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**LESSONS ABOUT THE FUTURE OF IMMIGRATION LAW FROM THE RISE  
AND FALL OF DACA**

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## LESSONS ABOUT THE FUTURE OF IMMIGRATION LAW FROM THE RISE AND FALL OF DACA

KEVIN R. JOHNSON\*

### ABSTRACT

Observers spanning the political spectrum have characterized the American immigration system as “broken.” Unfortunately, Congress for many years has been unable to forge agreement on the appropriate set of reforms, including a path for regularizing the legal status of the approximately eleven million undocumented immigrants living in the United States. Congress also has been unable to change the immigration laws in ways that measurably reduce the undocumented population, which has more than doubled over the last three decades.

In no small part due to the prolonged stalemate in Congress combined with a sizable and stable undocumented population spread across the United States, immigration has become nothing less than a high-profile political battleground. Contemporary immigration touches on some of the most contentious divisions in modern American politics, including race, class, and national identity.

Taking an enforcement-oriented approach to immigration unparalleled in modern American history, Donald Trump successfully ran for President by making immigration a central plank of his campaign. In so doing, Trump forcefully criticized the Obama administration’s immigration record. Consequently, to place President Trump’s immigration agenda into proper perspective, we must consider his target — the immigration record of President Barack Obama.

With immigration reform efforts proving fruitless, President Obama sought through executive action to make improvements at the margins. Created by the Obama administration in 2012, Deferred Action for Childhood Arrivals (“DACA”) over a period of five years shielded from removal hundreds of thousands of young undocumented immigrants brought to the United States as children. Through an exercise of executive authority rather than a direct act of Congress, President Obama readily admitted that DACA necessarily was a limited, temporary, and incomplete form of relief for one component of the undocumented immigrant population. It was not intended to extend permanent legal status to undocumented immigrants or to address the many policy problems commonly associated with the contemporary immigration system. At the

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same time, DACA provided a valuable form of relief, including the authorization to work, to a sub-group of the total undocumented immigrant population.

Claiming that DACA infringed on the power of Congress to designate the immigrants to be targeted for removal from the United States, the Trump administration provoked considerable controversy and debate in announcing the end of the program. DACA's rescission posed critically important questions to the entire nation: what would become of the former DACA recipients? Was their removal a possibility? Might Congress provide them relief? In the political uproar following the attempted rescission, DACA became virtually synonymous with the political movement to reform the immigration laws and their enforcement.

Part I of this essay initially considers President Obama's immigration record, which saw a record number of removals, Congress's failure to enact immigration reform, and the Executive Branch's response through adoption of deferred action policies providing limited relief to a subset of the undocumented immigrant population. Exhibiting a devotion to aggressive immigration enforcement like no other president in modern American history, President Trump has focused on immigration enforcement above all other immigration goals and escalated enforcement efforts in new and different directions. With this background in mind, Part II sketches possible future directions for immigration reform in the wake of the rise and fall of DACA.

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## INTRODUCTION

Although his administration removed a record number of immigrants,<sup>1</sup> President Barack Obama's immigration record probably will be most remembered for his extension of deferred action as a form of relief from removal from the United States for young undocumented immigrants.<sup>2</sup> Over five years, the Deferred Action for Childhood Arrivals ("DACA") policy<sup>3</sup> benefited hundreds of thousands of undocumented immigrants brought to the United States as children.<sup>4</sup> In 2014, the President attempted to extend deferred action relief to undocumented parents of U.S. citizens and lawful immigrants through Deferred Action for Parents of Americans ("DAPA"). The proposed expansion sparked robust political debate, along with legal challenges that permanently derailed the program.<sup>5</sup>

President Obama candidly admitted that, as an exercise of executive discretion, DACA was a temporary and incomplete form of relief from removal for a sub-group of undocumented immigrants: "This is not amnesty. This is not immunity. This is not a path to citizenship. It's not a permanent fix. This is a temporary stopgap measure."<sup>6</sup> Consequently, the program could not be a lasting solution to the problems commonly associated with the current U.S. immigration system, which a bipartisan group of political leaders has proclaimed time and again to be "broken."<sup>7</sup>

Most importantly, as President Obama emphasized,<sup>8</sup> DACA did not purport to provide a path to a durable legal immigration status for the cohort of young undocumented immigrants who the program benefited. Lawful permanent resident status, which can ultimately

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<sup>1</sup> See *infra* Part I.A.1. Consequently, some critics disparaged President Obama as the "deporter-in-chief." See *Obama Leaves Office as "Deporter-In-Chief,"* NPR (Jan. 20, 2017), <http://www.npr.org/2017/01/20/510799842/obama-leaves-office-as-deporter-in-chief>.

<sup>2</sup> See *infra* Part I.B.

<sup>3</sup> See *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, DACA, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited July 29, 2018).

<sup>4</sup> See Jens Manuel Krogstad, *DACA Has Shielded Nearly 790,000 Young Unauthorized Immigrants from Deportation*, PEW RESEARCH CENTER (Sept. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/09/01/unauthorized-immigrants-covered-by-daca-face-uncertain-future/>.

<sup>5</sup> See *infra* notes 115–18 and accompanying text accompanying 114–17 (discussing President Obama's Deferred Action for Parents of Americans (DAPA) policy and the injunction blocking its implementation, which a deadlocked Supreme Court allowed to remain in place).

<sup>6</sup> Tom Cohen, *Obama Administration to Stop Deporting Some Young Illegal Immigrants*, CNN (June 16, 2012), <http://www.cnn.com/2012/06/15/politics/immigration/index.html> (quoting President Obama's announcement of DACA and explaining how it represented a response to the failure of Congress to pass immigration reform).

<sup>7</sup> See, e.g., *Transcript of President Obama's Immigration Address at American University* (July 1, 2010), [http://www.american.edu/media/president\\_obama\\_visit\\_transcript.cfm](http://www.american.edu/media/president_obama_visit_transcript.cfm) (proclaiming that, because the immigration "system is broken," reform is necessary); Editorial, *An Incremental Change*, N.Y. TIMES (Nov. 18, 2011), at A20 (recognizing "our national failure to fix a broken immigration system"); Huma Khan & Devin Dwyer, *Broken Borders: Will Immigration Reform Be Next?*, ABC NEWS (Mar. 19, 2010) ("[B]oth Republicans and Democrats [consider the current immigration system to be] broken.").

<sup>8</sup> See *supra* note 6 and accompanying text.

lead to naturalization and full U.S. citizenship, is something that only Congress can bestow on noncitizens.<sup>9</sup>

Bolstered by the support of proponents of more aggressive immigration enforcement, a new president with a dramatically different immigration agenda then President Obama changed directions. Proclaiming that it infringed on the power of Congress to designate the immigrants to target for removal from the United States, presidential candidate Donald Trump successfully campaigned on the promise to dismantle DACA.<sup>10</sup> After months of delay, considerable speculation, and much lobbying, Attorney General Jeff Sessions announced the rescission of DACA,<sup>11</sup> thereby provoking controversy, protests, and legal challenges.<sup>12</sup> Three federal district courts enjoined the Trump administration's attempted rescission.<sup>13</sup> The failure to reach agreement to provide relief to the noncitizens threatened with loss of the protection of DACA resulted in a budget impasse in Congress and a temporary shutdown of the federal government.<sup>14</sup>

[A2]

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<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> See *infra* notes 94–96 and accompanying text.

<sup>11</sup> See *Attorney General Session Delivers Remarks on DACA*, U.S. DEP'T OF JUSTICE (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

<sup>12</sup> See *infra* notes 110–14 and accompanying text.

<sup>13</sup> See *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018); *Regents of Univ. of Calif. v. United States*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018); *Vidal v. Nelson*, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018); see also Kevin J. Fandl, *Presidential Power to Protect Dreamers: Abusive or Proper?*, 36 *YALE L. & POL'Y REV. INTER ALIA* 1, 3-7 (2018) (defending the presidential power to create the DACA program and offering policy arguments for its continuation), [https://ylpr.yale.edu/sites/default/files/IA/fandl\\_inter\\_alia\\_produced-3.pdf](https://ylpr.yale.edu/sites/default/files/IA/fandl_inter_alia_produced-3.pdf) (defending the presidential power to create the DACA program and offering policy arguments for its continuation). At the request of the Trump administration, the Supreme Court considered, but subsequently refused, direct review of an injunction in one of the cases. See *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 200 L. Ed.2d 325 (2018); *Justice Department Files Notice of Appeal and Intends to Petition for Immediate Supreme Court Review in DACA Lawsuit*, U.S. DEP'T OF JUSTICE (Jan. 16, 2018), <https://www.justice.gov/opa/pr/justice-department-files-notice-appeal-and-intends-petition-immediate-supreme-court-review>.

<sup>14</sup> See Carl Hulse, *Shutdown's Crux: Democrats' Deep-Rooted Distrust of G.O.P. on Immigration*, *N.Y. TIMES* (Jan 21, 2018), <https://www.nytimes.com/2018/01/21/us/politics/shutdown-immigration.html>. As a compromise to resolve the impasse, President Trump proposed a path to legalization for DACA recipients and DACA eligible noncitizens, funding for a border wall between the United States and Mexico, increased immigration enforcement generally, and overall reductions in legal immigration. See *White House Framework on Immigration Reform and Border Security*, *WHITEHOUSE.GOV* (Jan. 25, 2018), <https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/>; Michael D. Shear & Sheryl G. Stolberg, *Trump Immigration Plan Demands Tough Concessions from Democrats*, *N.Y. TIMES* (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-immigration-plan-white-house.html>. Congress passed a temporary budget bill without any immigration component. See Mike DeBonis & Erica Werner, *Brief Government Shutdown Ends as Trump Signs Spending Bill*, *WASH. POST* (Feb. 9, 2018), [https://www.washingtonpost.com/powerpost/congress-passes-sweeping-budget-bill-ending-brief-shutdown/2018/02/09/6021367e-0d69-11e8-8890-372e2047c935\\_story.html?utm\\_term=.127b24b8b59b](https://www.washingtonpost.com/powerpost/congress-passes-sweeping-budget-bill-ending-brief-shutdown/2018/02/09/6021367e-0d69-11e8-8890-372e2047c935_story.html?utm_term=.127b24b8b59b). Congress ultimately passed a budget without a major immigration component. See David Nakamura & Seung Min Kim, *Spending Deal Marks End of Immigration Debate for Year, Kicks Off New Round of Blame Game*, *WASH. POST* (Mar. 22, 2018), [https://www.washingtonpost.com/politics/spending-deal-marks-end-of-immigration-debate-for-year-kicks-off-new-round-of-blame-game/2018/03/22/b5387a50-2de4-11e8-b0b0-f706877db618\\_story.html?utm\\_term=.76ebcd991f06](https://www.washingtonpost.com/politics/spending-deal-marks-end-of-immigration-debate-for-year-kicks-off-new-round-of-blame-game/2018/03/22/b5387a50-2de4-11e8-b0b0-f706877db618_story.html?utm_term=.76ebcd991f06). As the Trump administration's aggressive immigration enforcement continued to generate controversy, Congress considered other immigration reform possibilities. See Phil Mattingly, *Immigration Reform Bill's Both Options Headed for Failure*, *CNN* (June 21, 2018),

Despite years of debate over immigration reform, Congress has been unable to forge consensus on whether and how to provide legal status to the approximately eleven million undocumented immigrants living in the United States.<sup>15</sup> Nor has it been able to reform the immigration laws, or enforce them, to effectively prevent undocumented immigration in the future.<sup>16</sup> The result has been criticism from across the political spectrum, with one side strongly advocating a path to legalization for the undocumented and the other just as adamantly calling for zealous enforcement of the immigration laws to remove all undocumented immigrants from the country.<sup>17</sup> In no small part due to congressional inaction combined with a large undocumented population dispersed across the United States, immigration emerged as a battleground in the volatile political, economic, social, cultural, and racial conflict.<sup>18</sup>

To place contemporary developments in immigration law and policy in proper historical perspective, Part I of this essay initially considers President Obama's overall immigration record, which sustained forceful criticism from the left and the right. In an attempt to prod Congress to pass immigration reform, the Obama administration took steps resulting in the removal from the United States of hundreds of thousands of noncitizens annually.<sup>19</sup> After ultimately failing to prod Congress to enact immigration reform, the President announced two deferred action programs providing limited relief to undocumented immigrants.<sup>20</sup> Quickly after his inauguration, President Trump dramatically changed course, introducing a variety of aggressive immigration enforcement measures, followed by the announcement of the rescission of DACA.<sup>21</sup>

Based on this background, Part II considers the implications of the rise and fall of DACA for a long-overdue reform of the U.S. immigration laws.<sup>22</sup> Such reform is much-needed to address the realities of immigration in a time of global migration pressures.

## I. THE OBAMA IMMIGRATION LEGACY: REMOVAL RECORDS, FAILED IMMIGRATION REFORM, AND DACA AND DAPA

Before the election of President Obama in 2008, few but the most experienced immigration practitioners knew much about deferred action as a form of relief from removal for undocumented immigrants.<sup>23</sup> That changed forever with the 2012 announcement of DACA, a policy allowing “deferred action” for undocumented immigrants brought to the United States as

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<https://www.cnn.com/2018/06/21/politics/immigration-reform-bills-republican-congress-family-separation/index.html>.

<sup>15</sup> See Jeffrey S. Passel & D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RES. CTR. (Sept. 20, 2016), <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>.

<sup>16</sup> See *infra* Part I.A.2. (reviewing the years of unsuccessful efforts in Congress to pass comprehensive immigration reform).

<sup>17</sup> See *infra* notes 94–103 and accompanying text.

<sup>18</sup> See *infra* Part I.

<sup>19</sup> See *infra* Part I.A.1.

<sup>20</sup> See *infra* Part I.B.

<sup>21</sup> See *infra* notes 94–114 and accompanying text.

<sup>22</sup> See *infra* Part II.

<sup>23</sup> See *infra* notes 79–80 and accompanying text (discussing the U.S. government's longstanding use of deferred action as a form of relief for noncitizens from removal).

children.<sup>24</sup> The tumultuous rise and fall of DACA over the next five years became front-and-center in the contemporary debate over immigration reform.

