IS THE RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) JUSTIFIED BY THE RESULTS OF COST-BENEFIT ANALYSIS?

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ABSTRACT

On September 5, 2017, Attorney General Jeff Sessions announced the rescission of the Deferred Action for Childhood Arrivals program (“DACA”). The program was created in 2012 and it has been evaluated as an overall success. Members of both political parties and business leaders have criticized its rescission. In light of this controversy, what are the benefits and costs associated with the rescission of DACA? This article argues that the Trump Administration’s rescission of DACA is not justified based on three different accounts of a cost-benefit analysis. First, it evaluates the manner in which the Trump Administration’s decision was made, targeting how it was implemented (namely, its procedural terms), and how it increased litigation, uncertainty, and the lack of uniformity within immigration law generally. Second, it assesses the costs and benefits of the policy decision, focusing on the substantive effects of the rescission. Third, it examines the rescission using the normative approach of cost-benefit analysis, arguing that this method should not discount moral considerations.

The research presented in this article is timely because it targets a currently controversial topic that is subject to intense media coverage and litigation. Moreover, this article may influence such litigation because it provides novel arguments against the rescission of DACA. For example, the principles of administrative law applied to immigration may require agencies to consider costs. This remains to be examined by the courts. Similarly, the framework of this research may provide additional arguments based on its findings. From a theoretical perspective, this paper fills a void in the literature, as studies on the cost-benefit analysis of the DACA rescission have not yet been published. In addition, the framework chosen for this research contributes to cost-benefit analysis literature addressing a contemporary example of public policy that was enacted without the normative use of economics and that disregarded the cost-benefit analysis as a methodological tool for maximizing overall well-being. This

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article also advances a trending topic concerning cost-benefit analysis, namely, the incorporation of moral dimensions into cost-benefit analysis, including rights-based considerations.

This article is organized as follows: Part II presents an overview of the policy changes from the enactment of DACA to its rescission. Part III discusses the reasons that the rescission of DACA is not justified by the results of a cost-benefit analysis, focusing on its procedural terms (i.e., the manner in which the rescission was decided and implemented). Part IV assesses the costs and benefits of the rescission based on its substantive terms, including its quantitative and qualitative effects. In Part V, the results of the normative approach to the cost-benefit analysis reveal the moral considerations involved in the rescission. Part VI concludes that the rescission of DACA is not justified by the results of the cost-benefit analysis developed in this article.

KEY WORDS: DACA, Deferred Action for Childhood Arrivals, immigration law, immigration policy, rescission of DACA, revocation of DACA, cost-benefit analysis, CBA.

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I. INTRODUCTION

On September 5, 2017, Attorney General Jeff Sessions announced the

1. Jefferson B. Sessions III, U.S. Dep’t of Justice, Letter to Acting Secretary of the Department
rescission of the Deferred Action for Childhood Arrivals (“DACA”) program.² DACA, created in 2012,³ has been evaluated as an overall success.⁴ Members of both political parties and business leaders have criticized its rescission.⁵ Nearly 400 U.S. executives, in an open letter to President Trump, called for continuity of the DACA program.⁶ In light of this controversy, what are the benefits and costs associated with the rescission of DACA?⁷ According to the Department of Homeland Security (“DHS”), there were approximately 689,800 active DACA recipients as of September 4, 2017.⁸ Recent studies estimate that the rescission of DACA will cost the national GDP more than $460.4 billion within the next decade.⁹ Some states will be more affected than others. California’s economy, for instance, will lose more than $1 billion.¹⁰ The economies of Midwestern states will also suffer.¹¹ Nationally, Social Security and Medicare tax receipts are estimated to decrease by $24.6 billion.¹²

This article contends that DACA’s rescission by the Trump Administration is not justified by the results of cost-benefit analysis based on procedural, substantive, and moral grounds. The rescission of DACA violated the normative use of

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⁷ Cost-benefit analysis is utilized as a technique for systematically assessing policies. See DAVID L. WEIMER & AIDAN R. VINGING, POLICY ANALYSIS: CONCEPTS AND PRACTICE 398 (2017).
⁸ In a report including statistics until that date, the Department of Homeland Security estimates that the number of DACA deferrals was around 800,000, with 760,000 DACA recipients (excluding those who later adjusted their status and became lawful permanent residents, or LPR). See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, REPORT ON APPROXIMATE ACTIVE DACA RECIPIENTS (2017), at 5.
¹⁰ See Svajlenka et al., supra note 9 (explaining statistics on the impact of ending DACA on annual GDP loss within a decade of the rescission).
¹¹ See generally VICTORIA CROUSE, THE BENEFITS OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) ON IMMIGRANTS IN MICHIGAN (2017) (emphasizing that the end of DACA will result in deportation, which not only will be inhumane but also will result in the loss of $418 million to the annual GDP in Michigan). See also Silvia Mathema, Ending DACA Will Cost States Billions of Dollars, CENTER FOR AMERICAN PROGRESS (January 9, 2017, 9:04 AM), https://www.americanprogress.org/issues/immigration/news/2017/01/09/396125/ending-daca-will-cost-states-billions-of-dollars/.
¹² Svajlenka et al., supra note 9.
economics and basic tenets of cost-benefit analysis as a method to help determine the maximization of overall well-being. The decision to rescind DACA did not take into consideration any alternative policies. There was no determination of whose costs and benefits count, no catalog of predicted effects and future alterations, no computation of present values of net benefits, no sensitivity analysis, and no related recommendations—not even regarding the potential costs of deportation.

The cost-benefit analysis presented in this article assumes that rational administrative agencies should work to maximize the well-being of the public. This analysis is relevant for several reasons. Cost-benefit analysis fosters transparency and is a good proxy for overall well-being. Cost-benefit analysis also helps administrators and the public visualize the economic and social costs of a given policy. Hence, this study addresses the positive and normative conceptions of cost-benefit analysis. Such analysis can serve to isolate governmental decisions from interest-group politics.

The cost-benefit analysis presented in this article is based on the tenet that a regulation should aim to achieve overall well-being instead of economic efficiency. This article illustrates how DACA’s rescission abruptly departs from prior administrations’ regulatory action by focusing on an economic analysis of law and assessing the costs and benefits of rescinding DACA. This study does not focus on

13. See Richard A. Posner, Economics Analysis of Law 402–403 (2007) (using cost-benefit analysis as a regulatory tool has different meanings ranging from the normative use of economics to criteria of wealth maximization in evaluating a particular policy). See also Matthew D. Adler & Eric A. Posner, New Foundations of Cost-Benefit Analysis 4 (2006) (holding that efficiency is very controversial to define and the modern foundations of cost-benefit analysis rest upon maximization of overall well-being. Cost-benefit analysis “is best defended as a welfarist decision procedure. Cost-benefit analysis is justified as a decision procedure to the extent that it advances overall well-being—that is, the well-being of the public generally, if not necessarily every member of the public—relative to alternative decision procedures, including the null case of doing nothing”).

14. See Weimer & Vining, supra note 7, at 399–434, concerning the tenets of cost-benefit analysis.

15. See e.g., Sessions, supra note 1.

16. This is the case, because the justifications that the administration mentioned for rescinding DACA revolved around its arguable and general unconstitutionality.

17. See generally Office of Management and Budget, Circular A-4 on Regulatory Analysis (2003), for guidance on regulatory analysis and details on cost-benefit analysis.

18. See, e.g., Stuart Shapiro, A Recipe for Improving Regulatory Analysis, The Regulatory Review (Feb. 28, 2018), https://www.theregulareview.org/2018/02/28/shapiro-improving-regulatory-analysis/ (contending that, under the Trump Administration, regulatory agencies have been criticized due to use of “shoddy analysis” and concealing the regulatory process from the public).


20. Id. at 101 (emphasizing that cost-benefit analysis, as a procedure, fosters monitoring of errors and deterrence of opportunistic behavior because it facilitates oversight by public and elected officials).

21. Adler & Posner, supra note 13, at 62 (explaining cost-benefit analysis as a procedure for maximizing overall well-being. The authors define maximization of well-being as the well-being of the public generally, albeit not necessarily to every single member of society).


23. Adler & Posner, supra note 13, at 25 (noting that overall well-being is part of the economic analysis, and it is one among several criteria mentioned in Law and Economics literature). See Adler & Posner, supra note 13, at 21–23, for a discussion about Pareto efficiency, Kaldor-Hicks efficiency, and cost-benefit analysis.

whether President Trump should rescind DACA. Instead, it focuses on the costs and benefits associated with its termination.²⁵

This article has three objectives. First, to evaluate the manner in which the decision to rescind DACA was made. This procedural analysis provides evidence of increased litigation and uncertainty, which potentially jeopardized the uniformity of immigration law. Second, this article aims to assess the costs and benefits of DACA, targeting the merits of the rescission as a policy choice. Third, it addresses DACA’s rescission under a normative cost-benefit analysis approach, and argues that this method should not ignore moral considerations.²⁶

The research presented in this article is timely because it targets a controversial topic that has been subject to intense media coverage and ongoing litigation. In addition, this article may further influence litigation because it provides novel arguments against the rescission of DACA. For instance, the principles of administrative law as applied to immigration may require agencies to consider social and economic costs. This remains to be examined by the courts in the immigration law context.²⁷

From a theoretical perspective, this paper fills a void in the DACA literature²⁸ because studies analyzing the costs and benefits of its rescission have not yet been published.²⁹ This research also contributes to the literature because it provides a contemporary example of a public policy that was enacted without considering normative economics and that disregarded cost-benefit analysis as a methodological tool for maximizing well-being.³⁰ Moreover, this article encourages the incorporation of moral dimensions into cost-benefit analysis, including rights-based considerations—a trending topic in the literature concerning cost-benefit analysis.

This article is organized as follows. Part II presents an overview of the policy changes spanning from DACA’s enactment to its rescission. Part III discusses the reasons that this rescission is not justified on its procedural terms based on the results of a cost-benefit analysis focused on the manner in which the rescission was decided and implemented. Furthermore, it addresses the arbitrary nature of the Administration’s action, its disregard for cost considerations, and its intensification of


²⁶ See Richard O. Zerbe, Jr., Is Cost-Benefit Analysis Legal? Three Rules, 17 J. POL’Y ANALYSIS & MGMT. 419, 456 (1998), for the distinction between cost-benefit analysis and benefit-cost analysis; see also Richard O. Zerbe Jr., The Legal Foundation of Cost-Benefit Analysis, UNIVERSITY OF WASHINGTON SELECTED PAPERS 1, 3 (2007) (stating that normally the terms are used interchangeably).


