

The Access to Courts as an Access to the State: An Analysis of Strategic Litigation as a Tool to Institutionalization

Andréia Fressatti Cardoso¹

ABSTRACT:

The aim of this paper is to assess the potential of institutionalization through strategic litigation by bridging a gap between social movements and legal mobilization literature. While the former tends to overlook the processes inside courts, the latter has focused mainly on the effects of lawsuits on society and social movements. I argue that, since strategic litigation is an institutional tactic that accesses the state through the Judiciary, it could be a tool to insert social actors' claims and interests in state structures. To support such an argument, I explore the literature gap through a specific case in the United States: the lawsuits against the rescission of the Deferred Action for Childhood Arrivals (DACA). I identified ten lawsuits proposed between 2016 and 2017, two of which reached the Supreme Court – *Batalla Vidal v. Nielsen* (2016), *National Association for the Advancement of Colored People v. Trump* (2017), and *Regents of the University of California et al. v. Department of Homeland Security et al.* (2017). DACA was a deferred action program signed by the Obama administration in 2012 to benefit the undocumented youth in the country. After a campaign based on anti-immigrant rhetoric, Donald J. Trump tried to rescind DACA in September 2017 despite the public support that this group of immigrants had in American society. Hence, I assess how the opportunities of accessing the state through its different powers were available or not to activists and movement leaders, and how strategic litigation was used to overturn the rescission. I contend that the specificities of the case pushed the mobilization towards the courts, but also inserted some of their claims and interests inside the structure of the state by testing and pushing legal meaning. However, the limitations of litigation to institutionalization should be emphasized, since it is both an expensive and specific tactic and has a limited reach for transformation.

Keywords: institutionalization; strategic litigation; undocumented youth; DACA lawsuits; immigrant rights.

Introduction

Strategic litigation is one of the possible institutional strategies in social movements' repertoire. It allows claims to be taken to the public and the state through courts. Hence, it is

¹ PhD candidate in the Graduate Program of Political Science at the University of São Paulo, with a grant from the Sao Paulo Research Foundation (FAPESP - process n. 2020/14387-8). I have a master's degree in Political Science from the State University of Campinas, and a bachelor's degree in Law from the State University of Maringa, and I was a research fellow at the Center for Latin American and Latino Studies at American University (CLALS/AU), at Washington DC, in 2023. E-mail: afressatticardoso@gmail.com.br; ORCID: <https://orcid.org/0000-0001-9156-436X>. The opinions, hypotheses and conclusions or recommendations expressed in this material are of responsibility of the author(s) and do not necessarily represent the views of FAPESP.

primarily confrontational and depends on special resources, such as law professionals, time, and the ability to pay for a lawsuit (Marshall, 2006). However, little has been investigated on how such a tactic can be a means for the institutionalization of social actors' claims, interests, and values. I question: *Could the use of strategic litigation generate the institutionalization of claims? What would be its limitations?*

My argument in this paper is exploratory, and it builds on a gap in the literature on social movements, which is to consider the possibility of institutionalization through access to the courts. Literature on social movements and collective action has already indicated how social actors can access the state, institutionalizing demands and values. If we consider that social movements and social actors seek to influence the state's decision-making, identifying or creating an instance of institutionalization could represent a qualitative leap in their struggle. By influencing the state, they would be able to transform state action into an instrument of mobilization (Dowbor, 2012; Skocpol, 1992). In collective action, the state plays a central role, but usually as the target of social movements and actors. Nevertheless, another dimension of its importance is how it can influence social actors' actions by the potential returns they can get from their mobilization (Amenta & Young, 1999). This argument goes beyond the structure of political opportunities (Amenta *et al.*, 2002), and brings to light that *how* the state is structured and organized, including its bureaucratic dimension, can play a part in social mobilization.

Challengers aiming at institutionalization will decide on a course of action based on which "parts" of the state are open - or not - to their demands. This will depend on other political factors, as while some may seem *closed* to them, others might be more receptive to their claims. We learn from Amenta and Young (1999) that divisions in power encourage different types of collective action, designed to influence different levels and structures of the state. However, strategies involving the courts are hardly presented as possible instances of institutionalization and tend to usually be viewed as a resource to stop a state's action that goes against the interests of social actors.

On the other hand, literature on strategic litigation has focused either on the gains obtained through this strategy in specific cases, or on the limitations of the tactic and the impact it might have on social movements, such as demobilization. As a collective action strategy, strategic litigation aims to alter a legal status considered unjust through the courts (Fanti, 2016). It implies, concomitantly, the understanding that the courts might be a venue to start or continue the struggle and comprehension of the law and legal language as cognitive lenses to frame one's mobilization (Martinez Carmona, 2020). It has been used by different

social movements, but mainly to halt the implementation of policies and programs. More recently, it has been mobilized by conservative actors to reverse policies on sexual rights (Brown, 2019). The limitations of such a tactic are not negligible and can impact considerably the outcome expected from the courts. Both McCann (1995) and Marshall (2006) call attention to the costs involved in taking demands to the courts. First, a win does not generate new policies, and the main result is temporary relief. Lawsuits also tend to be costly and time-consuming, and demand specialized knowledge from law professionals, which can distance the claim from social actors.

