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## ”You May Say I’m a Dreamer, But I’m Not the Only One”: Categorical Prosecutorial Discretion and its Consequences for US Immigration Law

Maria Fufidio\*

\*Fordham University School of Law

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“YOU MAY SAY I’M A DREAMER, BUT I’M NOT  
THE ONLY ONE”<sup>a1</sup>: CATEGORICAL  
PROSECUTORIAL DISCRETION AND ITS  
CONSEQUENCES FOR US IMMIGRATION LAW

*Maria A. Fufidio\**

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a1. JOHN LENNON, *IMAGINE* (Apple 1971); see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–48 (2010) [hereinafter Wadhia, *Prosecutorial Discretion*] (discussing the public disclosure of the Immigration and Naturalization Service’s practice of deprioritizing individuals for removal as a consequence of John Lennon and Yoko Ono’s custody pursuit of Kyoko Ono).

\*J.D. Candidate, 2014, Fordham University School of Law; B.A., 2011, American University. Thanks to Professor Joseph Landau for his continued support, the editorial board of *Fordham International Law Journal* for their enthusiasm and edits, and to my family and GFK for appreciating that a note is more than something to be passed.

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*INTRODUCTION*

“This is a temporary, stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people . . . it’s the right thing to do.”<sup>1</sup> On June 15, 2012, the Obama administration

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1. Barak Obama, President, United States of America, Speech on Immigration Delivered from the White House Rose Garden (June 15, 2012), *available at*

initiated a new policy in immigration enforcement, providing temporary relief from deportation to 800,000 individuals without lawful immigration status who came to the United States as children.<sup>2</sup> This policy, known as Deferred Action for Childhood Arrivals (“DACA”), defers removal action for two years and provides individuals with work authorization if they meet other eligibility criteria for eligibility.<sup>3</sup> Prior to the implementation of this policy, Congress failed to pass an immigration reform bill, known as the Development, Relief, and Education for Alien Minors (“DREAM”) Act.<sup>4</sup> The DREAM Act addressed, among other aspects of immigration, this specific group of undocumented immigrants.<sup>5</sup>

The executive branch implemented DACA through the exercise of categorical, or macro-level, prosecutorial discretion.<sup>6</sup>

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<http://www.nytimes.com/2012/06/16/us/transcript-of-obamas-speech-on-immigration-policy.html> [President Obama, Speech on Immigration].

2. Julia Preston & John Cushman, Jr., *Obama to Permit Young Migrants To Remain in U.S.*, N.Y. TIMES, June 15, 2012, at A1, available at <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> (“Hundreds of thousands of illegal immigrants who came to the United States as children will be allowed to remain in the country without fear of deportation . . .”); see Obama, *supra* note 1 (explaining the framework of this new enforcement policy and who is eligible for deportation relief).

3. See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., Dep’t of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came Here as Children to David Aguilar, Acting Comm’r, U.S. Customs and Border Patrol, Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., John Morton, Dir., U.S. Immigration and Customs Enforcement (June 15, 2012) [hereinafter Napolitano, DACA Memorandum], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (explaining Deferred Action for Childhood Arrivals (“DACA”), who will be eligible for relief from deportation, and the inability for DACA to grant legal status); Preston & Cushman, *supra* note 2 (discussing the parameters of DACA and its potential renewal after two years).

4. Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010).

5. *Id.* § 4(a) (detailing a policy of canceling the removal of aliens “present in the United States for a continuous period of not less than 5 years immediately preceding the date of the enactment of this Act and was younger than 16 years of age on the date the alien initially entered the United States . . .”); see 156 CONG. REC. S8662–01 (Daily ed. Dec. 9, 2010) (tabling the Development, Relief, and Education for Alien Minors Act (“DREAM”) Act in the Senate for later consideration after its passage in the House).

6. Compare Napolitano, DACA Memorandum, *supra* note 3 (discussing the broad category of individuals eligible for relief under DACA based on their circumstances of arrival and time in the United States), with HIROSHI MOTOMURA, IMMIGRATION POLICY CTR., PROSECUTORIAL DISCRETION IN CONTEXT: HOW DISCRETION IS EXERCISED THROUGHOUT OUR IMMIGRATION SYSTEM 2 (2012), available at <http://www.ilw.com/>

Prosecutorial discretion is the ability of law enforcement agencies to make discretionary decisions about whether a law should be enforced against a particular individual or category of individuals.<sup>7</sup> Agents may make discretionary decisions in the context of criminal law enforcement, or civilly when deciding whether to remove undocumented immigrants from the United States.<sup>8</sup>

Opposition from Republicans, state governments, and agents within the Department of Homeland Security followed the announcement of DACA.<sup>9</sup> Some criticize the Obama administration for creating through executive action what Congress had failed to pass through the legislative process.<sup>10</sup> Specifically, critics dub DACA an administrative “end run around Congress” to create immigration reform.<sup>11</sup> Others suggest President Obama has stepped outside the bounds of

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articles/2012,0516-motomura.pdf (defining categorical macro-level and individualized micro-level prosecutorial discretion).

7. See KATE M. MANUEL & TODD GARVEY, CONGR. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 1 (2013) (explaining prosecutorial discretion); see also 8 U.S.C. § 1103(a)(1) (2012) (charging the Secretary of Homeland Security with the administration of immigration law).

8. See Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 633 (2012) (discussing how prosecutorial discretion is intrinsic to criminal law, but also widely exercised by the executive branch in immigration law enforcement); Wadhia, *Prosecutorial Discretion*, *supra* note a1, at 244 (explaining the different contexts in which prosecutorial discretion is exercised).

9. See Press Release, Office of the Gov. Rick Perry, Statement by Governor Perry on Obama Administration’s Immigration Announcement (June 15, 2012), available at <http://governor.state.tx.us/news/press-release/17344/> (“This Administration has failed to provide a secure border, which is essential to national security, and is instead granting blanket amnesty to those who have broken our laws.”); Brian Tashman, *Anti-Immigrant Leader Kris Kobach Levels Dishonest Attacks on Obama Immigration Directive*, RIGHT WING WATCH (Aug. 31, 2012, 2:25 PM), <http://www.rightwingwatch.org/content/anti-immigrant-leader-kris-kobach-levels-dishonest-attacks-obama-immigration-directive> (discussing Kris Kobach’s opposition to DACA because it forces immigration agents and administrative officials to break the law and allows illegal immigrants to stay in the United States).

10. Tashman, *supra* note 9 (discussing the failed passage of the DREAM Act and the Obama Administration’s circumvention of Congress in violation of the separation of powers); see Preston & Cushman, *supra* note 2 (explaining that the group of immigrants benefitting from DACA is similar to those that would have benefitted from the DREAM Act).

11. Preston & Cushman, *supra* note 2 (explaining how Republicans reacted angrily to DACA and view the policy as an end-run around Congress); see Tashman, *supra* note 9 (“The DREAM Act has been proposed in Congress 24 times in the last 11 years, it never passed and yet this administration thinks it can just circumvent Congress and that violates our constitutional separation of powers.”).

appropriate executive power.<sup>12</sup> Finally, Republican critics fear that DACA will result in added costs to American citizens, specifically in job competition, crime, and education and healthcare expenses.<sup>13</sup>

The state and agency response to DACA begs the question: Should categorical prosecutorial discretion continue to be exercised in the same way as it was in DACA to grant large groups of undocumented immigrants relief from deportation? The backlash to DACA may indicate that categorical prosecutorial discretion should be altered, when the category of potential beneficiaries and perceived breadth of the policy is expansive, to avoid similar responses in the future.<sup>14</sup>

Perceptions of DACA's scope and its potential for encroachment on state law has prompted some states to define DACA recipients as unlawfully present in the United States, as opposed to simply being in the United States without lawful status.<sup>15</sup> By defining DACA recipients in this way, these states

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12. See Tashman, *supra* note 9 (“[T]his administration thinks it can just circumvent Congress and that violates our constitutional separation of powers.”); Robert Delahunty & John Yoo, *The Obama Administration, the DREAM Act and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (theorizing that claims of a broad power of prosecutorial discretion run counter to the Take Care Clause).

13. See Elizabeth Llorente, *Mitt Romney’s Unofficial Advisor Confident About Immigration Lawsuit*, FOX NEWS (Oct. 11, 2012), <http://latino.foxnews.com/latino/politics/2012/10/11/mississippi-joins-lawsuit-against-obama-program-for-dreamers> (exploring the potential for criminal and healthcare costs due to DACA); Anna Fifield & Martha Shanahan, *Young Immigrants Hail Deportation Reprieve*, FIN. TIMES (London) (Aug. 15, 2012), <http://www.ft.com/intl/cms/s/0/d6272400-e6f5-11e1-8a74-00144fcab49a.html> (discussing how “potentially millions of illegal immigrants will be permitted to compete with American workers for scarce jobs”).

14. See MANUEL & GARVEY, *supra* note 7, at 16–17 (2013) (discussing the scope of DACA and the number of individuals categorically selected as potentially overstepping bounds of executive); see also *supra* notes 9–13 and accompanying text (explaining opposition and criticism of DACA).

15. See, e.g., Ariz. Exec. Order No. 2012–06 (Aug. 15, 2012), [http://www.azsos.gov/public\\_Services/Register/2012/36/governor.pdf](http://www.azsos.gov/public_Services/Register/2012/36/governor.pdf) [hereinafter Brewer, Executive Order], (stating DACA does not provide state benefits to DACA recipients, and the intent of Arizona lawmakers and voters was not to give driver’s licenses to these unlawfully present individuals); Miss. Exec. Order No. 1299 (Aug. 22, 2012) [hereinafter Bryant, Executive Order], *available at* <http://www.governorbryant.com/wp-content/uploads/2012/07/Executive-Order-1299.pdf> (viewing DACA recipients as unlawfully present and explaining states do not have to grant benefits to unlawfully present aliens).

refuse to convey public benefits, chiefly in the form of driver's license, to these individuals living within their borders.<sup>16</sup>

Additional opposition to DACA has come from Immigration and Customs Enforcement ("ICE"), the immigration law enforcement branch of the Department of Homeland Security.<sup>17</sup> Concerned about implementing DACA in the field, ICE agents and the State of Mississippi filed suit over the legality of DACA as an act of prosecutorial discretion.<sup>18</sup>

This Note examines the executive branch's macro-level and micro-level approaches to exercising prosecutorial discretion to grant discretionary relief to undocumented immigrants illegally present in the United States. Specifically, it explores DACA as an exercise of categorical prosecutorial discretion and the state and agency backlash to this enforcement policy. Then, it compares Canada's preference for individualized, case-by-case exercise of prosecutorial discretion for relief from immigration law. In Canada, the case-by-case resolutions of claims for discretionary relief and a different framework for immigration policy avoids the tensions presented by DACA.

Part I explores the background of prosecutorial discretion in the United States. This Part provides a general history of prosecutorial discretion, both in the criminal and immigration systems. Finally, this Part explores the exercise of prosecutorial discretion in Canada. Next, Part II explores the advantages and disadvantages of using categorical prosecutorial discretion in American immigration law through the lens of DACA, and dissects the state and agency backlash to this systemic policy.

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16. Compare Napolitano, DACA Memorandum, *supra* note 3, at 3 (explaining that DACA "confers no substantive right, immigration status or pathway to citizenship" to beneficiaries of the policy), with Jonathan Oosting, *Michigan Immigrants Rally at Capitol, Seeking Driver's Licenses for Those Allowed to Work*, MLIVE (Nov. 10, 2012), [http://www.mlive.com/news/index.ssf/2012/11/michigan\\_immigrants\\_rally\\_at\\_s.html](http://www.mlive.com/news/index.ssf/2012/11/michigan_immigrants_rally_at_s.html) (noting the Michigan Secretary of State's interpretation DACA beneficiaries as unlawfully present, as opposed to having unlawful status, and therefore ineligible for driver's licenses).

17. See Napolitano, DACA Memorandum, *supra* note 3, at 2-3 (discussing how Immigration and Customs Enforcement agents, along with US Citizenship and immigration Services agents, are tasked with implementing DACA); see also Amended Complaint at 1, *Crane v. Napolitano*, No. 3:12-CV-03247-O (N.D. Tex. Oct. 10, 2012), available at [https://www.numbersusa.com/content/files/Amended\\_Complaint.pdf](https://www.numbersusa.com/content/files/Amended_Complaint.pdf) (explaining the grounds for this action against the Department of Homeland Security).

18. See Amended Complaint, *supra* note 17, at 1-2 (introducing the parties and grounds of the lawsuit).

Part II then compares the advantages and disadvantages of Canada's adherence to individualized, micro-level prosecutorial discretion as the primary means for effectuating discretionary relief. Finally, Part III offers recommendations for the future use of categorical prosecutorial discretion in American immigration. These recommendations aim to avoid negative state and agency reactions to future executive policies providing for discretionary relief from deportation to large groups of similarly situated individuals.

### I. *THE UNDERPINNINGS OF PROSECUTORIAL DISCRETION*

Part I explains prosecutorial discretion generally and its place in the immigration enforcement sector of the executive branch. Part I.A presents a brief history of this practice and its origins in the criminal justice system. Next, Part I.B discusses prosecutorial discretion in immigration law through DACA, and explains the Supreme Court rhetoric about prosecutorial discretion in *Arizona v. United States*.<sup>19</sup> Finally, Part I.C explores the use of micro-level prosecutorial discretion as the primary means for discretionary relief in Canadian immigration.

#### A. *What is Prosecutorial Discretion?*

In general, prosecutorial discretion is a power inherent in law enforcement, allowing officials to use discretion when implementing broad statutes passed by the legislature and entrusted to the executive for implementation.<sup>20</sup> Prosecutorial discretion allows the executive branch, or certain law

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

20. See Memorandum from Doris Meissner, Comm'r of Immigration and Naturalization Servs. on Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter Meissner Memorandum], available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view> ("Prosecutorial discretion' is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone."); Wadhia, *Prosecutorial Discretion*, *supra* note a1, at 246 (explaining how prosecutorial discretion allows each law enforcement agency to decide whether to use its enforcement power against someone).



enforcement officials, to determine how best to enforce the law, while meeting administrative goals and conserving resources.<sup>21</sup>

Historically, prosecutorial discretion was exercised by criminal prosecutors, and later developed within the context of immigration.<sup>22</sup> Since the 1930s, prosecutorial discretion has been recognized in the criminal justice system.<sup>23</sup> In this system, police officers and prosecutors exercise discretion when deciding to arrest, prosecute, and charge individuals with violations of the law.<sup>24</sup> Similarly, immigration officials also exercise prosecutorial discretion in the context of immigration enforcement.<sup>25</sup>

From a US Constitution standpoint, the power to exercise prosecutorial discretion falls within the confines of the separation of powers doctrine, and is considered a valid exercise

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21. See IMMIGRATION & CUSTOMS ENFORCEMENT, TOOLKIT FOR PROSECUTORS 2 (2011) [hereinafter TOOLKIT FOR PROSECUTORS], available at <http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf> (explaining how prosecutors and other government agents can use such discretion as a tool to meet various ends); see also Tara Leigh Groc, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 795–96 (2009) (explaining the president’s constitutional role to enforce the laws effectuated by the discretionary decision making of executive agencies).

