUTION IN 2020 at 133, 136, 139-40 (Jack M. Balkin & Reva P. Siegel eds. 2009).

309 Chacón, *supra* note 10, at 713.

310 *Id.* at 729.

"vulnerable to the discretionary decision-making of public . . . actors."[311] For that reason, when government action is designed to exclude and subordinate the liminally legal, there is good reason for courts to consider the normative implications, as *Plyler* did. That imperative seems particularly compelling when undocumented youth are subjected to political vicissitudes that destabilize their lives in dehumanizing ways.[312]

One way to address these concerns is to consider the reliance interests of those who depend significantly on consistency in the government's application of non-binding policy statements or interpretive guidance. The Supreme Court has acknowledged that when a change like DACA's rescission occurs, agency officials bear a heavier burden of justification than when they write on "a blank slate."[313] In addition to arguing for enhanced scrutiny, Emerson contends that an agency's obligation to address reliance interests is particularly weighty when the policy has "vast economic and political significance," as DACA arguably does.[314] In challenges to the program's rescission, reliance interests should take on heightened importance precisely because the policy changes bear on social inclusion and the perils of liminal legality.[315] By acknowledging that the Dreamers have a right to have expectations, even if they do not have a right to have rights, claims under the APA can nurture the communitarian seeds that *Plyler* planted, even if its equal protection analysis remains a jurisprudential anomaly.

Of course, the prospect of judicial scrutiny could discourage officials from relying on categorical grants of deferred action because case-by-case decision-making substantially insulates agency decisions from meaningful review. However, political considerations will likely overcome any worries about second-guessing by the courts. The transparency of administrative policy, coupled with the ability to grant

311 *Id.* at 717.

312 *See id.* at 733-34.

313 *See* Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

314 Emerson, *supra* note 10, at 2205 (citing Texas v. United States, 809 F.3d 134, 183 (5th Cir. 2015)).

315 *See id.* at 2208-15. The significance of arguments based on reliance interests has only grown since the Court's recent decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). There, a majority of the Justices refused to find that adding a citizenship question to the United States Census was arbitrary and capricious solely because Secretary of Commerce Wilbur Ross systematically ignored his staff's findings and recommendations. *Id.* at 2569-71. Instead, the Court overturned the Secretary's decision because he offered a "contrived" reason for the question that had nothing to do with his actual motivations. *Id.* at 2573-76.

or deny relief wholesale, can win points with constituents in ways that largely invisible, individual determinations never will. Before DACA was adopted, the Dreamers were low priorities for deportation, but the program formalized their protected status, made it widely known, and could be celebrated as a political victory.[316] DACA's rescission mollified those who wanted the Trump administration to crack down on undocumented immigration.[317] The significant increase in denials of DACA petitions, standing alone, was not enough to placate these hard-liners.[318] Whether an administration wins or loses in the courts, taking executive action on immigration issues — to offer or to withdraw relief — draws attention to the magnitude of the problems, provides a platform for criticizing congressional inaction, and appeases advocates who insist on some sort of decisive measures. Even when there are