Despite such limitations, access to courts has the potential to bring social change and, as I will argue in the following pages, institutionalize social interests and values by exploring, creatively, legal margins and gaps. Two mechanisms will be highlighted, both presented by Silverstein (1996) in her analysis of the animal rights movements and their use of litigation: recognition of standing and stretching the law. To explore the potential of strategic litigation in producing institutionalization, I also ground my argument on the lawsuits against the end of the Deferred Action for Childhood Arrivals (DACA) in the United States.

DACA was a policy promulgated during President Barack Obama's administration to answer to the pressure of the immigrant youth movement and the lack of congressional action on the matter. At its peak, the program benefitted around 800 thousand people, allowing them to benefit, in addition to having their deportation deferred, from two-year authorization to work and access to some kind of documentation, such as a social security number and a driver's license (Gonzales, 2016). After a campaign with strong anti-immigrant rhetoric, the following administration, President Donald J. Trump, decided to rescind DACA in September 2017, winding the program down.

This decision was met with resistance from beneficiaries, allies, civil society organizations, social movements, and even some U.S. states. One of the strategies employed was litigation: Ten lawsuits were proposed against the end of DACA, three of which reached the Supreme Court of the United States (SCOTUS) – *Batalla Vidal v. Nielsen* (2016), *National Association for the Advancement of Colored People (NAACP) v. Trump* (2017), and *Regents of the University of California v. Department of Homeland Security* (2017). In June 2020, through a *writ of certiorari*, the SCOTUS decided that the administration could not end DACA capriciously, and should follow administrative procedure. I argue, however, that it is not the result of the litigation that brings about institutionalization, especially in a case in which the decision was mainly based on procedure. Rather, one should evaluate how the

arguments of the complaints were received by the Justices and how such claims worked on the margins of the norm.

Thus, I analyzed the initial complaints and amendments, considered as the expression of plaintiffs' claims, and the judicial decisions, understood as the Judiciary's response to those claims, of the three cases that reached the SCOTUS. The documents were qualitatively analyzed, and the complaints were considered timely responses to the September 2017 rescission of DACA. The June 2020 decision, for the aims of this paper, is considered the end of the lawsuit and the struggle over courts.

This paper is divided into two sections in addition to this introduction and the conclusion. In the following section, I highlight the literature gap, by reconstructing the two literatures aforementioned. I also explore the two mechanisms that could potentially bring institutionalization through strategic litigation, the recognition of standing and stretching the law. In the following section, I present the DACA lawsuits and indicate how plaintiffs' arguments were received by the courts. Finally, in the conclusion, I synthesize the argument, emphasizing the potential and limitations of strategic litigation as a way of seeking institutionalization.

Building a possibility: institutionalization and strategic litigation

Literature on social movements has emphasized that these social actors and the state are not completely separate entities, and they interact in many instances (Gurza Lavallo et al., 2019). In addition to its role as a target and adversary, it has been explored how the state constitutes and is constituted by society and collective action, and how its responses to social mobilization can shape and influence collective action (Amenta & Young, 1999). Following Amenta et al. (2002), the state is understood as a set of political, military, judicial, and bureaucratic organizations that exercise political authority and control over the people who live in a specific and well-defined territory.

To consider the state as such means to go beyond the framing of political opportunities when investigating social movements, because it tends to address the state in a quite ambiguous manner, as it focuses on how social movements emerge, shape themselves, and the results that they are able to obtain (Amenta et al., 2002). Political opportunities are usually broadly defined and do not necessarily focus on the state and how its responses can impact both the gains and future actions of social movements. With the renewed interest in the states in social sciences (Skocpol, 1985), there has been more attention on how they are active actors in social conflicts, and their interactions with society should be closely observed.

There are a range of ways that society can interact with the state. They can be divided into two broad categories: extra-institutional, which includes all tactics that, even if they target the state, do not use its structure for mobilization; and institutional ones, that resort to institutions. Even if we usually associate social movements with their use of extra-institutional strategies, such as marches, rallies, and social media campaigns, institutional action is closer to the state and seeks to transform state action into a mobilization tool (Dowbor, 2012). It can also provide a qualitative leap in the struggle if social actors are able to *institutionalize* social claims.

Institutionalization is the act of bringing into the state social interests, claims, values, and agendas. It means that social actors were able to access state structure and insert their interests inside it, reducing the contingencies of the political struggle. This can be done either by creating a point of access – the *fix* described by Skocpol (1992) –, or by exploring those that are already available to them. It does not necessarily indicate the end of the conflict, much less definite protection of social movements' interests; rather, it represents a dislocation to a more favorable terrain for social action (Gurza Laval et al., 2019). Instead of demobilization and co-optation, usually portrayed in traditional social movements literature, this proximity between social actors and the state can promote important gains without necessarily leading to the end of the movement.

