

# **KEEP DREAMING: DEFERRED ACTION AND THE LIMITS OF EXECUTIVE POWER**

Daniel A. Arellano<sup>\*</sup>

*The Obama administration recently announced a policy whereby it would grant deferred action to undocumented immigrants who arrived in the United States as children and who meet additional criteria. In response, Arizona Governor Jan Brewer issued an executive order instructing state agencies to deny driver's licenses and other public benefits to individuals granted deferred action under the new policy. Both actions drew significant criticism and raised important questions as to the limits of executive power vis-à-vis the rights of undocumented immigrants. Despite critics' concerns, however, the actions of both executives are likely to have little lasting effect in the absence of further legislative action. In order for an executive to grant substantive benefits to a class of persons that a future administration cannot revoke, the legislative branch must first define and confer those benefits. Conversely, an executive cannot abridge a class of individuals' rights that the legislative branch has clearly defined and granted. With respect to undocumented immigrants who arrived in the United States as children, then, only the legislative branch can grant lasting force to the executives' actions.*

---

<sup>\*</sup> J.D. Candidate, University of Arizona James E. Rogers College of Law, 2014. The author would like to thank Grant D. Wille and Stuart D. Kottle for their excellent research assistance, feedback, and editing.

## TABLE OF CONTENTS

INTRODUCTION .....	1140
I. THE STATUTORY RIGHTS OF “LAWFULLY PRESENT” INDIVIDUALS UNDER FEDERAL AND STATE LAW .....	1141
II. EXECUTIVE POWER IN IMMIGRATION LAW .....	1145
III. DACA AND THE LIMITS OF EXECUTIVE DISCRETION IN THE ABSENCE OF LEGISLATIVE GUIDANCE .....	1146
IV. DACA AND THE LIMITS OF EXECUTIVE ACTION IN THE PRESENCE OF CLEAR LEGISLATIVE GUIDANCE .....	1150
CONCLUSION .....	1156

## INTRODUCTION

On June 15, 2012, President Obama announced that his administration would grant deferred action to certain undocumented individuals who came to the United States at a young age.<sup>1</sup> In response to the President’s policy, Arizona Governor Jan Brewer issued an executive order instructing Arizona agencies to deny public benefits to individuals granted deferred action under the Obama administration’s policy.<sup>2</sup> The Obama policy (known as Deferred Action for Childhood Arrivals or “DACA”) and the Governor’s response each generated significant controversy and raised important questions about the limits of executive power. One of these questions is whether an executive can unilaterally grant lasting rights to a class of individuals for whom the legislative branch has provided no such rights. Conversely, can an executive unilaterally limit those individuals’ rights when the legislature has previously acted to define them?

Despite the controversy generated by these state and federal executive orders, the policies are likely to have little lasting effect without further legislative action. Those undocumented individuals eligible for DACA will not see a substantive change in their rights absent action by the U.S. Congress or the Arizona legislature. The President cannot confer substantive, lasting rights to these individuals when Congress has not acted to grant them such rights. Similarly, the Arizona Governor cannot infringe upon the privileges that DACA recipients are clearly eligible for under existing state law. The power of the executive in granting or taking away rights ultimately is constrained by the power of the legislature.

---

1. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> (“These are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they’re undocumented until they apply for a job or a driver’s license, or a college scholarship.”).

2. Ariz. Exec. Order No. 2012-06, 18 Ariz. Admin. Reg. 2237 (Sept. 7, 2012), available at <http://www.azsos.gov/aar/2012/36/governor.pdf>.

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1141

This Note will explore the nuances of this limitation. Part I will examine the federal and state statutory framework that affects those eligible for deferred action under the DACA policy. Part II will briefly discuss the theory behind the limitations of executive power in the face of this legislative framework. Part III will explore how the legislative context constrains the effectiveness of the DACA policy, and Part IV will explore similar constraints on Arizona's executive order.

### I. THE STATUTORY RIGHTS OF “LAWFULLY PRESENT” INDIVIDUALS UNDER FEDERAL AND STATE LAW

Under the Immigration and Naturalization Act and its subsequent amendments, an individual can enter the United States with lawful status in two manners: as an immigrant or as a non-immigrant.<sup>3</sup> Generally, immigrants include all those who intend to move here permanently.<sup>4</sup> These individuals must obtain legal permanent resident status through family or employment sponsorship, through the Department of State's annual Diversity Visa Lottery, or through the Department of Homeland Security's process for refugees or asylum seekers.<sup>5</sup> In contrast, non-immigrants are defined by their lack of intent to permanently reside in the country.<sup>6</sup> There are a variety of different non-immigrant visas listed under the Immigration and Nationality Act that these individuals may pursue.<sup>7</sup>

Pertinent to this Note, individuals who have entered the United States without some sort of lawful status may face significant bars to obtaining lawful status in the future.<sup>8</sup> Because of the restrictive eligibility requirements and the limited number of visas available, many of these individuals have no way to seek lawful status in the United States.<sup>9</sup> The effects of this legal dilemma are especially pronounced in the case of young immigrants who have lived in the United States for most of their lives—yet who have no way to seek legal status—leading many to call for legislative action.<sup>10</sup> At this time, however, Congress has not resolved the impasse.

Perhaps in anticipation of this type of inflexibility found within the immigration laws, and in light of the frequent need for the United States to react to international and refugee crises, Congress has created means by which the executive branch and its agencies can allow individuals to enter or remain in the

---

3. See 8 U.S.C. § 1101(a)(15) (2012) (defining who is, and is not, an immigrant).

4. See *id.*

5. *Id.* §§ 1153(a)–(c), 1158.

6. *Id.* § 1101(a)(15).