²⁸ According to searches conducted in WestLaw and Google Scholars, until July 2017, no previous article focused on the DACA rescission and cost-benefit analysis. This is not surprising, because most immigration law experts are not necessarily interested in cost-benefit analyses, despite their importance for public policy.


³⁰ POSNER, supra note 13, at 402.

³¹ ADLER & POSNER, supra note 13, at 26–61 (conceptualizing “weak welfarism” and proposing that overall welfare have moral relevance, while contextualizing that distributive or rights-based considerations may also be of moral relevance).
legal uncertainty and procedural litigation. Lastly, it addresses the lack of uniform immigration law across the country and its effect on increasing transaction costs for the involved parties. Part IV assesses the costs and benefits of the rescission in substantive terms, including its quantitative and qualitative effects. Part V relies on a normative cost-benefit analysis approach to determine DACA’s impact on moral considerations. Part VI concludes that DACA’s rescission is not justified based on the cost-benefit analysis performed in this article.

II. OVERVIEW OF THE CHANGES IN POLICY FROM ENACTING DACA TO ITS RESCISSION

A. Legal History of DACA and the DREAM Act

The failure of the Development, Relief, and Education for Alien Minors (“DREAM”) Act led to the DACA program—a non-legislative policy that was enacted on June 15, 2012. The DREAM Act was first introduced to Congress in 2001. It was originally put forth by Republicans and Democrats to amend the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996 by allowing “states to determine State residency for higher education purposes” and by allowing for the changing of status of “certain alien, college-bound students who are long-term United States residents.” Because IIRIRA requires individuals to be physically present in the United States for at least ten years, minors and young people did not qualify for cancellation of their potential removal unless they were brought to the United States as infants. Since 2009, the main political parties have become increasingly divided on the issues associated with the DREAM Act, partly because it would allow those admitted under it to petition for the admission of their family. There is also disagreement about its potential impact on the economy. Some opponents of the bill claimed that the entire immigration system was broken and the DREAM Act was not a “fix.” The bill failed to pass even when there was a Democratic majority in both Houses from 2009 to 2010.

The DREAM Act provided the means for certain young people to qualify for

34. Id.
35. Naomi Cobb, Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means to an End That Misses the Bull’s-Eye, 15 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 651, 653 (2013). The DREAM Act was intended to rectify the adverse effects of the IIRIRA on alien children, and the bill was first introduced by two Republican Senators in 2001. It had surprising bipartisan support, but it did not receive enough votes to pass, as it was five votes short in the Senate in 2009. See FACT SHEET BY THE AMERICAN IMMIGRATION COUNCIL, The Dream Act, DMCA and Other Policies Designed to Protect Dreamers (Sept. 6, 2017), at 1. (https://americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers).
36. Cobb, supra note 35, at 663.
37. Id.
citizenship if they illegally entered the United States as children. If the applicant could prove certain conditions required by the bill in advance, the Attorney General could cancel the removal of an alien child and grant lawful status for permanent residence. There were many proposed versions of this bill, but it ultimately failed to pass. However, the name “Dreamers,” which referred to the group of children the bill intended to protect, endured.

B. Implementation of DACA

Because of the inability of Congress to pass the DREAM Act, the Obama Administration utilized the Department of Homeland Security (“DHS”) to draft the DACA memorandum as a non-legislative policy directive to accomplish goals similar to those envisioned by the DREAM Act. DACA does not grant citizenship to alien minors; it is an exercise of prosecutorial discretion in deferring the enforcement of immigration laws against those minors. The term “deferred action” means that the government will not commence or will temporarily terminate any action for removal if the applicants are approved. Applicants must meet requirements similar to those under the DREAM Act before they are considered for the exercise of discretion. The government can rescind its promise not to prosecute at any time. This means that the beneficiary has to remain in compliance with DACA requirements and continue being a law-abiding citizen.

DACA was President Obama’s first step toward changing United States immigration policy, but it was not a permanent solution. As a Senator, Obama supported the DREAM Act in 2005 and promised in his campaign to make comprehensive immigration reform a priority of his Administration. After President Obama took office and it became clear that Congress was not moving forward on immigration issues, the Obama Administration produced DACA as a “last-ditch”

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39. Delahunty & Yoo, supra note 38, at 794.
40. Representative Berman, a Democrat from California, introduced a version of the DREAM Act on July 12, 2010, as informed by Congress.gov. DREAM Act of 2010, H.R. 6497, 111th Cong. (2010), https://perma.cc/SWK6-G7PW. The Bill was approved in the House but failed in the Senate. See DACA and the DREAM Act, supra note 33.
42. Napolitano, supra note 32, at 1–2.
43. Cobb, supra note 35, at 663–64.
44. Id.
45. Id.
46. Napolitano, supra note 32, 1–3 (stating the main DACA formal requirements: being under age sixteen when arriving in the United States; continuously residing in the United States for at least five years prior to the date of the memorandum; being currently enrolled in or having graduated from high school, or obtaining a certificate of education or being honorably discharged from the military; not having been convicted of a felony, significant misdemeanor, multiple misdemeanors, or posing a threat to national security or public safety; and not being above age thirty).
48. Obama, supra note 3.
effort to help Dreamers under the failing immigration system.\textsuperscript{49} However, President Obama stated, “this is not amnesty, this is not immunity. This is not a path to citizenship. It’s not a permanent fix.”\textsuperscript{50}

Overall, DACA provides benefits to the recipients and to the economy. The practical benefits for DACA recipients include temporary avoidance of deportation, legal presence in the U.S., and work authorization. DACA also allows recipients to obtain a driver’s license and a restricted social security number. Further, DACA recipients are able to travel and to possibly renew their applications.\textsuperscript{51} Importantly, over two million DACA requests have been accepted since 2012, most of which have been renewals.\textsuperscript{52} In addition, DACA allows some recipients to attend college because their family could not otherwise afford the costs without the children working to produce income.\textsuperscript{53} DACA also benefits the economy. President Obama emphasized that DACA benefits the economy by allowing young people to stay and contribute to society, to work, and to start businesses.\textsuperscript{54} Furthermore, the recipients do not continue to accrue an unlawful presence when their application is accepted, which can prevent their subsequent inadmissibility.\textsuperscript{55}

C. Opposition to DACA

Beginning in 2012, lawsuits were filed to challenge the validity of DACA and state and local policies providing benefits under it.\textsuperscript{56} The opponents of DACA argue that it takes away jobs from Americans and that the Obama Administration overstepped its executive power.\textsuperscript{57} In Crane v. Napolitano, the plaintiffs (ten Immigration and Customs Enforcement—ICE—agents) alleged that DACA violated federal immigration law, Article II, Section 3 of the Constitution (separation of powers), and the Administrative Procedure Act (“APA”).\textsuperscript{58} The court first found through a preliminary injunction hearing that the plaintiffs were likely to prevail on two of their claims, federal immigration law and separation of powers, since plaintiffs could suffer disciplinary action under the Immigration and Nationality Act (“INA”) if they refused to enforce executive discretion.\textsuperscript{59} The court ultimately dismissed the case because of lack of jurisdiction based on the Civil Service Reform Act.\textsuperscript{60} Remarkably, the plaintiffs’ main claim was based on INA (8 U.S.C. § 1225(b)(2)(A)), which was

\begin{itemize}
  \item[49] Cobb, supra note 35, at 664–65.
  \item[50] Obama, supra note 3.
  \item[53] Id.
  \item[54] OBAMA, supra note 3.
  \item[55] Bono, supra note 47, at 207.
  \item[56] See id. at 209.
  \item[57] See id. at 196–197.
  \item[59] Id. at 26–27.
  \item[60] Bono, supra note 47, at 209. (The dismissal occurred on July 31, 2013).\end{itemize}
not applicable to DACA applicants.\textsuperscript{61} This lawsuit widened the divide in public support for DACA and raised questions about the overall merit of the policy, including whether the policy was created with proper authority.\textsuperscript{62} Litigation surrounding potential expansion of the DACA program ensued and contributed to the controversy of the original program. In \textit{Texas v. United States}, DACA II/DACA+\textsuperscript{63} and the Deferred Action for Parents of Americans and Lawful Residents (“DAPA”) were similarly challenged, but both were successfully enjoined.\textsuperscript{64} This decision halted any expansion of the DACA program and contributed to the growing uncertainty surrounding it. On appeal, the government moved to stay the injunction, but the appellate court denied this motion.\textsuperscript{65} The Supreme Court affirmed the appellate court’s decision.\textsuperscript{66} As a result of this decision, at the state level, although DACA recipients are lawfully present in the United States, some states began to decline to issue them driver’s licenses, which prevented them from working despite having a work authorization.\textsuperscript{67} This contributed to the reinforcement of doubt surrounding DACA.