Although limited in scope, DACA came to stand for much more than the limited relief that it extended to young undocumented immigrants. The policy ultimately became the focal point of a grassroots social movement.— The movement sought nothing less than to vindicate immigrant rights; it emerged at the epicenter of the national debate over immigration law, its enforcement, and reform.<sup>25</sup>

To place DACA into its proper historical perspective and better understand the current political climate, a bit of context about the evolution of immigration law and policy over the last decade, is in order. Along with many failed attempts by Congress to pass immigration reform, developments in immigration enforcement indelibly shaped the political dynamics leading to the rise and fall of DACA.<sup>26</sup> Those developments in combination necessarily have set the stage for possible reform.

Throughout the 2008 presidential campaign, Barack Obama unequivocally endorsed comprehensive immigration reform. As part of an overall strategy to convince Congress to pass reform legislation, the Obama administration initially took steps to ramp up the number of deportations.<sup>27</sup> Despite record numbers of removals, Congress failed to pass immigration reform legislation.<sup>28</sup>

The end result was what critics viewed as the worst of all possible outcomes for immigrant rights advocates. The nation saw record numbers of removals devastatingly injuring immigrant communities combined with the inability of Congress to move forward on immigration reform. The lack of legislation left millions of vulnerable undocumented immigrants in indefinite legal limbo and an array of unaddressed immigration policy problems. In measured fashion, President Obama responded to one aspect of the deficiencies in the current immigration system through expanded use of a limited form of relief for undocumented immigrants known as “deferred action.” Although deferred action did not create a path to legalization for the undocumented, it offered a limited respite from immediate removal from the United States for one portion of that community.<sup>29</sup>

#### A. *Prelude to DACA*

Two related immigration developments during the Obama presidency — (1) removal records; and (2) the failure of Congress to enact immigration reform — fueled pressures on the administration resulting in DACA and DAPA.<sup>30</sup>

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<sup>24</sup> See *supra* note 3 (citing authority).

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part I.B.

<sup>27</sup> See *infra* Part I.A.1.

<sup>28</sup> See *infra* Part I.A.2.

<sup>29</sup> See *infra* Part I.B.

<sup>30</sup> See *infra* Parts I.A–B.

## 1. Record Numbers of Removals

Hoping to help persuade Congress to enact immigration reform, President Obama initially took steps that unsettled some of his most ardent supporters. From the outset of the Obama presidency, the administration sought to demonstrate a firm commitment to immigration enforcement. The hope was that a demonstrated commitment to enforcement would improve the likelihood that Republicans in Congress would agree to a compromise immigration reform package.<sup>31</sup>

To boost the number of removals, the Obama administration revamped a pre-existing program known as “Secure Communities,” which placed noncitizens who had brushes with state and local criminal justice systems in the federal removal pipeline. As reconfigured, that program required state and local law enforcement agencies to share information with the U.S. government about noncitizens, lawful permanent residents as well as undocumented immigrants, arrested by state and local law enforcement.<sup>32</sup> Secure Communities further called on law enforcement agencies to detain noncitizens arrested for crimes (even those eligible for release from state and local custody); federal immigration authorities could, at their discretion, directly take custody of noncitizens for possible removal from the United States.

Dedicated execution of Secure Communities resulted in the removal of hundreds of thousands of immigrants annually, including lawful permanent residents, who had been arrested for, but not necessarily convicted of, relatively minor criminal offenses.<sup>33</sup> [A3] Besides claiming that the program infringed on state and local police powers, critics of the reinvigorated Secure Communities program pointed to its impacts on immigrants as well as their families and communities.<sup>34</sup>

With Secure Communities operating at full tilt during President Obama’s first term, the U.S. government expanded removal efforts to include virtually all criminal noncitizen

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<sup>31</sup> See Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM Act)*, 48 HARV. J. LEGIS. 623, 637 (2011). From its creation early in the twentieth century, the agency primarily in charge of the administration of the U.S. immigration laws embraced the use of aggressive enforcement tactics directed at immigrants from Mexico. See generally S. DEBORAH KANG, *THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE U.S.-MEXICO BORDER, 1917-54* (2017) (documenting the emergence of the Immigration and Naturalization Service and its emphasis on immigration enforcement along the U.S.-Mexico border).

<sup>32</sup> See Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 207-08 (2013) (summarizing the operation of the Obama administration’s revitalized Secure Communities program). For critical analysis of Secure Communities and other initiatives designed to increase state and local government involvement in federal immigration enforcement, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579-98 (2010); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 22-42 (2016); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842-58 (2011).

<sup>33</sup> See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1015-16 n.92 (2016) (citing authority).

<sup>34</sup> See, e.g., Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, CHIEF JUSTICE EARL WARREN INST. ON LAW AND SOC. POL’Y (Oct. 2011), [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf); Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement’s “Secure Communities” Program*, 10 SEATTLE J. SOC. JUST. 327, 337-38 (2011).

offenders.<sup>35</sup> During that same time period, the Supreme Court regularly rejected removal orders aggressively defended by the Obama administration for running afoul of the immigration statute.<sup>36</sup> A series of rejections of deportation orders by a moderate-to-conservative Court led by Chief Justice John Roberts compels the conclusion that the administration's efforts, at least at times, went too far.

The Obama administration removed in the neighborhood of 400,000 noncitizens a year during the first six years of the Obama presidency.<sup>37</sup> Total removals of noncitizens by the U.S. government reached an all-time high of nearly 440,000 in 2013, a dramatic jump of roughly ten-fold from the annual removal totals in the early 1990s.<sup>38</sup> Consistent with the political strategy of pursuing removals as a means of prodding Congress to pass immigration reform, the administration proudly touted the removal records as a major success.<sup>39</sup>

Record numbers of removals failed to significantly reduce the overall undocumented population in the United States.<sup>40</sup> In fact, despite greatly increased enforcement efforts, including the vast expansion of immigrant detention beginning in the 1990s,<sup>41</sup> the undocumented

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<sup>35</sup> See *infra* notes 44–47 and accompanying text.

<sup>36</sup> See, e.g., *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (rejecting Obama administration arguments that criminal conviction for statutory rape was an “aggravated felony” requiring mandatory removal); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (vacating an order for the removal of a lawful permanent resident based on a single criminal conviction for possession of drug paraphernalia); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (same for the order of removal of a long-term lawful permanent resident with U.S. citizen children founded on a single conviction for simple marijuana possession).

<sup>37</sup> See, e.g., Brian Bennett, *U.S. Deported Record Number of Illegal Immigrants*, L.A. TIMES (Oct. 6, 2010), <http://articles.latimes.com/2010/oct/06/nation/la-na-illegal-immigration-20101007>.

<sup>38</sup> See DEP’T OF HOMELAND SECURITY AND OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 3–*Immigration Enforcement Actions: 2013*, at 6 (2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf). The claim has been made that the Obama administration inflated the removal numbers. See Brian Bennett, *High Deportation Figures are Misleading*, L.A. TIMES (Apr. 1, 2014), <http://www.latimes.com/nation/la-na-obama-deportations-20140402-story.html>. Even reducing the reported data by half would mean that the administration removed roughly 200,000 noncitizens each year.

<sup>39</sup> See, e.g., Julia Preston, *Deportations Up in 2013; Border Sites were Focus*, N.Y. TIMES (Oct. 1, 2014), <http://www.nytimes.com/2014/10/02/us/deportation-up-in-2013-border-sites-were-focus.html> (reporting on the U.S. government’s annual statistical report on immigration enforcement).

<sup>40</sup> See *infra* Part I.A.1.

<sup>41</sup> In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, which “toughened . . . immigration detention,” and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546, which “expanded the scope of mandatory detention.” Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 610-11 (2010); see, e.g., Immigration & Nationality Act (INA) § 236(e), 8 U.S.C. § 1226(c) (added by 1996 immigration reforms) (requiring mandatory detention of noncitizens convicted of an “aggravated felony” as defined by Immigration Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43)); *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (reversing court of appeals’ ruling in class action requiring periodic bond hearings for detained noncitizens in removal proceedings); *Demore v. Kim*, 538 U.S. 510, 531 (2003) (rejecting a challenge to a provision of the immigration laws allowing detention pending the removal of a noncitizen convicted of crime); see also Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 302-20 (2017) (considering the harsh impacts of the tough 1996 immigration reforms); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 89-91 (2005) (analyzing critically the U.S. government’s reliance on the mass detention of Muslim noncitizens in the various security measures implemented in the wake of the tragic loss of life on September 11, 2001). Scholars have criticized the expanded use of immigrant

immigrant population has more than doubled over the last thirty years.<sup>42</sup> “Rather than deterring undocumented immigration and reducing the undocumented immigrant population, the aggressive border enforcement strategies . . . appear to have increased the permanent settlement of undocumented immigrants in the United States.”<sup>43</sup>

The aggressive removal campaign had stark disparate racial consequences. In 2013, “Mexican nationals accounted for seventy-two percent of all aliens removed . . . Latina/os thus comprised virtually all of the noncitizens removed from the United States.<sup>44</sup> The next leading countries were Guatemala (eleven percent), Honduras (8.3 percent), and El Salvador (4.7 percent). *These four countries accounted for ninety-six percent of all removals . . .*”<sup>45</sup> In essence, removals fell almost exclusively on Latina/os,<sup>46</sup> even though Latina/os comprised a much smaller percentage of the overall immigrant population. The racial impacts of the modern

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detention. See, e.g., César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 251-60 (2017); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351-1413 (2014); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 533-34 (1999); Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. LAW & PUB. POL’Y 77, 84-102 (2017). In an Executive Order issued shortly after his inauguration, President Trump called for the expansion of detention in immigration enforcement. See Exec. Order No. 13,767, 82 Fed. Reg. 8793, § 6 (Jan. 25, 2017) (titled *Border Security and Immigration Enforcement Improvements*) [hereinafter Border Security Executive Order], <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>; see also Julie Hirschfeld Davis, *Trump Signs Memo Ordering End to “Catch and Release” Immigration Policy*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/us/politics/trump-immigration-policy.html> (reporting on President Trump’s directions to end the bonding out of immigrants apprehended at the border while awaiting removal hearings).

<sup>42</sup> See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 246 (2003).

<sup>43</sup> *Id.* (footnote omitted); see Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 124-40, <http://www.cardozolawreview.com/content/denoco/HONG.38.symposium.pdf>.

<sup>44</sup> See Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 328-29 (2012); Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAPMAN L. REV. 481, 492-98 (2015).

<sup>45</sup> DEP’T OF HOMELAND SECURITY AND OFFICE OF IMMIGRATION STATISTICS, *supra* note 38, at 6 (emphasis added). Consistent with the Obama removal record but embraced with a racially-tinged rhetorical flourish, Donald Trump from the beginning of his 2016 presidential campaign promised to target for removal Mexican immigrants, who he characterized as criminals and “bad hombres.” See Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm\\_term=.27306c3d84fe](https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm_term=.27306c3d84fe).

<sup>46</sup> See Johnson, *supra* note 33, at 1016-17; Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 646-47 (2015). For a sampling of the voluminous criticism of the reliance on the criminal justice system for removals, frequently referred to as “crimmigration law,” see Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 630-40 (2012); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1681-88 (2011); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 101-32 (2013); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 475-500 (2007); Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 710-35 (2017). The foundational crimmigration article is Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006). For analysis of the historical origins of the contemporary crimmigration system, see Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration’s Past Can Tell Us About Its Present and Its Future*, 104 CAL. L. REV. 149 (2016).

removal system are entirely consistent with the long history of reliance on crime-based removals as a tool for removing noncitizens of disfavored races and national origins from the United States.<sup>47</sup>

The explanation for one-sided contemporary removal statistics is readily apparent. Critics long have accused state and local law enforcement agencies of targeting Latina/os and African American men in law enforcement efforts.<sup>48</sup> Consistent with that criticism, controversies over claims of racially discriminatory policing and violence regularly make the national news.<sup>49</sup> Not surprisingly, the Executive Branch's targeting of immigrants caught up in the racially-skewed state and local criminal justice systems generated a pattern of racially-skewed removals.<sup>50</sup> Despite the racially discriminatory impacts, "the goal of criminal-alien removal enjoys almost universal support . . . ."<sup>51</sup> The widespread public popularity of the removal of "criminal aliens" persists even though the empirical evidence demonstrates "that *non-citizens commit fewer crimes and reoffend less than citizens* . . . ."<sup>52</sup>

Political leaders and policy-makers have paid little attention to the racially disparate impacts of the U.S. government's tying removals to criminal law enforcement.<sup>53</sup> At the same time, immigrant and Latina/o advocacy groups have protested the modern removal efforts and, in

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<sup>47</sup> See generally Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 51 UC DAVIS L. REV. (forthcoming 2018) (analyzing the history of the U.S. government's reliance on crime-based removal grounds under the U.S. immigration laws to target disfavored racial minorities for removal from the United States). More generally, racism historically has deeply influenced the U.S. immigration laws and their enforcement. See generally Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (analyzing the historical influence of race on U.S. immigration law and its enforcement from the early federalization of immigration through the modern era).

<sup>48</sup> See generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (analyzing a pair of Supreme Court decisions that contributed to the widespread use of racial profiling in both immigration and criminal law enforcement).

<sup>49</sup> See, e.g., FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION (Kimberly Jade Norwood ed., 2016) (offering perspectives on the mass resistance generated by the popular perception of the use by police of unjustifiable racial violence against African Americans, specifically the killing of an African American man by law enforcement officers, in Ferguson, Missouri); Christine Hauser & Maggie Astor, *Protests Grip Sacramento After Police Fatally Shoot Unarmed Black Man*, N.Y. TIMES (Mar. 22, 2018) (reporting on protests following the killing of an unarmed African American man by Sacramento police), <https://www.nytimes.com/2018/03/22/us/video-sacramento-police-shooting.html> (reporting on protests following the killing of an unarmed African American man by Sacramento police).

<sup>50</sup> See *supra* text accompanying notes 44-47.

<sup>51</sup> Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 421 (1999).

<sup>52</sup> Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2072 (2017) (emphasis added) (footnote omitted); see Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 598-601 (2016) (contending that "criminal aliens" should be protected from, rather than targeted for, removal from the United States).