7. *Id.*

8. See *id.* § 1182(a)(9)(B)–(C).

9. See *id.* §§ 1151–1153 (setting the caps and quotas for various immigrant visas).

10. See, e.g., Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010).

country without lawful status.<sup>11</sup> Though these individuals have no lawful status, they are considered lawfully present. For example, an individual who has entered the United States without lawful status, has been detained, and is now facing removal proceedings may be released on bond.<sup>12</sup> While awaiting his immigration case, the individual is no longer considered *unlawfully* present.<sup>13</sup> This categorization has important implications for the non-citizen. The availability of certain forms of relief or the individual's ability to seek lawful status in the future after removal can be affected by the length of time he or she spent within the country while unlawfully present.<sup>14</sup>

When an executive agency grants lawful presence, though, none of the statutory guarantees associated with lawful status come into play.<sup>15</sup> Individuals in lawful status have defined statutory benefits permitting their presence in the United States subject to a few conditions, such as refraining from committing a crime of moral turpitude.<sup>16</sup> In fact, legal permanent residents eventually become eligible to apply for U.S. citizenship.<sup>17</sup> In contrast, individuals who are granted lawful presence stay in the United States more or less at the discretion of the executive branch and have no federal statutory right to remain in the country.<sup>18</sup>

---

11. 8 U.S.C. § 1182(d)(4)–(5). These sections allow immigration authorities to “parole” individuals into the United States temporarily for emergencies, international reciprocity with neighboring countries, humanitarian reasons, or public benefit. *Id.*

12. *See id.* § 1231(c)(2)(3).

13. *See id.* § 1182(a)(9)(B)(ii) (“For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the [Secretary of Homeland Security] or is present in the United States without being admitted or paroled.”). A grant of lawful presence—that is, an individual without status but not accruing unlawful presence time—is referred to as parole. *See id.* § 1182(d)(4)–(5); U.S. CITIZENSHIP AND IMMIGRATION SERVS., ADJUDICATORS’ FIELD MANUAL—REDACTED PUBLIC VERSION, § 40.9.2(a)(3)(D) [hereinafter ADJUDICATORS’ FIELD MANUAL], available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-17138/0-0-0-18383.html>. It is important to note, however, that the Adjudicator’s Field Manual indicates that “the reason for . . . parole is irrelevant.” *Id.*; see also CATHOLIC LEGAL IMMIGRATION NETWORK, INC., STATE & LOCAL IMMIGRATION ENFORCEMENT: ARIZONA’S GOVERNOR BREWER AIMS TO PREVENT DACA RECIPIENTS FROM OBTAINING DRIVERS’ LICENSES 2 (2012), available at [http://www.cliniclegal.org/sites/default/files/updated%20Brewer%27s%20Executive%20Order%20re%20DACA%20FINAL%209-4-12\\_0.pdf](http://www.cliniclegal.org/sites/default/files/updated%20Brewer%27s%20Executive%20Order%20re%20DACA%20FINAL%209-4-12_0.pdf).

14. *See* 8 U.S.C. § 1182(a)(9)(B)–(C).

15. *See id.* §§ 1153(a)–(c), 1158, 1227(a)(2)(A)(i)–(ii).

16. Generally, only the grounds of deportation (as opposed to the more comprehensive grounds of admissibility) apply to those individuals who have been granted lawful status. Compare *id.* § 1227(a)(1) (“Deportable aliens”), with *id.* § 1182(a) (“Inadmissible aliens”).

17. *Id.* § 1427.

18. These individuals may have some limited rights, but nothing of much substance, and certainly no right gained from the executive’s grant of lawful presence. Consider, again, the example of the individual released on bond while awaiting his or her removal case. *See supra* notes 12–13. The individual has a right to remain in the country in so far as the government cannot remove him until an immigration judge has determined that

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1143

The most tangible right they may have is the right to apply for work authorization.<sup>19</sup>

Whether an individual is legally present in the United States may also affect his or her eligibility for certain state benefits. Although immigration law and policy generally falls within the purview of the federal government's authority, several areas of the law affecting non-citizens remain open to state regulation.<sup>20</sup> Arizona has enacted a significant amount of legislation intended to protect state resources from undocumented aliens and to encourage their self-deportation.<sup>21</sup> Most undocumented aliens in Arizona may not obtain driver's licenses or receive in-state tuition at public universities and community colleges.<sup>22</sup> Employers who hire aliens without work-authorization may incur state-level sanctions, including having their business licenses revoked for repeated violations.<sup>23</sup> Additionally,

---

the individual is without lawful status. *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."); *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005). The grant of parole while on bond, however, confers nothing substantive to the individual. *See Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 282 (2010) (noting that the exercise of prosecutorial discretion confers no substantive benefit).

19. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., INSTRUCTIONS FOR I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION 5–6, available at <http://www.uscis.gov/files/form/i-765instr.pdf>.

20. *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-3153(D) (2012) ("[T]he department shall not issue to or renew a driver license or nonoperating identification license for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law."); *Arizona v. United States*, 132 S. Ct. 2492, 2507–11 (2012) (holding that Arizona may require its state officers to stop, detain, and arrest individuals suspected of lacking lawful presence); *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (holding that states may regulate businesses that hire foreign nationals without federal work authorization).

21. *See* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) ("The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."); Nicholas D. Michaud, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083 (2010).

22. ARIZ. REV. STAT. ANN. § 15-1803(B) (2012) ("[A] person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student . . . or entitled to classification as a county resident . . ."); *id.* § 28-3153(D) ("[T]he department shall not issue to or renew a driver license or nonoperating identification license for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law.").