22. See KATE M. MANUEL & TODD GARVEY, CONGR. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES, 8, 10 (2013) (discussing the roots of prosecutorial discretion in criminal prosecution dating back to English common law and its later application to immigration law enforcement); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIRCUIT REV. 1, 19 (2009) (discussing the origins of prosecutorial discretion in criminal prosecution).

23. See Joan E. Jacoby, *The American Prosecutor’s Discretionary Power*, 31 PROSECUTOR 25, 39 (Dec. 1997) (noting how the Wickersham Commission recognized the exercise of prosecutorial discretion in the criminal justice system as early as the 1930s); Wadhia, *Prosecutorial Discretion*, *supra* note a1, at 266 (citing the Wickersham Commission’s recognition of prosecutorial discretion in the 1930s).

24. See Wadhia, *Prosecutorial Discretion*, *supra* note a1, at 267 (discussing the federal prosecutor’s ability to use discretion); see also Krauss, *supra* note 21, at 4 (quoting Kenneth Culp Davis’ criticism of the wide latitude of “unnecessary discretionary power over individual parties” given to police and prosecutors).

25. See MANUEL & GARVEY, *supra* note 7, at 1 (explaining how prosecutorial discretion is recognized as exercised outside of prosecution to include the enforcement decisions of immigration officials); see also IMMIGRATION POLICY CTR., UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW (May 26, 2011), <http://www.immigrationpolicy.org/just-facts/understanding-prosecutorial-discretion-immigration-law> (explaining prosecutorial discretion is recognizing in the enforcement decisions of the sub-agencies within the Department of Homeland Security).

of the executive branch's Article II powers.<sup>26</sup> Article II of the US Constitution provides that the President is vested with the power to "take Care that the Laws be faithfully executed."<sup>27</sup> The Supreme Court has held that executive decisions to enforce the law, and the use of executive orders to guide uniformity in agency interpretation and enforcement of a statute, are appropriate constructions of the executive branch's Article II powers.<sup>28</sup>

Exercises of prosecutorial discretion may still be subject to limitations by the other government branches.<sup>29</sup> Because the executive branch is implementing legislation when making discretionary decisions about enforcement, Congress may mandate the specific mode of executive enforcement for a specific law.<sup>30</sup> Generally, judicial review of prosecutorial discretion is limited because the executive branch, not the judiciary, is thought to be the best suited to decide how to effectively enforce the law and allocate agency resources.<sup>31</sup> In

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26. See U.S. CONST. art. II, § 3; see also Krauss, *supra* note 21, at 11–12 (discussing the executive branch's use of prosecutorial discretion as part of the "Take Care" Clause of the Constitution); MANUEL & GARVEY, *supra* note 7, at 16 (explaining the authority to exercise prosecutorial discretion in immigration context arises from the US Constitution).

27. See U.S. CONST. art. II, § 3; Grove, *supra* note 20, at 795–96 (noting the executive branch's Article II powers includes the duty to see federal law obeyed requiring a considerable degree of prosecutorial discretion).

28. See *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (explaining that the executive branch is tasked with implementing certain laws and has certain expertise to exercise discretion when enforcing these laws); see also Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 *YALE L.J.* 2280, 2294–97 (2006) (describing how this is a proper executive function); MANUEL & GARVEY, *supra* note 7, at 8 (discussing how courts characterize prosecutorial discretion as a mixture of separation of powers and Article II doctrine, and a necessary executive function to administer justice).

29. See Goldsmith & Manning, *supra* note 27, at 2295 (discussing congressional oversight to acts of executive enforcement of law); see also Grove, *supra* note 20, at 800 ("Executive enforcement decisions are subject to congressional oversight.").

30. See *supra* note 28 and accompanying text (noting that Congress may be explicit about how the US executive branch should implement a law); see also MANUEL & GARVEY, *supra* note 7, at 4–5 (explaining how some view immigration law as delegated to the executive branch while others believe Congress and the executive share plenary power).

31. See MANUEL & GARVEY, *supra* note 7, at 8–9 (discussing the executive's duty to enforce the legislature's laws which allows exclusive executive authority to enforce and prosecute under these laws); see also Goldsmith & Manning, *supra* note 27, at 2294–95; Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 *AM.*

the specific context of immigration law, the Court has similarly deferred to the discretionary decision-making of the executive branch, leaving this task to the executive branch and Congress.<sup>32</sup>

### B. *Prosecutorial Discretion in American Immigration*

As in the criminal law context, prosecutorial discretion in immigration law allows executive branch officials to decline to enforce the full power of a law against a particular individual or group.<sup>33</sup> Prosecutorial discretion in immigration can be exercised both categorically and individually.<sup>34</sup> Categorical, or macro-level prosecutorial discretion is a discretionary decision to adopt a systemic agency policy that grants relief from enforcement to categories of similarly situated individuals.<sup>35</sup> DACA seems to be a clear example of prosecutorial discretion at the categorical level, as the executive branch chose to develop a systemic plan to defer removal action for an entire class of

CRIM. L. REV. 351, 366–67 (“[T]his ‘broad discretion’ rests largely on the recognition that the decision to prosecute is particularly ill suited to judicial review.”).

32. See *Reno v. American–Arab Anti–Discrimination Comm.*, 525 U.S. 471, 490 (1999) (explaining how judicial deference to prosecutorial discretion in immigration deportation decisions should be even greater than in criminal proceedings); MANUEL & GARVEY, *supra* note 6, at 6, 9 (explaining courts do not require specific statutory authorization for acts of prosecutorial discretion in immigration and treat these enforcement decisions with as much deference as discretionary decisions by criminal prosecutors); see generally Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787, 1803–10 (2010) (discussing how Congress, the President, and the bureaucracy are the parties responsible for making policy decisions in immigration law, and the advantages each party has in making these decisions).

33. See Landau, *supra* note 7, at 632 (“Prosecutorial discretion . . . concerns the authority of the immigration enforcement arm of the executive branch not to assert the full scope of its powers of enforcement in an individual case or category of cases.”); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 6 (2012) [hereinafter Wadhia, *Sharing Secrets*] (explaining how favorable exercises of prosecutorial discretion allows the Department of Homeland Security to not assert the full scope of enforcement authority in every case and may depend on economic and humanitarian factors).

34. See Wadhia, *Prosecutorial Discretion*, *supra* note 31, at 246 (“Prosecutorial discretion is applied at both a categorical and an individual level.”); see also MOTOMURA, *supra* note 6, at 2 (explaining macro-level and micro-level prosecutorial discretion).

35. See MOTOMURA, *supra* note 6, at 2 (noting categorical prosecutorial discretion is systemic and grants relief to groups); see also Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 623 (2006) (discussing the executive branch’s authority to identify categories of cases for discretionary relief from removal).

individuals.<sup>36</sup> Discretionary relief may also be granted on an individualized basis, known as micro-level prosecutorial discretion.<sup>37</sup> Micro-level prosecutorial discretion is the decision to enforce, or not to enforce, the law to its fullest extent against a specific individual.<sup>38</sup>

Despite the conceptual differences between these approaches to prosecutorial discretion, immigration officials have been granting discretionary relief from deportation to immigrants prior to the formal recognition of this practice in the mid-1970s.<sup>39</sup> Within the agency then responsible for immigration, Immigration and Naturalization Services (INS), administrative officials granted case-by-case relief from deportation if an undocumented immigrant, or the immigrant's family, would face extreme hardship or injustice by the removal.<sup>40</sup> However, in 1975 the INS formally recognized prosecutorial discretion by acknowledging its long-time non-priority program.<sup>41</sup> The INS non-priority program deferred

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36. Compare Napolitano, DACA Memorandum, *supra* note 3 (citing the criteria of DACA that defines a category of similarly situated individuals afforded discretionary relief from deportation under this enforcement priority), with MOTOMURA, *supra* note 6, at 2 (explaining categorical prosecutorial discretion and how it differs from individualized prosecutorial discretion).

37. See MOTOMURA, *supra* note 6, at 2 (describing macro-level prosecutorial discretion); Wadhia, *Prosecutorial Discretion*, *supra* note 1, at 246 (explaining that prosecutorial discretion may be exercised categorically and individually).

38. See MOTOMURA, *supra* note 6, at 2 ("Micro-level discretion involves decisions to proceed—or not to proceed—against identified individuals."); Wadhia, *Prosecutorial Discretion*, *supra* note 1, at 246 (describing the two forms of discretionary relief as categorical and individualized).

39. See generally Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation, 1921–1965*, 21 *LAW & HIST. REV.* 69 (2003) (examining deportation policy and discretionary relief from 1921 through 1965, including a call for more administrative discretion in deportation decision-making during the New Deal era); see also Neuman, *supra* note 34, at 622–23 (recognizing the existence of administrative discretion prior to, and in, the 1940s).

40. See Ngai, *supra* note 39, at 99 (discussing how discretionary relief would be granted in "meritorious" cases to avoid the extreme hardship and injustice of the "rigid" immigration laws); see also Neuman, *supra* note 35, at 622–23 (noting that US "statutory law" allows discretionary relief in cases of hardship or injustice).

41. See Memorandum from Andorra Bruno et al., Specialist in Immigration Pol'y, Cong. Research Serv. to Multiple Cong. Requesters, at 8 (July 13, 2012), available at <http://www.edsource.org/today/wp-content/uploads/Deferred-Action-Congressional-Research-Service-Report.pdf> [hereinafter Bruno Memorandum] (offering guidance for the exercise of prosecutorial discretion where an individual presented appealing humanitarian factors were present); see also Wadhia, *Prosecutorial*

action for an individual undocumented immigrant who exhibited certain appealing humanitarian circumstances.<sup>42</sup>

Following the INS's recognition of the non-priority program of the 1970s, the agency began to provide agents with official guidance on the proper exercise of prosecutorial discretion.<sup>43</sup> Significantly, a 2000 memorandum from former INS Commissioner Doris Meissner provided concrete guidelines on the use of prosecutorial discretion.<sup>44</sup> These guidelines listed situations and various factors an immigration agent should consider to determine the "totality of the circumstances" of an individual case before initiating removal proceedings.<sup>45</sup>

Since the issuance of the Meissner memorandum, the Department of Homeland Security has continued to issue guidance, emphasizing the use of discretion to avoid deportation for humanitarian reasons, and deprioritizing individuals for removal by ICE agents.<sup>46</sup> These memoranda

*Discretion*, *supra* note 41, at 248 (listing factors that the INS considered when determining if action should be deferred and if an individual was a non-priority).

42. See Wadhia, *Prosecutorial Discretion*, *supra* note 41, at 248 (citing advanced or tender age, year's present in the United States, physical or mental condition requiring care in the United States, family situation in the United States, and criminal or immoral activities and affiliations as factors Immigration and Naturalization Service ("INS") agents considered when granting deferred action at this time); see also Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion*, AM. IMMIGR. COUN. 3 (2011) [hereinafter Wadhia, *Morton Memo*], available at <http://www.ilw.com/articles/2011.0805-Wadhia.pdf> (discussing history of individualized discretionary relief within immigration agencies).

43. See, e.g., Bruno Memorandum, *supra* note 40, at 6 ("Over the next few decades, an official guidance on discretionary relief from removal began to take shape."); Meissner Memorandum, *supra* note 19 (explaining prosecutorial discretion and the guidelines for enforcing it).

44. See Wadhia, *Prosecutorial Discretion*, *supra* note 41, at 255 (discussing the guidance given to immigration officials by the Meissner memorandum on exercising discretion); see also Meissner Memorandum, *supra* note 19 (offering guidance for field agents making decisions about undocumented immigrants).

45. See Wadhia, *Prosecutorial Discretion*, *supra* note 41, at 255 (stating an INS field officer may look to the immigration status, length of residence in the United States, criminal history, humanitarian concerns, immigration history, likelihood of ultimate removal of the alien, likelihood of achieving enforcement goal by another means, whether the alien is or could be eligible for relief, the effect of action on future admissibility, current or past cooperation with law enforcement, honorable military service, community attention, and INS's resources, when deciding to enforce immigration law); see also Meissner Memorandum, *supra* note 20 (listing the factors an immigration should consider when exercising prosecutorial discretion).

46. See Memorandum from Bo Cooper, General Counsel, Immigration and Naturalization Servs., Dep't of Justice, to all Office of the Principle Legal Adviser Chief

urged immigration officials at all stations of the removal process to exercise prosecutorial discretion.<sup>47</sup> After the Meissner memorandum, subsequent memoranda instructed immigration officials to defer removal action if an individual displayed sympathetic humanitarian factors.<sup>48</sup> The guidelines in these memoranda were broad and left agents to decide who would be eligible for relief.<sup>49</sup> They also reminded immigration officials of their ability to exercise discretion, as not all cases can and should be prosecuted to the fullest extent under the law.<sup>50</sup>

Two recent memoranda added to the Meissner progeny.<sup>51</sup> These documents, issued by ICE Director John Morton, listed

Counsel (July 11, 2000) (on file with author) (offering further information on prosecutorial discretion to guide INS agents' in the exercise of this authority after the issuance of the Meissner memorandum<sup>3</sup>); Memorandum from William J. Howard, Principal Legal Advisor, US Immigration and Customs Enforcement, to all OPLA Chief Counsel (Oct. 24, 2005) [hereinafter Howard Memorandum] (on file with author) (offering further guidance on the exercise of prosecutorial discretion, and its continued importance, after the Meissner memorandum).

47. See Howard Memorandum, *supra* note 46 (providing guidance for the continued use of prosecutorial discretion); Memorandum from Julie Myers, Assist. Sec'y, U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec., to All Field Office Directors, All Special Agents, on Prosecutorial and Custody Discretion (Nov. 7, 2007) [hereinafter Myers Memorandum] (illustrating the continued use of prosecutorial discretion in immigration management after the Meissner memorandum).

48. See Howard Memorandum, *supra* note 46, at \*4 (encouraging prosecutorial discretion in sympathetic cases such as "where the alien has a citizen child with a serious medical condition"); Myers Memorandum, *supra* note 47, at \*1 (providing the example of nursing mothers as a situation requiring discretion).