<sup>53</sup> See Johnson, *supra* note 33, at 1036 ("Little attention has been paid to the racially disproportionate impacts of the criminal justice system combined with the contemporary immigration enforcement focus of the federal government on 'criminal aliens.'") (footnote omitted).

fact, have characterized the administration's immigration record as a "betrayal" by President Obama.<sup>54</sup>

Mass deportations by the Obama administration generated state and local government resistance. Resistance manifested itself in laws and policies declaring that those jurisdictions would provide "sanctuary" to undocumented immigrants.<sup>55</sup> Growing numbers of "sanctuary cities" contributed significantly to the Obama administration's decision in 2014 to end Secure Communities. As Department of Homeland Security Secretary Jeh Johnson explained, the abolition of the "controversial" program responded to "[a] rapidly expanding list of city, county

<sup>54</sup> See Molly Ball, *Obama's Long Immigration Betrayal*, ATLANTIC (Sept. 9, 2014),

<https://www.theatlantic.com/politics/archive/2014/09/obamas-long-immigration-betrayal/379839/>.

<sup>55</sup> See, e.g., Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. (forthcoming 2018); Rose Cuison Villazor, *What is Sanctuary?*, 61 SMU L. REV. 133, at 142-50 (2008). For analysis of the evolution of state and local "sanctuary" laws, see Barbara E. Armacost, "Sanctuary" Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1205-22 (2016); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 735-43 (2013); see also Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U.L. REV. (forthcoming 2018), *Immigration Equity's Last Stand: Sanctuaries & Legitimacy in an Era of Mass Immigration Enforcement*, unpublished manuscript (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3053609](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053609) (analyzing the legitimacy afforded immigration enforcement by state and local "sanctuary" laws that seek to protect noncitizens from removal). After the election of President Trump, the California legislature passed a law declaring California to be a "sanctuary state" and took steps attempting to limit state and local involvement in federal immigration enforcement. See S.B. 54, *2017-18 Leg. Reg. Sess. (Cal. 2017)*, Cal Legis. 2017-18, signed by Governor Oct. 5, 2017, [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB54](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB54). The Trump administration challenged the law, and others, as intruding on the federal power to regulate immigration. See *United States v. California*, 2018 U.S. Dist. Lexis 112005 (E.D. Cal. July 4, 2018) (refusing to enjoin most of the California laws challenged by the Trump administration); Katie Benner & Jennifer Medina, *Trump Administration Sues California Over Immigration Laws*, N.Y. TIMES (Mar. 6, 2018), [https://nytimes.com/2018/03/06/us/politics/justice-department-california-sanctuary-cities.html?ref=collection%2Fbyline%2Fjennifer-medina&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=latest&contentPlacement=2&pgtype=collection](https://nytimes.com/2018/03/06/us/politics/justice-department-california-sanctuary-cities.html?ref=collection%2Fbyline%2Fjennifer-medina&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection).

"Sanctuary laws," and the lawsuits challenging them, can be understood as efforts between coordinate governments to draw the appropriate line between state laws protecting immigrant residents and those that intrude on federal power to regulate immigration. Although the U.S. government undisputedly has the exclusive power over the admission and removal of immigrants, see *Chamber of Commerce v. Whiting*, 563 U.S. 582, 588 (2010) ("recogniz[ing] that the [p]ower to regulate immigration is unquestionably . . . a federal power") (quoting *DeCanas v. Bica*, 424 U.S. 351, 354 (1976)), states unquestionably play an important role with respect to the law and policy involving the health, safety, and welfare of immigrant residents. See Kevin R. Johnson, *California Dreaming? The Integration of Immigrants in American Society*, BOOM CAL. (Oct. 29, 2017), <https://boomcalifornia.com/2017/10/29/california-dreaming-the-integration-of-immigrants-into-american-society/>; Leticia M. Saucedo, *The Role of States in Constructing the Desired Immigrant Under Federal Immigration Law*, 51 UC DAVIS L. REV. (forthcoming 2018).

In sharp contrast to the approach taken by "sanctuary" jurisdictions, a number of states and localities, most notably Arizona, during the Obama presidency passed laws designed to facilitate immigration enforcement. Courts invalidated numerous state immigration enforcement efforts for unconstitutionally infringing on the federal power to regulate immigration. See, e.g., *Arizona v. United States*, 567 U.S. 387 (2012) (invalidating core provisions of Arizona's controversial immigration enforcement law (S.B. 1070) as preempted by federal immigration law); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013) (same for South Carolina immigration enforcement law); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (Alabama law); *Georgia Latino Alliance-All. for Human Rights v. ~~Deal~~ Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012) (Georgia law).

and state governments” enacting laws that restricted state and local cooperation with federal immigration enforcement authorities.<sup>56</sup> While dismantling Secure Communities, the administration simultaneously announced that the policy would be replaced with the “Priority Enforcement Program” (PEP). PEP narrowed the instances in which the U.S. government demanded state and local law enforcement agencies to hold immigrants and focused removal efforts on noncitizens *convicted* of *serious* crimes, not merely *arrested* for virtually *all crimes*.<sup>57</sup> In sum, by restricting the scope of the U.S. government’s criminal removal efforts, PEP responded to strong state and local concerns with Secure Communities.<sup>58</sup>

The end of Secure Communities received little public attention. Commentators and political pundits instead focused criticism on the announcement of the controversial Deferred Action for Parents of Americans (DAPA) policy.<sup>59</sup>

After a campaign in which he promised to zealously enforce the immigration laws, President Trump took office in 2017. The Executive Branch soon dramatically changed course. Embracing a no-tolerance policy for noncitizens caught up in the criminal justice system, as well as those generally subject to removal, President Trump rescinded the short-lived PEP and reinstated Secure Communities.<sup>60</sup>[A5]

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<sup>56</sup> *Hearing on the Oversight of the United States Department of Homeland Security Before the H. Comm. on the Judiciary*, 114th Cong. 11 (2015) (statement by Secretary of Homeland Security the Hon. Jeh Charles Johnson, Secretary, Department of Homeland Security), U.S. House of Rep., Comm. on the Judiciary (July 14, 2015), <http://docs.house.gov/meetings/JU/JU00/20150714/103734/HHRG-114-JU00-Wstate-JohnsonJ-20150714.pdf>; see Katlyn Brady, *Sanctuary Cities and the Demise of the Secure Communities Program*, 23 TEX. HISP. J.L. & POL’Y 21, 22 (2017) (noting the Obama administration’s ending of Secure Communities); Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 130-34 (2015) (examining the Obama administration’s dismantling of Secure Communities in light of the constitutional concerns with the use of the state criminal laws as a tool for federal immigration enforcement); ~~Katlyn Brady, *Sanctuary Cities and the Demise of the Secure Communities Program*, 23 TEX. HISP. J.L. & POL’Y 21, 22 (2017) (noting the Obama administration’s ending of Secure Communities)~~. The Trump administration publicly denounced “sanctuary cities” and threatened to strip them of federal funding. See, e.g., *City and County of San Francisco v. Trump*, 2018 U.S. App. LEXIS 21318 (9th Cir. Aug. 1, 2018) (affirming in part injunction barring federal de-funding of sanctuary cities); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017) (enjoining the implementation of provisions of Trump executive order seeking to de-fund “sanctuary” jurisdictions); *City of Chicago v. Sessions* 264 F. Supp. 3d 933 (N.D. Ill. 2017) (same); Carlos Ballesteros, *Trump and Jeff Sessions Are Going After More Sanctuary Cities*, NEWSWEEK (Nov. 15, 2017), <http://www.newsweek.com/sanctuary-cities-trump-sessions-department-justice-712965> (reporting on the Trump administration’s attacks on “sanctuary” cities).

<sup>57</sup> See Memorandum dated November 20, 2014 from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Security, to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, Megan Mack, Officer, Office of Civil Rights & Civil Liberties, & Philip A. McNamara, Assistant Sec’y for Intergovernmental Affairs 2-3 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf); see also Carrie Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 540-48 (2017) (analyzing the likely continued disparate racial impacts of PEP).

<sup>58</sup> See *supra* notes 55–57 and ~~text~~ accompanying text.

<sup>59</sup> See *infra* Part I.B.

<sup>60</sup> See Executive Order No. 13,768, 82 Fed. Reg. 8799, ~~Enhancing Public Safety in the Interior of the United States~~ § 5 (Jan. 25, 2017) (titled *Enhancing Public Safety in the Interior of the United States*) [hereinafter Interior Enforcement Executive Order], <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>; see also Cindy Chang, Paloma Esquivel, & Maya Lau, *California Police See Dangers in Trump’s Immigration Crackdown*, L.A. TIMES (Jan. 26, 2017),

## 2. Immigration Reform

Almost all observers agree that the contemporary U.S. immigration system is deeply flawed.<sup>61</sup> However, despite years of turbulent debate over a variety of reform proposals, Congress has been unable to agree to the compromises necessary to pass a comprehensive immigration reform bill.

Part of the challenge in passing immigration reform is the very different set of policy problems addressed in compromise reform proposals. The proposals that Congress has debated would have generally provided some combination of:

(1) a path to a durable legal status for certain categories of undocumented immigrants, often championed by supporters as a “path to legalization” or derided by critics as an unjustifiable “amnesty” for lawbreakers;<sup>62</sup>

(2) new avenues for lawful immigration to the United States through, among other steps, eliminating the lengthy backlogs in various immigrant visa categories and allowing increased migration of low- and medium-skilled workers through temporary worker programs; and

(3) various steps designed to improve and expand the enforcement of the immigration laws.<sup>63</sup>

Immigration profoundly influenced national presidential politics long before the 2016 presidential campaign in which Donald Trump made aggressive immigration enforcement one of his central campaign pledges.<sup>64</sup> “On the 2008 campaign trail, candidate Barack Obama trumpeted the importance of enacting comprehensive immigration reform. In describing undocumented immigrants, he spoke empathetically of the ‘[twelve] million people in the shadows’ who are ‘counting on us to rise above the fear and demagoguery, the pettiness and partisanship.’”<sup>65</sup> In contrast, 2008 Republican presidential candidate John McCain emphasized enforcement in his

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<http://www.latimes.com/local/lanow/la-me-california-jails-20170126-story.html> (noting that President Trump’s Executive Order eliminated PEP and reinstated Secure Communities).

<sup>61</sup> See *supra* note 7 and accompanying text.

<sup>62</sup> For analysis of the creation of a possible path to legalization for undocumented immigrants in immigration reform legislation and the fractious debate over any “amnesty,” see Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 259, 271-72 (2017). “[D]uring the 2013 congressional debates about comprehensive immigration reform [see *infra* note 70 and accompanying text], the most contentious issue debated was whether to provide an eventual pathway to citizenship for currently undocumented migrants.” Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 852-53 (2017). ~~(footnote omitted).~~

<sup>63</sup> See Kevin R. Johnson, *Possible Reforms of the U.S. Immigration Laws*, 18 CHAP. L. REV. 315, 339-322-23 (2015). The *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions*, 55 WAYNE L. REV. 1599 (2009), and Symposium, *Stalemate on Immigration Reform*, 18 CHAP. L. REV. 315 (2015), offer a variety of perspectives on the debates in Congress over comprehensive immigration reform.

<sup>64</sup> See *infra* Part II.B. (discussing efforts to enforce the prohibition of the employment of undocumented immigrants).

<sup>65</sup> Gerald P. López, *Don’t We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1793 (2012) (quoting Barack Obama, *Remarks at the Congressional Hispanic Caucus Institute’s 33rd Annual Gala Awards* (July 15, 2008)) ~~(footnotes omitted).~~

approach to immigration, even though he previously had supported comprehensive immigration reform legislation.<sup>66</sup>

President Obama failed to make immigration reform a top priority during his first term, with health care instead dominating the administration's legislative agenda.<sup>67</sup> Congress failed to pass immigration reform. That failure generated considerable discontent among supporters of reform who had overwhelmingly voted for President Obama because of his promise to push immigration reform through Congress.<sup>68</sup> Many Latina/os felt betrayed by the dramatic increase in removals, falling almost exclusively on Latino/as, combined with the lack of congressional action on immigration reform.<sup>69</sup>

Congress had debated various comprehensive immigration reform proposals for more than a decade. In 2013, reform efforts appeared tantalizingly close to a reality. The Senate passed a comprehensive immigration reform bill, which would have provided for a path to legalization of undocumented immigrants, increased enforcement, and expanded avenues for legal immigration; the Republican leadership in the House of Representatives, however, prevented a vote on the proposal.<sup>70</sup> Congressional failure to pass immigration reform generated widespread disappointment among supporters of reform. To add to the dashed hopes, Congress also failed to pass the Development, Relief, and Education for Alien Minors ("DREAM") Act,<sup>71</sup> which had been introduced regularly in varying forms since 2001 and would have created a path to legalization for undocumented college students and others.

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<sup>66</sup> See Shan Carter, Jonathan Ellis, Farhana Hossain & Alan McLean, *Election 2008 – On the Issues: Immigration*, N.Y. TIMES (undated), <https://www.nytimes.com/elections/2008/president/issues/immigration.html> (last visited July 23, 2018).

<sup>67</sup> See Josh Hicks, *Obama's Failed Promise of a First-Year Immigration Overhaul*, WASH. POST (Sept. 25, 2012), [https://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258\\_blog.html](https://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258_blog.html).

<sup>68</sup> See Richard Cowan & Julia Edwards, *Obama Seeks to Restore Trust With Disappointed Latinos*, HUFF. POST (Dec. 2, 2014), [http://huffingtonpost.com/2014/10/02/obama-disappoints-latinos\\_n\\_5919284.html](http://huffingtonpost.com/2014/10/02/obama-disappoints-latinos_n_5919284.html); Julia Preston, *While Seeking Support, Obama Faces a Frustrated Hispanic Electorate*, N.Y. TIMES (June 10, 2012), <http://www.nytimes.com/2012/06/11/us/politics/obama-faces-a-frustrated-hispanic-electorate.html>; see also Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 339-44 (2012) (analyzing the disparate impacts on Latina/os of the failure of Congress to enact immigration reform).

<sup>69</sup> See *id.* (citing authorities).