23. *Id.* § 23-212(F)(2) ("For a second violation . . . the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work."). The Arizona Legal Workers Act, codified in part in section 23-212(F)(1) of the Arizona Revised Statutes, was recently held not to be preempted by federal law. *Chamber of Commerce of*

Arizona's well-known and notably litigated Senate Bill 1070 requires police officers to determine the immigration status of individuals whom they stop, detain, or arrest if the officers reasonably suspect the individual is "unlawfully present in the United States."<sup>24</sup>

An individual's lawful presence, however, is sufficient to overcome some of these obstacles. Despite the common goals of the Arizona statutes, each statute provides a distinct standard as to what papers or status a person must possess in order to avoid adverse consequences. To be eligible for federal or state benefits administered by the state (including the issuance of a driver's license), an individual must demonstrate "lawful presence."<sup>25</sup> To qualify for in-state tuition, an individual must have "lawful immigration status."<sup>26</sup> For an individual to be presumed lawfully present in the United States by law enforcement officials, he or she must present identification that "requires proof of legal presence in the United States before issuance."<sup>27</sup> Finally, Arizona employers may not hire "unauthorized aliens" who do not have "the legal right or authorization under federal law to work in the United States" without risking sanctions.<sup>28</sup> Although the statutes use distinct standards, the requisite standard in each statute is clearly prescribed.

Having statutory rights like these has important implications for an individual beyond simply being able to get a driver's license. Even those unlawfully in the United States have constitutional rights that they can assert, and with each new statutory guarantee, an individual gains the power to defend that right before the courts from attack by a government agency.<sup>29</sup> Through substantive rights, an individual can challenge how the federal government has interpreted and applied a

---

the U.S. v. Whiting, 131 S. Ct. 1968, 1987 (2011). Section 23-211(11) of the Arizona Revised Statutes defines "unauthorized alien" for purposes of the Arizona Legal Workers Act as "an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code § 1324a(h)(3)."

24. ARIZ. REV. STAT. ANN. § 11-1051 (this provision is commonly known as the "papers please" provision of Senate Bill 1070 and was upheld by the U.S. Supreme Court in *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

25. *Id.* §§ 1-501(A), -502(A).

26. *Id.* § 15-1803(B).

27. *Id.* § 11-1051(B)(4).

28. *Id.* § 23-211(11).

29. U.S. CONST. amends. V, XIV; *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments. Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." (citations omitted)); *see also* *Ariz. State Liquor Bd. v. Ali*, 550 P.2d 663, 665 (Ariz. Ct. App. 1976) ("Aliens as a class are a prime example of a discrete and insular minority for whom . . . heightened judicial solicitude is appropriate. Accordingly . . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." (citations omitted) (internal quotation marks omitted)).

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1145

law to their detriment or how a state government has discriminatorily withheld a benefit it provides to other non-citizens.<sup>30</sup>

Accordingly, the Arizona statutes provide a significant amount of legal security to those lawfully present in the United States. In comparison to federal statutes—which give nearly no statutory guarantees to individuals who have only lawful presence—the Arizona statutes clearly define the benefits a non-citizen may or may not receive. Individuals who have only lawful presence can point to at least a few benefits in Arizona to which they are lawfully entitled—namely, public benefits such as driver’s licenses. Under federal statutory law, however, individuals with only lawful presence enjoy no such clarity. Whereas Congress has not defined the rights of individuals who have only lawful presence, the Arizona legislature has addressed clearly what rights lawful presence confers under Arizona law.

### II. EXECUTIVE POWER IN IMMIGRATION LAW

Federal and state executive branches can also influence immigration law and policy. Executive actions may be politically motivated and can generate significant controversy, particularly because many see these acts as unilateral and antidemocratic.<sup>31</sup> Irrespective of an executive’s political motives or the popularity of such action, the power of the executive to act is ultimately limited by existing law. That is, an executive may not unilaterally take away rights that are clearly defined by statute, nor can he or she grant durable, substantive rights that existing law does not already provide.

The recent DACA policy provides a telling example of the ways executive actions are limited by statutory law in the area of immigration law. The President may not confer any kind of reliable, lasting benefit to DACA recipients

---

30. 8 U.S.C. § 1229a(b)(4) (2012) (affording immigrants a full and fair hearing); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (explaining that if an immigration statute’s language is clear, an agency cannot exercise its discretion in interpreting that language); *Kurti v. Maricopa Cnty.*, 33 P.3d 499, 502–05 (Ariz. Ct. App. 2001) (holding that when a state discriminates between individuals beyond the manner and purpose by which the federal government has, it must satisfy strict scrutiny in order to survive a claim under the Equal Protection Clause); *Ali*, 550 P.2d at 665 (same).

31. See, e.g., Robert J. Delahunty & John C. Yoo, *The Obama Administration, the DREAM Act and the Take Care Clause*, 91 TEX. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2144031> (“The President’s claim of prosecutorial discretion in immigration matters threatens to vest the Executive branch with broad domestic policy authority that the Constitution does not grant it.”); Daniel Gonzalez & Yvonne Wingett Sanchez, *Brewer Bars Public Benefits for Illegal Immigrants*, ARIZ. REPUB. (Aug. 15, 2012, 11:20 PM), <http://www.azcentral.com/news/politics/articles/20120815arizona-brewer-bars-public-benefits-illegal-immigrants.html> (“‘She shattered my dreams today,’ said Lorenzo Santillan, . . . one of the protestors [of the Brewer announcement].”); E.J. Montini, *Brewer’s Ire over Policy Is About Timing*, ARIZ. REPUB., June 18, 2012, at B1 (quoting Governor Brewer’s reaction to Obama’s announcement of the DACA policy: “This was an outrageous announcement . . . that intends to grant back-door amnesty . . . . It doesn’t take a cynic to recognize this action for what it is: blatant political pandering”); Alia Beard Rau, *New Obama Policy May Affect Senate Bill 1070*, ARIZ. REPUB., June 16, 2012, at A4.

because only federal legislation could confer such rights. Because a future administration could simply end the DACA policy and deport individuals who have applied for deferred action, many eligible undocumented immigrants are unwilling to expose themselves to the authorities by applying for the program, in turn significantly limiting the effectiveness of the federal administrative action.<sup>32</sup> In the same vein, a state governor may not deny DACA recipients the rights that state statutes would bestow by virtue of the recipients' lawful presence. Such efforts to effect change in the opposite legislative context—where the field is occupied by clear legislation—would be limited. Whether existing law explicitly defines the rights of a class of individuals or fails to provide them any substantive and dependable benefit, the power of the executive is limited by the legislative branch's legislative choices.