49. See, e.g., Howard Memorandum, *supra* note 46, at \*2-3 (explaining generally the various stages where ICE agents could exercise discretion to grant relief after arrest<sup>4</sup>); Myers Memorandum, *supra* note 47 (reaffirming the use of prosecutorial discretion to afford relief from the assertion of the full force of immigration law at the immigration enforcement stage).

50. See *supra* notes 45-48 and accompanying text (reiterating the use of prosecutorial discretion and continued administration of memoranda for guidelines for its exercise); see also Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, Dep't of Homeland Sec., to All Field Office Directors, on Enforcing Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens, at \*1 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton, Civil Memorandum] (discussing how this memorandum builds on existing memoranda regarding prosecutorial discretion).

51. See Morton, Civil Memorandum, *supra* note 60, at \*2 (providing a list of factors and situations that aid in the determination of grants of favorable discretion); see also Memorandum from John Morton, Dir., Immigration and Customs Enforcement, Dep't of Homeland Sec., to All Field Officers, All Special Agents in Charge, All Chief Counsel, on Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, at \*2

factors that indicated an individual was not a threat to the United States, allowing the Department of Human Services (“DHS”) to decline using the full scope of its removal powers.<sup>52</sup> The Morton memoranda streamlined the agency goals articulated in past memoranda, and helped ICE agents make enforcement decisions on an individualized basis.<sup>53</sup> Additionally, the Morton memoranda provided for the exercise of categorical prosecutorial discretion, as the memoranda also included categories of individuals eligible for discretionary relief.<sup>54</sup>

An analysis of prosecutorial discretion in US immigration over time reveals it has been exercised both at the micro-level, indicated by the litany of internal guidance for the assessment of individual cases, and at the categorical, or macro-level.<sup>55</sup> While immigration officials were usually instructed to exercise prosecutorial discretion on a case-by-case basis, there have been instances where broader classes of undocumented immigrants were designated for discretionary relief.<sup>56</sup> For example, from

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(June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> [hereinafter Morton, Certain Victims] (discussing how victims, witnesses, and plaintiffs of certain crimes should be afforded discretionary relief in order to pursue justice and aid in an investigation).

52. See Morton, Civil Memorandum, *supra* note 60 at \*2, (allowing Department of Human Services (“DHS”) personnel to make arrest, detention and removal decisions based on enforcement priorities and DHS resources); see also Mary Kenney, Legal Action Ctr., American Immigration Council, PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT at \*2–4 (June 24, 2011) (outlining the Morton memoranda and summarizing the different factors that point to a favorable grant of discretionary relief).

53. See Wadhia, *Morton Memo*, *supra* note 42, at \*4 (discussing how the Morton memoranda seek to stream-line all pre-existing memorandum on prosecutorial discretion through a large list of favorable factors for relief); see also Morton, Civil Memorandum, *supra* note 60 (offering a long, amalgamated list of factors to guide the exercise of prosecutorial discretion in immigration law enforcement).

54. See Morton, Certain Victims, *supra* note 61 (reminding ICE agents and officials that discretionary relief should be made on a case-by-case basis, but still articulating classes of individuals categorized for particular attention); Wadhia, *Morton Memo*, *supra* note 42, at \*6 (“The Morton Memo on Prosecutorial Discretion also identifies classes of persons who warrant ‘particular care’ when making prosecutorial decisions.”).

55. See MOTOMURA, *supra* note 6, at \*2 (indicating that decisions made adhering to the Morton memoranda are indicative of micro-level prosecutorial discretion); Wadhia, *Prosecutorial Discretion*, *supra* note 41 at 246 (discussing categorical and individual level prosecutorial discretion).

56. See MANUEL & GARVEY, *supra* note 7, at 12–13 (2013) (discussing that while guidance on prosecutorial discretion indicated it should be exercised on a case-by-case basis, some categories of individuals for relief have also been designated). Compare Napolitano, DACA Memorandum, *supra* note 3 (explaining the broad category of

1960 through 1990 the executive branch granted discretionary relief to certain groups of foreign nationals through extended voluntary departure, which offered blanket relief from removal to a particular country.<sup>57</sup>

Aside from deferring deportation for groups of foreign nationals of the same country, the US executive branch has identified other categories eligible for discretionary relief.<sup>58</sup> For example, during the George W. Bush administration, DHS instructed ICE officers to use discretion when they initiated administrative arrests of undocumented immigrants that were nursing infants.<sup>59</sup> Furthermore, DHS also categorized undocumented immigrants serving in the US military as a group eligible for discretionary relief from certain provisions of immigration law.<sup>60</sup> While military service was not a dispositive

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individuals all eligible for discretionary relief from deportation), *with Wadhia, Morton Memo, supra* note 41, at \*1 (discussing the “nonpriority” program which identified factors to determine discretionary relief on an individualized basis).

57. *See* Oversight Hearing on Issues Arising From Past Designations of Temporary Protected Status and Fraud in Prior Amnesty Programs Before the H. Subcomm. on Immigration & Claims of the H. Comm. On the Judiciary, 106 Cong. (Mar. 4, 1999) (testimony of Mark Krikorian, Executive Dir., Ctr. for Immigration Studies) *available at* <http://judiciary.house.gov/legacy/106-53.htm> (explaining various instances where the Attorney General exercised prosecutorial discretion to grant extended voluntary departure, and after 1990 deferred enforced departure, to nationals of different countries); *see also* MANUEL & GARVEY, *supra* note 7, at 12–13 (discussing extended voluntary departure as a means for exercising favorable grants of discretion and how this was categorical prosecutorial discretion);

58. *See, e.g.*, Memorandum from Marcy M. Forman, Acting Dir., Office of Investigations, Dep’t of Homeland Sec., to All Special Agents in Charge, on Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Order of Removal on Aliens with United States Military Service, at \*1 (June 21, 2004), *available at* <http://www.legalactioncenter.org/sites/default/files/docs/lac/Forman-2004-memo.pdf> [hereinafter Forman Memorandum] (providing guidance for discretion when issuing notices to appear and removal orders to an undocumented immigrant who served in the US military); Myers Memorandum, *supra* note 47 (explaining the categorical approach for exercising discretion when deciding to make administrative arrests or custody determinations in cases regarding undocumented, nursing mothers); *see also* Kenney, *supra* note 62, at \*10 (discussing categorical discretion exercised when assessing undocumented nursing mothers and aliens in the US military).

59. *See* Myers Memorandum, *supra* note 47 and accompanying text (delineating the parameters of this categorical enforcement policy); *see also* Kenney, *supra* note 61 (discussing internal guidance on exercising discretion when confronted with this category of undocumented immigrants).

60. *See* Forman Memorandum, *supra* note 60 (setting forth military service as an important factor when assessing an individual case); *see also* Kenney, *supra* note 62, at



factor, ICE agents were required to inquire about military service to guide their enforcement of immigration law.<sup>61</sup>

The Obama administration has also exercised categorical prosecutorial discretion before DACA, to defer action against foreign-born spouses and children of deceased US citizens present in the United States.<sup>62</sup> This allowed an entire class of individuals to avoid removal from the United States.<sup>63</sup> This policy, and DACA, exemplifies the Obama administration's willingness to exercise wide-scale categorical prosecutorial discretion, and micro-level prosecutorial discretion to grant relief to undocumented immigrants.<sup>64</sup>

### 1. The Mechanics of DACA as an Example of Categorical Prosecutorial Discretion

Immigration officials are allowed a "broad range of discretionary enforcement decisions" at both the enforcement and adjudicatory stages of removal proceedings.<sup>65</sup> In the field,

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2-3, 10 (noting that internal guidance requires ICE agents to exercise discretion if the undocumented immigrant, or their immediate family, served in the US military).

61. See Forman Memorandum, *supra* note 60, at \*1 (indicating that ICE agents should inquire about military service, weigh this factor, and report this if a notice to appear or removal order is ultimately filed); Kenney, *supra* note 62 and accompanying text (explaining the Forman Memorandum).

62. See Wadhia, *Prosecutorial Discretion*, *supra* note a1, at 263-64 (explaining the Obama administration's widowed spouses policy for discretionary relief); see also Press Release, US Dep't of Homeland Sec., DHS Establishes Interim Relief for Widows of US Citizens (June 9, 2009), available at <http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens> [hereinafter Press Release, DHS Interim Relief for Widows] (establishes foreign national widows with deceased citizen-spouses to be a category for discretionary relief).

63. See Press Release, DHS Interim Relief for Widows, *supra* note 61 (setting forth that this class of individuals with specific similar characteristics would not be subject to removal from the United States); see also Press Release, US Dep't of Homeland Sec., Secretary Napolitano and USCIS Director Mayorkas Announce Full Implementation of New Law Providing Permanent Residence Eligibility for Surviving Spouses and Children of US Citizens (Dec. 14, 2009), available at <http://www.dhs.gov/news/2009/12/14/full-implementation-new-law-providing-permanent-residence-eligibility-surviving> (explaining this categorical, blanket policy exercised with respect to this distinct group of undocumented immigrants).

64. See *supra* notes 2, 50, 61 (outlining the individualized discretionary decision-making provided by the Morton memoranda as well as the broad-scale categorical enforcement policies implemented during this administration).

65. See, e.g., Morton, Civil Memorandum, *supra* note 60, at 2-3 (discussing that ICE agents exercise discretion when "deciding to issue or cancel a notice of detainer; deciding to issue, reissue, serve, file, or cancel a notice to appear; focusing

DHS agents may exercise prosecutorial discretion by granting individuals an administrative stay of removal, or deferred action.<sup>66</sup> Administrative stays of removal allow ICE agents to delay, or suspend removal proceedings pending before an immigration judge.<sup>67</sup>

Deferred action prioritizes certain classes of undocumented immigrants for removal to conserve agency resources or to keep witnesses in the country for assistance during court proceedings.<sup>68</sup> The policy allows DHS agents to choose not to arrest, detain, prosecute, or remove an undocumented immigrant for a specified time period.<sup>69</sup>

Agents grant deferred action based on DHS enforcement priorities and policies that synthesize factors like national security concerns, the criminal history of undocumented immigrants, the likelihood of removal, sympathetic factors, and the needs and interests of other executive agencies.<sup>70</sup> These

enforcement resources on particular administrative violations and conduct; deciding whom to stop, question, or arrest on an administrative violation; deciding whom to detain or release on bond, supervision, personal recognizance, or other condition; and by seeking expedited removal or other forms of removal other than formal removal proceedings"); *see also* Neuman, *supra* note 35, at 616 (discussing how discretionary decision-making occurs at the enforcement phase when immigration officials decide to initiate proceedings, and the adjudicatory stage when immigration officials, or a court decides to stay a removal).

66. *See* TOOLKIT FOR PROSECUTORS, *supra* note 20, at \*4 (explaining deferred action and administrative stays of removal as means for providing discretionary relief); *see also* Morton, Civil Memorandum, *supra* note 49, at \*3 (listing deferred action and staying an action as a means of exercising prosecutorial discretion).

67. *See* TOOLKIT FOR PROSECUTORS, *supra* note 20, at \*6–7 (explaining administrative stays of removal); *see also* 8 C.F.R. § 1241.6 (2012) (granting DHS agents the ability to stay a removal proceeding or order of deportation).

68. *See* TOOLKIT FOR PROSECUTORS, *supra* note 20, at \*4 (explaining deferred action and its purpose); *see also* Morton, Civil Memorandum, *supra* note 49, at \*3 (listing deferred action as a way to meet agency enforcement priorities and conserve resources).

69. *See* TOOLKIT FOR PROSECUTORS, *supra* note 21, at \*6 (explaining that deferred action is granted “for a specific period of time that ICE determines to be appropriate”); *see also* Wadhia, *Prosecutorial Discretion*, *supra* note a1, at 263 (“Deferred action is generally an act of prosecutorial discretion to suspend removal proceedings against a particular individual or group of individuals for a specific timeframe; it cannot resolve an individual’s underlying immigration status.”) (quoting Press Release, Dep’t of Homeland Sec., DHS Establishes Relief for Widows of U. S. Citizens (June 9, 2009), available at [http://www.dhs.gov/ynews/releases/pr\\_1244578412501.shtm](http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm)).

70. *See* TOOLKIT FOR PROSECUTORS, *supra* note 21, at \*5 (“ICE considers DA requests based on a variety of factors and balances those interests against its core mission to remove persons illegally present in the United States. ICE’s decision to grant

policies then guide agent encounters with low-priority undocumented immigrants at various stages of the enforcement process.<sup>71</sup> Additionally, deferred action can be used to grant relief to broad categories of undocumented immigrants.<sup>72</sup>

DACA is a recent example of deferred action granted via categorical, macro-level prosecutorial discretion.<sup>73</sup> DACA is somewhat similar to Congress's DREAM Act.<sup>74</sup> Under DACA, ICE agents must first determine whether a young, undocumented immigrant meets certain criteria, and once this is determined, may defer removal action for two years with the possibility of extension.<sup>75</sup> An ICE agent may grant deferred action under DACA if an individual:

[I]s under the age of thirty;  
 came to the United States under the age of sixteen;  
 has continuously resided in the United States for at least five years, and was in the United States when the DACA memorandum was issued;  
 is currently in school, has obtained a high school diploma or educational equivalent, or is an honorably discharged veteran; and

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DA is purely discretionary."); *see also* Morton, Civil Memorandum, *supra* note 60 (listing the factors balanced to determine if an individual should be afforded relief from the full freight of immigration law).

71. *See, e.g.*, Napolitano, DACA Memorandum, *supra* note 3 (guiding the implementation of this categorical enforcement policy); Morton, Civil Memorandum, *supra* note 49 (guiding the exercise of discretion in individual cases).

72. *See, e.g.*, Memorandum from John Morton, Dir., US Immigration and Customs Enforcement, Dep't of Homeland Sec., to All Employees (June 15, 2012), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf> (explaining how ICE agents are tasked with applying the DHS Secretary's enforcement policy to provide discretionary relief to all eligible recipients in the field); *see also* Wadhia, *Prosecutorial Discretion*, *supra* note a1, at 263 ("More recently, deferred action has been applied at a macro-level.").

73. *Compare* Napolitano, DACA Memorandum, *supra* note 3 (granting deferred action to DACA recipients), *with* MOTOMURA, *supra* note 6, at 2 (explaining the differences between macro-level and micro-level discretion).

74. *See* S. 3992, 111th Cong. (2010) (providing relief to undocumented immigrants that came to the United States as children was part of this bill); *see also* Fifield & Shanahan, *supra* note 13 ("President Barack Obama said in June that he was taking the initiative because Congress had failed to pass the 'Dream Act' that would create a path to citizenship for young illegal immigrants . . .").