<sup>70</sup> See Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation Beyond Our Borders*, 39 YALE J. INT'L L. 37, 37-38 (2014) (describing the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, Senate Bill 744, as "written by a bipartisan group of eight senators" and "designed to streamline the admission of 'desirable' immigrants while addressing the challenges posed by approximately 11.2 million undocumented migrants") (footnote omitted); Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality"*, 52 HARV. J. LEGIS. 355, 390-405 (2015) (identifying the harmful impacts that the passage of Senate Bill 744 would have on immigrants); Maria Pabón López & Natasha Ann Lacoste, *Immigration Reform in 2013-2014: An Essay on the Senate's Bipartisan Plan, the House's Standards for Immigration Reform, Interest Convergence and Political Realities*, 17 HARV. LATINO L. REV. 121, 131-23-42 (2014) (analyzing and comparing Senate Bill 744 and the House "standards for immigration reform").

<sup>71</sup> In 2010, the House passed a version of the DREAM Act but the Senate blocked its passage. See Catalina Camia, *Senate Blocks DREAM Act*, USA TODAY (Dec. 18, 2010), <https://usatoday30.usatoday.com/communities/onpolitics/post/2010/12/senate-dream-act-/1#.WzphEU2ouUk>.

Despite congressional failure to enact immigration reform legislation, the prolonged push for reform contributed to the emergence and maintenance of a potent grassroots political movement, including many undocumented college students, advocating the extension of legal protections to immigrants.<sup>72</sup> The movement supported, among other reforms, the DREAM Act, President Obama's deferred action policies, and comprehensive immigration reform.<sup>73</sup> Importantly, the organized and energetic advocacy of immigrant rights activists grew from simple enactment of the reform proposals to address broader challenges to the mass deportations pursued by the Obama administration.<sup>74</sup> This spirited activism proved to be one of the most exciting and surprising grassroots political developments of the early twenty-first century.<sup>75</sup> Part II discusses that robust political movement, which at this historical moment appears to have staying power, and unquestionably will shape the future of immigration reform.

### B. *DACA and DAPA*

With dramatically increased removals failing to move Congress to pass immigration reform,<sup>76</sup> President Obama weighed the available options that could provide relief for undocumented immigrants. As the 2012 election approached, some Obama supporters expressed deep unhappiness with the President's first-term immigration record. The administration felt pressure to act.<sup>77</sup>

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<sup>72</sup> See Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1468-90 (2017); Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 102-04 (2013); Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 85-98 (2013); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 519-26 (2012); see also Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 51-55 (2013) (noting the political significance of the emergence of the political movement of undocumented immigrants focused on reform of the immigration laws and their enforcement). See generally WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* (2013) (analyzing the growth of the powerful grassroots political movement of young undocumented immigrants); EILEEN TRUAX, *DREAMERS: AN IMMIGRANT GENERATION'S FIGHT FOR THEIR AMERICAN DREAM* (2015) (to the same effect); LAURA WIDES-MUÑOZ, *THE MAKING OF A DREAM: HOW A GROUP OF YOUNG UNDOCUMENTED IMMIGRANTS HELPED CHANGE WHAT IT MEANS TO BE AMERICAN* (2018) (same).

<sup>73</sup> See *supra* note 72 (citing authorities).

<sup>74</sup> See, e.g., Kathryn Abrams, *Contentious Citizenship: Undocumented Activism in the Not-1+More Deportation Campaign*, 26 BERKELEY LA RAZA L.J. 46 (2016); Vasanthi Venkatesh, *Mobilizing Under "Illegality": The Arizona Immigrant Rights Movement's Engagement With the Law*, 19 HARV. LATINO L. REV. 165 (2016); Laura Corruñer, *"Coming Out of the Shadows": DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEG. STUD. 143 (2012); Karen J. Pita Loo, *A Study on Immigrant Activism, Secure Communities, and Rawlsian Civil Disobedience*, 100 MARQ. L. REV. 565 (2016); Vasanthi Venkatesh, *Mobilizing Under "Illegality": The Arizona Immigrant Rights Movement's Engagement With the Law*, 19 HARV. LATINO L. REV. 165 (2016); Laura Corruñer, *"Coming Out of the Shadows": DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEG. STUD. 143 (2012).

<sup>75</sup> See *supra* notes 72-74 and text accompanying text.

<sup>76</sup> See *supra* Part I.A.2.

<sup>77</sup> See *supra* notes 67-69 and text accompanying text.

With much fanfare, the Obama administration announced and quickly implemented Deferred Action for Childhood Arrivals (DACA) in 2012.<sup>78</sup> DACA made undocumented immigrants brought to the United States as children eligible to apply for a form of relief from removal known as “deferred action.”

Well-established in immigration law and practice,<sup>79</sup> deferred action amounts to the exercise of prosecutorial discretion by the U.S. government in selecting the noncitizens to prioritize for removal from the United States.<sup>80</sup> In granting deferred action to a group of young immigrants, DACA removed them from the government’s immigration enforcement efforts, thereby offering these immigrants a modicum of security.

DACA recipients received employment authorization, which is denied to undocumented immigrants,<sup>81</sup> and proved to be an especially controversial aspect of the policy.<sup>82</sup> Critics vehemently attacked DACA as an unconstitutional “amnesty” for undocumented immigrants that unlawfully intruded on the power of Congress to determine which noncitizens are subject to removal.<sup>83</sup>

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<sup>78</sup> See *supra* note 3 and accompanying text (citing authority); see also Bianca Figueroa-Santana, Note, *Divided We Stand: Constitutionalizing Executive Immigration Reform through Subfederal Regulation*, 115 COLUM. L. REV. 2219, 2220 (2015) (“Frustrated by congressional paralysis, the [Obama] Administration initiated Deferred Action for Childhood Arrivals (DACA) in 2012 . . . .”)—(footnote omitted).

<sup>79</sup> See generally SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (analyzing the history of the exercise of prosecutorial discretion by the U.S. government in immigration enforcement through deferred action and other mechanisms). One famous case that revealed the use of deferred action by the U.S. government involved the musician John Lennon of the rock band the Beatles. See generally LEON WILDES, JOHN LENNON VS. THE U.S.A.: THE INSIDE STORY OF THE MOST BITTERLY CONTESTED AND INFLUENTIAL DEPORTATION CASE IN UNITED STATES HISTORY (2016) (discussing the Lennon case).

<sup>80</sup> See Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 507-14 (2017); see also Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 378-412 (2017) (examining executive action in the realm of immigration); Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 502-27 (2018) (arguing that the executive branch can and should play a larger role in enforcing constitutional norms in immigration law); Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 412-18 (2017) (criticizing the limited avenues of relief from removal available under the U.S. immigration laws). See generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (evaluating President Obama’s deferred action programs in light of the power of the President over immigration); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (analyzing the presidential power over the enforcement of the immigration laws); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168 (2018) (proposing doctrinal and institutional arrangements that could effectively check the exercise of presidential power in immigration).

<sup>81</sup> See *infra* Part II.B. (discussing the employer sanctions provisions in immigration reform legislation passed by Congress in 1986 that prohibit the employment of undocumented immigrants).

<sup>82</sup> See 8 C.F.R. § 274a.12(c)(14) (2018); Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action on Immigration Law*, 66 SYRACUSE L. REV. 87, 96 & n.27 (2016) (citing authority about DACA); see also Leticia M. Saucedo, *Employment Authorization and Immigration Status: The Janus-Faced Immigrant Worker*, 43 OHIO N.U. L. REV. 471, 478 (2017) (“The authority to grant employment authorization became controversial during the Obama administration because it struck a collective nerve about the availability of work, the right to job security, and the centrality of work to an individual’s identity.”)—(footnote omitted).

<sup>83</sup> Critical assessments of the constitutionality of the Obama administration’s deferred action policies can be found in Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J.

As the Obama administration made clear in announcing DACA, the policy exempted certain noncitizen youth without serious criminal convictions from the U.S. government's removal efforts. The Secretary of Homeland Security, Janet Napolitano, explained that the policy would ensure that federal "enforcement resources are not expended" on "low priority [removal] cases."<sup>84</sup> That approach, in turn, allowed the federal government to focus its limited enforcement resources on the removal of serious noncitizen criminal offenders.<sup>85</sup> Despite the fact that DACA allowed the Executive Branch to target its immigration enforcement efforts at noncitizens who placed public safety at risk, critics nonetheless challenged the policy as unconstitutional.<sup>86</sup>

Legal challenges to DACA failed to delay, much less derail, its implementation.<sup>87</sup> Over its five-year life span, DACA provided relief to hundreds of thousands of young undocumented immigrants.<sup>88</sup> Studies found that the relief provided concrete benefits to the national economy.<sup>89</sup>

The top five countries of origin for DACA recipients were as follows:<sup>90</sup>

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ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U.L. REV. 1183 (2015). For defenses of the lawfulness of President Obama's deferred action policies, see, for example, ~~Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U.L. REV. 1083 (2015)~~; Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255 (2013); ~~Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U.L. REV. 1083 (2015)~~; Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action in Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015), <https://www.uclalawreview.org/deferred-action-supervised-enforcement-discretion-rule-law-basis-executive-action-immigration/>; see also Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 662-71 (2015) (contending that the Obama administration's deferred action policies added necessary discretion to the contemporary immigration enforcement system).

<sup>84</sup> Memorandum from Janet Napolitano, Sec'y. U.S. Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children+ (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>85</sup> See *id.*

<sup>86</sup> See *supra* notes 81-83 and accompanying text.

<sup>87</sup> See, e.g., *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015) (holding that controversial Maricopa County, Arizona Sheriff Joe Arpaio lacked Article III standing to challenge the lawfulness of DACA); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (dismissing on standing grounds another challenge to DACA); see also *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (holding that the state of Arizona could not constitutionally deny DACA recipients eligibility for driver's licenses), *cert. denied*, 138 S. Ct. 1279 (2018).

<sup>88</sup> See *supra* note 4 and text accompanying text note 4 & n.4 (citing authority about the number of DACA recipients).

<sup>89</sup> See Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>. Several commentators conclude that the dismantling of DACA would have adverse fiscal and budgetary impacts. See Ike Brannon, *The Economic and Fiscal Impact of Repealing DACA*, CATO AT LIBERTY (July 18, 2017), <https://www.cato.org/blog/economic-fiscal-impact-repealing-daca>; Ben Gitis, *The Budgetary and Economic Costs of Ending DACA*, AM. ACTION F. (Sept. 7, 2017), <https://www.americanactionforum.org/research/budgetary-economic-costs-ending-daca/>; Nicole Prchal Svajlenka, Tom Jawetz, & Angie Bautista-Chavez, *A New Threat to DACA Could Cost States Billions of Dollars*, CTR. FOR AM. PROGRESS (July 21, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/>.

<i>Country</i>	<i>Total</i>	<i>% of total DACA recipients</i>
Mexico	548,000	79.4
El Salvador	25,900	3.7
Guatemala	17,700	2.7
Honduras	16,100	2.3

Nearly ninety percent of the DACA recipients were Latina/o. Consequently, just as they have been dramatically affected by removals,<sup>91</sup> Latina/os noncitizens were the group that gained the most from DACA and stood to be injured in the largest numbers by its rescission.<sup>92</sup>

Besides providing relief, DACA had political impacts, which arguably were much more significant than its legal impacts. Namely, the policy served to energize the political movement demanding justice for undocumented immigrants.<sup>93</sup>

As a presidential candidate, Donald Trump from the beginning of his campaign made tough immigration enforcement a central issue, thus tapping into the popular anti-immigrant impulse that has flared sporadically in the United States.<sup>94</sup> [A6] He also criticized DACA as an

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<sup>90</sup> *Top Countries of Origin for DACA Recipients*, PEW RES. CTR. (Sept. 25, 2017), [http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/ft\\_17-09-25\\_daca\\_topcountries/](http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/ft_17-09-25_daca_topcountries/).

<sup>91</sup> See *supra* Part I.A.1.

<sup>92</sup> In light of the President's "racial slurs" and "epithets" directed at immigrants, a district court allowed an action to proceed challenging the rescission of DACA as racially discriminatory in violation of the Equal Protection guarantee. See Alan Feuer, *Citing Trump's "Racial Slurs," Judge Says Suit to Preserve DACA Can Continue*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/nyregion/daca-lawsuit-trump-brooklyn.html>. Similarly, the Trump administration's announcement of the end of temporary protected status (TPS) for nearly 200,000 Salvadorans in January 2018 had adverse impacts on a large sub-group of Latina/o noncitizens living in the United States, a group that the President had previously disparaged. See *Press Release, Dep't of Homeland Sec., Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador*, (Jan. 8, 2018), <https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>; Josh Dawsey, *Trump Derides Protections for Immigrants from "Shithole" Countries*, WASH. POST (Jan. 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html?utm\\_term=.471ed1da26ab](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.471ed1da26ab). A lawsuit challenged the administration's decision to end TPS for Salvadorans, as well as Haitians, as racially discriminatory. See *Press Release, Lawyers Comm. for Civil Rights and Econ. Justice, Black and Latino Immigrants File Federal Lawsuit to Block Trump's Termination of TPS* (Feb. 22, 2018), <http://lawyerscom.org/black-and-latino-immigrants-file-federal-lawsuit-to-block-trumps-termination-of-tps/>.

<sup>93</sup> See *supra* notes 72–75 and text accompanying text.