Strategies to do so can vary according to the degree of access to and influence over the state, as well as the type of institutionalization. Gurza Laval et al. (2019) point to three variations of access, namely horizontal (access to offices), vertical (the authority level of the access), and agency domain (configuration of the access). Szwako & Gurza Laval (2019) indicate four types of institutionalization: positional, which are the offices held institutionally; technical-practical, the creation or control over policy tools; programmatic, the elaboration of specific policies and projects; and, finally, symbolic, which is the institutionalization of categories and concepts. Social movements and actors can access different levels and promote different types of institutionalization at a time, but those processes can have very specific characteristics.

Despite this, literature on institutionalization has rarely considered one of the state authorities and access that is usually historically and constitutionally built, the courts. The Judiciary, bearing its differences from the Executive and Legislative powers, can represent one of the options available to social movements, especially when accessing the other powers may be too costly, or even closed to any of their claims. Thus, I pose the question: *can social actors institutionalize their claims through the courts?*

My argument is that there is the possibility of doing so, but first, we need to consider the law as constituting and being constituted by society, viewing it through a *bottom-up* approach. Legal mobilization literature has demonstrated that contrary to a top-down approach to law, much of it is constructed through processes of building legal consciousness, social mobilization, and even resistance to legal orders (McCann, 1996). To mobilize the law means presenting a claim through the language of rights. This can include, but not be restricted to, strategic litigation.

According to Fanti (2016), as a collective action tactic, strategic litigation seeks to alter an existing legal status considered unjust and, in this process, to identify different directions for the current legal understanding of the issue, which will probably be resisted. To resort to law as a strategy of collective action also means considering it as a set of meanings and symbols that play the role of cognitive lenses through which social groups articulate their mobilization (Martinez Carmona, 2020). Thus, literature on legal mobilization has recognized that social actors may turn to courts to influence state decision-making processes, and it may be a way to consider how access to courts can *institutionalize* social claims, by changing the cognitive lenses in which the state has been framing an issue.

Since strategic litigation is an institutional tactic, it has (limited) access to the state, the potential to influence its actions, and, as I am arguing here, the potential to institutionalize demands, interests, and values. Since it accesses the judiciary's power, deciding on strategic litigation may necessarily implicate the action of law professionals so they can *translate* social demands and interests into legal and rights language.² When working on the latter, the intention of influencing the state's action is explicit, by seeking to enter institutions and alter practices considered contrary to the rights argued. In other words, entitlements point to limits that should not be trespassed by the state or that demand a certain course of action from this entity while making a case for a specific vision of law and its symbols.

How can a norm be altered by the collective action of organized groups? We learn from Silverstein (1996) that one of the answers to this can be found in the constitution of legal meanings, understood more broadly as all the legal concepts, expressions, and practices that shape legal and moral behavior. Transformation through legal meaning usually occurs at the margins and gaps of official norms and their usual interpretations. It is a matter of exploring these spaces through strategic litigation, and other strategies and seeking gains that can favor

² While legal language refers more broadly to the jargon and vocabulary used in courts, rights language means to put civil society interests in terms of rights, as understandings of the law that produce entitlements (Engel & Munger, 2003).

social movements and civil society's organizations. In her work on the animal rights movement, Silverstein (1996) identified different effects of strategic litigation that can contribute directly or indirectly to pushing social movements' agenda. I highlight two of them: the recognition of standing, and *stretching the law*.

The importance of recognizing one's standing is their constitution as legal subjects as opposed to legal objects. While the latter have a passive participation in the norm, since they are at the receiving end and feel the effects of the laws, legal subjects participate more actively and can demand the law against an unjust situation. When the court recognizes standing, it indicates that the plaintiffs have the right to demand and hence participate in legal debates, but it does not necessarily follow that their claim will be considered valid or true. What is built in the recognition of standing is a legal identity (Silverstein, 1996:187), and an opening to the state.

The second mechanism I would like to explore is the *stretching of the law*. To stretch the law means inserting new situations in what is already predicted by the norm, either by bringing a new case under its prescription, or transforming what was understood as included in the legal text, especially in redefining the categories that are already in the norm. In Silverstein's words:

Stretching the law means testing its limits as defined by officials who "police" law's meaning. Through such testing, the boundaries of official law can be pushed and reshaped to allow for the acceptance of new concepts. Since this kind of reshaping may require the pursuit of numerous cases, an important side effect of each case may include pushing the law's boundaries. (Silverstein, 1996:203)

It involves expanding norms margins. However, Silverstein (1996) warns us of the possible need for many cases to bring an important effect. Every lawsuit can represent a step forward in this expansion, and small efforts of inclusion can be significant when taken together and in a broader use of different litigations. If we consider this mechanism in light of the institutionalization literature, it would be through stretching the law that social actors could promote the inclusion of their interests in the norm and state action by transforming existing meanings. Institutionalization, in this case, would be of new concepts and situations that social actors understand as part of or in need of being excluded from specific norms, in challenge of their original intention.