75. *See* Napolitano, DACA Memorandum, *supra* note 3 (delineating the criteria to be part of the category defined by DACA and noting that, for those meeting the criteria, deferred action may be renewed after two years).

has not committed a felony, a serious misdemeanor, multiple misdemeanors, or pose a threat to national security.<sup>76</sup>

DACA thus grants deferred action to an entire category of individuals meeting these criteria.<sup>77</sup>

## 2. Recent Affirmation of Prosecutorial Discretion in Immigration Law: *Arizona v. United States*

The Supreme Court's 2012 decision in *Arizona v. United States* examined the federalism tensions that prosecutorial discretion can create and reinforcing the unique role discretion plays in the context of immigration.<sup>78</sup> In the case, the Supreme Court addressed the constitutionality of Arizona law S.B. 1070, a state law that attempted to regulate illegal immigration within its borders.<sup>79</sup> The Supreme Court determined the constitutionality of four provisions of the law.<sup>80</sup> Two of these provisions created new state offenses for violations of immigration law, while the others gave law enforcement officers enhanced arrest authority and investigative responsibility with respect to certain immigrants.<sup>81</sup>

In general, the federal law preempts state law where: (1) the state law regulates an area of law within the exclusive governance of Congress, or where (2) state and federal law are

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76. *See id.* (delineating the criteria for DACA eligibility); *see also* President Obama, Speech on Immigration, *supra* note 1 (presenting the criteria to identify this category of individuals as low-priority for removal).

77. *See* S. 3992, 111th Cong. (2010) (explaining the parameters of DACA).

78. *See Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012) (indicating that one issue with S.B. 1070 was its encroachment on the executive branch's discretion in immigration enforcement); *see also* Roderick M. Hills, Jr., *Arizona v. United States: The Unitary Executive's Enforcement Discretion as a Limit on Federalism*, *CATO SUP. CT. REV.* 190, 195 (2012) (discussing the Arizona's interpretation of the President's ability to suppress more exacting state enforcement policy).

79. *See Arizona v. United States*, 132 S. Ct. at 2497 ("Its stated purpose is to 'discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.'"); *see also* Hills, *supra* note 77, at 190 ("At issue in *Arizona* was . . . [a state] statute . . . authorizing or requiring state and local law enforcement officials to arrest, detain for questioning, or impose state-defined penalties on persons . . .").

80. *See Arizona v. United States*, 132 S. Ct. at 2497–98 (citing the provisions of S.B. 1070 considered by and struck down by the Court).

81. *See id.* at 2497 (explaining the provisions of S.B. 1070 struck down by the Court); *see also* Hills, *supra* note 78, at 192–93 (explaining the provisions of S.B. 1070 considered and struck down by the Court).

in conflict and compliance with both laws would be impossible.<sup>82</sup> The Supreme Court ruled that federal law preempted three of S.B. 1070's provisions, leaving only one of the challenged provisions standing because its effect on federal immigration law could not yet be determined.<sup>83</sup> This provision allowed state law enforcement officials to stop and inquire about an individual's immigration status upon "reasonable suspicion" that the individual was illegally in the United States.<sup>84</sup>

*Arizona v. United States* enabled the Supreme Court to address the role of prosecutorial discretion in immigration law.<sup>85</sup> Before assessing the provision of S.B. 1070, the Court discussed federal statutory supremacy over state statutes, and the necessity of executive discretion in immigration enforcement.<sup>86</sup> The Court explained that agency discretion allows the executive branch to decide when to enforce the full extent of the law, provides flexibility to respond to human concerns, and allows policies that reflect international relations concerns.<sup>87</sup>

The Court's holding suggests that prosecutorial discretion is important in immigration enforcement, regardless of Arizona's significant interest in curbing illegal immigration.<sup>88</sup>

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82. See *Arizona v. United States*, 132 S. Ct. at 2501 (explaining federal preemption law where federal and state law were in conflict); see also KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42719, *ARIZONA V. UNITED STATES: A LIMITED ROLE FOR STATES IN IMMIGRATION ENFORCEMENT* 3–4 (2012), available at <http://www.fas.org/sgp/crs/homsec/R42719.pdf> (examining federal preemption doctrine).

83. See *Arizona v. United States*, 132 S. Ct. at 2510 (holding S.B. 1070 sections 3, 5(C), and 6 were preempted by federal law while upholding section 2(B)).

84. See *id.* at 2507 (discussing how Section 2(B) requires state officers to determine the immigration status of those they stop, detain or arrest if they reasonably suspect the person is illegally present in the United States).

85. See *Arizona v. United States*, 132 S. Ct. at 2499, 2507 (discussing the importance of prosecutorial discretion in immigration law and its relevance in the Court's analysis of section 6); see also Bruno Memorandum, *supra* note 40, at 13 (explaining how the Arizona Court arguably affirmed the executive's ability to avoid removal and noted the importance of discretionary relief).

86. See *Arizona v. United States*, 132 S. Ct. at 2499–2500 (establishing the background legal principles of federalism and discretion before assessing the constitutionality of S.B. 1070).

87. See *id.* at 2499; see also Bruno Memorandum, *supra* note 41, at \*13 (recognizing how prosecutorial discretion may "reflect immediate human concerns" like being born in the United States and having ties to the community, as well as policy concerns).

88. See *Arizona v. United States*, 132 S. Ct. at 2503, 2505–06 (discussing how section 3 and section 6 of S.B. 1070 would impede agency discretion in the enforcement of the law, and frustrates federal enforcement policies, despite Arizona's interest in stopping

The Court struck down most of this state law because it would have undermined the effective exercise of prosecutorial discretion in immigration enforcement.<sup>89</sup> Thus, this case explores the tension that prosecutorial discretion can cause between the executive branch and the states.<sup>90</sup>

*C. Canada: A Similar Federal System's Exercise of Prosecutorial Discretion in Immigration Law*

Immigration law in the United States and Canada is ripe for comparison, as both are multicultural societies with liberal immigration policies.<sup>91</sup> The two countries neighbor each other, and both function as federal systems.<sup>92</sup> Key differences exist however in each country's overall concept of immigration law, as well as in each country's exercise of prosecutorial discretion to

illegal immigration); *see also* Hills, *supra* note 78, at 199 (“[P]rotecting the president’s enforcement discretion formed the heart of *Arizona*’s preemption of Section 6’s authorization of warrantless arrests.”).

89. *See Arizona v. United States*, 132 S. Ct. at 2505–06 (discussing how section 6 should be preempted because federal agencies are guided by the ICE Memorandum of John Morton when making removal decisions, and section 6 would give state officials greater authority to remove than the guidelines offered to federal officers); *see also* Press Release, Dep’t of Homeland Sec., Statement by Secretary Napolitano on the Supreme Court’s Ruling on *Arizona v. United States* (June 25, 2012), <http://www.dhs.gov/news/2012/06/25/statement-secretary-napolitano-supreme-court’s-ruling-arizona-v-united-states> (recognizing that the Supreme Court’s holding “confirmed that state laws cannot dictate the federal government’s immigration enforcement policies or priorities”).

90. *See supra* notes 84–87 and accompanying text (addressing the credence given to prosecutorial discretion by the *Arizona* Court and the consideration of this in evaluating whether sections of a state law were preempted).

91. *See* Steve de Eyre, *The Prospects For a North American Security Perimeter: Coordination and Harmonization of United States and Canadian Immigration and Refugee Laws*, 35 CAN.–U.S. L.J. 181, 185 (2011) (discussing the liberal immigration policies in the United States and Canada); *see also* George Jordan Ashkar, *Oh Canada! We Stand on Guard for Thee: Bill C-50 and the Negative Impact It “May” Have on Immigrant Hopes, Immigration Objectivity, and the Immigration and Refugee Protection Act of 2002*, 17 SW. J. INT’L L. 101, 103 (2011) (“As one of the world’s major immigrant receiving countries, Canada is a leader in granting newcomers the full range of rights and responsibilities that come with citizenship.”).

92. *See Canada’s System of Government*, GOV’T OF CAN., <http://www.canada.gc.ca/aboutgov/ausujtgouv/structure/menu-eng.html> (last modified Dec. 5, 2011) (explaining the general federal structure of government in Canada); Citizenship and Immigration Canada, *Discover Canada*, GOV’T OF CAN., <http://www.cic.gc.ca/english/resources/publications/discover/section-08.asp> (last modified Apr. 11, 2012) (citing the government structure and sources of government power in Canada).

grant undocumented immigrants relief.<sup>93</sup> Generally speaking, a prevailing view of immigration in Canada is that it fosters multiculturalism and adds positive economic value to the country.<sup>94</sup> Canadian immigration officials see immigration as nation building and focuses immigration policies on attracting young, skilled immigrants for economic purposes.<sup>95</sup> This is achieved by an admissions points system, which evaluates potential immigrants based on various factors that accrue “points” for entry, such as the type of employment an individual will seek in Canada.<sup>96</sup> Once accepted, immigrants are welcomed into Canada and provided with a host of federal and provincial resources, such as language training.<sup>97</sup>

The Canadian federal government also allows the various provinces to nominate, or seek to attract, certain categories of

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93. See *Immigration: The United States v. Canada*, ECONOMIST (May 20, 2011, 3:39 PM) [hereinafter ECONOMIST, IMMIGRATION], <http://www.economist.com/blogs/democracyinamerica/2011/05/immigration> (explaining how Canadians view immigration as a means of population and nation-building); see also Genevieve Cartier, *The Baker Effect: A New Interface Between the Canadian Charter of Rights and Freedoms and Administrative Law—the Case of Discretion* 61, 81–83, in *THE UNITY OF PUBLIC LAW*, (David Dzyenhaus ed., 2004) (discussing the individualized approach the administrative branch takes when assessing whether to grant an immigrant discretionary relief).

94. See ECONOMIST, IMMIGRATION, *supra* note 93 (explaining how Canadians view immigration as a means of population and nation-building); see also CATHERINE DAUVERGNE, HUMANITARIANISM, IDENTITY, AND NATION: MIGRATION LAWS IN CANADA AND AUSTRALIA 12, (2005) (discussing how in Canada migration has been used to increase the population generally and in specific parts of the country to benefit the economy).

95. See ECONOMIST, IMMIGRATION, *supra* note 93 (explaining the goal of nation-building guiding Canadian immigration policy); Tobi Cohen, *Canada To Admit 1,000 Fewer Newcomers on Humanitarian Grounds*, CANADA.COM (Nov. 5, 2012), <http://o.canada.com/2012/11/05/144180/#.USxdZOvSMWP> (explaining how the Canadian government ensures that the immigration system attracts skilled workers required by labor market).

96. See Steve de Eyre, *supra* note 91, at 18586 (explaining the points system for entry into Canada); see also F. Leslie Seidle, *Intergovernmental Immigration Agreements and Public Accountability*, POLY OPTIONS, July–Aug. 2010, at 51, available at <http://www.irpp.org/po/archive/jul10/seidle.pdf> (exploring the employment focused admission policies in Canada that guide the conception of immigration).

97. See Seidle, *supra* note 96, at 51 (discussing the various programs and the provincial governments fund to help fully integrate immigrants into the country); see also Citizenship and Immigration Canada, *Immigrant Services in Your Area*, GOV'T OF CANADA, <http://www.cic.gc.ca/english/newcomers/map/services.asp> (citing language assessments and classes as a free service for new immigrants to Canada).

individuals, for both economic and non-economic purposes.<sup>98</sup> This further demonstrates the shared decision-making between the provincial and federal governments regarding immigration into Canada.<sup>99</sup> Additionally, the Minister of Citizenship and Immigration Services sets the number of individuals that can legally immigrate to Canada for humanitarian and compassionate, or public policy reasons.<sup>100</sup> Therefore, the Canadian federal government and the provincial governments share decision-making about admissions policies and create categories of immigrants for legal admission and immigration to Canada.<sup>101</sup>

Aside from these front-end admissions policies, immigration officials in Canada also exercise prosecutorial discretion, primarily on the micro-level through an

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98. See Seidle, *supra* note 96, at 50–51 (explaining the points system and how categories of individuals considered for entry are developed); Citizenship and Immigration Canada, *Provincial Nominees*, GOV'T OF CANADA, <http://www.cic.gc.ca/english/immigrate/provincial/index.asp> (last modified Oct. 22, 2012) (explaining how the Provincial Nominee Program allows the provinces to determine the types of immigrants needed in a specific area for economic advancement, which is then considered when the federal government sets immigration goals).

99. See Seidle, *supra* note 96, at 49 (noting the concurrent jurisdiction between the federal and provincial governments regarding immigration); see also Gov't of Canada Privy Council Office, *The Constitutional Distribution of Immigration Powers*, INTERGOVERNMENTAL AFFAIRS, <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng> (follow “Intergovernmental Affairs” hyperlink under “Quick Links”; then follow “Canadian Federalism” hyperlink; then follow “Distribution of Legislative Powers” hyperlink) (last visited Nov. 23, 2012) (explaining concurrent jurisdiction in Canadian immigration).

100. See Ashkar, *supra* note 90, at 113 (discussing how the Minister can set the number of individuals admitted into Canada each year, including those applying for relief on humanitarian or compassionate grounds); Cohen, *supra* note 94 (“[O]fficials say they’ve actually re-jigged their categories this year and that Canada will admit about 1,000 fewer newcomers on humanitarian and compassionate grounds.”); see also Citizenship and Immigration Canada, *Government of Canada’s Immigration Planning Story*, GOV'T OF CANADA, [hereinafter *Canada’s Immigration Planning Story*], <http://www.cic.gc.ca/english/department/ips/operational.asp> (last modified Mar. 2, 2012) (explaining how immigration to Canada is planned by the federal government to set categories of individuals for admission before immigrants are granted entry).