\textbf{D. Rescission of DACA}

During Trump’s presidential campaign, he actively and openly opposed illegal immigration. He referred to the DACA program as “illegal amnesty” and promised to reverse the program because he believed that Obama’s actions were “unconstitutional.”\textsuperscript{68} conservatives urged him to keep his promise after the election although he seemed increasingly sympathetic toward the Dreamers.\textsuperscript{69} When President Trump terminated DACA protections, he signaled that he would be open to codifying them legislatively if he and the Republican party received something in return.\textsuperscript{70} Democrats stated that they would be willing to allocate funding to increase border security, including for fencing and more border patrol agents, in exchange for an agreement regarding the Dreamers.\textsuperscript{71}

In June and July of 2017, attorney generals in conservative states\textsuperscript{72} threatened

\begin{itemize}
\item \textsuperscript{61} Id. at 209–211.
\item \textsuperscript{62} See id.
\item \textsuperscript{63} DACA II/DACA+ extended the deference from two to three years and eliminated the age requirement. See Jeh Charles Johnson, \textit{Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents}, U. S. DEP’T OF HOMELAND SECURITY, (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.
\item \textsuperscript{64} Bono, supra note 47, at 213–214.
\item \textsuperscript{65} \textit{Texas v. United States}, 787 F.3d 733, 769 (5th Cir. 2015).
\item \textsuperscript{66} \textit{United States v. Texas}, 138 S. Ct. 2271, 2272 (2016).
\item \textsuperscript{67} Bono, supra note 47, at 214–215.
\item \textsuperscript{68} Katie Reilly, \textit{Here’s What President Trump has said about DACA in the Past}, TIME (Sept. 5, 2017), http://time.com/4927100/donald-trump-daca-past-statements/.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Tal Kopan, \textit{States Try to Force Trump’s Hand on DACA}, CNN (July 1, 2017), https://www.cnn.com/2017/06/30/politics/trump-daca-bind/index.html. This first led to the revocation of DAPA, which never took effect due to injunctions by Secretary John Kelly on June 15, 2017.
\end{itemize}
to sue the Trump Administration if DACA was not rescinded by September 2017.\textsuperscript{73} This threat was in response to the Administration’s previous concerns about the ability of DACA to survive lawsuits and Attorney General Jeff Sessions’s proclamation that he would not defend DACA.\textsuperscript{74} The Trump Administration announced the rescission of DACA in September 2017 and gave Congress six months to find a permanent solution, which has been unsuccessful since the introduction of the DREAM Act.\textsuperscript{75} Within this six-month period, DACA would be phased out for the recipients, and the Administration would not grant any new requests. Protection for the approximately 800,000 people currently covered by DACA would end on March 5, 2018.\textsuperscript{76}

E. State and Court Responses to the Rescission

Political and legal controversies have marked the DACA policy since its inception. This Section limits itself to examining the most relevant legal claims raised. When DACA was rescinded in September 2017, some states, including California, Washington, and New York, threatened to sue the Trump Administration to protect the Dreamers in their state.\textsuperscript{77} California Senator Jeff Wiener stated that California, which is home to a large portion of current DACA recipients,\textsuperscript{78} would “work to safeguard immigrant rights and resist any federal policies that target immigrants or other vulnerable community.”\textsuperscript{79} Ultimately, fifteen states and the District of Columbia sued to block Trump’s decision and protect DACA, each seeking to enjoin the rescission of DACA and arguing that President Trump’s motive was discriminatory.\textsuperscript{80}

In \textit{Regents of California v. United States Department of Homeland Security}, one of five DACA lawsuits filed in the Northern District of California, the University of California sought to enjoin the rescission of DACA under the Constitution and the APA.\textsuperscript{81} The defendants filed the administrative record exclusively with documents that were previously submitted or already public record. The plaintiffs responded by moving to require the administrative record to be completed, including the addition of all the documents that led to the rescission of DACA by the current Administration.\textsuperscript{82}

\textsuperscript{73} Daniel Bush, \textit{Trump’s decision to end DACA, explained}, PBS (Sep. 5, 2017), https://www.pbs.org/newshour/nation/trumps-decision-end-daca-explained.
\textsuperscript{74} Id.
\textsuperscript{75} Gonzales, supra note 69.
\textsuperscript{76} Bush, supra note 73.
\textsuperscript{81} \textit{Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.}, 279 F. Supp. 3d 1011, at 1029–1031 (N. D. Cal. 2018).
\textsuperscript{82} Id.
The court granted the plaintiff’s motion to complete the administrative record, and the Government filed a petition for a Writ of Mandamus, requesting a permanent stay of the district court’s order. The Supreme Court granted certiorari and proceeded to vacate and remand, requiring the district court to first consider the Government’s threshold arguments that the DACA rescission is unreviewable under the APA and that the district court lacks jurisdiction under the INA.

In the Northern District of California, the plaintiffs moved for provisional relief while the government moved to dismiss. In response to the request for provisional relief, the court ordered that the defendants be enjoined (pending final judgment) to maintain DACA nationwide according to the conditions instated before the September rescission, and provided for the continued renewal of previously enrolled recipients. However, this order did not require the government to process new applications or to otherwise refrain from removing anyone they deemed a risk to national security or public safety. At a minimum, the court’s decision provided for the renewal of current recipients, and it has potentially bought Congress time beyond the original deadline of March 5th, pending another court decision prior to that date.

Before the March 5th deadline, the Department of Justice and the Attorney General released a notice stating that they would resort to the uncommon remedy of early certiorari in the Supreme Court. This remedy has a high burden of proof because it can only be granted “upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” The government argued that without the relief sought, the injunctions previously granted would persist and the United States would remain embroiled in extended litigation in a matter that, in their view, was within the agency’s discretion. The Supreme Court recently denied that petition without prejudice.

As of June 10, 2019 (and since February 14, 2018), the website of the U.S. Citizenship and Immigration Services announces that no new DACA applications will...
be accepted, but that it is processing renewals.95 This change is the result of two preliminary injunctions issued by the U.S. District Court for the Northern District of California and the U.S. District Court for the Eastern District of New York.96 In a different set of consolidated cases, the U.S. District Court for the District of Columbia vacated DACA’s rescission for 90 days.97 The court ordered the Secretary of Homeland Security to reissue a memorandum rescinding DACA, “this time providing [a] fuller explanation for the determination that the program lacks statutory and constitutional authority.”98 After the 90 days, if a new memorandum had not been issued, the Court determined that DACA’s rescission memo would be restored in its entirety, meaning that new applications for DACA and advanced paroles would be resumed.99 A new rescission memo has not been issued and the website was recently modified to comply with this judicial order.100

III. Why is the Rescission of DACA Not Justified by a Cost-Benefit Analysis Based on Procedural Terms?

Part III examines DACA’s revocation based on procedural terms. It discusses the lack of administrative notice-and-comment, the arbitrary and capricious review, and the absence of cost considerations. All three of these procedural terms are formal requisites that the administration was obliged to fulfill but did not. Consequently, the failure to follow these procedural mechanisms increased the amount of legal uncertainty, precipitating unnecessary litigation, and jeopardizing the uniformity of immigration law across the country. The lack of compliance also induced higher transaction costs for the involved parties.

A. Arbitrary Action arising from the Absence of the Notice-and-Comment Requirement

According to the Administrative Procedure Act (“APA”) of 1946, before creating, modifying, or repealing substantive rules, agencies must start a procedure known as notice-and-comment.101 This procedure requires that agencies provide at least thirty days’ notice of a planned action and hear comments by the affected and interested parties.102 The legal rationale for this procedure is to ensure the agency’s


96. See Regents of the Univ. of Cal., supra note 81, at 1047; Batalla Vidal v. Nielsen, 291 F. Supp. 3d., at 283–286.


98. Id. at 246.

99. Id.

100. See U.S. Dep’t of Homeland Sec., supra note 95.


102. 5 U.S.C. § 553(b)(A) (exempting an agency’s action from notice-and-comment requirements if the action consists of merely “general statements of policy”).
action is neither arbitrary nor capricious. The DACA rescission did not comply with this requirement; no notice was given and no comments were heard. DACA was enacted without fulfilling the notice-and-comment requirement. Under administrative law, if a regulation is issued in a particular fashion, the deregulation action should be enacted in the same form.

The formal legal status of DACA is disputed. If the DACA Rescission Memo is considered a legislative act, it is invalid under the APA because it did not comply with its notice-and-comment requirement. There is significant controversy about when an agency action is considered one of the following: of a substantive nature, merely a policy statement made in general, or a rule of agency organization, procedure, or practice. Because of this controversy, courts have suggested that the DACA rescission did not have to comply with the notice-and-comment procedure despite recognizing some strengths in the DACA recipients’ arguments.

In light of this legal gray area, DHS could have avoided litigation by fulfilling the notice-and-comment requirement for the rescission. It is important to differentiate DACA’s enactment from its rescission. Clearly, the rescission has dire consequences for the individual recipient, their family, and society. DACA was enacted to confer benefits, not remove them. In this sense, the Trump Administration could have anticipated such arguments, and fulfilled the notice-and-comment requirement, despite the aforementioned legal controversy. This would have allowed more time for the recipients and society to debate the benefits and costs of the rescission. To the extent that neither notice nor comment has occurred, the DACA rescission will potentially increase litigation that arises from mere procedural and avoidable claims. The more uncertain a particular rule or its interpretation is, the higher the likelihood the parties will litigate.

B. The End of DACA as an “Arbitrary and Capricious” Administrative Action

The distinction between DACA’s creation and its termination is relevant to individual litigation based on suspicion of the agency’s “arbitrary and capricious” action. As the high number of lawsuits in response to the DACA rescission demonstrate, recipients will resort to judicial action. No individual beneficiary, however, complained of DACA’s enactment. Thus, states identified as being pro-DACA are more likely to actively litigate in the case of rescission. For the same reason, states identified as anti-DACA are more likely to go to court either to oppose the enactment of DACA or to defend its rescission. Therefore, as the increased litigation illustrates, the rescission itself has expanded litigation due to the lawsuits brought by

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103. 5 U.S.C. § 556(d).
104. 5 U.S.C. §§ 553, 706(2)(D).
106. See, e.g., Batalla Vidal, supra note 96, at 273 (acknowledging the difficulty in classifying an administrative action as legislative, and suggesting that if DACA was legislative, then its rescission was illegal) (“Plaintiffs’ view that Defendants must use notice and comment to stop what started without notice and comment is not only counterintuitive, but also at odds with the general principle that the procedures needed to repeal or amend a rule as [sic] the same ones that were used to make the rule in the first place.”).
individual beneficiaries. Because the Trump Administration opted to rescind DACA without offering solid legal reasoning, the rate of litigation has been even higher.

DHS has not shown the benefits of rescinding DACA\textsuperscript{109} and lawsuits have challenged the completeness of the administrative record.\textsuperscript{110} The Trump Administration argued that if DACA continued, the Administration would have to divert resources to respond to unnecessary litigation.\textsuperscript{111} However, the federal courts\textsuperscript{112} and DHS\textsuperscript{113} rejected this argument. The term “arbitrary and capricious” has been interpreted as generally requiring courts to give deference to agency decisions as it is not sufficient for a court to be unpersuaded by the agency’s reasoning.\textsuperscript{114} Differently stated, for a court to not give deference, an agency’s action must be ultimately unsupported, not merely insufficiently supported.\textsuperscript{115} DACA was rescinded without a reasoned explanation for the departure from DHS’s previous regulation.\textsuperscript{116} Nonetheless, the agency and the Attorney General\	extsuperscript{117} continue to justify the legitimacy of the rescission, referring to the invalidation of DAPA and the extended DACA because of Congress’s failure to approve such measures.\textsuperscript{118} However, the courts have referred to this reasoning as a flawed legal premise because it is based on an incorrect legal assumption, namely, that the DACA program was illegal because DAPA has been ruled as so.\textsuperscript{119}

Another basis for suspecting that the DACA rescission was “arbitrary and capricious” is the lack of rationale for the decision to end DACA through the so-called “wind-down” process.\textsuperscript{120} After all, if DACA was unconstitutional, as the Attorney

\textsuperscript{109} Donald Trump, U.S. President, Statement from President Donald J. Trump (September 5, 2017) (transcript available at https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7/ (“The decades-long failure of Washington, D.C. to enforce federal immigration law has had both predictable and tragic consequences: lower wages and higher unemployment for American workers, substantial burdens on local schools and hospitals, the illicit entry of dangerous drugs and criminal cartels, and many billions of dollars a year in costs paid for by U.S. taxpayers. Yet few in Washington expressed any compassion for the millions of Americans victimized by this unfair system.”)).