### III. DACA AND THE LIMITS OF EXECUTIVE DISCRETION IN THE ABSENCE OF LEGISLATIVE GUIDANCE

Immigration authorities have explicitly acknowledged their power to exercise prosecutorial discretion in the form of deferred action in immigration enforcement since 1975.<sup>33</sup> Since 2000, they have followed a clear set of guidelines explaining when to apply deferred action, which were issued by then-commissioner of the Immigration and Naturalization Service (“INS”), Doris Meissner.<sup>34</sup> The Meissner memorandum emphasized that the INS could exercise prosecutorial discretion in its enforcement activities so long as such discretion was not barred by statute, and it provided a list of factors that the agency could take into consideration in exercising its discretion to grant deferred action.<sup>35</sup>

---

32. See Brian Bennett & Cindy Chang, *Some Wary of Work Permit Program; Many Younger Illegal Immigrants Hesitate to Apply, Fearing Their Data Could Be Used Against Them One Day*, L.A. TIMES, Oct. 2, 2012, at A1 (“U.S. Citizenship and Immigration Services officials had prepared to process 300,000 applications from young illegal immigrants by Oct. 1. But only about 120,000 people have applied so far.”).

33. Wadhia, *supra* note 18, at 248 (“The governing section [of the Immigration and Naturalization Service’s Operations Instructions] stated: ‘(ii) Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category.’” (footnote omitted)); see also *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.” (citation omitted)).

34. Memorandum from Doris Meissner, Comm’r of INS, on Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter Meissner Memo], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Wadhia, *supra* note 18, at 254 (“In many ways, the Meissner memo became the modern day ‘Operations Instruction’ for practitioners to utilize in compelling cases.”). Wadhia also adds that “[s]ubsequent written memos issued by [USCIS], CBP, and ICE have been in keeping with, referenced, or in some cases explicitly reaffirmed, the Meissner memo.” *Id.* at 259 (footnote omitted).

35. Meissner Memo, *supra* note 34, at 4–5 (listing the following “Factors to Consider When Exercising Prosecutorial Discretion”: immigration status, length of

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1147

Department of Homeland Security Secretary Janet Napolitano, in her memorandum describing the DACA program, also provided criteria for DACA eligibility that was similar, albeit more specific, than the guidelines in the Meissner memorandum.<sup>36</sup> To be considered for DACA, an applicant must have come to the United States under the age of 16, have lived in the United States continuously for the last five years, be in school, not have been convicted of any serious criminal offenses, and be less than 30 years old.<sup>37</sup>

A DACA recipient receives two years of deferred action and work authorization, allowing the recipient to support himself or herself while in the United States.<sup>38</sup> At the end of the two years, the recipient can apply for renewal of the deferred action and work authorization.<sup>39</sup> Like individuals released on bond during removal proceedings, DACA recipients also do not accrue unlawful presence during their period of deferred action.<sup>40</sup> It appears, therefore, that DACA recipients also enjoy lawful presence under federal law.

But just like any other individual lawfully present in the United States through an executive action, DACA recipients receive no permanent or substantive benefit under the program: “This memorandum confers no substantive right,

---

residence in the United States, criminal history, humanitarian concerns, immigration history, likelihood of ultimately removing the alien, likelihood of achieving enforcement goals by other means, whether the alien is eligible or is likely to become eligible for other relief, effect of action on future admissibility, current or past cooperation with law enforcement authorities, honorable U.S. military service, community attention, and resources available to the agency).

36. Memorandum from Janet Napolitano, Secretary, Dep’t Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, at 2–3 (June 15, 2012) [hereinafter Napolitano Memo], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. The memorandum labels the action purely an act of prosecutorial discretion. *Id.* at 1. Although the memorandum provides no guarantees of deferred action for applicants who satisfied all the criteria, it directly instructs immigration agencies to implement the policy. *Id.* at 3. It directs agencies to consider the eligibility criteria even if the applicant was in removal proceedings or subject to a final order of removal. *Id.* at 2.

37. *Id.* at 1. If the applicant is not currently in school, he must have completed high school or its equivalent, or be honorably discharged from the military. *Id.*

38. *Id.* at 2–3. The form to apply for deferred action requires applicants to submit an application for work authorization. *I-821D, Consideration of Deferred Action for Childhood Arrivals*, U.S. Citizenship and Immigration Servs., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=05faf6c546129310VgnVCM100000082ca60aRCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last updated Aug. 14, 2012) (“Individuals filing Form I-821D must also file Form I-765, Application for Employment Authorization . . . .” (emphasis removed)).

39. Napolitano Memo, *supra* note 36, at 2–3.

40. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. Citizenship and Immigration Servs., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD> (last updated Sept. 14, 2012); see also *supra* Part II.

immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law.”<sup>41</sup>

Further, the memorandum explains that, despite its explicit eligibility requirements, the decision to grant DACA status is wholly within the discretion of the executive branch.<sup>42</sup> This type of language, found both in the DACA and the Meissner memoranda, is used to maintain the executive agency’s discretion and flexibility in the face of judicial review.<sup>43</sup> The very memorandum that announced the DACA policy, therefore, illustrates from the start the limits of executive action in the absence of legislative structure. Specifically, because Congress has not yet enacted legislation to confer any substantive right, immigration status, or pathway to citizenship to the class of individuals eligible for relief under DACA,<sup>44</sup> and the executive branch is unwilling to forgo its flexibility, DACA recipients cannot depend on any guaranteed benefit. As a result, DACA recipients have only the same limited rights that other individuals granted lawful presence by the executive branch do.<sup>45</sup> Because deferred action is purely an act of executive discretion, DACA recipients would not necessarily be entitled to reapply for deferred action at the end of their two-year benefit.<sup>46</sup> A new administration could simply choose to terminate the DACA policy, leaving DACA recipients with no way to renew their deferred action.<sup>47</sup> Without legislative action, DACA recipients are utterly subject to changing political winds.