101. See *Canada’s Immigration Planning Story*, *supra* note 100 (explaining categorical parameters set by Canada regarding who will be admitted into Canada each year, with the majority of immigration classes admitted falling within the economic category); Citizenship and Immigration Canada, *Immigrate to Canada*, GOV'T OF CANADA, <http://www.cic.gc.ca/english/immigrate/index.asp> (last modified Jan. 8, 2013) (indicating how Citizenship and Immigration Canada creates categories for admittance).



individualized case-by-case review.<sup>102</sup> Discretion is individually exercised when humanitarian and compassionate concerns, or public policy warrants relieving a specific individual from removal.<sup>103</sup> Primary adherence to case-by-case micro-level prosecutorial discretion may be a function of continued deference to the Supreme Court of Canada's decision in *Baker v. Canada*.<sup>104</sup> The *Baker* decision required immigration officials to grant relief from immigration law based on an individual's specific circumstances, implying that discretion should be exercised at the micro-level.<sup>105</sup> Thus, prosecutorial discretion in Canada is likened to a dialogue between an immigration official that is able to grant discretionary relief and the undocumented individual about why the individual should not be deported from Canada.<sup>106</sup>

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102. See Cartier, *supra* note 93, at 81–83 (discussing the individualized approach the administrative branch takes when assessing whether to grant an immigrant discretionary relief); see also *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.) (explaining that an officer must make an individualized determination); Dauvergne, *supra* note 93, at 160, 162 n.128 (noting how “decisions about humanitarian and compassionate consideration . . . are made almost entirely on a case-by-case discretionary basis,” even though identity categories were used prior to 1997).

103. See DAUVERGNE, *supra* note 94, at 160–62 (discussing the case-by-case individualized approach taken to assessing a case on humanitarian and compassionate grounds, or for public policy reasons); see also Cartier, *supra* note 93 (identifying the individualized consideration necessary for evaluating cases for discretionary relief).

104. See Cartier, *supra* note 93, at 81–83 (explaining the *Baker* decision and how its individualized approach to discretionary relief from the immigration laws is still followed despite the court interpreting past legislation); see also *Baker v. Canada*, [1999] 2 S.C.R. 817, (Can.) (holding that an applicant for discretionary relief from deportation proceedings must have the individual factors of his or her case considered by an immigration official).

105. See Cartier, *supra* note 93, at 83 (“[*Baker*] shifts the emphasis from the nature of the power to the consequences of the exercise of that power on the individual, *Baker* requires that discretion be conceived from a new perspective . . . centered on the individual affected by the decision.”) (emphasis added); see also TRS Allan, *Common Law Reason and the Limits of Judicial Deference*, in *THE UNITY OF PUBLIC LAW*, *supra* note 92, at 289, 291 (“[T]he ‘discretionary area of judgment’ . . . [will be] attuned to the facts of the particular case; and the court will respect a legitimate governmental purpose in judging the extent to which the individual must endure its adverse consequences . . .”) (emphasis added).

106. See Cartier, *supra* note 93, at 84 (explaining how the reasonableness of a discretionary decision is closely linked to the establishment of proper dialogue with the individual); see also Anna Prait and Lorne Sossin, *A Brief Introduction to the Puzzle of Discretion*, 24 CAN. J.L. & SOC'Y 301, 309 (discussing a dialogue between the decision-maker and the individual affected by the immigration decision).

The Immigration and Refugee Protection Act authorizes Canada's Ministers of Citizenship and Immigration Services and Public Safety and Emergency Preparedness to exercise prosecutorial discretion and exempt undocumented individuals from provisions of immigration law.<sup>107</sup> The Minister of Citizenship and Immigration Services is primarily responsible for the administration of the Immigration and Refugee Protection Act, while the Minister of Emergency Preparedness is responsible for enforcing the law as it relates to the arrest, detention, and removal of immigrants.<sup>108</sup> The Ministers, or the immigration officials they supervise, may make discretionary decisions based on humanitarian and compassionate concerns, or public policy considerations.<sup>109</sup>

Undocumented immigrants present in Canada may be granted exemptions from immigration law on the Minister's own initiative, or through the individual's application request.<sup>110</sup> In either case, the Minister may exercise discretion to grant an administrative stay of removal proceedings, or an exemption from provisions of the Immigration and Refugee Protection Act to an otherwise inadmissible immigrant.<sup>111</sup>

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107. Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25(1), 25.1(1), 25.2(1) (Can.) (allowing the Minister, of either Citizenship and Immigration Services, or Public Safety and Emergency Preparedness, to grant permanent residency status or exemptions from federal immigration laws); *see* Toussaint v. Canada, [2011] F.C.A. 1446 (Can.) (holding humanitarian and compassionate grounds, or public policy concerns, warrant discretionary relief).

108. Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 4(1) (Can.) (explaining the role of the Minister of Citizenship and Immigration Services); *Id.* at s. 4(2) (2012) (explaining the role of the Minister of Public Safety and Emergency Preparedness).

109. *See* Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25(1), 25.1(1), 25.2(1) (Can.) (allowing either Minister to grant permanent residency status or exemptions from the statute to those that demonstrate humanitarian and compassionate concerns and public policy considerations); *see also* Toussaint v. Canada, [2011] F.C.A. 1446, para. 11 (Can.) (explaining the Minister's role in granting discretionary relief from immigration law).

110. *See* Immigration and Refugee Protection Act, S.C. 2001 c. 27, s. 25(1), 25.1, 25.2 (Can.) (explaining how individualizes micro-level prosecutorial discretion is typically exercised in response to a request); *see also* Immigration and Refugee Protection Regulations, SOR/2002-227, s. 66 (Can.) (explaining how a request for discretionary relief from immigration law may be made by an undocumented individual).

111. *See* Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25.1(1), s. 50 (Can.); Immigration and Refugee Protection Regulations, SOR/2002-227, s. 233 (explaining how Ministers may exercise prosecutorial discretion and grant exemptions

Typically, if removal from Canada would cause an individual to face a demonstrable hardship, humanitarian and compassionate concerns will exist for discretionary relief.<sup>112</sup> Ministers or immigration officials usually exercise prosecutorial discretion where an analysis of the individual's situation shows removal will cause undeserved, unusual, or disproportionate hardship.<sup>113</sup> Canadian courts have accepted the synonymy between humanitarian and compassionate concerns and individual hardship, and have allowed this to guide the individualized exercise of prosecutorial discretion.<sup>114</sup> Hardship is identified through an analysis of factors such as:

- [E]stablishment in Canada;
- ties to Canada;
- the best interests of any child affected by removal;
- factors in the country of origin;
- health or family violence considerations;
- separation of relatives; and

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from immigration law or stay a removal resulting from a deportation proceeding); Citizenship and Immigration Canada, *ENF 10 Removals: Enforcement Manuals*, GOV'T OF CANADA (Mar. 31, 2010), <http://www.cic.gc.ca/english/resources/manuals/enf/enf10-eng.pdf> (explaining the process for staying a removal action in Canada).

112. See BEDIAKO BUAHENE, *MOSAIC, A GUIDE TO HUMANITARIAN AND COMPASSIONATE APPLICATIONS* 3–5 (2008), available at [http://www.accessjustice.ca/downloads/A\\_Guide\\_to\\_Humanitarian\\_and\\_Compassionate\\_Applications.pdf](http://www.accessjustice.ca/downloads/A_Guide_to_Humanitarian_and_Compassionate_Applications.pdf) (discussing hardship, specifically medical hardship, the risk of persecution, and the best interest of children as main factors considered by Citizenship and Immigration Canada and the Minister of Citizenship and Immigration); see also *Singh v. Canada*, [2009] F.C. 11 (Can.) (analyzing an application for discretionary relief on humanitarian and compassionate grounds by looking for hardship, and applying the factors found in IP 5).

113. See Citizenship and Immigration Canada, *IP 5 Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds*, GOV'T OF CANADA, 12–13 (Apr. 4, 2011), <http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf> [hereinafter *IP 5 Immigrant Applications*] (explaining the circumstances that usually exist when an individual has demonstrated humanitarian and compassionate grounds for discretionary relief); see also *Compassion in Canada's Immigration Program: Discretionary Relief in Immigration Processing and a Review of the Refugee Determination Process*, CANADIAN B. ASS'N ANN. MEETING, Aug. 19, 2009, at 12–14 [hereinafter *CANADIAN BAR ASS'N*] (explaining hardship and how it is interpreted when assessing grounds for discretionary relief).

114. See *Singh v. Canada*, [2009] F.C. 11 (Can.) (identifying humanitarian and compassionate grounds for exercising prosecutorial discretion pursuant to IRPA section 25).

an individual's inability to leave Canada.<sup>115</sup>

Additionally, the Minister or immigration officer may consider any other important factor to assess an individual for discretionary relief.<sup>116</sup>

Of these two processes for discretionary relief, prosecutorial discretion usually is exercised after an undocumented immigrant submits an application for permanent residency or exemption from immigration law from within Canada.<sup>117</sup> The main difference between these applications and a Minister exercising prosecutorial discretion on his own initiative is that the submission of an individual's application requires the Minister or immigration official to consider these factors.<sup>118</sup> When exercising prosecutorial discretion on his own initiative, a Minister assesses an individual's circumstances by weighing a combination of these factors, or by choosing not to weigh these factors at all.<sup>119</sup> In Canada, the frequent use of this application

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115. See IP 5 Immigrant Applications, *supra* note 113, at \*13 (explaining the circumstances considered when assessing an application for discretionary relief); CANADIAN BAR ASS'N, *supra* note 113, at \*14 (explaining the factors considered when determining whether sufficient humanitarian and compassionate concerns, or public policy grounds, exist for relief).

116. See IP 5 Immigrant Applications, *supra* note 113, at \*13 (explaining the individualized assessment of an application for discretionary relief); CANADIAN BAR ASS'N, *supra* note 113, at \*14 (explaining the individualized process to determine grounds for granting discretionary relief).

117. See Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25(1) (Can.); Immigration and Refugee Protection Regulations SOR/2002-227, s. 66 (Can.); IP 5 Immigrant Applications, *supra* note 113, at \*10, \*21–\*22 (demonstrating the individualized process for granting discretionary relief); CANADIAN BAR ASS'N, *supra* note 113, at \*10–\*12 (discussing how applications for an exemption from the usual immigration criteria is most frequently invoked by an individual's use of section 25(1) of IRPA).

118. See *Cha v. MCI*, [2007] 1 F.C.R. 409 (Can.) (holding that when a Minister decides to deport an undocumented individual on his own initiative, without an application, he does not have an obligation to consider all relevant humanitarian and compassionate circumstances before exercising his prosecutorial discretion); IP 5 Immigrant Applications, *supra* note 113, at \*13 (discussing how each case must be assessed on its own initiative, weighing factors to determine if humanitarian and compassionate grounds exist to exercise discretion).

119. See *Toussaint v. Canada*, [2011] F.C.A. 146, paras. 10–11 (Can.) (holding the proper interpretation of 25(1) requires the Minister to weigh these factors and then make a decision regarding the application, as opposed to deciding to exercise prosecutorial discretion and weigh these factors on his own initiative); CANADIAN BAR ASS'N, *supra* note 113, at \*6 (quoting *Baker v. Canada Minister of Citizenship & Immigration*, [1999] 174 D.L.R. 193 (Can.)) (discussing the Minister's duty to act fairly

process for discretionary relief from the law, along with *Baker's* conception of the proper exercise of prosecutorial discretion, indicates that prosecutorial discretion is primarily exercised on the micro-level.<sup>120</sup>

## II. PROSECUTORIAL DISCRETION IN AMERICAN AND CANADIAN IMMIGRATION: A DACA CASE STUDY

Part II uses DACA as a case study in categorical, macro-level prosecutorial discretion in the United States, and explains the issues it has created at the state and agency levels. Although categorical prosecutorial discretion has been used without such controversy in the past, Part II addresses DACA's potential for encroachment on areas of traditional state governance. It also discusses the intra-agency concerns about granting relief to this large category of individuals.

Part II.A explores the federalism tension caused by DACA, through the lens of the state divide over issuing driver's licenses to DACA recipients. While states have refused to grant DACA recipients other public benefits, the driver's license debate has guided the conversation about state sovereignty and state interpretation of DACA. Next, Part II.B explores the intra-agency tensions that have arisen in response to DACA. Finally, Part II.C discusses the advantages and disadvantages of primarily relying on individualized prosecutorial discretion to grant undocumented immigrants discretionary relief, as in Canada.

### A. Federalism Tensions

Before analyzing the federalism tension created by DACA, it is important to note the advantages that a categorical policy could have at the state-level. It provides relief to a large number of undocumented individuals through one executive policy.<sup>121</sup>

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and consider all humanitarian and compassionate circumstances before exercising his discretion regarding an application pursuant to IRPA section 25(1)).

120. See *supra* notes 102–06, 114–18 and accompanying text (noting that post-*Baker* prosecutorial discretion was conceptualized as an individualized determination, which is furthered by the routine submission of individual applications for discretionary relief requiring case-by-case assessment by immigration officials). Cf. MOTOMURA, *supra* note 6, at \*2 (defining micro-level discretion as individualized).

121. See Preston & Cushman, *supra* note 2, at A1 (asserting that 800,000 young individuals, if eligible, could benefit from this policy).

From a humanitarian and economic standpoint, this policy provides a category-wide opportunity for these individuals to become legal contributors to the country's economy.<sup>122</sup> Also, this policy provides wide-scale relief, without having to wait for Congressional action.<sup>123</sup>

### 1. Arizona, Nebraska, Mississippi and Michigan Treat DACA Recipients like Immigrants with Unlawful Status

Some states perceive DACA as a broad policy that impedes state sovereignty. The states fear that DACA implies more than just deferred action for beneficiaries, threatening state discretion in the disbursement of public benefits. In response to this policy, these states quickly reacted to clarify exactly what DACA recipients should expect from state governments if eligible for relief from deportation.<sup>124</sup>

DACA's potential scope, construed to include benefits beyond federal work authorization, has been met with opposition from the state governors of Arizona, Nebraska, Mississippi, Texas, and Michigan because of its perceived threat to state sovereignty.<sup>125</sup> Following DACA's announcement, these

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122. See Napolitano, DACA Memorandum, *supra* note 3, at \*2 (discussing how immigration laws are not designed to remove productive young people, many of which have already contributed to the country in significant ways).

123. See Memorandum from Denise Vanison, Policy and Strategy, US Citizenship and Immigration Servs., Dep't of Homeland Sec'y, to Alejandro M. Mayorkas, Dir., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec'y, on Administrative Alternatives to Comprehensive Immigration Reform, at \*2 (Oct. 2010) [hereinafter Vanison Memorandum], <http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf> (discussing the benefits of broad grants of prosecutorial discretion, namely the ability to relieve a large group of similarly situated individuals).

124. See President Obama, Speech on Immigration, *supra* note 1 ("Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people."); Preston and Cushman, *supra* note 2, at A1 ("The policy, while not granting any permanent legal status, clears the way for young illegal immigrants to come out of the shadows, work legally, and obtain driver's licenses and other documents they have lacked.")