316 *See* Chacón, *supra* note 10, at 719; Carlos Ballesteros, *What Happens if DACA Ends? Deporting Dreamers Won't Be a Priority, Homeland Security Secretary Says*, NEWSWEEK (Jan. 16, 2018), https://www.newsweek.com/what-happens-if-daca-ends-dreamers-deported-homeland-782290 [https://perma.cc/99TN-NXL3] (describing Secretary Kirstjen Nielsen's view that deporting the Dreamers will remain a low priority "in perpetuity"). *But cf.* Elise Foley, *Obama Administration To Stop Deporting Younger Undocumented Immigrants And Grant Work Permits*, HUFFPOST (June 15, 2012, 9:41 AM), https://www.huffpost.com/entry/obama-immigration-order-deportation-dream-act_n_1599658?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20vc2VhcmNoP3E9b2JhbWErZGVwb3J0YXRpb24rb2YrZHJlYW1lcnMrbG93K3ByaW9yaXR5JmZvcm09RURHRUFSJnFzPVBGJmN2aWQ9NzU3NmNlZDg4YWM4NGJjNmE0YTcwMjEyOWI5NjVmOTcmY2M9VVMmc2V0bGFuZz1lbi1VUw&guce_referrer_sig=AQAAAIvogfm_BcNhixnF43HvwsA7P92E8RpCJfFQAg4890Qo-AZAAwrdC8QkAhSzs3QW0psfooo2ycrr2LCT6wlluLtmyw6GUNMukMNtFNCXE72dXR8KBfSBLLO_lC0A8CKOjooxlYdpkGmPF2EplPmH24OvmZmAQbZls3RnR9YbrCtb [https://perma.cc/SPC5-2ML2] (noting that an official in the Obama administration described the DACA program as "'the next step of prosecutorial discretion' along the same lines as it is already being applied, and not inconsistent with past statements"); Raul Reyes, *Dreamers Aren't Going to Be Safe from the Law Without a DACA Agreement*, USA TODAY (Jan. 17, 2018, 5:59 PM), https://www.usatoday.com/story/opinion/2018/01/17/dreamers-arent-going-safe-law-without-daca-agreement-raul-reyes-column/1038330001/ [https://perma.cc/Y9AT-EUQW] (arguing that "virtually all undocumented immigrants are vulnerable to deportation" because the Trump administration has failed to set enforcement priorities as the Obama administration did).

317 *See generally* Johnson, *By Playing Politics*, *supra* note 19.

318 During the initial years of the DACA program, the denial rate was just 1%. That figure rose to 16% in the last months of the Obama administration. The denial rates doubled to 32% under the Trump administration. Dinan, *supra* note 128. A federal court recently concluded that DACA applicants have little recourse if an application is denied. Laura D. Francis, *DACA Recipient Denied Renewal Can't Overcome Legal Hurdle (1)*, BLOOMBERG L. (May 9, 2019, 8:58 AM), https://news.bloomberglaw.com/daily-labor-report/daca-recipient-denied-renewal-cant-overcome-legal-hurdle [https://perma.cc/8SHT-V4VV].

setbacks in the courtroom, they occur only after a substantial lapse of time and can always be blamed on the judiciary's unnecessarily crimped understanding of executive authority.[319]

CONCLUSION

The polarized rhetoric surrounding undocumented students' access to public education, which prompted *Plyler v. Doe* and precipitated Proposition 187, still continues, as the tensions surrounding the rise and fall of the DACA program make clear. Today, constitutional arguments about equal protection hold little promise for vindicating the Dreamers' rights; instead, their struggles for recognition have been largely political. As administrative authority grows in the face of congressional inaction, a new brand of civil rights advocacy has emerged. Advocates now demand that the courts discipline official discretion by requiring transparency, accountability, and some regard for the reliance interests of affected individuals. Decades ago, *Plyler* embraced an undocumented student's right to become a capable adult as a defining expression of our shared democratic values. Now, the Dreamers ask only that courts hold agencies accountable for the expectations that they have created. With *Plyler* a jurisprudential anomaly, the promise of personhood can be heard not in a constitutional roar but in a bureaucratic whisper.

[319] *See, e.g.*, Press Release, The White House, Office of the Press Sec'y, Statement by the Press Secretary on State of Texas v. United States (Feb. 17, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/02/17/statement-press-secretary-state-texas-v-united-states-america [https://perma.cc/4PLT-KNQQ] (criticizing the district court decision invalidating expanded DACA and DAPA because "the President's actions are well within his legal authority. Top law enforcement officials, along with state and local leaders across the country, have emphasized that these policies will also benefit the economy and help keep communities safe. The district court's decision wrongly prevents these lawful, commonsense policies from taking effect . . . .").