---

41. Napolitano Memo, *supra* note 36, at 3.

42. *Id.*

43. *See* *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985). INS and DHS have incorporated this language in response to previous attempts within the jurisdiction of the Ninth Circuit to bind immigration agencies to their deferred action guidelines. *See* *Nicholas v. INS*, 590 F.2d 802, 807 (9th Cir. 1979) (holding that INS’s original deferred action policy conferred substantive benefit). *But see* *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983) (refusing to follow *Nicholas* and rejecting the notion that the INS’s deferred action policy conferred a substantive benefit).

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

45. *See* ADJUDICATORS’ FIELD MANUAL, *supra* note 13, § 40.9.2(a)(3)(D) (discussing the nature of parole and lawful presence generally).

46. *See* Napolitano Memo, *supra* note 36, at 2–3.

47. *See* *Romeiro de Silva*, 773 F.2d at 1025 (holding that federal courts lack jurisdiction to review agency’s denial of deferred action pursuant to validly promulgated statement of policy). DACA recipients will not have their admission of unlawful presence referred to U.S. Immigration and Customs Enforcement (“ICE”) for removal purposes, but “this policy . . . may be modified, superseded, or rescinded at any time without notice.” *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, *supra* note 40. This uncertainty may dissuade potential applicants. *See* Laurel Morales, DACA Applicants Deterred by Romney’s Immigration Stance, KPBS.ORG (Oct. 30, 2012), <http://www.kpbs.org/news/2012/oct/30/daca-applicants-deterred-romneys-immigration-stanc/> (“The question is what happens to the people who have applied to the program . . . under a possible [new] administration.”).

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1149

A new administration may even be able to revoke deferred action before a recipient's two years have expired. In the face of such a decision, it would be difficult for DACA recipients to bring a successful challenge. If no legally recognizable right is conferred, an individual cannot challenge the infringement of that right in court.<sup>48</sup> Moreover, when Congress fails to provide an immigration agency with specific procedural guidance, and the agency adopts its own regulations and procedures, a court cannot provide its own procedures simply because the court may find them preferable.<sup>49</sup>

Here, the INS and its successor agencies have repeatedly emphasized that deferred action creates no substantive or legal right and that the policy is purely an act of agency discretion.<sup>50</sup> While it can be argued that there is some semblance of a liberty interest at stake, the qualifying language of the DACA policy seems to imply that even that interest is flimsy.<sup>51</sup> Nor does a recipient's work authorization provide any security. Federal administrative regulations state that work authorization can terminate without notice when the set expiration for the authorization is reached *or* when exclusion or deportation proceedings are instituted against the recipient.<sup>52</sup> This means that an agency could simply revoke the deferred action first and then initiate removal proceedings against a DACA recipient, thereby terminating his or her interest in work authorization. Because Congress has not provided procedural guidance for an agency's treatment of individuals with lawful presence, and the agency's regulations already provide for

---

48. *Id.* (noting that, because immigration agency's grant of deferred action did not confer a substantive benefit, the federal court lacked jurisdiction to review the agency's denial of the relief).

49. *Landon v. Plasencia*, 459 U.S. 21, 31–35 (1982) (“The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.”). The Court held that when Congress has failed to provide its own procedures, “the courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process.” *Id.* at 35.

50. *Napolitano Memo*, *supra* note 36, at 3 (“This memorandum confers no substantive right, immigration status or pathway to citizenship.”); *Meissner Memo*, *supra* note 34, at 10 (“There is no legal right to the exercise of prosecutorial discretion, and . . . this memorandum creates no right or obligation enforceable at law by any alien or any other party.”); *Wadhia*, *supra* note 18, at 282 (noting that “the INS modified the Operations Instruction in 1981 to clarify that deferred action was a discretionary act as opposed to a formal benefit” after a court had held otherwise); *see also Romeiro de Silva*, 773 F.2d at 1024 (“Under the 1981 instruction, it is no longer possible to conclude that the instruction is intended to confer any benefit upon aliens, rather than to operate merely for the INS's own convenience.” (citations omitted) (internal quotation marks omitted)).

51. *See Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1330 n.13 (9th Cir. 2006) (aliens “must in the first instance possess a liberty or property interest” to defend).

52. Termination of Employment Authorization, 8 C.F.R. § 274a.14(a)(1)(i)–(ii) (2012). Aliens granted deferred action must apply for work authorization. Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12(c) (2012). The institution of exclusion or deportation proceedings, though, does not preclude the alien from seeking work authorization during removal proceedings. *Id.*

this procedure, the DACA recipient would have no legal grounds on which to challenge the agency's revocation of the employment authorization.

The DACA policy's failure to provide a reliable, lasting benefit to potential recipients illustrates the extent to which the executive is limited by the absence of legislative action. Because Congress has not guaranteed substantive rights for individuals with lawful presence, an executive cannot confer upon DACA recipients any rights that would not be subject to the discretion of a future executive with differing policies. The uncertainty surrounding the permanency of DACA benefits has already caused a number of potential applicants to hesitate to apply despite their eligibility and current vulnerability to deportation.<sup>53</sup> The absence of congressional action in this area of law, therefore, seems to render the executive's action with respect to DACA ultimately ineffective.

#### IV. DACA AND THE LIMITS OF EXECUTIVE ACTION IN THE PRESENCE OF CLEAR LEGISLATIVE GUIDANCE

To the same extent that legislative inaction can limit an executive in granting substantive benefits, clear legislative guidance can limit an executive from abridging clearly defined rights. Arizona Governor Jan Brewer recently issued an executive order barring state agencies from issuing driver's licenses or other public benefits to DACA recipients.<sup>54</sup> But just as the memorandum issued by Secretary Napolitano is limited by a lack of legislative structure to support her policy, the Governor's executive order will likely fail to make any substantive change for DACA recipients. Though, in this case the ineffectiveness stems from existing state law that already grants well-defined rights to lawfully present individuals.