125. See James Eng, *Arizona Gov. Jan Brewer's Ban on Driver's Licenses for Undocumented Immigrants Likely To Wind Up in Court*, NBC NEWS (Aug. 26, 2012), [http://usnews.nbcnews.com/\\_news/2012/08/16/13317418-arizona-gov-jan-brewers-ban-on-drivers-licenses-for-undocumented-immigrants-likely-to-wind-up-in-court?lite](http://usnews.nbcnews.com/_news/2012/08/16/13317418-arizona-gov-jan-brewers-ban-on-drivers-licenses-for-undocumented-immigrants-likely-to-wind-up-in-court?lite) (explaining Governor Brewer of Arizona's limiting the potential scope of DACA by denying recipients licenses); Oosting, *supra* note 16 (discussing Secretary of State Ruth Johnson's memorandum telling Michigan employees to not issue driver's licenses to DACA beneficiaries); see also Brewer, Executive Order, *supra* note 15; Bryant, Executive

states vowed to deny state benefits to DACA recipients, specifically driver's licenses.<sup>126</sup>

Government officials from these states issued executive orders specifying that DACA recipients are not lawfully present in the state and thus are ineligible for driver's licenses.<sup>127</sup> For example, Arizona Governor Jan Brewer authorized state agencies to block DACA recipients from obtaining state public benefits or state identification.<sup>128</sup> As a result, the Arizona Department of Motor Vehicles has changed its policy for issuing driver's licenses, which included using work authorization for proof of lawful presence in the United States.<sup>129</sup> After Governor Brewer's order, the Arizona Department of Motor Vehicles removed work authorization from its list of documents for licensing, which denies DACA recipients a driver's license.<sup>130</sup>

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Order, *supra* note 13 (clarifying the scope of DACA and Arizona's ability to determine those eligible for state benefits); *Mississippi Governor is Latest to Bar Benefits for Undocumented Immigrants*, FOX NEWS LATINO (Aug. 24, 2012), <http://latino.foxnews.com/latino/politics/2012/08/24/miss-bars-benefits-for-deferred-status-immigrants/> (noting how Nebraska decided not to issue driver's licenses to DACA beneficiaries); Press Release, Gov. Rick Perry, *supra* note 8 (denying to issue driver's license to DACA beneficiaries in Texas).

126. See Llorente, *supra* note 13 (explaining the state backlash to this policy); Brewer, Executive Order, *supra* note 15 (stating Arizona's refusal of driver's licenses to DACA recipients).

127. See, e.g., Brewer, Executive Order, *supra* note 15; Bryant, Executive Order, *supra* note 15; Sandra Lilley, *Michigan: No Driver's Licenses for Deferred Deportation Dreamers*, NBC NEWS (Nov. 26, 2012), <http://nbc latino.com/2012/11/26/michigan-no-drivers-licenses-for-deferred-deportation-dreamers>; cf. Press Release, Gov. Rick Perry, *supra* note 9.

128. See, e.g., Brewer, Executive Order, *supra* note 15 (disallowing DACA recipients any public benefit otherwise bestowed to those lawfully present in Arizona); Eng, *supra* note 125 (explaining how Arizona views DACA recipients as both unlawfully present and with unlawful status to support denial of driver's licenses).

129. See *Identification Requirements*, ARIZONA DEP'T MOTOR VEHICLES, MOTOR VEHICLE DIV., <http://mvd.azdot.gov/mvd/formsandpub/mvd.asp> (follow "1" hyperlink; then follow "Identification Requirements" hyperlink) (last visited Oct. 17, 2012) (disallowing DACA recipients to present work authorization from US Citizenship and Immigration Services as proof for a driver's license); Karen McVeigh, *Undocumented Immigrants File Lawsuit Against Arizona Over Denied State IDs*, GUARDIAN (Nov. 29, 2012), <http://www.guardian.co.uk/world/2012/nov/29/immigrants-dream-act-lawsuit-arizona-denied> ("Previous to the order, according to the lawsuit, DACA recipients would have been able to meet the requirements for a driving license by submitting their employment authorisation documents.").

130. See Lilley, *supra* note 127 (noting the Arizona Department of Motor Vehicles changed its list of proper proof of identification as these individuals could use their newly obtained work authorization to apply for a license under the old policy).

In defense of their position, these states argue that because DACA beneficiaries are unlawfully present, instead of without lawful status, they can refuse to issue driver's licenses.<sup>131</sup> These states argue that being granted deferred action does not provide an undocumented immigrant with lawful presence in the country, which they contend the federal government recognized by allowing them to choose what DACA recipients would receive within state borders.<sup>132</sup> These states view granting state benefits to DACA recipients as rewarding unlawfully present immigrants for illegally entering the country, and exposes these states to the future entry of illegal immigrants at the risk of national security.<sup>133</sup>

Additionally, these states cite federal law as support for their decision to deny state benefits to DACA recipients because of their unlawful status and presence in the country.<sup>134</sup> Under US federal law, the states are not required to disburse state benefits to immigrants who are not considered "qualified aliens."<sup>135</sup> The states may determine how "qualified aliens" can become eligible for a state benefit, allowing state discretion in

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131. See Bryant, Executive Order, *supra* note 15 (explaining how these individuals are unlawfully present, and therefore ineligible for state benefits); Eng, *supra* note 125 (discussing how DHS considered DACA recipients to be without lawful status but eligible to remain in the country and avoid deportation).

132. See Napolitano, DACA Memorandum, *supra* note 3, at \*2 (explaining how DACA does not change the immigration status or citizenship of those eligible for relief); see also Eng, *supra* note 125 (explaining how Brewer cited these individuals as unlawfully present and ineligible for public benefits, citing DHS's assurance that DACA recipients would not have lawful status as support).

133. See Gosia Wozniacka, *Driver's Licenses for Undocumented Immigrants Could Be a Big Benefit of DACA in California*, HUFFINGTON POST (Sept. 15, 2012), [http://www.huffingtonpost.com/2012/09/16/drivers-licenses-undocumented-immigrants\\_n\\_1888297.html](http://www.huffingtonpost.com/2012/09/16/drivers-licenses-undocumented-immigrants_n_1888297.html) (discussing how critics believe that driver's licenses are "breeder" documents for a host of other documents, as well as access to bank accounts, credit cards, and mortgages); Kathleen Miles, *DACA: Driver's Licenses For Undocumented Immigrants Varies by State*, HUFFINGTON POST (Aug. 20, 2012), [http://www.huffingtonpost.com/2012/08/20/daca-drivers-licenses\\_n\\_1811899.html?](http://www.huffingtonpost.com/2012/08/20/daca-drivers-licenses_n_1811899.html?) ("Opponents say granting licenses to undocumented individuals would be a national security risk because license holders can fly and enter buildings.")-

134. See, e.g., Brewer, Executive Order, *supra* note 15 (citing that the states' authority to exclude unlawfully present aliens from state benefits is grounds for denying DACA beneficiaries driver's licenses); see also 8 U.S.C. §§ 1621(a)-(b), 1622(a) (2012) (explaining the state discretion in deciding how to disburse benefits, like licenses, to all those they deem "qualified" aliens).

135. See 8 U.S.C. § 1621(a), (c)(1) (listing professional and commercial licenses as state benefits under this section).



determining what “qualified” means.<sup>136</sup> The states contend that DACA recipients are not “qualified aliens” under federal law because they are unlawfully present in the United States, despite being allowed by the federal government to stay and work.<sup>137</sup> While these statutes define “qualified” to include those who have had a deportation withheld, states do not have to consider DACA recipients as “qualified” for state benefits.<sup>138</sup> According to this reasoning, the states’ actions are defensible under federal law because they conceptualize DACA recipients as unlawfully present, and therefore unqualified for state benefits.<sup>139</sup>

Also, these states argue that they can deny public benefits, like driver’s licenses, because the disbursement of state benefits is traditionally a state function, and not a power of the federal government.<sup>140</sup> Issuance of driver’s licenses has been considered powers reserved to the states pursuant to the 10<sup>th</sup> Amendment.<sup>141</sup>

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136. See 8 U.S.C. § 1622(a) (explaining how state benefits may be provided to “qualified” aliens); Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 228 (2004) (discussing the reasons for providing undocumented immigrants with licenses and the barriers created by the federal government’s encouragement of state limitations on their issuance).

137. See Brewer, Executive Order, *supra* note 15 (citing the unlawful presence as grounds for denying driver’s licenses, and reiterating that DACA does not convey lawful status); Bryant, Executive Order, *supra* note 15 (explaining how unlawfully present DACA recipients may not receive driver’s licenses).

138. See 8 U.S.C. § 1641(b)(5) (giving states the leeway to determine whether an alien is “qualified” to be eligible for public benefits conveyed by the state).

139. Compare Brewer, Executive Order, *supra* note 15, with Bryant, Executive Order, *supra* note 15, with 8 U.S.C. §§ 1621, 1641(b)(5) (giving states the ability to deny state benefits to undocumented immigrants and leeway in deciding if having a delayed deportation is considered “qualified”); see Eng, *supra* note 124 (explaining how Arizona Governor Brewer used the separate concepts of unlawful presence and unlawful status as interchangeable terms to justify this policy, whereas DACA indicates recipients are without lawful status).

140. See Alexander L. Mounts, *A Safer Nation?: How Driver’s License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists*, 37 IND. L. REV. 249–51 (2003) (explaining how driver’s licenses are traditionally thought of as within the province of the states); see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

141. See Mounts, *supra* note 140, at 249–50 (noting how licenses have been within the powers reserved to the states, which allows the states to determine eligibility); see also Johnson, *supra* note 136, at 220–21 (recognizing how driver’s license schemes have been traditionally created and enforced by the states).

Thus, restricting driver's licenses to exclude DACA recipients is arguably an appropriate, constitutional state prerogative.<sup>142</sup>

## 2. California and Nevada

State officials in California and Nevada support issuing driver's licenses and other state benefits to young, undocumented immigrants.<sup>143</sup> California went so far as to pass its own state version of the DREAM Act.<sup>144</sup> Since DACA, California state and local legislators have proposed and passed legislation that allows individuals with deferred action to apply for driver's licenses.<sup>145</sup> These states argue conferring driver's licenses to DACA recipients ensures public safety, allows DACA recipients to attend work, and avoids the potential for federal preemption of policies denying this benefit.<sup>146</sup>

Public safety and everyday necessity are the main reasons for the states' willingness to convey driver's licenses to DACA

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142. See Mounts, *supra* note 140, at 271–72; Johnson, *supra* note 136, at 220–21; see also Catherine E. Shoichet and Mariano Castillo, *Driver's License Rules Fuel New Immigration Debate*, CNN (Aug. 22, 2012), <http://edition.cnn.com/2012/08/21/us/states-immigration-policy/index.html> (explaining that driver's licenses typically are within the province of the states, as they set eligibility rules and issue the document).

143. See Elise Foley, *Brian Sandoval Supports Driver's Licenses for Deferred Action Recipients*, HUFFINGTON POST (Nov. 29, 2012), [http://www.huffingtonpost.com/2012/11/29/brian-sandoval-drivers-licenses-deferred-action\\_n\\_2212017.html](http://www.huffingtonpost.com/2012/11/29/brian-sandoval-drivers-licenses-deferred-action_n_2212017.html) (explaining state support for conveying public benefits, specifically driver's licenses, to DACA recipients); Wozniacka, *supra* note 133 (stating California's grounds for conveying driver's licenses to DACA recipients).

144. See Cal. Assembly Bill No. 130, ch. 93 (providing a state version of the defunct DREAM Act); Cal. Assembly Bill No. 131, ch. 604 (explaining the grounds for a California DREAM Act initiative).

145. See 2012 Cal. Legis. Serv. 862 (West) (filed Sept. 30, 2012) (amending California Vehicle Code section 12801.6 to allow “any federal document demonstrating favorable action by the federal government for acceptance of a person in the deferred action for childhood arrivals program” to satisfy the requirements for a driver's license); see also Ian Lovett, *IDs For Illegal Immigrants Take a Step in Los Angeles*, N.Y. TIMES, Oct. 16, 2012, <http://www.nytimes.com/2012/10/17/us/la-takcs-step-to-issuing-id-cards-to-illegal-immigrants.html> (explaining the Los Angeles city initiative to provide driver's licenses to undocumented immigrants).

146. See, e.g., Raymond C. Peck, *Unlicensed Driving: A Major California Safety Problem*, CAL. DEP'T OF MOTOR VEHICLES (2011), <https://www.dmv.ca.gov/about/profile/rd/resnotes/unlicensed.htm> (indicating unlicensed drivers or drivers with suspended or revoked licenses were much more likely to be responsible for fatal car crashes); John Wildermuth, *Dems Try to Give Young Illegals Licenses*, SFGATE (Aug. 23, 2012, 9:04 AM), <http://www.sfgate.com/news/article/Dems-try-to-give-young-illegals-licenses-3808747.php> (noting a driver's license would allow undocumented immigrants to attend and obtain work).

recipients.<sup>147</sup> Unlicensed drivers operating vehicles affects traffic safety, with undocumented immigrants comprising part of this unlicensed group.<sup>148</sup> By issuing driver's licenses to DACA recipients, states will be able train these individuals in driver's education courses and improve traffic safety.<sup>149</sup> Also, providing DACA recipients with driver's licenses is a necessity.<sup>150</sup> These states recognize that employment depends on being able to attend work.<sup>151</sup> Without the mobility a license provides, DACA recipients may not be able to effectuate the work authorization granted by the policy and attend work.<sup>152</sup>

Finally, by issuing driver's licenses to DACA recipients these states may escape legal challenge on federal preemption grounds, avoiding lawsuits like the Arizona case challenging Governor Brewer's executive order.<sup>153</sup> Denying driver's licenses

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147. See *supra* note 142 and accompanying text (explaining these states recognize denying DACA recipients driver's licenses causes traffic safety concerns and difficulty attending to day-to-day activities).

148. See, e.g., SUKHVIR S. BRAR, CAL. DEP'T OF MOTOR VEHICLES, ESTIMATION OF FATAL CRASH RATES FOR SUSPENDED/REVOKED AND UNLICENSED DRIVERS IN CALIFORNIA, at vi, 2-3 (2012), available at [http://apps.dmv.ca.gov/about/profile/rd/r\\_d\\_report/Section\\_6/S6-238.pdf](http://apps.dmv.ca.gov/about/profile/rd/r_d_report/Section_6/S6-238.pdf) (correlating undocumented immigrants driving without a license to fatal car accidents in California); see also Peck, *supra* note 146 (indicating unlicensed drivers were much more likely to be responsible for fatal car crashes).