<sup>94</sup> See, e.g., *supra* note 92 (citing authority quoting President Trump). See generally IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed. 1997) (compiling essays analyzing the rise of nativism in the United States in the 1990s and episodes of anti-immigrant sentiment in U.S. history). Some commentators questioned whether, in light of the removal records set by President Obama, see *supra* Part I.A.1., President Trump would be able to increase the number of removals. See, e.g., Jennifer Lee Koh, *Anticipating Expansion, Committing to Resistance: Removal in the Shadows of Immigration Court Under Trump*, 43 OHIO N.U. L. REV. 459, 459 (2017).

unconstitutional exercise of executive power by President Obama.<sup>95</sup> Candidate Trump promised to abolish the policy and, as President, ultimately did just that.<sup>96</sup>

However, before moving to rescind DACA, President Trump shortly after his inauguration issued Executive Orders that established a blueprint for greatly ramping up immigration enforcement.<sup>97</sup> News reports of arrests of DACA recipients,<sup>98</sup> including one who reportedly was deported,<sup>99</sup> generated palpable fear in immigrant communities. The Trump administration later engaged in much-publicized workplace raids,<sup>100</sup> and ordered the deployment

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<sup>95</sup> See, e.g., James Pfiffner & Joshua Lee, *Trump Pledged to Reverse Obama's Executive Orders*, WASH. POST (Jan. 23, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/23/trump-pledged-to-reverse-obamas-executive-orders-heres-how-well-past-presidents-have-fulfilled-that-pledge/?utm\\_term=.021829d4d67c](https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/23/trump-pledged-to-reverse-obamas-executive-orders-heres-how-well-past-presidents-have-fulfilled-that-pledge/?utm_term=.021829d4d67c).

<sup>96</sup> See *supra* note 11 and accompanying text.

<sup>97</sup> See Border Security Executive Order, *supra* note 41; Interior Enforcement Executive Order, *supra* note 60. For analysis of President Trump's initial immigration enforcement executive orders, see Jennifer M. Chacón, *Immigration and The Bully Pulpit*, 130 HARV. L. REV. FORUM 243, 244 (2017), [https://harvardlawreview.org/wp-content/uploads/2017/05/vol130\\_Chacon.pdf](https://harvardlawreview.org/wp-content/uploads/2017/05/vol130_Chacon.pdf); Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEXAS A&M L. REV. 253 (2018); Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 628-51 (2017); Julie Rheinstrom, Current Development, *One Hundred Days of President Trump's Executive Orders*, 31 GEO IMMIGR. L.J. 433, 434-43 (2017). For the claim that heightened immigration enforcement may result in increased exploitation of undocumented immigrant workers, see Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CAL. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3040872](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040872) available at [https://papers.ssrn.com/sol3/paper.cfm?abstract\\_id=3040872](https://papers.ssrn.com/sol3/paper.cfm?abstract_id=3040872).

President Trump's tough immigration enforcement measures also included three versions of a "Muslim" or "travel" ban directed primarily at noncitizens from several predominantly Muslim nations. See *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 583 (D. Md. 2017) ("For the third time [in 2017], President Donald J. Trump has issued an order banning the entry into the United States, with some exceptions, of nationals of multiple predominantly Muslim nations."), *aff'd*, *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018) (holding that the third version of the travel ban violated the Establishment Clause), *vacated and remanded in light of Trump v. Hawaii*, 138 S. Ct. 2392, 138 S. Ct. 2710 (2018). See generally KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA* (2018) (analyzing the history of "Islamophobia" underlying President Trump's Muslim bans). The Supreme Court stayed an injunction preventing some provisions of the travel ban from being implemented, thus allowing the President Trump's third version of the ban to go into effect. See *Int'l Refugee Assistance Project v. Trump*, 138 S. Ct. 542, 542 (2017). A 5-4 Court ultimately upheld the third version of the travel ban. See *Hawaii v. Trump*, 138 S. Ct. 2392 (2018).

<sup>98</sup> See, e.g., Jenny Jarvie, *Mississippi "Dreamer" Daniela Vargas Released From Detention But Deportation Order Stands*, L.A. TIMES (Mar. 10, 2017), <http://www.latimes.com/nation/la-na-mississippi-dreamer-20170310-story.html>; Christine Hauser, *A Young Immigrant Spoke About Her Deportation Fears, Then She Was Detained*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/immigrant-daca-detained.html>; see also Lori A. Nessel, *Instilling Fear and Regulation Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L.J. 525, 525 (2017) (analyzing immigration law and its enforcement as a form of social control).

<sup>99</sup> See Miriam Jordan, *U.S. Deported Immigrant in "Dreamer" Program, Lawsuit Says*, N.Y. TIMES (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/us/dreamer-deported-lawsuit.html>.

<sup>100</sup> See, e.g., Maria Sacchetti, *ICE Raids Meatpacking Plant in Rural Tennessee; 97 Immigrants Arrested*, WASH. POST (Apr. 6, 2018), [https://www.washingtonpost.com/local/immigration/ice-raids-meatpacking-plant-in-rural-tennessee-more-than-95-immigrants-arrested/2018/04/06/4955a79a-39a6-11e8-8fd2-49fe3c675a89\\_story.html?utm\\_term=.d9e4f8fa734a](https://www.washingtonpost.com/local/immigration/ice-raids-meatpacking-plant-in-rural-tennessee-more-than-95-immigrants-arrested/2018/04/06/4955a79a-39a6-11e8-8fd2-49fe3c675a89_story.html?utm_term=.d9e4f8fa734a); Natalie Kitroeff, *Workplace Raids Signal Shifting Tactics in Immigration Fight*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/economy/immigration-raids.html>. Commentators have criticized workplace raids pursued by previous administrations. See, e.g., Raquel Aldana, *Of Katz and "Aliens": Privacy*

of the national guard to the U.S. Mexico border.<sup>101</sup> As part of a “zero tolerance” approach, the administration implemented a policy of separating families in detention along the U.S./Mexico border but abandoned it in the wake of a firestorm of controversy.<sup>102</sup> As one observer summarized, “the [Trump] administration’s sweeping, high profile immigration enforcement initiatives — along with its inflammatory anti-immigrant rhetoric— mark the ascendance of immigration restrictionism to the highest levels of the executive branch *to an extent that is entirely without modern precedent.*”<sup>103</sup>

Although President Trump moved quickly in his first weeks in office to aggressively enforce the immigration laws,<sup>104</sup> he delayed the announcement of the phasing out of DACA.<sup>105</sup> That delay may have been the result of uncertainty about whether the program should be ended as a policy matter and concern that eliminating DACA, which benefited a sympathetic group of undocumented immigrants, would produce a political backlash.<sup>106</sup> The delay, in turn, led to worry in some circles that President Trump would not in fact end DACA. -Consequently, a number of states threatened to sue the federal government if the administration did not end the policy.<sup>107</sup>

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*Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 UC DAVIS L. REV. 1137 (2008); Karla Mari McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. (2010); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008); see also Shoba Sivasprasad Wadhia, *Under Arrest: Immigrants’ Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 862-88 (2008) (analyzing the rights of noncitizens in workplace enforcement of the U.S. immigration laws).

<sup>101</sup> See Seung Min Kim, *Trump is Sending National Guard Troops to the U.S.-Mexico Border*, WASH. POST (Apr. 4, 2018), [http://www.washingtonpost.com/politics/trump-to-sign-proclamation-to-send-national-guard-troops-to-the-us-mexico-border/2018/04/04/9f9cd796-3838-11e8-acd5-35eac230e514\\_story/html?utm\\_term=.c2b80faa47f0](http://www.washingtonpost.com/politics/trump-to-sign-proclamation-to-send-national-guard-troops-to-the-us-mexico-border/2018/04/04/9f9cd796-3838-11e8-acd5-35eac230e514_story/html?utm_term=.c2b80faa47f0).

<sup>102</sup> See Sarah McCammon, *After Family Separation Policy Reversal, Trump Says “Zero Tolerance” Should Remain in Effect*, NPR, June 21, 2018, <https://www.npr.org/2018/06/21/622361876/after-family-separation-policy-reversal-trump-says-zero-tolerance-should-remain->. In addition, Attorney General Sessions intervened in several matters in Board of Immigration Appeals matters designed to prod the immigration courts to ramp up removals. See *Matter of L-A-B-R.*, & N. Dec. 405 (AG 2018) (restricting immigration court discretion to grant continuances of removal proceedings); *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018) (overruling BIA precedent and narrowing eligibility to establish membership in a “particular social group” for asylum seekers who claim to have fled domestic or gang violence); *Matter of Castro-Tum*, 27 I. & N. Dec 271 (AG 2018) (rejecting the practice of administrative closure of removal proceedings in the immigration courts and instructing immigration courts to expeditiously decide cases).

<sup>103</sup> Anil Kalhan, *Revisiting the 1996 Experiment in Comprehensive Immigration Severity in the Age of Trump*, 9 DREXEL L. REV. 261, 262 (2017) (emphasis added). Jayashri Srikanthiah, *Resistance and Immigration Rights*, 13 STAN. J. C.R.-C.L. 5 (2017) analyzes various forms of resistance to President Trump’s aggressive immigration enforcement policies.

<sup>104</sup> See *supra* notes 97–103 and accompanying text.

<sup>105</sup> See *supra* note 11 and accompanying text.

<sup>106</sup> See *supra* text accompanying notes 72–75 (noting the emergence of an organized undocumented student movement demanding immigration reform).

<sup>107</sup> See Antonio Olivo, *GOP Officials in 10 States Push Trump Administration to End DACA Program*, WASH. POST (June 30, 2017), [https://www.washingtonpost.com/local/immigration/officials-in-10-states-push-trump-administration-to-end-daca-program/2017/06/30/5bd05ec4-5da1-11e7-a9f6-7c3296387341\\_story.html?utm\\_term=.edbf323fde5](https://www.washingtonpost.com/local/immigration/officials-in-10-states-push-trump-administration-to-end-daca-program/2017/06/30/5bd05ec4-5da1-11e7-a9f6-7c3296387341_story.html?utm_term=.edbf323fde5).

As DACA's future hung in the balance, there was considerable lobbying by prominent Republicans to keep DACA in place. Two Republican congressional leaders, Speaker of the House Paul Ryan (R-WI) and Senator Orrin Hatch (R-UT), for example, called on the President to retain DACA.<sup>108</sup> Indeed, immediately before the announcement of its rescission, DACA appeared to have more bipartisan political support than ever.<sup>109</sup>

After much speculation, Attorney General Jeff Sessions announced the rescission of DACA.<sup>110</sup> That announcement generated immediate political and legal responses. The nation saw protests across the country calling for congressional action to provide relief to DACA recipients.<sup>111</sup> Congress began reconsidering a version of the DREAM Act and more far-reaching immigration reform.<sup>112</sup> In addition to widespread public condemnation of DACA's elimination, New York and a number of other states, including California, filed legal challenges to the Trump administration's rescission of DACA.<sup>113</sup> The University of California, the nation's largest public university system, did as well.<sup>114</sup>

Besides DACA, President Obama had sought to implement similar policies that Trump opposed. In 2014, the Obama administration announced an expanded deferred action policy. Building on DACA and seeking to eliminate another group of noncitizens from federal immigration enforcement efforts, Deferred Action for Parents of Americans (DAPA) would have made undocumented parents of lawful permanent residents and U.S. citizens eligible to apply for deferred action.<sup>115</sup> By so doing, DAPA sought to further narrow the U.S. government's immigration enforcement efforts to focus on the removal of the most serious criminal immigrant offenders. -The policy thus would have promoted public safety goals similar to those promoted by DACA.<sup>116</sup>

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<sup>108</sup> See Ben Mathis-Lilley, *Paul Ryan and Orrin Hatch Urge Trump Not to Cancel DACA*, SLATE (Sept. 1, 2017), [http://www.slate.com/blogs/the\\_slatest/2017/09/01/paul\\_ryan\\_orrin\\_hatch\\_support\\_daca.html](http://www.slate.com/blogs/the_slatest/2017/09/01/paul_ryan_orrin_hatch_support_daca.html).

<sup>109</sup> See *id.* (citing authorities)

<sup>110</sup> See *supra* note 11 and accompanying text.

<sup>111</sup> See Scott Neuman, *Protesters in D.C., Denver, LA, Elsewhere Demonstrate Against Rescinding DACA*, NPR (Sept. 5, 2017), <http://www.npr.org/sections/the-two-way/2017/09/05/548727220/protest-in-d-c-denver-la-elsewhere-protest-rescinding-data>.

<sup>112</sup> See Nolan D. McCaskill, *Trump Ends DACA – and Pressures Congress to Pass Immigration Reform*, POLITICO (Sept. 6, 2017), <https://www.politico.com/story/2017/09/05/trump-dreamers-daca-work-permits-242323>, <http://www.politico.com/story/2017/09/05/trump-dreamers-daca-work-permits-24232>.

<sup>113</sup> See Alexander Burns & Vivian Yee, *Democrats Begin Legal Assault on Trump's Move to End "Dreamer" Program*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/us/daca-lawsuits-trump.html?mtrref=www.google.com&gwh=346CCB0C6B310CA126E0D24D83F169D3&gwt=pay>; Patrick McGreevy, *California Sues Trump Administration Over Plan to End DACA*, L.A. TIMES (Sept. 11, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-sues-trump-administration-1505150334-htlstory.html>. Two district courts enjoined the rescission of DACA. See *supra* note 13 (citing authority).

<sup>114</sup> See Michael D. Shear, *Napolitano Sues Trump to Save DACA Program She Helped Create*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/us/politics/napolitano-sues-trump-to-save-daca-program-she-helped-create.html>.

<sup>115</sup> See U.S. Citizenship and Immigration Services, 2014 Executive Actions on Immigration (2015), <https://www.uscis.gov/archive/2014-executive-actions-immigration>.

<sup>116</sup> See *supra* notes 84–86 and accompanying text.

The Obama administration's announcement of DAPA provoked nothing less than a firestorm of controversy. The most stridently made objections centered on claims that President Obama had violated the separation of powers between Congress and the Executive Branch and usurped the lawmaking power of Congress.<sup>117</sup> The courts enjoined the implementation of the expanded deferred action policy, and a deadlocked Supreme Court allowed the injunction to stand.<sup>118</sup> Consequently, DAPA never was implemented.