When announced, this executive order raised an uproar from immigrant-rights groups.<sup>55</sup> The order states that DACA recipients cannot demonstrate lawful presence in the United States for purposes of Arizona law and, therefore, are ineligible to receive taxpayer-funded benefits.<sup>56</sup> The order suggests that United

---

53. See Miriam Jordan, *Young Immigrants Pause on 'Deferred Action' Offer*, WALL ST. J., Sept. 9, 2012, at A6.

54. Ariz. Exec. Order No. 2012-06, *supra* note 2, at 2237. Mississippi Governor Phil Bryant issued a similar order. See Miss. Exec. Order No. 1299 (Aug. 22, 2012), available at <http://www.governorbryant.com/wp-content/uploads/2012/07/Executive-Order-1299.pdf>. Nebraska Governor Dave Heineman also announced that DACA recipients would be ineligible for public benefits unless authorized by statute. Press Release, Governor Dave Heineman, Gov. Heineman Issues a Statement on President Obama's Deferred Action Program (Aug. 17, 2012), available at [http://www.governor.nebraska.gov/news/2012/08/17\\_deferred\\_action.html](http://www.governor.nebraska.gov/news/2012/08/17_deferred_action.html) ("President Obama's deferred action program to issue employment authorization documents to illegal immigrants does not make them legal citizens. The State of Nebraska will continue its practice of not issuing driver's licenses, welfare benefits or other public benefits to illegal immigrants unless specifically authorized by Nebraska statute.").

55. See Gonzalez & Sanchez, *supra* note 31.

56. Ariz. Exec. Order No. 2012-06, *supra* note 2, at 2237. More specifically:

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1151

States Citizenship and Immigration Services itself has concluded “the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants.”<sup>57</sup> In response, several immigration experts argued that the federal work authorization that DACA recipients receive constitutes lawful presence under Arizona law and that other individuals who also hold lawful presence, albeit for other reasons, are regularly granted public benefits from Arizona government agencies.<sup>58</sup>

Similar to the federal DACA policy itself, this executive order is unlikely to significantly affect the rights of undocumented individuals. But unlike the federal DACA policy, this order’s ineffectiveness will stem from a state statutory framework that clearly occupies the field. First, the order directly contravenes the statutory language that defines lawful presence for purposes of public benefit eligibility in Arizona. In fact, an Equal Protection Clause claim would likely succeed were the Arizona government to follow this executive order. Second, separating DACA recipients from other individuals with lawful presence would likely lead to absurd results if this interpretation of lawful presence were applied to the other areas of Arizona law that affect non-citizens, such as Senate Bill 1070. Finally, even where the executive order is not limited by legislative action, particularly in the field of in-state tuition, the order does not affect any change but rather only restates what the legislature has already stated.

The most obvious limitation to an executive order of this sort is the clear statutory language found within Arizona’s driver’s license and public benefits

---

State agencies that provide public benefits . . . shall conduct a full statutory, rule-making and policy analysis and, to the extent not prohibited by state or federal law, initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver’s license, so that the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification are enforced.

*Id.*

57. *Id.* Although the DACA policy clearly indicates it does not grant lawful status, it does not say DACA recipients do not have lawful presence. Napolitano Memo, *supra* note 36, at 2–3.

58. See Luige del Puerto, *Critics Debate Brewer Immigration Order*, ARIZ. CAPITOL TIMES (Aug. 16, 2012), <http://azcapitoltimes.com/news/2012/08/16/critics-debate-arizona-gov-jan-brewers-immigration-order/> (“The problem, says immigration lawyer Elizabeth Chatham, is the governor is confusing ‘legal status’ with lawful presence. No one is arguing that the deferred action policy grants ‘legal status.’”); Daniel Gonzalez, *Migrant Lawyers Say Brewer Edict Contradicts Law*, ARIZ. REPUB. (Aug. 16, 2012, 11:16 PM), <http://www.azcentral.com/arizonarepublic/news/articles/2012/08/16/20120816migrant-lawyers-say-brewer-edict-contradicts-law.html> (“Regina Jefferies, chair of the Arizona Immigration Lawyers Association, said undocumented immigrants who receive work permits while awaiting the outcome of other immigration proceedings—among them proceedings for refugees, domestic-violence victims and undocumented immigrants fighting their deportation cases—also routinely receive driver’s licenses.”).

law.<sup>59</sup> Arizona courts have held that when the Arizona legislature addresses an issue clearly and unequivocally, the court need not defer to an executive agency's interpretation of a statute.<sup>60</sup> Additionally, a court may reject an agency's interpretation of a word in one statute if it conflicts with the meaning of the same word used in other statutes.<sup>61</sup> Because this executive order's application would frustrate several statutes that also use some variation of lawful presence as a standard, a court is likely to find that the legislature's intent in its legislation negates the attempted action of the executive with respect to DACA recipients.

The executive order conflicts most directly with the Arizona public benefits law that the order claims to interpret.<sup>62</sup> In order to receive public benefits in Arizona, a non-citizen must demonstrate lawful presence.<sup>63</sup> As discussed above, DACA recipients do not accrue unlawful presence during their period of deferred action, indicating that under federal law they are considered lawfully present.<sup>64</sup> This alone suggests that the executive order's interpretation clashes with statutory law. More convincing, though, is the fact that the Arizona law already provides a clear manner by which an individual may demonstrate lawful presence: by showing "[a] United States Citizenship and Immigration Services employment authorization document."<sup>65</sup> Because DACA recipients receive federal work authorization during their deferred action, they would satisfy this definition of lawful presence under Arizona law.<sup>66</sup>

Perhaps a more illustrative example of why the executive order's interpretation of the DACA program is flawed is its potential to frustrate law enforcement officers' obligations under Senate Bill 1070.<sup>67</sup> Under this law, an individual with a government-issued identification that requires proof of legal presence before issuance—such as a work authorization—cannot be detained without further cause.<sup>68</sup> But if, under the executive order, a DACA work authorization somehow does not demonstrate lawful presence, then a law enforcement officer who stops, detains, or arrests a DACA recipient may have to contact federal immigration authorities under Senate Bill 1070's enforcement mandate. Ironically though, federal immigration authorities, once contacted, would

---

59. See ARIZ. REV. STAT. ANN. §§ 1-501, -502 (2012).

60. See *Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 91 P.3d 990, 997 (Ariz. 2004) (noting that an agency's interpretation "should be given great weight *in the absence of clear statutory guidance to the contrary.*" (emphasis added)).