\textsuperscript{110} See, e.g., Regents of the Univ. of Cal., supra note 81, at 1029; Batalla Vidal v. Nielsen 279 F. Supp. 3d, at 435.

\textsuperscript{111} Id.

\textsuperscript{112} See, e.g., Regents of the Univ. of Cal., supra note 81, at 1030–1033; Batalla Vidal, supra note 110, at 429–433.


\textsuperscript{115} Id.


\textsuperscript{117} Sessions, supra note 1 (“Because the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.”); but see, e.g., \textit{Batalla Vidal}, supra note 110, at 409 (“First, the decision to end the DACA program appears to rest exclusively on a legal conclusion that the program was unconstitutional and violated DAPA and INA. Because that conclusion was erroneous, the decision to end the DACA program cannot stand.”).

\textsuperscript{118} See, e.g., \textit{Regents of Univ. of Cal.}, supra note 81, at 1026.

\textsuperscript{119} See, e.g., \textit{Batalla Vidal}, supra note 110, at 419; \textit{Regents of the Univ. of Cal.}, supra note 81, at 1037–1043.

\textsuperscript{120} Sessions, supra note 1 (using the term “wind down” was used by the Attorney General).
General argued, would not the current administration be legally obligated to revoke it immediately instead of continuing to adjudicate renewal applications? Hence, the contradictory reasoning in the Attorney General’s letter also provokes litigation.

In addition, the Trump Administration’s claims about the unconstitutionality of DACA are an unjustified departure from the previous position of the Department of Justice (“DOJ”). Once DACA was created, the DOJ upheld its constitutionality. It was only after the recent presidential election that the agency changed its position. This change was based on flawed legal premises, such as the unconstitutionality of the policy, despite judicial action declaring DACA constitutional. In this context, the DOJ’s action is arbitrary and capricious because the agency is obligated to provide reasons for the modification, despite not being obliged to state the reasons that the current policy is better than the one it replaces.

Aiming at justifying the rescission, President Trump stated that it is the province of the legislative branch, not the executive, to legislate on immigration matters, concluding that DACA’s regulation through executive action was unconstitutional. This statement is in striking contrast to President Trump’s own executive actions on immigration, since he has excluded DACA recipients of priority regarding deportation.

The President cannot act in such a manner and later argue that presidential action in such direction is unconstitutional. The President also mentioned that DACA has contributed to a humanitarian crisis because of the “massive surge of unaccompanied minors from Central America including, in some cases, young people who would become members of violent gangs throughout our country, such as MS-13.” This declaration, however, sharply contrasts with the requirement that DACA recipients undergo a criminal record check. Moreover, federal immigration agencies have used deferred action with the Supreme Court’s authorization for over sixty years, and the astonishment of DACA’s opponents is perplexing to most seasoned immigration advocates.

The current Administration’s decision to rescind DACA deviated from its legal obligation of considering the interests of those who acted in reliance of DACA benefits. Because the agency is obliged to engage in reasoned decision-making, it must justify its actions, considering “serious reliance interests engendered by the previous policy.” Individual plaintiffs have argued that DACA has enabled them to raise

121. Id.
122. This contradiction was acknowledged by Judge Garaufis of the Second Circuit in New York v. Trump, No. 17-5228 (E.D.N.Y. filed Sept. 6, 2017), at 4226.
123. For the letter of the Attorney General, see Sessions, supra note 1.
124. See Brief for Respondents at 21, United States Dep’t of Homeland Sec., v. Regents of the Univ. of Cal., (2018) (No. 17-1003). It is worth mentioning that the arguments in the communication of the Department of Justice did not cite cases on unconstitutionality of any deferred action program.
126. Trump, supra note 109.
129. See Napolitano, supra note 32, at 1.
130. Bono, supra note 47, at 204.
131. Batalla Vidal, supra note 110, at 431.
families, invest in education, and purchase vehicles and homes. Similarly, employers have trained DACA recipients and states have adapted their motor vehicle rules and occupational license laws to include DACA recipients. Because the Administration did not consider these reliance interests, its discretionary rescission was arbitrary and capricious.

Under the APA, the DACA rescission is also arbitrary and capricious. DHS’s revocatory action without notice to participants hinders procedural due process and violates the agency’s previous rules. Accordingly, DACA petitioners have focused on the illegality of the agency’s “arbitrary and capricious action” and judicial review of the Trump Administration’s rescission is warranted.

Finally, the Trump Administration should have provided valid justifications for the DACA rescission, analyzing the reliance interests involved, and referring to findings not based on legal flaws. In not doing so, the Trump Administration contributed to the legal uncertainty surrounding the DACA rescission.

C. The Absence of Cost Considerations is Indicative of Irrationality

More attention should be given to the fact that cost considerations were not included in the reasoned decision to rescind DACA even though this is not required for immigration matters. Cost-benefit analysis is mandatory for significant regulations, except for foreign affairs. But for this exception, the DACA rescission would meet the general threshold for requiring cost-benefit analysis because it would likely incur losses above $40 billion per year to GDP. Cost-benefit analysis was not required when the APA was approved, but it is required nowadays.

132. Id.
133. Id.
134. See id. at 431–432. The court emphasized that the record did not provide evidence that the Acting Secretary actually considered the impact of DACA’s ending on its recipients. See also Regents of the Univ. of Cal., 279 F. Supp. 3d 1011. But cf. Casa de Md. v. U.S. Dep’t of Homeland Sec., 284 F. Supp. 3d 758, 767–770 (D. Md. 2018) (holding that the record did not show that the rescission was arbitrary and capricious).
135. See, e.g., 5 U.S.C. § 706 (2)(A). Individual revocation is permitted in very limited circumstances and under verification of threats to public safety, national security, or if the recipient is a criminal. See Napolitano, supra note 32, at 1–2.
136. See Napolitano, supra note 32, at 1–3.
139. For the general justification of the rescission see Sessions, supra note 1.
140. Cost-benefit analysis carries its own costs. At the federal level, cost-benefit analysis is traditionally required in all policies that are, for instance, significant regulatory actions. See Exec. Order No. 12866 §3(f), 58 Fed. Reg. 190 (Sept. 30, 1993). This provision defines a significant regulatory action as one that has an annual effect on the economy of $100 million or more. These rules are subject to the White House Office of Information and Regulatory Affairs (OIRA). This provision was supplemented by Exec. Order No. 13563 §1(b), 76 Fed. Reg. 14 (Jan. 18, 2011).
143. Svajlenka et al., supra note 9.
also because it reduces arbitrariness.\footnote{144} Non-arbitrary agency action requires a general assessment of the costs and benefits involved.\footnote{145} Reasoned decision-making, moreover, is a requisite for legal action under the APA.\footnote{146} Therefore, cost-cutting is legitimate reasoning “not only for agencies, but also for courts, to ask whether those consequences are unquestionably bad, or have been show[n] to be plausibly good.”\footnote{147}

Cost considerations are also indicative of the non-arbitrariness of an agency’s action, which is one of the general principles of administrative law.\footnote{148} This claim has been argued in contexts beyond the DACA rescission.\footnote{149} In \textit{Michigan v. EPA}, the Supreme Court determined that cost considerations are required by the statutory scheme and the principles of administrative law concerning reasoned decision-making.\footnote{150} Justice Scalia, writing for the majority held, “[C]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”\footnote{151} In the DACA rescission, such potential cost disadvantages were not considered.\footnote{152}

The DACA rescission lacked the consideration of costs, which is questionable. \textit{Michigan v. EPA}\footnote{153} established that cost considerations are a requirement of administrative rationality regarding the necessary and appropriate standard of review.\footnote{154} Under \textit{Michigan v. EPA}, regulatory action is reasoned if costs are considered and, importantly, “no regulation is appropriate if it does significantly more harm than good.”\footnote{155} At the very minimum, an agency that refuses to assess the impact of the proposed regulation, or fails to show that the benefits surpass the costs, has the burden of justification.\footnote{156} The rule of law binds everybody, not only undocumented immigrants and citizens, but also the Administration.

The DACA rescission, as it was decided, violates the APA by disregarding the notice-and-comment requirement, being arbitrary and capricious, being

\begin{itemize}
\item \textit{Michigan v. EPA}\footnote{153} at 2699. The holding was based on the requirement to engage in reasoned decision-making according to the “appropriate and necessary” standard.
\item \textit{Michigan v. EPA}\footnote{150} at 2707–708.
\item \textit{Id.} at 2707. Despite the 5-4 decision, all Justices agreed that cost considerations are required for reasoned administrative action. \textit{Id.} at 2714–717 (Kagan, J., dissenting).
\item \textit{Why Michigan v. EPA Requires That the Meaning of the Cost/Rationality Nexus Be Clarified}, 29 \textit{Ford. Env. L. Rev.} 125, 155 (2017) (arguing that the decision of the Supreme Court has neglected to consider cost as a relational concept, thus not clearly distinguishing cost determination and cost quantification, which ultimately led to the unduly extended judicial review of administrative action).
unreasoned (due to failure to address reliance interests), and ignoring cost considerations. The decision to rescind DACA was made without public notice or discussion; thus, substantially relevant evidence was not introduced. Therefore, the DACA rescission is a direct affront to transparency and reasoned decision-making, which previous Administrations have prioritized.\footnote{157} Furthermore, the rescission has increased transaction costs for the involved parties by increasing legal uncertainty, jeopardizing the consistency of immigration law across the country, and ultimately provoking unnecessary and avoidable litigation. This situation is aggravated by the significant numbers of DACA recipients\footnote{158} and requests under review.\footnote{159}

**IV. WHY DOES A SUBSTANTIVE COST-BENEFIT ANALYSIS NOT JUSTIFY THE DACA RESCISSION?**

Part IV assesses the costs and benefits of DACA, focusing on the effects of its rescission (its merits) rather than its implementation (procedural terms were discussed in Part III). It addresses whether the DACA rescission produced more benefits than costs both qualitatively (analyzing the descriptive data) and quantitatively (resorting to numerical data).