### C. *New Directions: President Trump's Immigration Enforcement Agenda*

From day one of his run for the presidency, Donald Trump made aggressive immigration enforcement the cornerstone of his campaign.<sup>119</sup> That focus energized immigration hawks of the Republican Party, who supported, for example, Trump's campaign pledge to build a wall along the U.S./Mexico border.<sup>120</sup> In addition, Trump harshly criticized DAPA as well as DACA as unconstitutional.<sup>121</sup> President Trump's forceful objections to the deferred action policies fit comfortably with his overall pro-immigration enforcement agenda.<sup>122</sup>

## II. LESSONS FROM THE RISE AND FALL OF DACA ABOUT THE FUTURE OF U.S. IMMIGRATION LAW

As outlined in Part I, President Obama's deferred action policies responded to: (1) Congress's prolonged failure to pass comprehensive immigration reform;<sup>123</sup> and (2) the fact that

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<sup>117</sup> See Joseph Tanfani, *Obama Faces High Stakes in Rollout of Controversial Immigration Program*, L.A. TIMES (Feb. 10, 2015), <http://www.latimes.com/nation/la-na-immigration-rollout-20150210-story.html>; see also Raquel Aldana, *Congressional Dysfunction and Executive Lawmaking During the Obama Administration*, 91 CHI.-KENT L. REV. 3, 3 (2016) (observing that President Obama's announcement of DAPA generated "simultaneous reactions of tamed enthusiasm and anger").

<sup>118</sup> See *United States v. Texas*, 136 S. Ct. 2271 (2016); see also Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 2-3 (2017) (observing that *United States v. Texas* was "one of the most important immigration cases in decades") ~~(footnote omitted)~~. For analysis of the complex legal issues presented by *United States v. Texas*, see Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 279-303 (2016).

<sup>119</sup> See *supra* notes 94-103 and accompanying text.

<sup>120</sup> See Peter Holley, *White Texas Teens Chant "Build That Wall" at Hispanics During High School Volleyball Match*, WASH. POST (Nov. 17, 2016) ("[B]uild that wall' . . . became synonymous with Donald Trump's high intensity campaign rallies, an expression that became more rallying cry than policy proposal during his ride to political power."), <https://www.washingtonpost.com/news/early-lead/wp/2016/11/17/white-texas-teens-chant-build-that-wall-at-hispanics-during-high-school-volleyball-match/> ("[B]uild that wall' . . . became synonymous with Donald Trump's high intensity campaign rallies, an expression that became more rallying cry than policy proposal during his ride to political power."). For analysis of the symbolic importance of the border wall, see Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147, 158-81 (2012). Despite the substantial costs, it is uncertain whether construction of a wall along the U.S./Mexico border in fact would provide any true immigration enforcement benefits. See *id.* at 151-58.

<sup>121</sup> See Nick Anderson, *Hundreds of Colleges Mobilize to Defend Immigrant Students*, WASH. POST (Nov. 23, 2016), at B1 (noting that "[t]he Trump campaign pledged to 'immediately terminate' [President] Obama's 'illegal executive amnesties'"), [https://www.washingtonpost.com/news/grade-point/wp/2016/11/23/hundreds-of-colleges-mobilize-to-defend-immigrant-students/?utm\\_term=.df0bd4cddcf](https://www.washingtonpost.com/news/grade-point/wp/2016/11/23/hundreds-of-colleges-mobilize-to-defend-immigrant-students/?utm_term=.df0bd4cddcf).

<sup>122</sup> See *supra* notes 94-103 and accompanying text.

<sup>123</sup> See *supra* Part I.A.2.

more than eleven million undocumented immigrants live and work in the United States.<sup>124</sup> So long as Congress fails to pass reform legislation and the undocumented population numbers in the millions, pressure in all likelihood will persist for the U.S. government to act. The announcement of the threatened rescission of DACA added pressure on Congress to reform the immigration laws.<sup>125</sup>

As a matter of law and policy, DACA by virtually all accounts was an imperfect response to regularizing the status of the millions of undocumented immigrants in the United States. In fact, DACA amply demonstrates the limited ability of the Executive Branch to address the deficiencies in the immigration laws. First of all, the policy only provided relief to young people brought to the United States as children, a subset of the eleven million undocumented immigrants in the United States.

Second, besides failing to address the status of all undocumented immigrants, DACA did nothing to change the immigration laws in a meaningful way that would reduce the pressures leading to the future emergence of a new undocumented immigrant population.<sup>126</sup> Access to employment is the primary magnet for undocumented immigration.<sup>127</sup> DACA did nothing to change the economic dynamics fueling undocumented immigration.

Last but not least, DACA provided only limited relief from removal to the beneficiaries of the policy. Most importantly, that relief did not provide lawful permanent residence status, and thus a direct path to a legal immigration status for undocumented immigrants. DACA recipients experienced the lack of durability of deferred action relief with full force after the election of President Trump and uncertainty lingered at the outset of his administration about whether DACA would be dismantled.<sup>128</sup> That uncertainty, combined with the Trump administration's persistent drum beat of heightened immigration enforcement, resulted in widespread fear and trepidation in the immigrant community.<sup>129</sup>

Despite the rescission of DACA, deferred action remains a viable form of relief for undocumented immigrants. In the future, however, one would strongly suspect that the U.S. government under President Trump might exercise deferred action only on an individual, case-by-case basis. Indeed, shortly after his inauguration, the President issued an Executive Order requiring that any relief from removal, including deferred action, be awarded on an individual basis.<sup>130</sup> Consequently, any new categorical deferred action policy providing relief to a group of undocumented immigrants similar to DACA and DAPA is currently off the table. In any event,

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<sup>124</sup> See *supra* note 15 and accompanying text (citing authority).

<sup>125</sup> See *supra* Part I.B.

<sup>126</sup> See *infra* Part II.B.

<sup>127</sup> See *id.*

<sup>128</sup> See *supra* notes 104–14 and accompanying text.

<sup>129</sup> See, e.g., Janell Ross, Aaron C. Davis, & Joel Achenbach, *Immigrant Community on High Alert, Fearing Trump's "Deportation Force,"* WASH. POST (Feb. 11, 2017), [https://www.washingtonpost.com/national/immigrant-community-on-high-alert-fearing-trumps-deportation-force/2017/02/11/e5c30d06-f06f-11e6-9973-c5efb7ccfb0d\\_story.html?utm\\_term=.41236359d700](https://www.washingtonpost.com/national/immigrant-community-on-high-alert-fearing-trumps-deportation-force/2017/02/11/e5c30d06-f06f-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.41236359d700); Matt Viser, *Fear of Trump Crackdown Haunts Undocumented Immigrants*, BOSTON GLOBE (Nov. 25, 2017), <https://www.bostonglobe.com/news/politics/2017/11/25/fear-trump-crackdown-haunts-daily-life-undocumented-immigrants/LozpzJIIPZS0mxQ34QMVvK/story.html>.

<sup>130</sup> See Interior Enforcement Executive Order, *supra* note 60, at § 1.

any deferred action policy could be expected to generate significant political and legal controversy, just as President Obama's policies did.<sup>131</sup>

### A. *The Need for Congressional Action*

At this historical moment, a social change strategy that focuses on persuading Congress to pass immigration reform, which would avoid the various political and legal limitations of relief provided by the Executive Branch, would seem to be the preferable way to address the nation's various immigration problems.<sup>132</sup> Through legislation, Congress could allow for more durable relief for undocumented immigrants than any kind of deferred action policy. It also could avoid the heated controversy generated by executive action providing relief to undocumented immigrants, and take affirmative steps to avoid the growth of future undocumented populations.

The political response to the rise and fall of DACA bolsters the argument that political action directed at Congress should be the focal point of efforts to bring about lasting and meaningful change to the U.S. immigration laws. Despite its limitations and ultimate rescission, the advent of DACA added considerable political force and urgency to the burgeoning grassroots immigrants' rights movement.<sup>133</sup> Political pressure directed at the Executive Branch can be expected to result in limited relief of uncertain duration. Consider that President Obama's creation of DACA directly responded to that political pressure and energized the immigrant rights movement. At the same time, after immigration restrictionists vociferously complained about President Trump's initial failure to dismantle DACA,<sup>134</sup> the administration acceded to political pressure and rescinded the policy.<sup>135</sup> President Trump's rescission of DACA appealed to his pro-immigration enforcement base and demonstrates the power of conservative political activism.<sup>136</sup>

Like executive action on immigration,<sup>137</sup> the power of the judiciary to address deficiencies in the immigration laws has institutional constraints. Generally speaking, the courts have grown increasingly protective of the rights of immigrants.<sup>138</sup> For example, resort to the

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<sup>131</sup> See *supra* Part I.B.

<sup>132</sup> See Hiroshi Motomura, *The DREAM Act Could Bring the Rule of Law Back to Immigration Policy*, L.A. TIMES (Dec. 7, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-motomura-dream-act-20171207-story.html>.

<sup>133</sup> See *supra* notes 72–75 and accompanying text.

<sup>134</sup> See Ball, *supra* note 54.

<sup>135</sup> See *Attorney General Session Delivers Remarks on DACA*, *supra* note 11 and accompanying text.

<sup>136</sup> See *supra* notes 81–83 and accompanying text.

<sup>137</sup> See *supra* Part I.B.

<sup>138</sup> See Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 111-18 (2015); Joseph B. Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 884-911 (2015); Mac LeBuhn, *The Normalization of Immigration Law*, 15 NW. HUM. RTS. 91, 117 (2017);

Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 4-5 (1984); see also Das, *supra* note 80 (calling on executive branch to enforce constitutional norms in immigration laws); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C.L. REV. 77, 79 (2017) (noting that courts “have largely . . . declin[ed] to exempt immigration law from generally applicable standards of judicial review”) (footnote omitted); Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 2-13 (calling for a new model of judicial review — “shared stewardship” — of the

courts by immigrants and their defenders has provided protections to noncitizens with respect to some of President Trump's executive orders.<sup>139</sup> Through the legal system, lawyers can protect the rights of immigrants. In a number of important instances, including for a time blocking the rescission of DACA,<sup>140</sup> courts have intervened to ensure compliance with the law. That important role, however, has limits and cannot change the laws.<sup>141</sup> Consequently, the judiciary cannot be expected to solve the formidable problems generated by immigration laws that are not particularly well-equipped for the global migration pressures of the 21st century.

At the same time, conservative litigation, as it did with respect to DAPA,<sup>142</sup> at times has been employed to put an end to certain executive actions championed by immigrants and their supporters. With constraints on the Executive Branch and the Judiciary limiting any attempts to improve the nation's immigration laws, congressional action is the real place for meaningful and lasting immigration reform on a national level.<sup>143</sup>

Although the political process should be the primary focus in bringing about true reform, one important structural dimension peculiar to immigration law should not be ignored. Namely, the ordinary operation of the political process cannot be expected to adequately weigh, much less protect, the rights of immigrants. Today largely composed of racial minorities, immigrants, including lawful permanent residents living in the United States, do not generally possess the right to vote and thus lack the direct political power enjoyed by U.S. citizens.<sup>144</sup> Needless to say, the majoritarian impulse among U.S. citizens cannot be relied upon to protect the rights of immigrants, a discrete and insular minority in the classic *Carolene Products* sense and a wholly (and lawfully) disenfranchised one as well.<sup>145</sup> Indeed, as regularly seen in some states,<sup>146</sup> and in

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immigration laws). *But see* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U.L. REV. 583 (2017) (questioning the alleged normalization of immigration law); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (to the same effect). Despite the fact that the "plenary power doctrine," which historically has immunized the immigration laws from routine constitutional review, is inconsistent with modern constitutional law, the Supreme Court has not fully overruled the doctrine. *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing the modern vitality of the plenary power doctrine).

<sup>139</sup> *See, e.g., supra* note 56 (citing court decisions in litigation challenging the Trump administration's attempt to defund "sanctuary" cities).

<sup>140</sup> *See supra* note 13 (citing authorities).

<sup>141</sup> *See* Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 45-56 (1995).

<sup>142</sup> *See supra* notes 115-18 and accompanying text.

<sup>143</sup> At the same time, however, states possess the constitutional responsibility to take steps to integrate immigrants into the greater community. *See supra* note 55 (citing authorities); *see, e.g.,* Rosenbaum, *supra* note 44 (analyzing the California TRUST Act that limits state and local law enforcement cooperation with federal immigration enforcement agencies). States, of course, cannot directly regulate the admission and removal of immigrants, a power exclusively reserved for the U.S. government. *See, e.g.,* *Arizona v. United States*, 567 U.S. 387 (2012) (invalidating provisions of Arizona's S.B. 1070 found to intrude on the federal power to enforce the U.S. immigration laws); *supra* note 54 (citing authorities).

<sup>144</sup> *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981-82 (2002).

<sup>145</sup> *See* *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 & n.4 (1938) (observing that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry"). For contemporary arguments that the courts should carefully review laws that disadvantage discrete and insular minorities, *see* Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323, 329-50 (2016); Nicholas O. Stephanopoulos, *Political*

many of President Trump's immigration enforcement actions,<sup>147</sup> popular pressure to punish immigrants, especially the undocumented and those who have brushes with the criminal justice system, often prevails in the political process.

As a consequence, this defect in the political process differentiates immigration law from other bodies of law.<sup>148</sup> It militates in favor of more careful judicial review of the immigration laws to ensure the adequate protection of immigrant rights in the face of the recurring anti-immigrant impulse that often prevails in the American political process.<sup>149</sup>[A7]

The constitutional constraints in the realm of immigration law could not have been lost on President Obama, a Harvard-educated lawyer who once taught constitutional law at the University of Chicago.<sup>150</sup> Lamenting the lack congressional action on immigration reform and admittedly acting in a limited fashion,<sup>151</sup> President Obama took a limited step toward offering relief to undocumented immigrants through DACA. As with the administration's tough stance on enforcement,<sup>152</sup> the long-term goal could only be to prod Congress to pass legislation that would provide fuller, more permanent relief to undocumented immigrants. President Trump's rescission of DACA returned the nation to the status quo ante for undocumented youth that existed before the creation of the program and, in so doing, also increased the pressure on Congress to act.

Although DACA's future is uncertain, the political genie released by the policy cannot easily be put back into the proverbial bottle. The policy's creation and controversial rescission forcefully thrust the uncertain and vulnerable status of undocumented immigrants into the national spotlight.<sup>153</sup> It is difficult to see, in the short term at least, the receding of the political forces unleashed and energized by the rise and fall of DACA.

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*Powerlessness*, 90 N.Y.U. L. REV. 1527, 1530-36 (2015). Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1429-30 (2017) summarizes the current state of the political process scholarship, including that which criticizes the theory as the basis for exacting judicial review. The Supreme Court's choppy equal protection decisions involving the rights of immigrants are analyzed in Jenny Brooke-Condon, *Equal Protection Exceptionalism*, 69 RUTGERS L. REV. 563, 571-603 (2017); Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 173-86 (2014).