61. See *Ariz. Gunit Builders, Inc. v. Cont'l Cas. Co.*, 459 P.2d 724, 726 (Ariz. 1969) ("It is a rule of construction that statutes in *pari materia* must be read and construed together and that all parts of the law on the same subject must be given effect, if possible." (internal quotation marks omitted)).

62. ARIZ. REV. STAT. ANN. § 1-502.

63. *Id.*

64. See *supra* Part II.

65. ARIZ. REV. STAT. ANN. §§ 1-501(A)(7), -502(A)(7).

66. See *Classes of Aliens Authorized to Accept Employment*, 8 C.F.R. § 274a.12(c) (2012) (aliens granted deferred action must apply for work authorization); *I-821D, Consideration of Deferred Action for Childhood Arrivals*, *supra* note 38.

67. See ARIZ. REV. STAT. ANN. § 11-1051(B).

68. *Id.*

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1153

then forgo any removal measures against the individual due to his or her deferred action under federal law.

If the Arizona executive branch's interpretation of the lawful presence of DACA recipients conflicts with state statutory language, then applying this interpretation would also likely violate the constitutional rights of DACA recipients by denying them equal protection of the law.<sup>69</sup> Aliens are, irrespective of their lawful status or presence, entitled to the guarantee of equal protection under the U.S. Constitution.<sup>70</sup> If a state legislature adopts a federal immigration law's distinction between classes of aliens but alters the definition of that distinction—that is, expands or narrows the class—the state must pass strict scrutiny to survive an equal protection claim.<sup>71</sup> The Arizona benefits-eligibility statute specifically adopts a federally defined class, “lawful presence,” and indicates that federal work authorization is sufficient proof of lawful presence.<sup>72</sup> Therefore, before the state's executive branch can make a distinction as to which forms of federal work authorization suffice to constitute lawful presence and which do not, the state must provide some kind of compelling interest in that distinction.<sup>73</sup>

While the executive order does provide some explanation for the decision to make this distinction, the reasoning provided seems inconsistent with Arizona's past treatment of lawfully present aliens. The order claims that allowing the potentially large number of DACA recipients to be eligible for public benefits

---

69. See U.S. CONST. amend. XIV, § 1 (No state shall “deny to any person within its jurisdiction the equal protection of the laws.”); ARIZ. CONST. art. II, § 13 (“No law shall be enacted granting to any citizen [or] class of citizens . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.”); *Chavez v. Brewer*, 214 P.3d 397, 408 (Ariz. Ct. App. 2009) (“Arizona's Privileges or Immunities Clause . . . is substantially the same in effect as the Equal Protection Clause in the United States Constitution.”).

70. *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments. Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.” (citations omitted)); see also *Ariz. State Liquor Bd. v. Ali*, 550 P.2d 663, 665 (Ariz. Ct. App. 1976) (“Aliens as a class are a prime example of a discrete and insular minority for whom . . . heightened judicial solicitude is appropriate. Accordingly . . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.” (citations omitted) (internal quotation marks omitted)).

71. *Sudomir v. McMahan*, 767 F.2d 1456, 1464–65 (9th Cir. 1985); *Kurti v. Maricopa County*, 33 P.3d 499, 502–05 (Ariz. Ct. App. 2001) (holding that when a state discriminates between individuals beyond the manner and purpose by which the federal government has, it must satisfy strict scrutiny in order to survive a claim under the Equal Protection Clause).

72. ARIZ. REV. STAT. ANN. §§ 1-501, -502. The federal government does not consider the reason for which parole was granted for purposes of lawful presence. See ADJUDICATORS' FIELD MANUAL, *supra* note 13, § 40.9.2(a)(3)(D) (discussing the nature of parole and lawful presence generally).

73. *Plyler*, 457 U.S. at 210; *Ali*, 550 P.2d at 665.

would drain the state's resources.<sup>74</sup> There is evidence, however, that prior to the announcement of the DACA policy, Arizona agencies provided driver's licenses and state identification cards to other undocumented aliens who had been granted lawful presence.<sup>75</sup> As discussed above, an alien in removal proceedings can be released on bond and then considered lawfully present in the United States while awaiting his or her case.<sup>76</sup> Because a removable alien on bond would qualify for an Arizona driver's license, it seems that Arizona has already opened its coffers to lawfully present individuals without lawful immigration status, despite the executive order's claim of financial hardship. In addition, the justification seems to have interesting results: Under the executive order's interpretation, if that same alien were to then receive deferred action under DACA after receiving a driver's license (thereby ending his or her removal case), he or she would immediately become ineligible for such benefits.

In sum, where the Arizona executive branch's interpretation of DACA status conflicts with statutory law, it is unlikely to pass muster before a court. The new interpretation conflicts with the clear language provided by the legislative branch, both within the public benefits law, but also in the context of other laws that use the term "lawful presence."<sup>77</sup> In addition, because the executive's given justification for distinguishing the lawful presence of DACA recipients appears to be faulty, especially in light of its past treatment of lawfully present individuals and the ironic results it would create, applying this interpretation would likely violate the Equal Protection Clause.<sup>78</sup>

Conversely, the Arizona executive order is not unlawful insofar as it acts within the bounds already prescribed by the legislature. For example, it would

---

74. Ariz. Exec. Order No. 2012-06, *supra* note 2, at 2237 ("WHEREAS, allowing more than an estimated 80,000 Deferred Action recipients improper access to state or local public benefits, including state issued identification, by presenting a USCIS employment authorization document that does not evidence lawful, authorized status or presence will have significant and lasting impacts on the Arizona budget, its health care system and additional public benefits that Arizona taxpayers fund." (emphasis removed)).