149. See Miles, *supra* note 133 (discussing how conveying driver's licenses can increase traffic safety and decrease crashes); see also Matt O'Brien, *Young Illegal Immigrants Will Be Eligible for California Driver's Licenses*, MERCURY NEWS (Aug. 16, 2012), [http://www.mercurynews.com/nation-world/ci\\_21327328/young-illegal-immigrants-will-be-eligible-california-drivers](http://www.mercurynews.com/nation-world/ci_21327328/young-illegal-immigrants-will-be-eligible-california-drivers) (discussing past Democratic movements for licensing undocumented individuals in California).

150. See Miles, *supra* note 133 (discussing the importance of driving to take advantage of work opportunities in California); Wildermuth, *supra* note 155 (explaining how most people depend on a car to get to work and go about daily life).

151. See Wozniacka, *supra* note 133 (discussing how unlicensed undocumented immigrants may not be able to gain meaningful employment due to the lack of accessible transportation to work); see also Wildermuth, *supra* note 146 and accompanying text (citing the necessity for driver's licenses in an individual's everyday life).

152. See Johnson, *supra* note 136, at 221-22 ("to an undocumented immigrant, a driver's license means the ability to live in a way that most Americans take for granted"); see also Wozniacka, *supra* note 133 (discussing how unlicensed undocumented immigrants drive may not be able to gain employment in most of the country or will be left to take illegitimate work).

153. See Johnson, *supra* note 136, at 228 (discussing that because the federal government regulates immigration, "[i]f immigration control is the primary reason for limiting undocumented immigrant access to driver's licenses, then an issue of federal

may limit the full recognition of DACA and constitute regulating immigration, which is typically left to the federal government.<sup>154</sup> Also, other provisions of US federal law may preempt state policies denying benefits to those granted deferred action.<sup>155</sup> Thus, by allowing DACA recipients to have driver's licenses these states avoid litigating this issue, and having their state's policy preempted.<sup>156</sup>

### B. *Intra-Agency Tensions Within the Executive Branch*

Irrespective of the following analysis of intra-agency backlash to DACA, categorical prosecutorial discretion can be advantageous to the US executive branch. Categorical prosecutorial discretion allows immigration agents to focus on dangerous, undocumented immigrants for removal.<sup>157</sup> The DHS has a limited amount of resources to spend in deportation, in comparison to the number of undocumented immigrants

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preemption arises"); Amended Complaint, *supra* note 17, at 1–3 (citing challenges to Governor Brewer's executive order on federal preemption grounds).

154. See *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (explaining that federal law preempts state law when state law regulates an area left to the US Congress, like immigration, or when it limits the effect of a federal law); see also Johnson, *supra* note 136, at 228 (explaining that if immigration control is the motivation for denying licenses then federal preemption issues arise); McVeigh, *supra* note 129 (explaining that instead of denying DACA recipients licenses, "our leaders should come together to enact long-term solutions that would allow talented immigrant youth to achieve the American dream").

155. See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2012) (prescribing specific parameters necessary for state driver's licenses to be recognized for federal purposes, and listing those eligible for driver's licenses to include deferred action recipients); see also Eng, *supra* note 125 ("Cruz noted that the REAL ID Act of 2005, a federal law that modified requirements for state driver's licenses and ID cards, specifically listed immigrants who have been granted 'deferred action' as among groups of people eligible for a license.").

156. See Amended Complaint, *supra* note 17 (explaining the lawsuit filed against Governor Brewer in Arizona); Jeremy White, *Immigration Policy's New Sticking Point: Drivers' Licenses For the Undocumented*, INT'L BUS. TIMES (Aug. 23, 2012), <http://www.ibtimes.com/immigration-policys-new-sticking-point-drivers-licenses-undocumented-754178> ("It now seems likely that the overarching question of what rights deprived immigrants [receive] will be hammered out in court.").

157. See Carol Craty, *Ten ICE Agents Target Obama Deportation Policy with Lawsuit*, CNN (Aug. 23, 2012), <http://www.cnn.com/2012/08/23/us/ice-agents-lawsuit> (discussing backlash to the policy that is supposed to allow ICE agents "to focus their attention on dangerous criminals who are illegal immigrants"); see also Llorente, *supra* note 13 (explaining the Republican and state backlash to DACA).

present in the United States.<sup>158</sup> Thus, policies like DACA allow immigration officials to conserve agency resources and focus on deporting egregious individuals.<sup>159</sup>

### 1. The ICE Agents Lawsuit

Aside from federalism tensions, DACA has created intra-agency conflict within DHS.<sup>160</sup> In August 2012, ten ICE agents, and the state of Mississippi, filed a lawsuit in the Northern District of Texas against the Secretary of Homeland Security, Janet Napolitano.<sup>161</sup> The suit attacked DACA specifically, and the executive branch generally, on their ability to exercise prosecutorial discretion and provide relief to undocumented immigrants.<sup>162</sup> The agents claim the US executive branch disregarded their concerns about DACA and ordered them to avoid removing a broad class of undocumented immigrants in

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158. See Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), available at <http://www.ice.gov/news/releases/1206/120615washingtondc.htm> [hereinafter Press Release, Deferred Action] (explaining DACA allows the DHS to continue focusing its enforcement resources on removing those posing risk to national security or public safety and deprioritizing others); see also Napolitano, DACA Memorandum, *supra* note 3 (explaining additional measures are necessary to ensure ICE enforcement resources are not expended on low priority cases).

159. See Press Release, Deferred Action, *supra* note 158 (“Today’s action further enhances the Department’s ability to focus on these priority removals.”); see also Napolitano, DACA Memorandum, *supra* note 3 (identifying that these individuals are low-priority and that many of these cases already had been closed administratively).

160. See Cratty, *supra* note 157 (“The complaint . . . objects to the policy of ‘prosecutorial discretion,’ in which ICE agents are supposed to focus their attention on dangerous criminals who are illegal immigrants.”); see also Elise Foley, *Kris Kobach Represents Immigration Agents in Lawsuit Against Obama Administration*, HUFFINGTON POST, Aug. 23, 2012, [http://www.huffingtonpost.com/2012/08/23/kris-kobach-immigration-lawsuit-obama\\_n\\_1825272.html?](http://www.huffingtonpost.com/2012/08/23/kris-kobach-immigration-lawsuit-obama_n_1825272.html?) [hereinafter Foley, *Immigration Agents Lawsuit*] (explaining the grounds for the ICE agent suit against DHS).

161. See Amended Complaint, *supra* note 17, at 1–2 (explaining grounds for the ICE agent suit, namely the agents’ belief DACA prevents agents from doing their job).

162. See Cratty, *supra* note 157 (“In a nutshell, the agents do not want to obey the new policies and do not want to face any disciplinary actions or lawsuits if they continue to arrest . . .”); see also Stephan Dinan, *Immigration Agents Sue to Stop Obama’s Non-Deportation Policy*, WASH. TIMES, Aug. 23, 2012, <http://www.washingtontimes.com/news/2012/aug/23/immigration-agents-sue-stop-obamas-non-deportation> (“[ICE] agents and deportation officers said Mr. Obama’s policies force them to choose between enforcing the law . . . and violating their own oaths of office . . .”).

violation of the law.<sup>163</sup> In the complaint, the agents allege that this executive action is a violation of the separation of powers, as it usurps Congress' role in passing immigration reform.<sup>164</sup>

Furthermore, the plaintiffs cite DACA's breadth and its ability to offer relief to an entire category of people as support for the causes of action.<sup>165</sup> Within the body of the amended complaint, one cause of action explicitly alleges that DACA is illegal because of the enormous group of individuals it will benefit if they are eligible.<sup>166</sup> Two other causes of action cite DACA's ability to categorically confer discretionary relief to similarly situated undocumented immigrants.<sup>167</sup>

The Department of Homeland Security has defended DACA in the face of this lawsuit, as well as the legality of the executive branch's use of prosecutorial discretion to deprioritize individuals for removal.<sup>168</sup> The US executive branch believes setting enforcement priorities is "well within its power in enacting policy," providing support for DACA as within the

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163. See *ICE Agents Sue to Stop Obama's Deferred Deportation Policy*, FOX NEWS (Aug. 23, 2012), <http://latino.foxnews.com/latino/politics/2012/08/23/ice-agents-sue-to-stop-obama-deferred-deportation-policy/> [hereinafter *ICE Agents Sue Deferred Deportation*] (discussing the administration's disinterest in working with agents to address fears over DACA); see also Niels Lesniewski, *Immigration Lawsuit Stirs Up Congressional, Presidential Politics*, ROLL CALL (Aug. 23, 2012), [http://www.rollcall.com/news/immigration\\_lawsuit\\_stirs\\_up\\_congressional\\_presidential\\_politics-216967-1.html](http://www.rollcall.com/news/immigration_lawsuit_stirs_up_congressional_presidential_politics-216967-1.html) (discussing how some view DACA as amnesty that rewards lawbreakers and forces ICE agents to break the law).

164. See Lesniewski, *supra* note 163 (explaining ICE agents believe the Obama administration overstepped prescribed bounds into that of the legislative branch); see also Corey Dade, *Immigration Employees File Suit Against Obama's New Immigration Policy*, NPR (Aug. 23, 2012, 6:33 PM), <http://www.npr.org/blogs/thetwo-way/2012/08/23/159926481/immigration-employees-file-suit-against-obamas-new-immigration-policy> (citing how the executive branch usurps congressional power by allowing DACA).

165. See Amended Complaint, *supra* note 17, at 16 (explaining federal regulations do not authorize conferring deferred action to an entire category of unlawfully present aliens of this size).

166. See *id.* at 20 (discussing how this policy cannot be legal because of the number of individuals eligible for relief).

167. See *id.* at 20–21 (discussing how this policy cannot be legal because it could grant deferred action to fifteen percent of all undocumented immigrants).

168. See Dinan, *supra* note 162 (quoting DHS as defending prioritizing of individuals for removal with DACA being "a continuation of these priorities"); see also Foley, *Immigration Agents Lawsuit*, *supra* note 160 (discussing the Obama Administration's belief that DACA is well within its power given the need for prosecutorial discretion).

province of the executive branch.<sup>169</sup> This intra-agency lawsuit over DACA shows how the use of categorical, macro-level prosecutorial discretion can create intra-agency complications.<sup>170</sup>

### C. *The Advantages and Disadvantages of the Canadian System's Reliance on Individualized Prosecutorial Discretion*

#### 1. Advantages of Individualized Prosecutorial Discretion

Canada's individualized, micro-level exercise of prosecutorial discretion has several advantages. First, Canada's individualized approach does not raise the same federalism tensions, as immigration policy-making is shared between the Canadian federal government and provincial governments.<sup>171</sup> This allows the provincial governments to communicate with the federal government about immigration policy, and help decide which types of immigrants to attract to specific provinces for the economic development of these areas.<sup>172</sup> At the most basic level, this relationship between the Canadian federal and provincial governments requires consultation with the provinces regarding changes to the legal framework of immigration.<sup>173</sup> This shared

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169. See Foley, *Immigration Agents Lawsuit*, *supra* note 160; see also Matt Negrin and Pierre Thomas, *Obama Defends Immigration Deportation Rules Criticized as Political*, ABC NEWS (June 15, 2012), <http://abcnews.go.com/Politics-/OTUS/obama-defends-immigrant-deportation-rules-criticized-political/story?id=16576677#.ULAcSHbUrg> (discussing how DACA is a logical progression from past valid DHS decisions regarding undocumented immigrants); Dinan, *supra* note 161 (defending DACA as part of DHS's tradition of granting prosecutorial discretion to certain undocumented immigrants).

170. See Julia Preston, *Agents Sue Over Deportation Suspensions*, N.Y. TIMES, Aug. 23, 2012, <http://www.nytimes.com/2012/08/24/us/agents-sue-over-deportation-suspensions.html> (explaining how the ICE agent suit indicates signs of turmoil within DHS in response to the Obama Administration's ambitious shift in focus); *supra* notes 162–67 and accompanying text (explaining the issues raised by DACA and how it grants discretionary relief to an enormous category of individuals).

171. See Gov't of Canada Privy Council Office, *supra* note 99 (explaining concurrent jurisdiction in Canadian immigration); see also Seidle, *supra* note 96, at \*49–50 (explaining concurrent federalism in immigration has been exercised by federal and provincial governments since the late 1800s).

171. See Seidle, *supra* note 95 (explaining concurrent jurisdiction and its benefits in immigration policy-making); see also Provincial Nominees, *supra* note 158.

172. See DAUVERGNE, *supra* note 94, at 18 (explaining public consultation in Canada helps the government assert changes in policy and respond to what the nation wants); see also Citizenship and Immigration Canada, *Canada–British Columbia Immigration Agreement*, GOV'T OF CANADA (2010), <http://www.cic.gc.ca/english/>

policy-making has resulted in immigration treaties between each province and the Canadian federal government.<sup>174</sup>

These treaties evince the shared jurisdiction between the Canadian federal government and provincial governments, as they allow the provincial governments to nominate immigrants and implement federal immigration policies.<sup>175</sup> The treaties also outline the integration programs the province will provide to all immigrants, administrated and in part offset by federal funding.<sup>176</sup> Through these treaties, the Canadian federal government considers the specific costs of immigration to the provinces, and promotes communication between the federal and provincial governments about discretionary decision-making in the admissibility of immigrants.<sup>177</sup> However, the treaties give the Canadian federal government the sole discretion to determine admissibility, despite any shared immigration policy-making powers.<sup>178</sup> Thus, these agreements

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department/laws-policy/agreements/bc/bc-2010.asp [hereinafter *British Columbia Agreement*] (discussing the duty to consult with provincial governments regarding immigration).

174. See, e.g., Citizenship and Immigration Canada, *Canada–Ontario Immigration Agreement*, GOV'T OF CANADA (2005), <http://www.cic.gc.ca/english/departement/laws-policy/agreements/ontario/ont-2005-agree.asp> [hereinafter *Ontario Agreement*] (explaining the concurrent policy-making in immigration law); see also See Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2008*, GOV'T OF CANADA, <http://www.cic.gc.ca/english/resources/publications/annual-report2008/section2.asp> (last visited Nov. 25, 2012) [hereinafter *Annual Report to Parliament*] (discussing the collaboration and communication between the federal, provincial, and local governments over immigration law and integration programs, and the concurrent jurisdiction over immigration between these governments).

175. See Seidle, *supra* note 96, at \*50 (discussing concurrent jurisdiction in Canadian immigration); see also *British Columbia Agreement*, *supra* note 174 (citing the immigration policies both the province and Canada recognize are of mutual interest, and delineating the immigration responsibilities of each entity); *Ontario Agreement*, *supra* note 174 (recognizing the immigration policy responsibilities of each entity).

176. See Seidle, *supra* note 96, at \*51 (discussing the settlement and integration programs in immigration treaties between provinces and Canada); see also *British Columbia Agreement*, *supra* note 174 (providing settlement and integration terms).