<sup>146</sup> See *Ball*, *supra* note 54 (citing court rulings invalidating state immigration enforcement laws found to intrude on the federal power to regulate immigration).

<sup>147</sup> See *supra* notes 94-103 and accompanying text.

<sup>148</sup> See Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1264-71 (2008) (noting that Latina/o political power is constrained by the fact that a significant part of the greater Latina/o community is comprised of noncitizens who cannot vote).

<sup>149</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161-62 (1980) (contending that, because because immigrants constitute a discrete and insular minority, laws that discriminate against them should be subject to heightened judicial scrutiny); Cole, *supra* note 144, at 981-82 ("When one adds . . . the ignoble history of anti-immigrant sentiment among the voting citizenry, usually laced with racial animus, aliens are a group particularly warranting judicial protection.").

<sup>150</sup> See Joe Miller, *Obama a Constitutional Law Professor?*, FACTCHECK.ORG (Mar. 28, 2018), <https://www.factcheck.org/2008/03/obama-a-constitutional-law-professor/>

<sup>151</sup> See *supra* note 6 and accompanying text (citing authority).

<sup>152</sup> See *supra* Part I.A.1.

<sup>153</sup> See Part I.B.

As most knowledgeable observers would agree, congressional action on immigration reform is much-needed.<sup>154</sup> The immigration laws require meaningful reform to bring legal immigration more into line with the labor needs of the nation, make the laws more enforceable, and address the precarious status of the millions of undocumented immigrants in the United States.<sup>155</sup> Despite a lengthy stalemate in Congress,<sup>156</sup> the future at some point will most likely see congressional passage of comprehensive immigration reform. Precisely when Congress will enact such reform, however, is far from certain.

DACA's trajectory starkly illustrates the nexus between law reform efforts and movements for social change. The contemporary movement for immigrant rights crystallized with the nationwide protests in 2006 of a tough enforcement-oriented immigration reform bill passed by the House of Representatives.<sup>157</sup> That movement, combined with the congressional failure to enact immigration reform, ultimately fueled pressures for action that resulted in President Obama's announcement of DACA and DAPA.<sup>158</sup> In turn, the implementation of DACA helped reaffirm, energize, and consolidate the political movement.<sup>159</sup> That movement forcefully, but unsuccessfully, opposed the Trump administration's rescission of DACA and pushed Congress to extend lasting legal protections to DACA recipients.<sup>160</sup> -In fact, the power of the immigrant rights movement led to a temporary shutdown of the entire federal government, an immigration political moment unprecedented in modern American history.<sup>161</sup>[A8]

This political dynamic thus suggests a silver lining to President Trump's effort to phase out DACA. With the nation sensing the urgency of the moment as DACA recipients are threatened with the loss of relief and possible removal from the United States, Congress has a window of opportunity to pass a law that would provide enduring protections for DACA youth. Congress might consider more far-reaching reform to create a path to legalization for

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<sup>154</sup> See *supra* note 63 and accompanying text (citing authorities discussing immigration reform proposals).

<sup>155</sup> See generally KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007) (outlining possible reforms to the U.S. immigration laws that would allow for increased lawful immigration, significantly reducing pressures for undocumented immigration).

<sup>156</sup> See *supra* Part I.A.2.

<sup>157</sup> See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 102-09 (2007) (analyzing the implications of mass protests in cities across the country in 2006 in response to a tough immigration enforcement bill passed by the U.S. House of Representatives).

<sup>158</sup> See *supra* Part I.B.

<sup>159</sup> See *supra* notes 72-75 and accompanying text.

<sup>160</sup> See David Nakamura & Ed O'Keefe, "This is the Moment": *Dreamers Face Make-or-Break Push on Immigration Fight with Trump*, WASH. POST (Dec. 4, 2017), [https://www.washingtonpost.com/politics/this-is-the-moment-dreamers-face-make-or-break-push-on-immigration-fight-with-trump/2017/12/03/df02aab0-d6a3-11e7-95bf-df7c19270879\\_story.html?utm\\_term=.6f90253b9b46](https://www.washingtonpost.com/politics/this-is-the-moment-dreamers-face-make-or-break-push-on-immigration-fight-with-trump/2017/12/03/df02aab0-d6a3-11e7-95bf-df7c19270879_story.html?utm_term=.6f90253b9b46) (reporting that the aggressive push for relief for DACA recipients "has reactivated a nationwide political movement honed over the past decade").

<sup>161</sup> See *supra* note 14 and accompanying text (discussing this development and subsequent adoption of a budget without an immigration component). Anti-immigrant outbursts often spur political responses. In California, for example, voter passage of the anti-immigrant landmark Proposition 187 in 1994, which would have denied undocumented immigrants access to the public schools and most benefit programs, see Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 642-72 (1995), triggered a political transformation in the Golden State that ultimately led the legislature in 2017 to declare the state of California to be a "sanctuary state." See *supra* note 55 (citing authority).

undocumented immigrants, address the perceived deficiencies of the current immigration laws, and reduce future pressures for undocumented immigration.

It is worth emphasizing that President Obama created DACA only after Congress failed for years to enact comprehensive immigration reform.<sup>162</sup> As the President candidly acknowledged at the time, the deferred action policy was a limited response to that prolonged congressional gridlock.<sup>163</sup> DACA thus was at best a second best approach taken by the Executive Branch to narrow the enforcement of the immigration laws and to offer limited relief to a subset of the undocumented immigrant population.<sup>164</sup> Only congressional action could make more enduring changes to the immigration laws that provide durable relief to a larger group of undocumented immigrants and also reduce future pressures for undocumented immigration.

In light of the fact that virtually all agree that the current immigration system has serious shortcomings,<sup>165</sup> members of Congress should embrace the chance to reconsider immigration reform. Critics objected to DACA and DAPA as constitutionally suspect because President Obama created the policies through executive action.<sup>166</sup> They forcefully argued that Congress is the constitutionally appropriate branch of government to provide relief from removal to undocumented immigrants.<sup>167</sup> Whether or not one accepts that argument, there can be no dispute that Congress possesses the constitutional authority to protect the DACA recipients and undocumented immigrants more generally.

In sum, although DACA provided some relief to young undocumented immigrants, that relief is at best uncertain with President Trump in office. However, the political controversy surrounding DACA's rise and fall may ultimately prod Congress to provide lasting relief to undocumented immigrants. Indeed, President Obama intervened through deferred action policies only after Congress had been mired for years in a stalemate over immigration reform. DACA and DAPA could thus be understood as an effort by the Obama administration to push Congress to act. The controversy surrounding the possible end of DACA by President Trump might move Congress toward more far-reaching and enduring reform.

#### B. *Regulating Employment: A Barrier to Comprehensive Immigration Reform*

Few knowledgeable observers would disagree that the revamping of the nation's immigration laws is complex politically and policy-wise. The near-misses with comprehensive immigration reform efforts illustrate the formidable political challenges.<sup>168</sup> In 2013, for example, a bipartisan group of the Senate passed a compromise piece of legislation aimed at reforming the legal immigration system, bolstering border enforcement, and providing a path to legalization for undocumented immigrants in the United States.<sup>169</sup> As a compromise, that legislation, as one

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<sup>162</sup> See *supra* Part I.A.2.

<sup>163</sup> See *supra* note 6 and accompanying text; Part I.A.2.

<sup>164</sup> See *supra* notes 128–29 and accompanying text.

<sup>165</sup> See *supra* note 7 and accompanying text.

<sup>166</sup> See *supra* notes 81–83 and accompanying text.

<sup>167</sup> See *id.*

<sup>168</sup> See *supra* Part I.A.2.

<sup>169</sup> See *supra* notes 70–71 and accompanying text.

might expect, had components that were not altogether satisfying to everyone.<sup>170</sup> Ultimately, the leadership of the Republican-controlled House of Representatives blocked a vote on that legislation.<sup>171</sup>

The policy challenges of immigration reform, especially reducing the pressures for undocumented immigration, also are formidable. It goes without saying that, as seen in the United States,<sup>172</sup> immigration reform that would remedy the system's current shortcomings is hard to come by. The Immigration Reform and Control Act ("IRCA"),<sup>173</sup> passed by Congress in 1986, was the last piece of legislation that attempted to address the nation's immigration system in a holistic fashion.<sup>174</sup> Amnesty programs in IRCA regularized the status of hundreds of thousands of undocumented immigrants.<sup>175</sup> Although increasing enforcement measures, including sanctions imposed on employers of undocumented immigrants designed to prevent the emergence of a new undocumented population, the Act proved to be unsuccessful at preventing the emergence of a new undocumented population.<sup>176</sup> [A9]The new employer sanctions program proving difficult to enforce, resulting in the growth of a—A new, and significantly larger, undocumented immigrant population.<sup>177</sup>

To provide a long-term solution to undocumented immigration, contemporary immigration reform would need to: (1) address the status of the existing undocumented immigrant population (legalization); and (2) prevent the growth of a new one (enforcement).<sup>178</sup> Experience teaches that the nation can implement a path to legalization for undocumented

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<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See *supra* Part I.A.2.

<sup>173</sup> Pub. L. No. 99-603, 100 Stat. 3359 (1986).

<sup>174</sup> See Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. LEGIS. 355, 396 (2015).

<sup>175</sup> See Ahmad, *supra* note 62, at 266-72 (discussing one "legacy of IRCA" as the avoidance of using the word "amnesty" to describe any proposal that would provide for the regularization of the immigration status of undocumented immigrants).

<sup>176</sup> See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL. F. 193, 200-04 (describing IRCA's employer sanctions provisions (IRCA § 101, 100 Stat. 3359, 3360-72 (1986) (codified at 8 U.S.C. § 1324a (2012)) as part of a "grand bargain" among interest groups necessary for Congress to enact immigration reform legislation). For a bold call in the wake of the attempted rescission of DACA by the Trump administration for civil disobedience by employers of the legal prohibition on employing undocumented immigrants, see Bill Ong Hing, *Beyond DACA — Defying Employer Sanctions Through Civil Disobedience*, 51 UC DAVIS L. REV. (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3089461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089461).

<sup>177</sup> See NICHOLAS LAHAM, RONALD REAGAN AND THE POLITICS OF IMMIGRATION REFORM 195 (2000) (contending that IRCA's employer sanctions regime has been "an unmitigated failure" and that the Act "failed to solve the problem of illegal immigration"). For critical analysis of the inability of employer sanctions to deter the employment of undocumented immigrants, see Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 347-48, 364-69, 381-83 (1994); Wishnie, *supra* note 176, at 200-04; see also Leticia M. Saucedo, *The Legacy of the Immigrant Workplace: Lessons for the 21st Century*, 40 T. JEFFERSON L. REV. 1, 3-11 (2017) (analyzing the vulnerability of immigrant workers historically and in the contemporary United States).

<sup>178</sup> See *supra* notes 70-71 and accompanying text (discussing immigration reform bill passed by the Senate in 2013 but not debated in the House).

immigrants.<sup>179</sup> However, as seen with IRCA, measures that avoid the growth of a new undocumented immigrant population pose formidable policy challenges.<sup>180</sup>

There currently is no ready means to ensure effective and efficient enforcement of the prohibition of the employment of undocumented immigrants. Federal law does not require employers to use E-Verify, the national computer database created to allow employers to verify employment authorization.<sup>181</sup> “Although only [seven] percent of employers have enrolled in E-Verify, Congress has considered several proposals to make the system mandatory.”<sup>182</sup> Some states, however, require use of the system by employers.<sup>183</sup>

In any event, legally requiring employers to use E-Verify would not instantly end the employment of undocumented workers. The database currently has a large error rate, which undermines its effectiveness.<sup>184</sup> The United States appears to be years away from creating a computerized system that can reliably and efficiently identify undocumented workers.<sup>185</sup> As one leading immigration scholar opined, “[t]here is no clear way to fix employer sanctions anytime soon. The widely discussed ‘smart cards’ or ‘swipe cards’ will be years in the making. Meanwhile, massive work will need to be done on government databases to clean up misspelled, duplicate, and false names.”<sup>186</sup> Deficiencies in the system must be remedied to effectively and accurately facilitate enforcement of the prohibition on the employment of undocumented immigrants.

The deficiencies in the current employment verification system militate in favor of consideration of alternatives that allow for improved workplace enforcement of the immigration laws. Creating an alternative through a national identification card, improved employment verification database, or some other mechanism, would increase the likelihood of convincing a majority of Congress to enact a new piece of comprehensive immigration reform legislation that

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<sup>179</sup> See Donald Kerwin, *More Than IRCA: U.S. Legalization Programs and the Current Policy Debate*, MIGRATION POLICY INST. (Dec. 2010), <http://www.migrationpolicy.org/research/us-legalization-programs-by-the-numbers>.

<sup>180</sup> See *supra* notes 176–77 and accompanying text.

<sup>181</sup> *New E-Verify.gov Website a User-Friendly Source to Verify Employment Eligibility*, *WHAT IS E-VERIFY?*, U.S. CITIZENSHIP & IMMIG. SERVS., <https://www.uscis.gov/news/news-releases/new-e-verifygov-website-user-friendly-source-verify-employment-eligibility> (last visited July 22, 2018).

<sup>182</sup> Jessica Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 781 (2015) (footnote omitted).

<sup>183</sup> See, e.g., *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011) (rejecting challenge to Arizona law requiring employers in the state to use E-Verify); Leann Gerlach, *Recent Development – Mandatory A E-Verification in North Carolina, The Adverse Consequences of the System in the Absence of Comprehensive Reform*, 91 N.C. L. REV. 361, 370-83 (2017) (analyzing critically the mandatory use of E-Verify in North Carolina).

<sup>184</sup> See *Findings of the E-Verify Program Evaluation 114*, WESTAT *Findings of the E-Verify Program Evaluation 114* (Dec. 2009), [http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%202012-16-09\\_2.pdf](http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%202012-16-09_2.pdf); see also David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POLITICS 411, 428-30 (2015) (discussing “E-Verify’s vulnerability to identity fraud”); Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381, 398-404 (2012) (analyzing the significant flaws in the current E-Verify system); Emily Patten, Note, *E-Verify During a Period of Economic Recovery and High Unemployment*, 2012 UTAH L. REV. 475, 482-83 (to the same effect).