75. See *Classes of Aliens Authorized to Accept Employment*, 8 C.F.R. § 274a.12(c) (2012) (providing which aliens must apply for work authorization); Uriel Garcia, *Certain Illegal Immigrants Collared by Arpaio Score Papers to Work Legally as a Result of Their Arrests*, PHX. NEW TIMES (Aug. 11, 2012), <http://www.phoenixnewtimes.com/2011-08-11/news/certain-illegals-immigrants-collared-by-arpaio-score-papers-to-work-legally-as-a-result-of-their-arrests/> (discussing how illegal immigrants who are released by ICE until pending court dates several years in the future "are released with temporary legal status. They then can score Social Security numbers, Arizona driver's licenses, and can work legally until their court dates."); Jim Small, *Trespassing Law May Turn More Illegal Immigrants into Citizens*, ARIZ. CAPITOL TIMES, (May 17, 2010, 7:02 AM), <http://azcapitoltimes.com/news/2010/05/17/trespassing-law-may-turn-more-illegal-immigrants-into-citizens/> ("Once removal proceedings begin, illegal immigrants [with clean records] can petition for relief and become eligible for a release from detention, work documents and even a driver's license").

76. See *supra* Part II.

77. See *supra* notes 59–68 and accompanying text.

78. See *supra* notes 69–74 and accompanying text.

## 2012] DEFERRED ACTION AND EXECUTIVE POWER 1155

likely be lawful to deny in-state tuition to DACA recipients.<sup>79</sup> The Arizona statute denying in-state eligibility to undocumented immigrant students provides that, “[i]n accordance with the illegal immigration reform and immigration responsibility act of 1996, a person . . . who is without *lawful immigration status* is not entitled to classification as an in-state student.”<sup>80</sup> As noted above, deferred action confers only lawful presence, not lawful status, to a deferred action recipient.<sup>81</sup> The plain language of the Arizona in-state tuition statute would therefore suggest that DACA recipients are not eligible for in-state tuition, because they lack lawful status as the statute requires.<sup>82</sup> Looking to the plain language of the statute and comparing it with DACA recipients’ clear lack of lawful status, a court is likely to hold that an executive action denying in-state benefits to DACA recipients is not unlawful. The executive could deny the benefit, however, only because it is acting within the language adopted by the legislature.

The potential ramifications of the Arizona executive order serve to illustrate the limits of executive power within a well-defined statutory framework. Where executive action contravenes clear statutory language—as does the Arizona executive order with respect to the statutory definition of lawful presence—the action is unlikely to be upheld by a court on review. The effects of applying this particular executive order would lead to unintended results that would frustrate the

---

79. Although the executive order does not refer to in-state tuition eligibility, the Arizona Governor has stated, in relation to the order, that in-state tuition for DACA recipients would be unlawful. Daniel Gonzalez, *Young Migrants May Get Arizona College Tuition Break*, ARIZ. REPUB. (Sept. 12, 2012, 10:07 PM), <http://www.azcentral.com/news/articles/20120912young-migrants-may-get-arizona-college-tuition-break.html> (“The executive order did not address tuition specifically, but Brewer said afterward that allowing illegal immigrants to pay in-state tuition even if they receive deferred action and work permits would violate state law.”).

80. ARIZ. REV. STAT. ANN. § 15-1803(B) (2012) (emphasis added) (citations omitted). “Lawful immigration status” is not defined in the Arizona statutes dealing with student residency and in-state tuition eligibility. *See id.* § 15-1801 (definitions).

81. *See supra* Part II.

82. Interestingly, the federal equivalent to section 15-1803(B) of the Arizona Revised Statutes uses lawful presence, not lawful status, as its criteria for eligibility for higher education benefits. 8 U.S.C. § 1623(a) (2012) (“Notwithstanding any other provision of law, an alien who is not *lawfully present* in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.” (emphasis added)). This language has persuaded at least one Arizona community college to accept federal work authorization granted to DACA recipients as evidence of lawful presence for purposes of in-state tuition. *See Statement by Maricopa Community Colleges Regarding Deferred Action for Childhood Arrivals (DACA)*, MARICOPA COMMUNITY COLLEGES. (Sept. 12, 2012), <http://www.maricopa.edu/residency/statement.php>; *see also DACA Frequently Asked Questions*, MARICOPA COMMUNITY COLLEGES., <http://www.maricopa.edu/residency/dacafaq.php> (last visited Oct. 19, 2012). Given the state statute’s reference to federal law, the Arizona executive order may present a preemption issue with respect to state’s conflating the federal statute’s standard of lawful presence with lawful status. This issue is beyond the scope of this note.

intent of the legislature. Conversely, where the executive action remains within the bounds of existing law—as the Arizona executive order might with respect to the denial of in-state tuition for individuals without lawful status—the executive’s action is less likely to be struck down.

### CONCLUSION

The federal DACA policy and subsequent state-level reactions have raised controversy and serious concerns about the proper role of executive power. An executive is limited, however, by the statutory context in which it operates. In the case of the DACA policy, executive agencies can neither grant substantive rights that statutes do not provide, nor take away rights that statutes clearly protect. When it comes to such rights, then, only the legislative branch can effect meaningful change. If DACA recipients are to receive lasting, reliable rights with respect to their immigration status, only Congress can provide those rights. By the same token, if DACA recipients are to be ineligible for public benefits under state law, only the state legislature can take away their eligibility. In the end, the power of the state and federal executive is significantly limited by the powers of the legislative branch.