177. See DAUVERGNE, *supra* note 94 and accompanying text (explaining the advantages of shared jurisdiction between the federal and provincial governments in Canadian immigration); see also, *British Columbia Agreement*, *supra* note 174 and accompanying text (determining the terms of the agreement between the provincial and federal government over immigration policy).

178. See, e.g., *British Columbia Agreement*, *supra* note 174 (recognizing the discretion retained by the Canadian federal government in decisions of admissibility or inadmissibility); *Ontario Agreement*, *supra* note 174 (explaining the terms of the treaty and what parts of immigration are retained by the Canadian federal government).



indicate that the provinces accept the Canadian federal government's exercise of micro-level prosecutorial discretion, unlike the US state and agency response to DACA.<sup>179</sup>

## 2. Disadvantages of Individualized Prosecutorial Discretion

Canada's individualized system of discretionary relief also comes with disadvantages. The main issue is the Immigration and Refugee Protection Act provisions are broad—the terms “humanitarian” and “compassionate” are not defined—suggesting that this type of discretionary decision-making is unstructured and is difficult to supervise.<sup>180</sup> This may result in arbitrary decision-making made at the individual level, and a lack of consistency across similar cases.<sup>181</sup>

This may harm undocumented individuals more than help them because the immigration official is left to interpret these broad guidelines and may impose personal biases, despite the required deliberation over an individual's application.<sup>182</sup> Furthermore, the determinations in these cases are

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179. See *supra* notes 173–78 and accompanying text (indicating that communication between the federal and provincial governments and the consideration of immigration's costs to the specific provinces creates concurrent jurisdiction allows for the acceptance of the federal government's exercise of micro-level prosecutorial discretion).

180. See Lorne Sossin, *From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion*, 55 U. TORONTO L.J. 427, 434 (2005) (explaining Canadian micro-level prosecutorial discretion does not have criteria for determining humanitarian and compassionate grounds and can be too unstructured, broad, and difficult to supervise); see also TRS Allan, *supra* note 104 (explaining the broader the terms of the relevant legal standard for administrative enforcement the greater the ability for administrative value judgments and expertise in discretionary decision-making).

181. See Sossin, *supra* note 180, at 434–44 (discussing how individualized prosecutorial discretion may result in inconsistency); see also TRS Allan, *supra* note 105 (discussing the potential limitations of individualized, case-by-case discretionary relief).

182. See Matthew J. Hrutkey, “Give Me Your Tired, Your Poor, Your Huddled Masses,” *But Not Your Homosexual Partners: International Solutions to America's Same-Sex Immigration Dilemma*, 18 CARDOZO J. INT'L & COMP. L. 89, 111–12 (2010) (discussing the criticism of prosecutorial discretion in Canada, through the lens of same-sex immigration, and how this individualized process for granting discretionary relief may reflect the immigration officer's own beliefs); see also Sossin, *supra* note 180, at 435–36 (discussing the limitations of individualized prosecutorial discretion, including the substitution of personal beliefs into the decision-making process).

individualized and do not allow for wide-scale relief to similarly situated individuals at once.<sup>183</sup>

### III. *RECOMMENDATIONS TO AID IN THE CONTINUED AND FUTURE USE OF CATEGORICAL PROSECUTORIAL DISCRETION IN AMERICAN IMMIGRATION*

Part III provides recommendations for the exercise of prosecutorial discretion in American immigration law. Part III.A argues that state communication and participation in immigration will make categorical prosecutorial discretion seem less threatening. In Part III.B, this Note asserts that categorical prosecutorial discretion may be less controversial if the US executive branch considers the unique disadvantages that deferred action policies like DACA may have on individual states. Finally, Part III.C suggests that intra-agency communication and education at the agent-level may limit the internal backlash to this specific exercise of discretion in the future.

#### A. *Get the States to Participate and “Buy In” to the Federal Discretionary Policy*

In the implementation of DACA, the US federal government has not communicated with the states as it did following the implementation of other reforms in President Obama’s first-term agenda.<sup>184</sup> While the battle over the Patient Protection and Affordable Healthcare Act was certainly contentious, the executive branch chose to communicate with the states about how best to enforce and implement the new

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183. Compare Napolitano, DACA Memorandum, *supra* note 3 and accompanying text (determining a category of individuals based on criteria that if met provides discretionary relief to this immigrant class), with IP 5 Immigrant Applications, *supra* note 113, at 12–13 (explaining the individualized assessment of each individual case for discretionary relief).

184. Compare Negrin & Thomas, *supra* note 169 (discussing how DACA was crafted within DHS and is a logical progression from past DHS decisions regarding undocumented immigrants), with Ricardo Alonso-Saldivar, *Obama’s Healthcare Law Advances in the States*, ASSOCIATED PRESS, Nov. 16, 2012, available at <http://finance.yahoo.com/news/obamas-health-care-law-advances-states-210635811-politics.html> (discussing the state input and participation in the enforcement and implementation of the Patient Protection and Affordable Healthcare Act, such as states being able to craft their own exchange programs to comply with the new law).

health care law after the Supreme Court upheld its validity.<sup>185</sup> In contrast, DACA has led to state deliberation over its scope, making it seem as though DACA does not invite state participation in its implementation.<sup>186</sup> Opening the lines of communication with the states about discretionary relief from deportation, like the Department of Health and Human Services did to implement the Patient Protection and Affordable Healthcare Act, may avoid challenges to the future exercise of categorical prosecutorial discretion.<sup>187</sup>

While the success of the US government's experiment in state communication remains to be seen, it is similar to the dialogue between the provincial and federal governments in Canada used to successfully implement immigration law.<sup>188</sup> It may benefit the US federal government to communicate with the states over enforcement priorities, especially in the exercise of categorical prosecutorial discretion where the executive decision has far-reaching influence.<sup>189</sup> Therefore, if categorical

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185. See Alex Nixon, *Pa. Faces Deadline for Health Insurance Exchange*, PITTSBURGH TRIB.-REV., Nov. 15, 2012, available at <http://triblive.com/business/headlines/2956946-74/exchange-state-health-insurance-corbett-pennsylvania-run-states-decision-exchanges#axzz2MLMvciFA> (explaining how states are allowed to decide how health insurance markets and exchanges will be structured, and report this information to the Department of Health and Human Services); see also Alonso-Saldivar, *supra* note 183 and accompanying text (discussing how states may decide how to implement portions of the new law and partner with Washington to build their own exchanges or defer to the federal plan).

186. Compare Eng, *supra* note 125 and accompanying text (demonstrating how states, like Arizona, have attempted to limit the scope of DACA by denying driver's licenses in response to the 'announcement of this federal enforcement priority), with Alonso-Saldivar, *supra* note 184 and accompanying text (discussing state input in the implementation of the Affordable Healthcare Act by crafting their own exchange programs to comply with the new law rather than deferring to the federal government's plans), and Nixon, *supra* note 185 and accompanying text (highlighting how the new healthcare law allows states to either partner with the federal government on exchanges and share enforcement, set up and run their own exchange, or defer to the federal government's plans).

187. See *supra* notes 183–84 and accompanying text (indicating that there could have been greater communication between the executive branch and the states about DACA's scope before implementation).

188. See *supra* notes 170–73 and accompanying text (explaining the advantages of Canada's system of concurrent jurisdiction in immigration law, which allows provinces to create treaties with the federal government to foster communication about immigration policy-making and limit provincial backlash to acts of prosecutorial discretion).

189. See Vanison Memorandum, *supra* note 123, at 10 (commenting on how expansive conferrals of deferred action, such as categorical prosecutorial discretion,

prosecutorial discretion is used in the future, it may behoove the federal government to communicate with the states and have these governments “buy in” to the federal policy.<sup>190</sup>

B. *Have the Executive Branch Consider the Disadvantage of Deprioritizing Classes of Individuals in Certain States*

Similarly, the US federal government could still limit challenges to categorical discretionary enforcement priorities by taking account of the unique disadvantages some states may incur from broad conferrals of deferred action, such as a decrease in available employment for citizens.<sup>191</sup> In Canada, the provinces are considered, and often consulted, when policy is made to ensure that the local burdens of federal immigration policy are understood.<sup>192</sup> This ensures that the provincial governments accept federal immigration decisions and the “unique economic, social, and labour market needs of each province and territory.”<sup>193</sup> Perhaps if the US federal government independently considered the potential disadvantages of wide-scale discretionary relief on the states, then the US government’s exercise of categorical prosecutorial discretion may not seem as threatening to the states.<sup>194</sup>

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could be controversial); *see also* Scidle, *supra* note 96 and accompanying text (explaining how the concurrent jurisdiction and communication between the different levels of government creates successful immigration policy-making in Canada).

190. *See supra* notes 183–86 and accompanying text (implying that allowing states to weigh in on priorities for immigration enforcement before implementation may not seem as threatening to states).

191. *See* Llorente, *supra* note 13 and accompanying text (explaining that DACA may have economic, safety, and other associated costs on certain states); *see also* Fifield and Shanahan, *supra* note 14 (discussing the possible disadvantages of DACA, like job competition).

192. *See Annual Report to Parliament, supra* note 174 and accompanying text (discussing the collaboration and communication between the federal, provincial, and local governments over immigration law and integration programs to create concurrent jurisdiction); *see also British Columbia Immigration Agreement, supra* note 174 and accompanying text (considering local concerns in the creation of the treaty terms).

193. *Annual Report to Parliament, supra* note 174, at section 2 (explaining how provinces are consulted and specific province-level characteristics are accounted for in immigration decision-making); *see also British Columbia Immigration Agreement, supra* note 174 and accompanying text (showing the Canadian government’s cognizance of the specific immigration needs of British Columbia when crafting immigration policy and its care in delineating areas solely under federal control).

194. *See supra* notes 187–91 and accompanying text (comparing the disadvantages of categorical prosecutorial discretion that make these policies seem threatening to the

*C. Better Intra-Agency Communication and Education Regarding  
Prosecutorial Discretion and Enforcement Priorities*

Finally, the intra-agency issues should be addressed to avoid dissention within DHS over categorical immigration enforcement priorities.<sup>195</sup> The crux of the ICE agents' lawsuit against DHS is the perception that DACA forces law enforcement officials to violate their oaths and federal law, while also overreaching the separation of powers.<sup>196</sup> Most notably, the ICE agents disagree with the wide-scale relief that will result from this act of categorical prosecutorial discretion.<sup>197</sup> Intra-agency fears could be mitigated if ICE agents burdened by a proposed enforcement policy were given the opportunity to voice concern before the policy went into effect.<sup>198</sup> ICE agents may feel that a forum to both voice concerns about enforcement priorities and to interact with higher-ranking administrators within DHS would ensure that their discomfort in implementing these policies is taken into consideration.<sup>199</sup> This additional process given to ICE agents can function as an internal check on agency discretion, legitimizing these discretionary enforcement priorities for agents and the public.<sup>200</sup> Thus, this

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states with the less threatening nature of prosecutorial discretion in Canada's system of concurrent jurisdiction).

195. See generally *supra* notes 159–69 and accompanying text (exploring the ICE agents' lawsuit against DHS and Secretary of Homeland Security, Janet Napolitano, over the legality of DACA).

196. See Amended Complaint, *supra* note 17, at 2 (explaining each of the causes of action against DHS and Secretary Napolitano); see also Cratty, *supra* note 156 and accompanying text (determining the basic grounds for the ICE lawsuit).

197. See Amended Complaint, *supra* note 17 and accompanying text (citing the scope of DACA and the number of individuals it has the potential to relieve from deportation as part of the cause of action in the ICE agents' suit).

198. See Dade, *supra* note 164 and accompanying text (explaining how the administration has been opaque with ICE agents about enforcement policies and have excluded agent participation and dialogue); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2318 (2006) (discussing how the executive branch can impose modest checks upon itself to ensure enforcement policies advanced by the president are not the product of presidential adventurism).

199. See ICE Agents Sue Deferred Deportation, *supra* note 162 (“Chris Crane, the president of ICE agents' union who is suing Napolitano and Morton, accused the Obama administration of ignoring the demands of ICE agents when formulating the new policy.”); see also Dade, *supra* note 161 (discussing how ICE agents must enforce this policy or risk suspension, despite the agents being outspoken in opposing DACA).

200. See Katyal, *supra* note 198, at 2347 (explaining how modest internal checking functions like overlapping agency jurisdiction will lead to executive policy legitimacy);

recommendation would allow for the exercise of categorical prosecutorial discretion without constant litigation and dissent within DHS over the propriety of these policies.<sup>201</sup>

### CONCLUSION

The response to DACA's broad conferral of deferred action has been aggressive at both the state and agency level.<sup>202</sup> While prosecutorial discretion to deprioritize immigrants has been used throughout presidential history, DACA has elicited strong criticism.<sup>203</sup> Reliance on categorical prosecutorial discretion may expose future policies to similar challenges on grounds of state sovereignty and separation of powers.<sup>204</sup> In contrast, the exercise of micro-level, individualized prosecutorial discretion, like that primarily relied on in Canadian immigration, may not present the same challenges.<sup>205</sup> However, primary reliance on micro-level prosecutorial discretion to grant relief is not without criticism.<sup>206</sup> While the US executive branch may prefer to develop systemic enforcement policies to grant relief to categories of immigrants without waiting for the US Congress, it could better accommodate the states and agents affected by these actions. Thus, accommodation and communication between these parties could prevent similar backlash every time categorical prosecutorial discretion is exercised in the future.<sup>207</sup>

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*see also* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 390 (2009) (explaining the lack of participation and transparency in the formulation of agency guidance, even among agency staff, allows public questioning of its legitimacy).

201. *See supra* notes 194–99 and accompanying text (discussing the legitimacy DHS agents and the public might feel if DHS allowed its agents to voice their concerns and check the discretionary decision-making of agency higher-ups).

202. *See supra* notes 128–30, 162–67 and accompanying text (discussing the state and agency level response to DACA because of its perceived scope, encroachment on state sovereignty, and overall legality).

203. *See supra* notes 122, 154 and accompanying text (explaining the state and agency backlash toward DACA).

204. *See supra* notes 128–30, 162–67 and accompanying text (discussing state government and agency barriers to the use of categorical prosecutorial discretion).

205. *See supra* notes 170–78 and accompanying text (discussing Canada's use of micro-level prosecutorial discretion).

206. *See supra* notes 178–82 and accompanying text (discussing the disadvantages of relying on micro-level prosecutorial discretion to grant undocumented immigrants relief).

207. *See supra* notes 183–200 and accompanying text (discussing the advantages of categorical prosecutorial discretion).