Quantifying the rescission is crucial because of the lack of studies on DACA recipients and the complexity of the policy. The baseline for the assessment is the revocation of DACA; this research uses the benefits that were accrued during DACA and that were terminated when the program was rescinded. Cost-benefit analysis, in general, may be limited to the consideration of citizens and residents of the United States.\footnote{160} Nevertheless, the interests of foreigners have been considered in studies on the cost-benefit analysis of state-level immigration policies.\footnote{161} In this article, these interests are considered for the purposes of completeness (DACA recipients live in the United States) and coherence with all the claims this research advances, including the moral considerations involved in cost-benefit analysis, which are discussed in Part V.

A corollary to a cost-benefit analysis of the DACA rescission is comparing it to alternative policy choices, such as not regulating or modifying the previous status quo.\footnote{162} In the case of DACA, President Obama understood that granting a deferred action to immigrants brought to the United States at an early age would have a net

\footnote{157} The Obama Administration did not create DACA through notice-and-comment, but it did provide reasoned justifications for creating DACA. Its rescission, however, was not reasoned, i.e., rationally justified, as the current litigation illustrates.\footnote{158} According to the Department of Homeland Security, there were approximately 689,800 active DACA recipients in September 2017. \textit{United States Citizenship and Immigration Services, supra} note 8, at 5.\footnote{159} As of August 2017, there were 106,341 pending requests (34,487 first-time requests and 71,854 renewals). U.S. Citizenship and Immigration Serv., \textit{Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA), Question 13} (September 5, 2017), https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca.\footnote{160} \textit{Office of Management and Budget, supra} note 17.\footnote{161} For a comprehensive research report on the topic, see Lynn A. Karoly & Francisco Perez-Arce, \textit{A Cost-Benefit Framework for Analyzing the Economic and Fiscal Impacts of State-level Immigration Policies}, \textit{RAND Corporation} (2016).\footnote{162} \textit{Weimer & Vining, supra} note 7, at 404.
benefit (i.e., more benefits than costs). The DACA rescission is questionable because the Trump Administration did not take into account the costs or benefits of continuing the policy or rescinding it. Attorney General Jeff Sessions did not consider the rescission’s effects and deportation costs were not examined. However, specifying alternative policies to allow for predictions of their impact is a cardinal tenet of cost-benefit analysis. Notably, administrative costs of the implementation of the DACA program are minimal because the applicants are required to pay administrative fees for background checks and processing. In general, these fees are not waived.

The cost of forgone opportunities is a central issue in the substantive analysis of the costs and benefits of the DACA rescission. The cost of opportunity is also a function of the elements that govern the decision maker’s set of opportunities. Despite its inherent subjectivity, the concept can be objectively conceived as the assessment of the processes by which it is determined whose interests count. Cost is also a “partial function” of power and a change in rights results in a change in whose interests count as a cost to others, thereby modifying the cost structure. This application of cost as a relational concept in cost-benefit analysis does not validate the Administration’s rescission of DACA. As of the time of this writing, it remains unclear whose interests the Administration officially took into account.

The DACA rescission affects a myriad of interests. United States citizens will lose friends, colleagues, and members of religious communities and local associations. Family members will be threatened by deportation, health care companies and banks
will lose clients, and schools and universities will lose interested students. Additionally, the military will no longer be able to count on the service of DACA recipients. Crucial institutions in the United States, such as universities, local and religious associations, and the armed forces, will be deprived of the contributions of DACA recipients. High-skilled immigrants generate human capital externalities because they expose the country to new forms of knowledge, increasing human capital and productivity. Thus, the DACA rescission deprives the United States of the invaluable resources and skills that young recipients are able to contribute.

Furthermore, employers will lose highly skilled employees. Employers have reported that they have been unable to fill various positions because of the lack of qualified applicants. For example, DACA recipients have included engineers, accountants, skilled traders, and nurses. Because of the market rules of supply and demand, as qualified workers become harder to find, hiring costs increase, resulting in American consumers ultimately paying for additional hiring costs. Employers will face approximately $6.3 billion in costs to replace DACA recipients, assuming that they can find skilled employees to replace them. The loss of DACA could cost employers in the United States $3.4 billion in turnover and hiring expenses, and would reduce Social Security contributions by $24.6 billion. Furthermore, without valid work authorization, undocumented students will only be able to obtain jobs from employers who are willing to break the law.

Indeed, the DACA rescission may provide incentives for employers to pursue illegal alternatives, especially if they have already had a positive professional experience with a particular DACA recipient. Employers may consider continuing to employ a DACA recipient who has already been trained in a position and knows the

176. Not all public universities allow DACA recipients to receive in-state tuition fees. See e.g., Britteny Pfleger, Show Me Your Legal Status: A Constitutional Analysis of Missouri’s Exclusion of DACA Students from Postsecondary Educational Benefits, 81 Mo. L. Rev. 605, 612–614 (2016).
182. Id. at 36.
185. Lee, supra note 29, at 248.
business well. To compensate for the risk of breaking the law, employers might lower DACA recipients’ wages. Alternatively, employers might second guess hiring a DACA recipient merely because their professional authorization is unclear under the terms of the rescission. 186 This is likely since employers are usually risk averse 187 and want to avoid hiring new employees within short periods (i.e., less than two years).

Additionally, victims of the rescission and their families 188 will lose a significant amount of income from the loss of their current employment. They will also sacrifice potential income gained by improving their education. 189 For DACA recipients, the loss of work authorization means an average ten percent decrease in household income. 190 Work and travel authorizations will be nonexistent when the two-year conditional deferral expires. 191

Consequently, instead of participating in the economy—paying rent, taxes, tuition, and contributing to social programs 192—these individuals will become marginalized from a significant part of the economy. In this scenario, the DACA rescission is likely to provide greater incentives for strategic behaviors, such as marriages to United States citizens. This should not be a surprise, as the consequences of the DACA rescission for recipients and their families are dire. Without deferred action, these individuals risk deportation from the United States. 193 Deportation sends an individual to a foreign country, which they likely have no recollection of, and leaves

186. These claims are based on the economic assumptions that human beings are reluctant to change (status quo bias) and risk averse. For a renowned study on such concepts, see Daniel Kahneman et al., Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 JOURNAL OF ECONOMIC PERSPECTIVES 193 (1991), at 197–203.

187. The risk assumption is intuitive: if employers have to choose between a DACA recipient and a U.S. citizen, the latter would be preferable. This is the case, because citizens (and green card holders) will not face the legal uncertainty and potential lack of work authorization that the current Administration has imposed on DACA holders with the rescission of the program.

188. See R. Maldonado & M. Hayem, Remittances to Latin America and the Caribbean Set a New Record High in 2014, MULTILATERAL INVESTMENT FUND, INTER-AMERICAN DEVELOPMENT BANK (2015), http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=39619143. Importantly, this is true even if the family of the DACA recipient is not in the United States, which is to say, even if he or she sends money abroad. Data about Latin America remittances in 2014 show that approximately ten percent of the wages of undocumented immigrants is sent abroad, considering the wages per week and the number of actual remittances made.

189. For research concluding that DACA recipients who have attended university have higher paying jobs, see Gonzales et al., supra note 175, at 1857.

190. Fry, supra note 184.

191. With regard to driver’s licenses, the situation is less clear. Notably, forty-five states have authorized action for DACA recipients to apply for a driver’s license. See Gonzales et al., supra note 175, at 1856.

192. Id. This is the case because DACA does not confer legal status but instead authorizes physical presence, so recipients do not qualify for federal financial aid.

193. The dire effects of deportation were famously addressed by Judge Learned Hand in United States ex rel. Klonis v. Davis, 13 F. 2d 630, 631-32 (2d Cir. 1926) (“Whether the relator came here in arms or at age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. False That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.”). This decision was interpreted as proof of moral reservations in common law that are no longer weighted. See John S.W. Park & Edward J.W. Park, PROBATIONARY AMERICANS: CONTEMPORARY IMMIGRATION POLICIES AND THE SHAPING OF ASIAN AMERICAN COMMUNITIES 49 (2005).
them there without family ties or knowledge of the language or culture.\textsuperscript{194} 

DACA recipients contribute to the economy by pursuing an education, serving in the military, and working. Instead of burdening the medical system,\textsuperscript{195} they support the United States’ aging workforce by contributing to Social Security. As a result of the DACA rescission, recipients will no longer pay taxes at the federal, state, or local level.\textsuperscript{196} It has been estimated that over the next ten years, DACA recipients would have increased the tax revenue by $60 billion.\textsuperscript{197} Moreover, immigration resources will have to be reoriented to manage the potential persecution (and eventual prosecution)\textsuperscript{198} of DACA recipients since the deferred action on deportations will no longer be available.\textsuperscript{199} 

The DACA rescission may also dis incentivize U.S. citizens from pursuing higher education.\textsuperscript{200} The rescission not only leaves DACA recipients in a worse position but also eliminates competition for U.S. citizens, which ordinarily might foster knowledge and innovation in the United States. This creates a vicious circle by/because, in the absence of competition from qualified DACA recipients, U.S. citizens will have less incentives to pursue higher education.

From a national perspective, the DACA rescission does not maximize welfare. According to the Cato Institute, a libertarian think tank, repealing the DACA protections for Dreamers would harm the United States economy and cost the government “a significant amount of lost tax revenue,” amounting to about $60 billion.\textsuperscript{201} It was estimated that deporting the current recipients, who number approximately 750,000, would immediately cost the federal government $7.5 billion.\textsuperscript{202} Moreover, several sources have estimated a loss between $200 to $400 billion in economic growth over the next ten years.\textsuperscript{203}

\textsuperscript{194} Some of those factors were considered by the Obama Administration. See Napolitano, supra note 32, at 1–2.

\textsuperscript{195} This is a logical assumption based on the young age of DACA recipients. In general, the older a person is, the higher the likelihood of using the medical system. For additional information about the age of DACA recipients, see chart at the end of this article. Because the DACA program is still very recent, reliable data about emergency systems were not available.