Nevertheless, there are important limitations to the use of strategic litigation. First, it cannot create new policies or directly reform those that already exist (McCann, 1995). In addition, lawsuits also tend to be costly and time-consuming, and they depend on the knowledge of law professionals, which might create a gap between social actors and the

courts (Marshall, 2006). Also, a country's legal system³ and its bureaucratic structure can also influence to what extent courts are able to institutionalize claims. These limitations are not negligible, as the impact of the decisions and the effort to keep resistance through the courts may have on social actors and movements.

Additionally, some extra caution is necessary. My argument of the possibility of institutionalization through courts in this paper does not consider what kind of demands are being presented. One must keep in mind that judicial tactics are not available only to progressive social actors, and, recently, strategic litigation has been used by far-right movements in the United States to change what they call “woke policies”. By accessing the judicial system, such groups have been able to argue that cakes can represent freedom of speech (Brown, 2019),⁴ and jurisprudence which had recognized the right to abortion in the same country was overturned by the mobilization of courts.⁵

In the next section, I explore the possibility of institutionalizing social demands through strategic litigation in a case of the rights of undocumented immigrants in the United States who had access to benefits due to a program from the Obama administration, DACA. As indicated in the introduction, the United States presents an interesting case to explore such an argument, especially because it is a *common law system* and SCOTUS rulings are held as norms.

The Judicial Struggle Over DACA

It is estimated that around 11.3 million people live in the United States undocumented (Gonzales, 2024), and there are very few - if any - options to regularize one status once they have entered the country. DACA was a policy designed at the end of Obama's first administration, in order to address the lack of congressional action on the situation of young immigrants. Two events are of interest in considering how DACA came about in 2012: the

³ *Common law* and *civil law* distinguish the Western law systems based on their historical development and they have specific characteristics of legal nature. Briefly, in a civil law system, the main source of norms are fixed legislative codifications, or law elaborations, whereas in common law systems, they come from customs and judicial decisions (Dainow, 1966). This difference becomes important for the reader that comes from a civil law system (also the case of this researcher), in which we expect less from court decisions.

⁴ Brown (2019) is referring to the case *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2017), decided by the SCOTUS in 2017, and discussed if a business had the right to discriminate based on the owner's belief. In this case, a couple was denied to order their wedding cake from a shop because the owner was against same-sex marriage. See more at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/

⁵ I refer here to the SCOTUS overturn of *Roe v. Wade* (1973) in 2022. See more at <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn>.

recent failure of the DREAM Act in 2010,⁶ and the push of the undocumented youth movement (Wong et al., 2012).

DACA benefitted undocumented migrants who met its criteria and had their application approved after a case-by-case analysis. In the terms of the 2012 memorandum, to apply for DACA, one had to: have entered the United States under the age of sixteen and before the signature of the memorandum; have had resided in the country uninterrupted for at least five years preceding the date of the memorandum and be present in the country in the date of its signature; be in school, have graduated from high school, have obtained a general education development certificate or have been honorably discharged from the Coast Guard or Armed Forces; have not been convicted of a felony, a significant misdemeanor offense, multiple misdemeanor offenses, or pose a threat to national security or public safety; *and* not be above the age of thirty (“Deferred Action for Childhood Arrivals (DACA)”, 2012). DACA did not provide a pathway to citizenship nor amnesty, but a status of liminal legality - a tolerance of their presence (Alulema, 2019). DACA benefitted over 800 thousand migrants at its peak (Gonzales, 2016).

The program faced some opposition in some American states, which promoted anti-immigrant and discriminatory local policies to restrict DACA’s effect (Cebulko & Silver, 2016). Also, in 2014, when the Obama administration proposed an expansion of the program and a similar policy for parents of American children,⁷ opposition escalated to the courts. The result was a nationwide preliminary injunction that halted this new memorandum (State of Texas v. United States, 2014) and created even more conflicts and confusion surrounding the legality of DACA (Bono, 2014). In 2016, after a political campaign with notable anti-immigrant rhetoric, Donald J. Trump was elected President of the United States. Following campaign promises, his administration decided to rescind DACA, frustrating the expectation of the policy’s continuation for thousands of beneficiaries (Johnson, 2018).

A series of political and legal struggles emerged from this policy change. The use of lawsuits was not novel for immigration lawyers (Bono, 2014), nor was the first of them

⁶ The Development, Relief, and Education for Alien Minors Act (DREAM Act) is a project that was first presented in 2001 by senators Hatch (Republican) and Durbin (Democrat). It has been presented in different legislatures ever since, being the most recent in 2021. Parts of this project were used in the design of DACA, such as the criteria of who could apply to the program, and some of the benefits, but with a time limitation in the latter. See more at <https://www.americanimmigrationcouncil.org/research/dream-act-overview>.

⁷ The Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) was proposed in 2014, following the success of DACA. If it was not barred after State of Texas v. United States (2014), it would have benefitted parents of US citizens and lawful residents with deferred action and would expand the coverage of DACA, changing its renewal period to three years.

proposed when DACA was rescinded (Batalla Vidal v. Nielsen, 2016).⁸ Plaintiffs presented their claims in the name of those who had DACA and those who could apply for it.⁹ In those lawsuits, we can identify two opposing parts: DACA beneficiaries and allies, who argued for the continuation of the program and its benefits (plaintiffs); and the state, especially the Trump administration and the DHS, who were trying to rescind the program and resist the plaintiffs' claims.

The plaintiffs' arguments can be divided into three main subjects. One of them is strictly procedural, which is the possibility of judicially reviewing DACA's rescission and the need to follow the Administrative Procedure Act (APA). The other two, which I call substantive claims, refer to the doctrine of legitimate expectation and the application of the clause of equal protection from the *Fourteenth Amendment* to the Constitution of the United States. The first substantive claim is based on how long DACA has been in place and beneficiaries' expectations of its continuity in the future. The second considers that, since the majority of beneficiaries identified as Latinx, the rescission seemed racially targeted. This is explicitly argued in Batalla Vidal v. Nielsen (2016) and Regents of the University of California v. U.S. Department of Homeland Security (2017).

Considering the limitations of what can be expected from judicial decisions, *how can strategic litigation insert social claims inside the state?* I argue that in the cases analyzed in this paper, we can observe the two mechanisms mentioned before: recognition of standing, and stretching the law.

Recognition of standing can be seen as both a mechanism and a condition for institutionalization (without standing, the case would be dismissed). One of the arguments against the claims of DACA beneficiaries and allies is their lack of standing, especially when the plaintiffs were civil society organizations, such as the National Association for the Advancement of Colored People (NAACP) (NAACP v. Trump, 2017). The defendants claimed that organizations should demonstrate the interest of specific persons since DACA was only granted after a case-by-case analysis and the benefits were individual.

This is rejected by the court because, if at least one of the plaintiffs could demonstrate such standing, all the others would benefit. Thus, collectives can argue in the

⁸ Batalla Vidal v. Nielsen (2016) was, actually, proposed when the DAPA memorandum was rescinded, because the first plaintiff had applied and been approved for the extension of DACA. The first complaint refers to the injunction from State of Texas v. United States (2014) that halted such a memorandum.

⁹ It is important to make a note on this point. DACA has strict criteria, and it is a policy that has aged over the years. In other words, since it establishes time limits of entry in the country, as well as age limits to apply for it, the reach of the policy has been diminishing ever since its promulgation. Many young immigrants are no longer eligible for DACA, and some do not qualify for any other type of protection.

name of undocumented immigrants and DACA beneficiaries, even if they are not formed exclusively by them – as long as one individual could demonstrate individual interest. Standing is also recognized in the other cases analyzed, especially in *Batalla Vidal v. Nielsen* (2016), since the first plaintiff is an individual who benefited from DACA.

Another condition for institutionalization through courts is the recognition of the possibility of judicial review of the rescission in all the lawsuits analyzed. In *Batalla Vidal v. Nielsen* (2016), even if Judge Garaufis does not immediately accept the substantive claims against the end of DACA, he decided that administrative acts such as DACA are not characterized as non-execution, and they create expectations for beneficiaries. Against the defendants' case, DACA created positive benefits for undocumented migrants in addition to tolerating their permanence. DACA was not merely administrative non-execution, and this would be the grounds for the application of the APA.

Both lower courts and the SCOTUS are adamant that they are not questioning the presidential authority to rescind DACA. As reiterated by Judge Alsup in *Regents of the University of California v. DHS* (2017), the change in administration would naturally mean the review of policies from predecessors and the rejection of those not in accordance with the new plan of government. The SCOTUS decision is restricted to how the policy was ended, that is if the legal procedure required by the APA was followed or not. However, I highlight the arguments justifying APA's application: DACA created a *legitimate expectation* of its continuity, *stretching* a characteristic that is usually attributed to rights in the US legal system to the benefits of a deferred action that expressly did not concede rights.