\textsuperscript{196} Brannon & Albright, supra note 165.

\textsuperscript{197} Id.

\textsuperscript{198} It is worth stressing that the Administration has already increased its scrutiny of young foreigners, even those with valid DACA permits. See Memorandum of Law in Support of Plaintiffs’ Motion for a Classwide Preliminary Injunction, Inland Empire—Immigrant Youth Collective v. Nielsen, No. 17-2048, 2017 WL 5900061, at 5–6 (C.D. Cal. filed Feb. 5, 2018).

\textsuperscript{199} This policy option is also directly related to moral choices as factors to be considered in cost-benefit analyses. Therefore, they are addressed from such perspective in Part V.

\textsuperscript{200} “Race to the top” and “race to the bottom” are economical concepts based on game theory. Application of these concepts to DACA is a contribution of this article. For an example of the application of the “race to the bottom” regarding welfare benefits, see Jan K. Brueckner, Welfare Reform and the Race to the Bottom: Theory and Evidence, 66 SOUTHERN ECONOMIC JOURNAL (2000), at 509–522.

\textsuperscript{201} Brannon & Albright, supra note 165.

\textsuperscript{202} Id.

Economic arguments favoring the DACA rescission generally focus on increasing job availability for Americans. Attorney General Jeff Sessions, for instance, has said that DACA recipients deny jobs “to hundreds of thousands of Americans by allowing those same illegal aliens to take those jobs.” Furthermore, proponents of the rescission argue that highly-skilled immigrants, such as DACA recipients, may reduce wages, which could negatively impact low-skilled workers. President Trump’s actions indicate that he subscribes to such theories.

However, empirical research on the impact of immigration on the wages of host countries has shown contradictory results. While some empirical findings have corroborated the theory that immigration has an adverse effect on the wages of some workers in a host country, many more have shown a negligible or marginally positive effect. In particular, one study found that potential adverse impacts of immigration in the lower paying job sectors affected mainly high school dropouts. Nevertheless, a report by the National Research Council of the National Academy of Sciences concluded that immigration contributes to a net gain of $15 billion a year. Moreover, “the inferred impact of immigration on the native wage structure depends almost entirely on how the analyst chooses to define the labor market.”

Recent research suggests that immigrants, including many unskilled workers, supplement rather than replace existing domestic workers. Immigrants and their children—documented and undocumented—pay more in taxes than they utilize in services. In fact, the Congressional Budget Office attributed a potential surplus of $25 billion to the legalization of unauthorized immigrants.

Therefore, undocumented immigrants do not burden the government or the economy. It has been argued that whatever the actual costs of the indirect benefits


204. Develin, supra note 203.
206. Id.
207. Trump, supra note 109.
208. BORIAS, supra note 179, at 63.
210. THE NATIONAL RESEARCH COUNCIL OF THE ACADEMY OF SCIENCES, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 8 (James P. Smith & Barry Edmonston eds., 1997). Importantly, the value actually estimated was $10 billion per year in 1997, but we reached $15 billion by updating it, conservatively.
211. BORIAS, supra note 179, at 80.
provided to undocumented immigrants, these costs are likely offset by the direct financial contributions that undocumented immigrants return to the nation.\textsuperscript{214} Immigrants pay taxes and are generally not eligible for tax refunds.\textsuperscript{215}

Most significant, perhaps, are the economic benefits of DACA, including participation in private health insurance, auto insurance, banking, and drivers' licenses, which lead to spillover benefits for the rest of society.\textsuperscript{216} Because DACA recipients are generally more educated than their American counterparts, they have the capacity for greater economic productivity, thus contributing to the increase in the wealth of the nation.\textsuperscript{217} An unanticipated consequence of DACA’s rescission is its contribution to perpetuating the shortage of medical doctors in the United States.\textsuperscript{218} In the long-term, the economic contribution by the children and grandchildren of immigrants has a positive effect on the economy.\textsuperscript{219}

Because the public is not aware of the economic contribution of immigrants, it is more difficult for DACA recipients to gather support against the rescission of the program. It is also harder to attract media coverage to report on recurrent abuses that DACA recipients face. Complaints by DACA recipients provide several examples of the abusive behavior of Immigration Custom and Enforcement (“ICE”) officers who deliberately target young immigrants.\textsuperscript{220} ICE officers have engaged in discriminatory and abusive police actions because they assumed they were authorized to do so, despite DHS’s declaration that DACA recipients are not a priority for deportation.\textsuperscript{221} Such discriminatory behavior by public officials is troubling because of the limited public resources that will come at the expense of pursuing actual criminals instead of DACA recipients.\textsuperscript{222} Importantly, recipients have to act in accordance with the law to maintain their valid DACA status.\textsuperscript{223} Therefore, pursuing DACA recipients is not only inefficient but also socially deplorable.

The evaluation of the DACA rescission is equally discouraging from the perspective of individual states. The DACA rescission has already escalated litigation between the federal government and “sanctuary cities” and “safe haven” states.\textsuperscript{224} New York declared that DACA recipients are permanently residing in the United States under the color of law (“PRUCOL”) even if the federal administration terminates

\textsuperscript{214} Lee, supra note 29, at 246.
\textsuperscript{215} Id. Importantly, DACA recipients are eligible for tax refunds.
\textsuperscript{216} Brannon & Albright, supra note 165.
\textsuperscript{217} Kurtzleben, supra note 205.
\textsuperscript{218} Japsen, supra note 177.
\textsuperscript{219} Brannon & Albright, supra note 165.
\textsuperscript{221} Napolitano, supra note 32, at 1–2. President Trump stressed this lack of priority in his press release for the DACA rescission. See Trump, supra note 109.
\textsuperscript{222} DACA’s enacting memorandum clearly stated that DACA recipients were not a priority in removal proceedings because recipients were “productive young people to countries where they may not have lived or even speak the language.” Napolitano, supra note 32, at 2.
\textsuperscript{223} Id. “DACA recipients must not have been convicted of ‘a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety.’”
DACA. The State Department is currently suing California for violating federal immigration powers based on three state laws of a “sanctuary” nature. Moreover, ICE has intensified raids in California because of the state’s sanctuary policies. Despite the injunction, some states have recognized that without a final court decision, it is ultimately the responsibility of Congress to enact legislation that will protect the Dreamers. Congressional action remains a distant chimera because of the conflicting interests involving the national politics of immigration. In this context, some states, such as New York, have taken affirmative measures to ensure that DACA recipients remain eligible for Medicaid and professional licenses.

In addition to the loss of protection to Dreamers, the DACA rescission will negatively impact states’ economies. Research has indicated that the DACA rescission will cost the country $433 billion in growth over the next ten years, and it will cost California $11 billion per year. Texas, Illinois, New York, New Jersey, and others stand to lose over $1 billion in GDP per year. The President has made clear that states that refuse to comply with his executive order shall not receive federal funds except when mandated by law.

Based on the arguments in Part IV, the DACA rescission has had numerous negative effects, including significant economic and social costs to American society. However, the benefits of the DACA rescission are unclear. Ultimately, the DACA rescission is not welfare maximizing.

V. WHY DOES THE DACA RESCISSION IS NOT JUSTIFIED UNDER A

226. Plaintiff’s Motion for Preliminary Injunction, United States v. California, No. 18-264 (E.D. Cal. filed Mar. 6, 2018). The State Department claimed that California law is preempted by federal law and is violating the Supremacy Clause of the U.S. Constitution. Id. at 4–5. In addition, the government petitioned the court to enjoy three Californian laws addressing the restriction on cooperation with Workplace Immigration Enforcement (AB 450), inspection and review of immigration detention facilities (AB 103), and restrictions on state and local cooperation with federal officials (SB 54). Id. at 7–16. In contrast, California’s State Attorney General peremptorily affirmed that California is in the business of public safety and not in the business of deportation. Dale Yurong, Justice Department’s Lawsuit Against California Claims Three State Laws Unconstitutional, ABC 30 Action News (March 07, 2018), http://abc30.com/politics/justice-departments-lawsuit-against-california-claims-three-state-laws-unconstitutional/3187976/.
228. Shabad, supra note 77.
229. As discussed at page 12 of this article, the recent government shutdown (December, 2018) based on political controversies involving the enhancement of immigration security and the controversy about the wall did not contribute to negotiation about DACA or the DREAM Act.
230. Calvo, supra note 225, at 5. If DACA recipients lose protection and are arrested, state and local governments are unable to act because U.S. Immigration and Customs Enforcement supersedes local law. See Rojas, supra note 78 (emphasizing that Los Angeles Mayor Eric Garcetti has acknowledged that without DACA, there is little that their city could do to protect young immigrants besides setting up immigrant-friendly policies and legal defense funds, maintaining safe school and city facility spaces, and declining requests by immigration agents to hold immigrants longer than required by law).
231. Fry, supra note 184.
232. Id.
233. Id. See also Appendix I for the chart illustrating the number of DACA recipients per state.
COST-BENEFIT ANALYSIS BASED ON MORAL CONSIDERATIONS?

Part V presents the theoretical framework of cost-benefit analysis, focusing on its moral dimension. Even if economic and social factors do not lead to a clear answer, the moral aspect of a given policy must be included in any cost-benefit analysis. Hence, this research is aligned with the modern trend in the field, which argues that cost-benefit analysis has limitations and should not ignore moral considerations.

Morality is relevant because law, even in a modern administrative state, grants decision-makers some independence. Moral considerations should be a part of cost-benefit analysis because they may justify the enactment of a particular policy when the benefits do not outweigh the economic costs when non-monetized factors are involved. There may also be non-quantifiable features in a particular period. It has been argued that moral considerations may justify the enactment of environmental, safety, or health regulations in cases where the immediate benefits measured through cost-benefit analysis do not outweigh the costs. Steven Kelman emphasizes the following:

... they may have what they themselves regard as “higher” and “lower” preferences. The latter may come to the fore in private decisions, but people may want the former to come to the fore in public decisions. They may sometimes display racial prejudice, but support antidiscrimination laws. They may buy a certain product after seeing a seductive ad but be skeptical enough of advertising to want the government to keep a close eye on it. In such cases, the use of private behavior to impute the values that should be entered for public decisions, as is done by using willingness to pay in private transactions, commits grievous offense against a view of the behavior of the citizen that is deeply engrained in our democratic tradition. It is a view that denudes politics of any independent role.