In June 2020, the SCOTUS¹⁰ understood, with the plaintiffs, that when a policy is applied for such a long time, it generates expectations in individuals who benefit from it, mainly in its continuity. Hence, any intention to end the program, which was still receiving renewals in 2020 and affected more than 800 thousand people at its peak, should consider the impact on the lives of beneficiaries and the states in which they lived. As argued by plaintiffs, DACA recipients were, after eight years of the program, vital parts of the community and its

¹⁰ The Supreme Court of the United States is composed of nine judges, and one of them presides over the decisions, the Chief Justice. The June 2020 decision mentioned in this paper was written by the following formation of the Supreme Court: the majority was formed by Chief Justice Roberts, and Justices Ginsburgh, Breyer, Kagan and Sotomayor (the latter dissenting in one of the points of the opinion); the majority dissenting opinion was signed by Justice Thomas, Alito and Gorsuch; and Justice Kavanaugh formulated another dissenting opinion. It is important to highlight that, at the time, only Justice Kavanaugh was appointed by the then-President Donald J. Trump (Republican Party). Despite the narrow majority, the decision is binding, and, even if we do not evaluate if the decision was adopted in its entirety by the state, it is expected - due to Common Law structural elements of the United State's legal system - that it will be considered as a norm.

economic relations. Not only was APA's application necessary because of its classification as more than an administrative act of non-execution, but also created a legitimate expectation.

But, because DHS was "not writing on a blank slate," post, at 22, n. 14 (opinion of THOMAS, J.), it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns. ("Department of Homeland Security et al. v. Regents of the University of California et al.", 2020, p. 26)

The impact of going against the interests that relied on DACA is noticeable in this excerpt. Even if there are no entitlements *per se*, DACA was an extra step compared to previous programs of deferred action, and those benefits generated legitimate expectation over time. This is not a natural conclusion, as demonstrated by the dissenting majority opinion at the SCOTUS. This opinion insisted on the lack of entitlements of the program, which would lead to the impossibility of a legitimate expectation from the beneficiaries and other undocumented immigrants. The Justices argued that without rights, one cannot demand that the benefits created by DACA continue over time, and they should have prepared for the end of the program (which could happen at any moment). The dissenting majority asserted the Congress' prerogative over the matter.

The SCOTUS decision would be, then, a *stretch* of the doctrine of legitimate expectation for this case, including the need to calculate the interests around the policy. I note that even the decision to apply APA to the case, a consequence of admitting that plaintiffs had legitimate expectation, is in itself a *stretch to the law*. The plaintiffs' claims that DACA benefits generated expectations of its continuity were inserted into the state when the Justices decided on the application of APA. DACA did not generate rights but allowed many people to "come out of the shadows:" it allowed immigrants to start or continue their studies, insert themselves in the labor market as employees and employers, form families without the fear of being separated, and ascend socially through education. In other words, as expressed in the complaint from Batalla Vidal v. Nielsen (2016), it recognized the presence of undocumented immigrants in the community and economy of "the only land they called home" - and this should be enough to generate *legitimate expectation*. The decision also emphasized how these immigrants had popular support since they are considered to have entered the territory through "no fault of their own."¹¹

¹¹ A note on this support is necessary. DACA was also responsible for creating cleavages among immigrants, especially by building on the narrative of a "good immigrant" versus a "bad immigrant", and on the innocence of children. This was reiterated in many interviews, and has already been explored in literature as an unintended, but consequential effect of the policy. See Gonzales (2016) and Cebulko & Silver (2016).

Due to the characteristics of the U.S. legal system, the SCOTUS opinion becomes a precedent for similar cases, and it can *stretch the law* in the sense of its future application in similar cases. SCOTUS decisions can create norms in a broader sense and insert new situations that society already seems to accept in the existing ones. It is an update of the law through what is argued by social actors, and it determines state action due to the binding effect of judicial decisions (Silverstein, 1996).

However, not all claims were well received by the Justices. Another argument from the decisions that tried to activate such a mechanism was the possibility of applying the equal protection clause from the *Fourteenth Amendment* to the U.S. Constitution. Such a clause was one of the main legal arguments used during the civil rights movements in the 1960s, and it is argued that those inside the territory cannot be discriminated against based on their race or ethnicity. When brought to the DACA lawsuits, plaintiffs indicated that the majority of DACA beneficiaries identified as Latinx, so the end of DACA could be racially motivated (Batalla Vidal v. Nielsen, 2016; Regents of the University of California v. U.S. Department of Homeland Security, 2017).

Decisions from the district courts in Batalla Vidal v. Nielsen (2016) and Regents of the University of California v. DHS (2017) agreed with the plaintiffs that many of then-President Trump's manifestations during his campaign, especially through social media, and some after the election were direct attacks to the Latinx community in the United States. So, when his administration tried to rescind the program, from which the Latinx community benefitted greatly (Alulema, 2019), the plaintiffs argued that the rescission could be motivated by *discriminatory animus*, a violation of the equal protection clause in the Fourteenth Amendment to the U. S. Constitution. They based this claim on declarations from President Trump on his social media and in press conferences.

However, this argument was not accepted by the SCOTUS due to insufficient evidence in the lawsuits. There was a dissent from Justice Sotomayor to the majority opinion on this issue: She highlights the moment in which the lawsuits reached the SCOTUS, through a *writ of certiorari*, and how evidence was still not produced in the lawsuit documents. The *writ of certiorari* is a kind of appeal that prompts an opinion from the court at the beginning of the lawsuit, hence before the probationary phase. It aims at pacifying the possibility of judicial review. For Justice Sotomayor, the lawsuit's timeline should be of importance to decide on the applicability, or not of a constitutional clause, and plaintiffs should have the opportunity to produce more robust legal evidence on this claim. Nevertheless, the other Justices, including the dissenting majority opinion, rejected the application of this clause to the case.

Therefore, the SCOTUS decision of June 2020 did stretch some of the legal meanings in the terms argued by plaintiffs, especially the legitimate expectation of DACA recipients and the applicability of APA to the case. On the other hand, it did not deny the administration's authority to end DACA and did not accept the applicability of the Fourteenth Amendment to the case due to lack of evidence. The direct consequence of such a decision was the continuity of DACA in the terms of the 2012 memorandum. For the movement, it was a short-lived win: a new lawsuit led by the state of Texas in 2021 stopped new applications once more and, since the SCOTUS did not decide on the legality of DACA, it is being argued that the program is a violation of the U.S. immigration system and an abuse of administrative discretion. The program is now pending on court's decision and it is expected to reach the SCOTUS once again in 2025.¹²

Conclusion

From the DACA lawsuits in the United States, I argue that strategic litigation has the potential to institutionalize social claims, even if this relation is rather absent in the literature. However, its limitations should be highlighted. The case of the DACA lawsuits has indicated the unpredictability of this tool, since not all the claims argued by the social actors were accepted, and the courts are also subject to contingencies. From the three main arguments highlighted in this paper, only two were recognized, the application of DACA and legitimate expectation. These lawsuits, nonetheless, were sufficient to avoid the end of DACA in 2020, but new lawsuits and the change of the SCOTUS composition are a threat to the program's survival in the future. As emphasized by Sarat and Scheingold (2006), we should bear in mind that the mobilizing ability of strategic litigation hardly survives a series of judicial defeats. This means that a negative outcome in June 2020, could have demobilized the movement, and the accrued effect of the most recent developments on DACA may hamper future mobilization.

Additionally, there are the structural limitations of strategic litigation. Not only are lawsuits costly and time-consuming, but years can go by before there is a decision and it can be exhausting for activists, leaders, and social movements as a whole. They have to rely on law professionals and demand financial resources for litigation costs, which can have the unintended effect of elitizing the struggle. Despite Marshall's (2006) argument that this is not always the case, there is the risk of distancing social actors and silencing those who cannot speak in the courts' arena. Finally, the difference between common law and civil law systems

¹² On this, see

<https://immigrationforum.org/article/explainer-u-s-district-court-judge-hanen-finds-new-daca-rule-unlawful/>.

is not negligible in the possibilities of stretching the law through courts. The stability of institutionalization depends on how court decisions are treated in the legal system of each country, and the binding effect is one of the conditions for considering the judiciary as a viable and worthy path for social struggles.

Even though those are non-negligible risks, strategic litigation has the creative potential to bring about important legal changes from the margins and gaps of norms. *Stretching the law* can be a significant tool in political struggles, allowing access and institutionalization of ideas and interests of social groups - especially when the Executive and Legislative powers are closed to their claims. Its institutionalization potential should be considered, but bearing in mind that it is not the only tool available and does not need to be used alone, nor is it used only by progressive social movements and civil society groups.

References

- Alulema, D. (2019). DACA and the Supreme Court: How We Got to This Point, a Statistical Profile of Who Is Affected, and What the Future May Hold for DACA Beneficiaries. *Journal on Migration and Human Security*, 7(4), 123–130. <https://doi.org/10.1177/2331502419893674>
- Amenta, E., Caren, N., Fetner, T., & Young, M. P. (2002). Challengers and states: Toward a political sociology of social movements. *Sociological Views on Political Participation in 21st Century*, 10, 47–83. [https://doi.org/10.1016/s0895-9935\(02\)80018-3](https://doi.org/10.1016/s0895-9935(02)80018-3)
- Amenta, E., Young, M. P. (1999). Democratic States and Social Movements: Theoretical Arguments and Hypotheses. *Social Problems*, 46(2), 153–168. <https://doi.org/10.2307/3097250>
- Batalla Vidal v. Nielsen, Nicholas G Garaufis* ____ (U.S. District Court for the Eastern District of New York 2016). <https://www.clearinghouse.net/detail.php?id=15462>
- Brown, W. (2019). *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West*. Columbia University Press.
- Carlos, E., Dowbor, M., & Albuquerque, M. do C. A. (2017). Movimentos sociais e seus efeitos nas políticas públicas: balanço do debate e proposições analíticas. *Civitas - Revista de Ciências Sociais*, 17(2), 360–378. <https://doi.org/10.15448/1984-7289.2017.2.25925>
- Cebulko, K., & Silver, A. (2016). Navigating DACA in Hospitable and Hostile States: State Responses and Access to Membership in the Wake of Deferred Action for Childhood Arrivals. *American Behavioral Scientist*, 60(13), 1553–1574. <https://doi.org/10.1177/0002764216664942>
- Dainow, J. (1966). The Civil Law and the Common Law: Some Points of Comparison. *American Journal of Comparative Law*, 15(3), 419–435. <https://heinonline.org/HOL/P?h=hein.journals/amcomp15&i=435>
- Deferred Action for Childhood Arrivals (DACA)*. (2012, July 11). Department of Homeland Security. <https://www.dhs.gov/deferred-action-childhood-arrivals-daca>