235. See GARY SAUL MORSON & MORTON SHAPIRO, CENTS AND SENSIBILITY: WHAT ECONOMICS CAN LEARN FROM THE HUMANITIES 28–29 (Princeton Univ. Press 2018). A famous example of the limitations of cost-benefit analysis refers to onchocerciasis, a parasitic disease popularly known as river blindness. In 1974, countries in the West-Africa region joined forces and received international help, including funds from the World Bank. A program to control the disease was created. It was an unprecedented success, saving many from losing their eyesight. A classic cost-benefit analysis, however, showed “inconclusive” results, as “the economic returns were only high enough to justify the costs given certain generous assumptions about the economic value of sight.” In practice, that meant that the population that benefited from the program was actually too poor and saving their vision did not have a measurable economic return.


237. ADLER & POSNER, supra note 13, at 28. See also id. at 4 (emphasizing that there has been little study about the philosophical (moral) basis of cost-benefit analysis).

238. Kelman, supra note 236, at 33.

239. See Cass R. Sunstein, Cost-Benefit Analysis, Who’s Your Daddy?, 7 J. BENEFIT COST. ANAL. 107, 110–120 (2016) (emphasizing that surveys of self-reported well-being are relevant and produce helpful information despite not being possible to “map” the regulatory impact using well-being scales).

240. Kelman, supra note 236, at 33.
in society, reducing it to a mechanistic, mimicking recalculation based on private behavior.241

In this sense, including moral considerations in traditional cost-benefit analysis results in the enactment of policies that tend to implement society’s general conception of the law. This moral rationale sheds light on the limitations of mere cost-effectiveness and traditional efficiency reasons that are common in ordinary cost-benefit analysis.242 From a normative perspective, choosing a given policy should give reflect society’s values. Accordingly, this Section addresses relevant moral considerations referring to the history of the United States and its international action. It further examines DACA recipients and the moral costs of denying them the benefits of DACA. This Section concludes by examining some moral instances the Supreme Court has considered.

An argument related to immigration policy’s moral contours focuses on globalization and its effects on developing countries. The history of the United States encompasses its direct interference with the self-determination of sovereign states, including the annexation of territories that belonged to other countries, such as Mexico.243 As such, immigration, specifically from Mexico (where most DACA recipients originate),244 is the product of the economic needs and choices of not only the United States, but also the economic and foreign policies of past American societies.245

"Immigration to the United States is a social good that is in society’s interest and also in the interest of our associations with others, regardless of borders and citizenship status."246

A factor of crucial importance for the moral dimension of cost-benefit analysis is the identity of the DACA recipient.246 The DACA program was created to protect alien minors who were brought into the United States at an age when valid legal consent was not feasible.247 Most DACA recipients are between twenty-one and

241. Id. at 37.
242. The common critique is that cost-benefit analysis discounts important values, such as the value of the environment, rests on narrow assumptions of human welfare, tends to ignore claims of less wealthy people and future generations. See, e.g., ADLER & POSNER, supra note 13, at 4.
244. Approximately 80% of DACA recipients are from Mexico. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, supra note 8. Here, it is open to speculation whether President Trump’s campaign statements might be evidence of previous bias against Mexicans or not. However, in the context of the travel ban, Chief Justice Roberts has wondered about a statute of limitations for the President’s statements during his presidential bid. See Adam Liptak & Michael D. Shear, Key Justices Seem Skeptical of Challenge to Trump’s Travel Ban, N.Y. TIMES (April 25, 2018), https://www.nytimes.com/2018/04/25/us/politics/trump-travel-ban-supreme-court.html.
245. Cristina M. Rodrigues, Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another, U. Of Chi. Legal F. 219, 252−258 (2007) (arguing that, “Immigration to the United States is the function of choices of which we as a society are the authors. These choices have given rise to an interdependence not only with immigrants who have already arrived, but also with future immigrants, which in turn requires us to recognize certain reciprocal obligations that arise from our associations with others, regardless of borders and citizenship status.”).
246. DACA recipients are immigrants who entered the United States before their sixteenth birthday and without admission (or who overstayed their visas) who have continuously resided in the United States since June 15, 2007 and who are physically present in the United States on June 15, 2012, who have fulfilled education requirements, and who were approved in extensive criminal background checks and voluntarily provide biographic and biometric information. See Napolitano, supra note 32, at 1−2.
twenty-five years old and many have no memory of their country of origin. The DACA population is predominantly female (52.6%), Latino (Mexicans represent 79.4%), and single. Because DACA recipients have experienced much adversity in their young lives, including migration, they are often considered more resilient. In order to qualify for DACA, the applicant cannot pose a threat to public safety or national security. DACA recipients may not be convicted of a felony, a significant misdemeanor, or three or more minor misdemeanors. In practice, DACA recipients may not be convicted of the following:

- domestic violence, sexual abuse or exploitation, burglary,
- unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence. One may not participate in the program if they have received a conviction in which the individual was sentenced to time in custody for more than 90 days.

DACA recipients do not pose a risk to national security because they are subject to extensive vetting in order to obtain their deferred status. Moreover, the Administration has the relevant information regarding current DACA applicants and future recipients because of their substantial and uninterrupted physical presence in the United States. For example, DHS has records of the phone numbers, email addresses, and physical addresses of all DACA applicants and recipients. In this way, DACA litigation is distinguishable from the “travel ban” litigation. For the former, DHS can access all relevant information about the recipient, whereas for the latter, the Administration must rely on information conveyed by foreign governments. Therefore, national security issues are less of a concern for DACA recipients given the wide access to information that the U.S. government has.

The cost-benefit analysis of the DACA rescission should include moral considerations because recipients who entered the U.S. at a young age do not pose national security threats. Additional moral considerations include the importance of education for the overall well-being of society, the difficulty for non-citizens to mobilize, and the American tradition of valuing fairness and diversity.

Although DACA did not create specific deferral rights for its applicants or recipients, the policy created the expectation of deferral. DACA authorized a deferred action against individuals who met all of its requirements, including the comprehensive background check. In addition, prosecutorial discretion is

248. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, supra note 8.
249. Id.
250. For a summary of compelling testimonies of the brutal challenges faced by DACA recipients, such as gang violence, starvation, physical and emotional abuse, and sexual assault, see Brief of Amici Curiae 121 Religious Organization, supra 247, at 15–19.
251. Napolitano, supra note 32, at 1–2.
253. The travel ban was enacted by President Trump. See Enhancing Vetting Capabilities and Processes for Deterring Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 24, 2017).
255. See discussion in Parts III and IV of this article.
particularly justified for DACA recipients because many have already contributed to the United States in several ways.\textsuperscript{256}

Hence, trust and morality, which are akin to equitable estoppel arguments and intrinsic to the moral dimension of cost-benefit analysis, are significant factors. DACA recipients acted in reliance on the deferral granted and had no expectations of abrupt (and unreasoned) modification of their deferred removal.\textsuperscript{257} Current DACA litigation includes equitable estoppel arguments to enjoin DHS to utilize the information provided by recipients through the DACA program for enforcement purposes.\textsuperscript{258} Therefore, the moral component of cost-benefit analysis is also relevant in the context of litigation.

Moreover, American society and the Supreme Court have historically understood that diversity is an important value. Fairness is essential to valuing diversity. The Court has prohibited discriminatory behavior based on factors that a person cannot modify or control. For the Court, such discrimination potentially violates the Equal Protection Clause.\textsuperscript{259} Accordingly, gender, race, national origin, and age are viewed as suspicious categories and are highly scrutinized\textsuperscript{260} because individuals cannot modify these characteristics.\textsuperscript{261}

This heightened scrutiny is also justified because discrimination based on race and national origin, for instance, affects individuals who have traditionally lacked political power.\textsuperscript{262} Importantly, strict scrutiny applies to state laws that discriminate against national origin, and the Equal Protection Clause applies only to the actions of

\textsuperscript{256} Napolitano, supra note 32, at 2.

\textsuperscript{257} The uncertainty of non-deferred removal proceedings causes individuals stress and psychological issues. After DACA, there was substantive progress in reducing this stress among recipients. For a comprehensive research on DACA recipients from 2012 to 2015 and findings on the benefits of lawful presence, see Caitlin Palter & Whitney Laster Pirtle, \textit{From undocumented to lawfully present: Do changes in legal status impact psychological wellbeing among latino immigrant young adults?}, 199 Soc. Sci. & Med. 39 (2018).


\textsuperscript{259} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section One, declares: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. For national protection, the Fifth Amendment Due Process Clause applies, prohibiting the deprivation of life, liberty and due process of law. It is noteworthy that the Supreme Court held in dictum in \textit{Graham v. Richardson}, a case about discrimination against lawful permanent residents, that the Equal Protection Clause may constrain even Congressional plenary immigration power. See Graham v. Richardson, 403 U.S. 365, 375–377 (1971).

\textsuperscript{260} The degrees of scrutiny vary among those factors. In fact, race and national origin are strictly scrutinized, under which “the government must show an extremely important reason for its action and it must demonstrate that the goal cannot be achieved through any less discriminatory alternative.” \textsc{Erwin Chemerinsky, Constitutional Law: Principles and Policies} 694–95 (3rd ed. 2006).

\textsuperscript{261} As determined by the Supreme Court in \textit{United States v. Carolene Products Co.}, 304 U.S. 144, 153 n. 4 (1938).

\textsuperscript{262} According to the famous footnote 4 in \textit{Caroline Products Co.}, a group is a discrete and insular minority if: it has been subject historically to discrimination; the characteristic which defines the group is immutable or constructively immutable; this characteristic is relevant to public policy in some way; and the group is traditionally politically powerless. \textit{See id.} at 144.
states. Discrimination by the federal government based on alienage requires only a rational review and is generally assumed to be valid based on presidential order or on Congress’s plenary power over immigration since the Court has reasoned that immigration belongs in the realm of foreign policy.

Despite such standard, moral considerations informed the United States Supreme Court decision concerning education of undocumented children. In Plyer v. Dole, the Supreme Court held that undocumented children are persons for the purpose of the guarantees of due process and equal protection under the Fifth and Fourteenth Amendments. The decision concerned the access of undocumented children to public schools in Texas. The Court affirmed, “it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime.” Unsurprisingly, the ruling prompted questions about whether the decision would protect undocumented college students.