- Dowbor, M. (2012). *A Arte da Institucionalização: estratégias de mobilização dos sanitaristas (1974-2006)* [Doctoral Dissertation]. Universidade de São Paulo.
- Dowbor, M. (2019). Escapando das Incertezas do Jogo Eleitoral: a construção de encaixes e domínio de agência do movimento municipalista de saúde. In A. Gurza Laval, E. Carlos, M. Dowbor, & J. Szwako (Eds.), *Movimentos Sociais e Institucionalização: políticas sociais, raça e gênero no Brasil pós-transição* (pp. 89–118). EdUERJ.
- Engel, D. M., & Munger, F. W. (2003). *Rights of Inclusion: law and identity in the life stories of Americans with disabilities*. The University of Chicago Press.
- Fanti, F. (2016). *Mobilização Social e Luta por Direitos: um estudo sobre o movimento feminista* [Doctoral Dissertation]. Universidade Estadual de Campinas.
- Gonzales, R. G. (2016). *Lives in Limbo: Undocumented and Coming of Age in America*. University of California Press.
- Gurza Laval, A., Carlos, E., Dowbor, M., & Szwako, J. (2019). Movimentos Sociais, Institucionalização e Domínios de Agência. In A. Gurza Laval, E. Carlos, M. Dowbor, & J. Szwako (Eds.), *Movimentos Sociais e Institucionalização: políticas sociais, raça e gênero no Brasil pós-transição* (pp. 21–86). EdUERJ.
- Marshall, A.-M. (2006). Social Movement Strategies and the Participatory Potential of Litigation. In A. Sarat & S. Scheingold (Eds.), *Cause Lawyers and Social Movements* (pp. 164–181). The Stanford University Press.
- Martínez Carmona, C. A. (2020). Cómo el movimiento LGBT define disputar en derechos de minorías. Enmarcamiento legal mediante difusión relacional. *Revista Mexicana de Ciencias Políticas y Sociales*, 65(239).
<https://doi.org/http://dx.doi.org/10.22201/fcpys.2448492xe.2020.239.71248>
- McCann, M. (1996). Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive...). *Law & Social Inquiry*, 21(2), 457–482. JSTOR.
<https://www.jstor.org/stable/828850>
- McCann, M. W. (1995). *Rights at Work: pay equity reform and the politics of legal mobilization*. The University of Chicago Press.
<https://press.uchicago.edu/ucp/books/book/chicago/R/bo3630053.html>
- National Association for the Advancement of Colored People v. Trump, John D. Bates ____ (U.S. District Court for the District of Columbia 2017).
<https://www.clearinghouse.net/detail.php?id=16162>
- Regents of University of California v. U.S. Department of Homeland Security, William Alsup ____ (U.S. District Court for the Northern District of California 2017).
<https://www.clearinghouse.net/detail.php?id=16132>
- Sarat, A., & Scheingold, S. (2006). What Cause Lawyers Do For, and To , Social Movements: An Introduction. In A. Sarat & S. Scheingold (Eds.), *Cause Lawyers and Social Movements* (pp. 1–34). The Stanford University Press.
- Silverstein, H. (1996). *Unleashing Rights: law, meaning, and the Animal Rights Movement*. The University of Michigan Press.

- Skocpol, T. (1985). Bringing the State Back In: Strategies of Analysis in Current Research. In P. B. Evans, D. Rueschemeyer, & T. Skocpol (Eds.), *Bringing the State Back In* (pp. 3–38). chapter, Cambridge: Cambridge University Press.
- Skocpol, T. (1992). Understanding the Origins of Modern Social Provision in the United States. In T. Skocpol, *Protecting Soldiers and Mothers: the political origins of social policy in the United States*. The Belknap Press of the Harvard University Press.
- Szwako, J., & Gurza Lavalle, A. (2019). “Seeing Like a Social Movement”: Institucionalização simbólica e capacidades estatais cognitivas. *Novos estudos CEBRAP*, 38(2), 411–434. <https://doi.org/10.25091/s01013300201900020009>
- Wong, K., Shaddock-Hernandez, J., Inzunza, F., Monroe, J., Narro, V., & Valenzuela Jr, A. (Eds.). (2012). *Undocumented and Unafraid: Tam Tran, Cynthia Felix, and the Immigration Youth Movement*. UCLA Center for Labor Research and Education.