Some contend that President Trump could still rescind DACA without further justification. Although the President has significant authority regarding immigration, he is required to comply with legal and moral requirements. Therefore, the President is one of the actors accountable in judging the moral trade-offs of the DACA rescission. The courts are not excluded from this process either. The paramount nature of education also puts to rest the reductionist view that moral accountability rests solely within the executive branch, ignoring the checks and balance system.

Relatedly, the courts have a special role protecting non-citizens in general. Immigrants are more vulnerable than citizens with regard to the enforcement of their rights and their political and legal representation. Immigration is such a volatile and

264. For the textual command of the Fourteenth Amendment as applied to states, see U.S. CONST. Amend. XIV, § 1, supra note 259.
265. CHEMERINSKY, supra note 260, at 774.
266. Id. at 775.
268. Id. at 241 (Powell, J., concurring).
270. For a general study on modern presidential authority, see HARVARD LAW REVIEW: DEVELOPMENTS IN THE LAW, PRESIDENTIAL AUTHORITY, 125 HARV. L. REV. 2057 (2012).
271. Alexander Hamilton stated the following in The Federalist Papers (No. 78), “Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it would be least in a capacity to annoy or injure them. . . . The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS 433 (Clinton Rossiter ed., 1960) (emphasis in the original).
272. After all, judicial review has been a corollary of the supremacy of the Constitution. See Marbury v. Madison, 5 U.S. 137 (1803), at 137–138.
273. For an informed discussion about the occasional power of immigrants (when they naturalize or in group action), see STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND
divisive issue that, curiously, it is not uncommon for socially conservative Republicans to join labor union Democrats in advocating against immigration.\textsuperscript{274} It must not be ignored that immigrants are difficult to mobilize.\textsuperscript{275} They do not vote, and in practice, undocumented immigrants have limited free speech. Traditionally, undocumented immigrants lack access to legal counsel and class action protections in general. Hence, moral considerations based on the exclusion of immigrants from the political process, as well as lack of legal access, highlight the moral costs of the DACA rescission.\textsuperscript{276}

The moral perspective also concerns the social and moral costs of denying education to a young person. Similar to most undocumented immigrants, a young immigrant without access to education will most likely have to perform menial tasks instead of going to college or joining the military. Additionally, education is often perceived as a means of reducing the gender pay gap in the United States. Consequently, Latinas have been hit the hardest, making only fifty-three cents for every dollar that a white non-Hispanic male earns in a full-time job.\textsuperscript{277} Without educational opportunities, early and unwanted pregnancies are more likely.\textsuperscript{278} The wage gap and potential pregnancy are relevant because the majority of DACA recipients are female (approximately 53\%) and of Latino origin (Mexicans account for 79\%).\textsuperscript{279}

Moreover, on several occasions, the Supreme Court has held that virtually immutable characteristics shall not determine the destiny of a person.\textsuperscript{280} The Court has already protected undocumented children, stating that society benefits if they are educated. The Court has focused on fairness and the absence of a caste system in the United States. When moral considerations are included in the cost-benefit analysis of the DACA rescission, the costs become even more significant.

\section*{VI. Conclusion}

This article asserts that the Trump Administration’s decision to rescind DACA is not justified by the results of a cost-benefit analysis based on procedural, substantive, and moral accounts. The Administration disregarded cost-benefit analysis, which is a tool to evaluate how much a particular policy maximizes overall well-being pertaining. The decision also disregarded the normative use of economics.

\begin{footnotesize}
\textsuperscript{274} Id. at 81.
\textsuperscript{275} Donald Kerwin, Roberto Suro, Tess Thorman & Daniela Aulelema, Center for Migration Studies, The DACA Era and the Continuous Legalization Work of the US Immigrant-Serving Community 9 (2017).
\textsuperscript{276} On the finding that education is crucial for protecting immigrants from the abusive behavior of authorities and nonprofessional representation, see id. at 11–15.
\textsuperscript{277} In an important comparison, the same study points out that African-American women make 61 cents. See National Partnership for Women & Families, America’s Women and the Wage Gap 1 (2019).
\textsuperscript{278} In the United States, women without a high school diploma were the highest population subject to unintended pregnancies. See Fact Sheet of the Guttmacher on Unintended Pregnancy in the United States 1 (2019), (https://www.guttmacher.org/sites/default/files/factsheet-tb-unintended-pregnancy-us.pdf).
\textsuperscript{279} See United States Citizenship and Immigration Services, supra note 8.
\textsuperscript{280} See, for instance, United States v. Carolene Products Co., supra note 261, at 144.
\end{footnotesize}
The study presented in this article is unique in the literature and focuses on a controversial topic. This article concludes that the DACA rescission is not justified on the procedural dimension of cost-benefit analysis. The rescission did not comply with the procedural rules established by the APA to the extent that there was no notice or comment. Particularly, the decision to rescind DACA was arbitrary, capricious, and noncompliant with the law. A final and novel argument is that the DACA rescission neglected cost considerations. The rescission was not aligned with rational administrative decision-making based on the general principles formulated in *Michigan v. EPA*.\(^{281}\) Thus, the DACA rescission created legal uncertainty, led to nonuniformity in immigration law, and caused unnecessary and avoidable litigation, which increased the transaction costs for the involved parties.

Cost-benefit analysis demonstrated that the DACA rescission is not justified when considering the substantive dimension because the Trump Administration failed to consider the interests of certain parties. This article assesses the costs of the DACA rescission, qualitatively and quantitatively, and the potential benefits.

The evidence suggests that this rescission was decided without regard to the costs and benefits involved. Moreover, the Administration did not consider alternative policies, determine whose costs and benefits count, catalog predicted effects and future alterations, compute present values of net benefits, or engage in sensitivity analysis, i.e., accounting for uncertainty. The Administration also did not address related recommendations. This heedlessness calls for the investigation of the Administration’s actual motivations for rescinding DACA and further research needs to be conducted. However, the results of the cost-benefit analysis presented in this article show that the effects of the DACA rescission include substantial economic and social costs, while its benefits are unclear.

The final part of this article is based on the premise that moral considerations are a relevant factor that the Administration should have considered regardless of who is affected by the DACA rescission. Leaving children uneducated and removing students from college does not benefit society. Rather, it serves to exacerbate its ills. Therefore, the DACA rescission is further unjustified when cost-benefit analysis includes moral considerations.

Based on the aforementioned, this article demonstrates that the DACA rescission substantially increased costs, while its benefits remain unclear. An agency action does not maximize well-being by pursuing goals that are contrary to such maximization or when the agency fails to minimize the costs involved. The DACA rescission fails on both procedural and substantive grounds because it does not lead to the maximization of overall well-being, nor was it implemented in a way that advances it. Morally, the DACA rescission is a retrograde action that affects not only the recipients of the program but also society as a whole. The moral costs of the DACA rescission are much more significant than the economic costs and they include the loss of a new life for the recipients, their community, and the country. Hence, the Trump Administration made a policy choice that neither fosters a virtuous circle nor maximizes overall well-being. Instead, this decision jeopardizes the interests of the United States.

\(^{281}\) See *Michigan v. EPA*, *supra* note 27.
Based on the results of the cost-benefit analysis that this article presents, the DACA rescission is not justified. At the time of writing, it is regrettable that the Trump Administration did not even address the need for a cost-benefit analysis as a normative use of economics or as a method of ensuring the maximization of well-being. Had cost-benefit analysis been considered, there would have been no question that the DACA rescission would have significant costs and no tangible benefits.

The Administration’s failure to conduct a rational evaluation of the DACA rescission has had significant ramifications that transcend any cost-benefit analysis. In conclusion, no regulation is “appropriate” if it does more harm than good. Therefore, the DACA rescission is arbitrary and capricious, does not maximize overall well-being of American society, and undermines the country’s moral foundation.

APPENDIX I: FIGURES

IMPACT OF THE DACA RESCISSION ON THE WORK FORCE PER STATE ACCORDING TO THE CENTER FOR AMERICAN PROGRESS

<table>
<thead>
<tr>
<th>State</th>
<th>Number of DACA Recipients</th>
<th>Number of DACA Workers</th>
<th>Annual GDP Loss from Removing DACA Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>4,180</td>
<td>3,637</td>
<td>178,193,400</td>
</tr>
<tr>
<td>Alaska</td>
<td>90</td>
<td>78</td>
<td>5,590,620</td>
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<tr>
<td>Arizona</td>
<td>27,211</td>
<td>23,674</td>
<td>1,291,455,542</td>
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<tr>
<td>Arkansas</td>
<td>4,998</td>
<td>4,348</td>
<td>231,353,010</td>
</tr>
<tr>
<td>California</td>
<td>216,060</td>
<td>187,972</td>
<td>11,269,495,234</td>
</tr>
<tr>
<td>Colorado</td>
<td>16,902</td>
<td>14,705</td>
<td>839,269,600</td>
</tr>
<tr>
<td>Connecticut</td>
<td>4,587</td>
<td>3,991</td>
<td>293,413,049</td>
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<tr>
<td>Delaware</td>
<td>1,379</td>
<td>1,200</td>
<td>84,152,490</td>
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<tr>
<td>District of Columbia</td>
<td>684</td>
<td>595</td>
<td>43,170,349</td>
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<tr>
<td>Florida</td>
<td>30,364</td>
<td>26,417</td>
<td>1,411,698,270</td>
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<td>Georgia</td>
<td>23,405</td>
<td>20,362</td>
<td>994,182,808</td>
</tr>
<tr>
<td>Hawaii</td>
<td>385</td>
<td>335</td>
<td>19,901,613</td>
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<td>Idaho</td>
<td>3,047</td>
<td>2,651</td>
<td>155,197,560</td>
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<td>Illinois</td>
<td>41,256</td>
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<td>Indiana</td>
<td>9,672</td>
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<td>Iowa</td>
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<td>Kansas</td>
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<td>330,038,096</td>
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282. See Michigan v. EPA, supra note 27, at 2707.
283. Mathema, supra note 11.
<table>
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<th>Population</th>
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Source for the study: U.S. Citizen and Immigration Service

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284. Source of the data for the two first charts: UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, supra note 8.
LOCATION

285. Giovanni Peri, *The Economic Cost of Repealing DACA*, ECONOFACT (September 11,
WHERE DO DACA RECIPIENTS LIVE?
MOST POPULAR STATES (2012–2017)

- California
- Texas
- Illinois
- New York
- Florida
- Arizona
- North Carolina
- Georgia
- New Jersey
- Washington
- Colorado
- Nevada
- Virginia
- Oregon
- Indiana