<sup>185</sup> See *id.* (citing authorities).

<sup>186</sup> T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1313, 1314 (2008) (footnote omitted).

includes a path to legalization for undocumented immigrants.<sup>187</sup> Unfortunately, creating such an enforcement mechanism is not an easy task as a political matter. Some possible alternatives have been the subject of intense debate:

While there are administrative and national security arguments for universal registration, Americans have historically rebuffed the idea of a national ID card. In recent years, national identification cards have been proposed to deal with an array of national security and immigration-related issues, *all of which . . . were rejected as threats to traditional values of liberty and freedom from undue government interference*. The specter of a national identification card has come up most recently in debates over comprehensive immigration reform. The reform bill that passed the Senate in the summer of 2013 includes a provision making use of the E-Verify program mandatory for employers, a proposition which requires the federal government to maintain an inventory of all those eligible to work in the United States, including citizens . . . *[C]ritics from both sides of the aisle have come out against E-Verify because they perceive it as leading to universal registration*.<sup>188</sup>

Put simply, the policy challenges of creating a system that would effectively reduce the employment of undocumented immigrants is daunting, to say the least. Nonetheless, addressing the issue seems critical to congressional passage of effective comprehensive immigration reform.

### C. *A Solution? The RAISE Act*

Since early in the twenty-first century, Congress has regularly considered immigration reform proposals. In 2017, one new proposal, which would greatly reduce legal immigration, garnered the support of President Trump and attracted national attention.<sup>189</sup> However, rather than solve problems of the current American immigration system, it would in all likelihood exacerbate them. Moreover, by reducing immigrant visas in reducing overall legal immigration, the Act would change the racial demographics of contemporary immigration by disfavoring prospective immigrants from developing nations.

Today, the U.S. government allows approximately one million immigrants to legally immigrate each year as lawful permanent residents. Mexico, China, and India currently are the three nations that send the most immigrants to the United States.<sup>190</sup> A majority of visas under

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<sup>187</sup> See *supra* notes 168–86 and accompanying text.

<sup>188</sup> Nancy Morawetz & Natasha Fernandez-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 UC DAVIS L. REV. 141, 198-99 (2014) (emphasis added) (footnotes omitted); see Jonathan Weinberg, *Providing Identity*, 44 PEPP. L. REV. 73, 76-80 (2017) (analyzing the history of national identification proposals in the United States); Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. 1475, 1480-83 (2013) (analyzing how a biometric identification system raises the potential of governmental cybersurveillance).

<sup>189</sup> See *infra* notes 193–96 and accompanying text.

<sup>190</sup> See *Legal Immigration and Adjustment of Status Report Fiscal Year 2017, Quarter 2*, U.S. DEP'T OF HOMELAND SEC. (June 27, 2017) [hereinafter HOMELAND SECURITY REPORT], <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#LPR> [<http://archive.is/MuCfi>] - *Legal Immigration and Adjustment of Status Report Fiscal Year 2017, Quarter 2* (“More than 40 percent of new [lawful permanent residents, about 550,000 in number] in the first two quarters of Fiscal Year 2017 were from the top six countries of nationality: Mexico, the People’s Republic of China, India, Cuba, the Dominican Republic, and the Philippines . . . . These were

today's U.S. immigration laws, which Congress generally designed to promote the reunification of families,<sup>191</sup> are allocated to visa applicants who have U.S. citizen and lawful permanent resident family members living in the United States.<sup>192</sup>

The Reforming American Immigration for Strong Employment (“RAISE”) Act<sup>193</sup> [A10] would reshape American immigration by dramatically reducing family-based legal immigration. Designed to cut legal immigration by one-half over the next decade from roughly one million to 500,000 a year, the RAISE Act eliminates a number of family immigrant visa categories.<sup>194</sup> The Act specifically would limit family immigrant visas to spouses and minor children of U.S. citizens and lawful permanent residents; consequently, parents, adult children, and brothers and sisters of U.S. citizens and lawful permanent residents would not be eligible for visas.<sup>195</sup> The RAISE Act's reduction of family immigration visas would likely lead to reductions in legal migration from the nations that currently send the largest numbers of immigrants to the United States, namely people of color from Mexico, China, and India.<sup>196</sup>

Besides drastically cutting family-based immigration, the RAISE Act would modify the current immigrant visa scheme with a “points” system ostensibly based on “merit.”<sup>197</sup> Under the system, visa applicants would earn points for high-paying job offers, advanced degrees, and the ability to make investments of more than one million dollars in the United States. Persons in their twenties with English language proficiency would receive more points than other visa

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also the top six countries for the first and second quarters of Fiscal Year 2016.”), <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#LPR>

<sup>191</sup> See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION & REFUGEE LAW & POLICY 269 (6th ed. 2015) (“[O]ne central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity.”) (footnote omitted). President Trump has attacked family immigration as “chain migration,” and has demanded that Congress replace the current family-based immigration system with a “merit-based” one. See *infra* notes 196–97 and accompanying text.

<sup>192</sup> See HOMELAND SECURITY REPORT, *supra* note 190 (“Nearly half of all [lawful permanent residents] in Fiscal Year 2017 obtained status as immediate relatives of U.S. citizens and approximately two-thirds obtained status either as immediate relatives or under a family preference category.”).

<sup>193</sup> See RAISE Act, S. Bill 354, 115th Cong., 1st Sess. (2017) (providing text of the Reforming American Immigration for Strong Employment (“RAISE”) Act). Critical analysis of the RAISE Act can be found in Stuart Anderson, *RAISE Act is DACA Poison Pill*, FORBES (Sept. 18, 2017, 11:04 AM), <https://www.forbes.com/sites/stuartanderson/2017/09/18/raise-act-is-daca-poison-pill/#1f61280e9909>; Michelle Mark, *Trump Just Unveiled a New Plan to Slash Legal Immigration*, BUSINESS INSIDER (Aug. 2, 2017, 12:10 PM), <http://www.businessinsider.com/trump-legal-immigration-bill-tom-cotton-2017-8>. For a criticism of the bill from an economic perspective, see Howard F. Chang, *The Economics of Immigration Reform*, 52 UC DAVIS L. REV. (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3216084](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216084).

<sup>194</sup> See Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment-Based System*, MIGRATION POLICY INSTITUTE (Aug. 2017), <http://www.migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-so-employment-based-system>.

<sup>195</sup> See *id.*

<sup>196</sup> See José Calderón, *The RAISE Act Reveals What Trump Really Thinks About Immigrants*, THE HILL (Aug. 14, 2017, 1:30 PM), <http://thehill.com/blogs/congress-blog/homeland-security/346480-the-raise-act-reveals-what-trump-really-thinks-about>; Andy Vo, *The RAISE Act, Chinese Exclusion Act, & Anti-Mexican Legislation*, ASIAN AM. POL'Y REV. (Feb. 17, 2017), <http://aapr.hkspublications.org/2017/02/17/the-raise-act/>.

<sup>197</sup> See RAISE Act, *supra* note 193, § 5. *supra* note 192, at §§ 2301–02. Reliance on the concept of “merit” has been criticized in other contexts, most notably in affirmative action programs in higher education. See, e.g., Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple on Adonis's Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. 379 (2005).

applicants. An applicant with sufficient points under the statute would be eligible for a merit-based immigrant visa.<sup>198</sup>

While reducing immigrant visas, the RAISE Act fails to make changes in the current immigration laws that would satisfy the persistent demand by employers in the United States for low- and medium-skilled workers.<sup>199</sup> As a result, the Act would do nothing to help ensure the lawful admission of adequate numbers of workers for the agriculture, construction, and service industries, which today rely heavily on undocumented labor.<sup>200</sup> Indeed, by reducing overall immigration levels, the Act would likely tighten the already tight labor markets in those industries. Consequently, the RAISE Act fails to ensure the availability of workers to fill jobs in industries that undocumented immigrants fill in significant numbers today and therefore will do nothing to reduce the pressures for undocumented immigration.<sup>201</sup>

In no small part because of unrealistic restrictions on legal immigration under current law, combined with ineffective enforcement of employer sanctions, roughly eleven million undocumented immigrants currently reside in the United States.<sup>202</sup> Besides failing to provide a path to legalization for undocumented immigrants, the RAISE Act by reducing family immigrant visas would increase pressures for undocumented immigration, as many noncitizens in all likelihood would resort to avenues outside the law to reunite with family members. And, absent changes in the law to improve enforcement of employer sanctions, employers would likely employ them as is the case today.<sup>203</sup> Consequently, if Congress passed the RAISE Act, the changes brought by the law would likely result in increased pressures for undocumented immigration and likely growth of the undocumented population.<sup>204</sup> [A11]

Moreover, the RAISE Act in all likelihood would change the racial demographics of the legal immigration stream.<sup>205</sup> The reduction in family visas would reduce the flow of immigrants from the developing nations populated predominately by non-whites currently sending large numbers of immigrants to the United States. Moreover, the “merit” system would redirect

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<sup>198</sup> See RAISE Act, *supra* note 193, § 2301-025.

<sup>199</sup> See *supra* notes 197-98 and accompanying text.

<sup>200</sup> See, e.g., Amy Wu, *Severe Labor Shortage Drives Ag Bill*, CALIFORNIAN (May 9, 2017, 6:35 PM), <https://www.thecalifornian.com/story/news/2017/05/09/severe-labor-shortage-drives-ag-bill/101492096/>.

<sup>201</sup> See Jeffery S. Passel & D’Vera Cohn, *Occupations of Unauthorized Immigrant Workers*, PEW RES. CTR. (Mar. 26, 2015), (identifying service, construction, and farm work among the top occupations for undocumented immigrant workers in the United States), <https://www.pewhispanic.org/2015/03/26/chapter-1-occupations-of-unauthorized-immigrant-workers/> (identifying service, construction, and farm work among the top occupations for undocumented immigrant workers in the United States).

<sup>202</sup> See JOHNSON, *supra* note 155, at 72, 168-79.

<sup>203</sup> See *supra* text accompanying notes 176-77 (analyzing inability to enforce IRCA’s employer sanctions provisions).

<sup>204</sup> See *supra* text accompanying notes 202-03 (identifying how passage of the RAISE Act might create pressures that fuel undocumented immigration).

<sup>205</sup> See *supra* notes 190-92 text accompanying notes; see also Jeff Stein & Andrew Van Dam, *Trump Immigration Plan Could Keep Whites in U.S. Majority for Up to Five More Years*, WASH. POST (Feb. 6, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/02/06/trump-immigration-plan-could-keep-whites-in-u-s-majority-for-up-to-five-more-years/?utm\\_term=.a7cf81233c9e](https://www.washingtonpost.com/news/wonk/wp/2018/02/06/trump-immigration-plan-could-keep-whites-in-u-s-majority-for-up-to-five-more-years/?utm_term=.a7cf81233c9e) (reviewing President Trump’s immigration proposal in response to the budget impasse, see *supra* note 14, and how it would reduce the immigration of persons of color).

migration flows away from the developing world (with large populations of people of color) to this country.

#### D. *The Trump Approach*

Even though the Obama administration deported record numbers of immigrants,<sup>206</sup> President Trump endeavored to keep his campaign promise of dramatically increasing immigration enforcement. As President, Trump has greatly redirected immigration law and policy and increased immigration enforcement.<sup>207</sup>

In his first weeks in office, in addition to the first iteration of the “travel” or “Muslim” ban, President Trump issued two executive orders geared toward enhancing border and interior enforcement of the U.S. immigration laws.<sup>208</sup> In pursuit of a “zero tolerance” policy, they set in motion efforts to strip federal funding from “sanctuary cities,” expansion of detention as a tool of immigration enforcement, increase the number of immigration enforcement officers, widen scope of “expedited removal” (i.e., removals with limited procedural protections), and more.<sup>209</sup> High level officials in the Trump administration repeatedly made statements about how all undocumented immigrants were subject to removal.<sup>210</sup> The administration has aggressively employed the enforcement machinery refined during the Obama presidency, with a particular focus on noncitizens who have had brushes with the criminal justice system.<sup>211</sup> The Trump administration also announced the phasing out of the DACA program, which led to a push for Congress to provide relief to the DACA recipients.<sup>212</sup>

In sum, President Trump made immigration enforcement a high priority in ways that President Obama did not. Although the Obama administration embraced enforcement as a political tool to help persuade Congress to pass comprehensive immigration reform,<sup>213</sup> President Trump pursues enforcement as an end in itself and seeks to increase enforcement at every turn.<sup>214</sup>

Nor are President Trump's immigration concerns limited to undocumented immigration. The administration has tightened visa requirements for legal entry into the United States.<sup>215</sup> In addition, President Trump endorsed the RAISE Act, which would aim to reduce legal immigration by one-half.<sup>216</sup> The President also has called on Congress to end “chain

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<sup>206</sup> See *supra* Part I.A.1.

<sup>207</sup> See *supra* notes 94–103 and accompanying text.

<sup>208</sup> See *sources cited supra* note 97 and text accompanying notes 97–103.

<sup>209</sup> See Johnson, *supra* note 97, at 628-51.

<sup>210</sup> See *supra* notes 94–103 and accompanying text.

<sup>211</sup> See *supra* Part I.A.1.

<sup>212</sup> See *supra* notes 104–09 and accompanying text.

<sup>213</sup> See *supra* Part I.A.

<sup>214</sup> See *supra* notes 94–103 and accompanying text.

<sup>215</sup> See Mica Rosenberg, *Fewer Family Visas Approved as Trump Toughens Vetting of Immigrants: Reuters Review*, REUTERS (Jan. 4, 2018, 3:11 AM), <https://www.reuters.com/article/us-trump-effect-immigration/fewer-family-visas-approved-as-trump-toughens-vetting-of-immigrants-reuters-review-idUSKBN1ET15I>.

<sup>216</sup> See *supra* Part II.C.

migration,<sup>217</sup> which is another way of calling for the end of family reunification as a primary goal of the U.S. immigration laws.

The necessary complexities of the immigration laws, with many arbitrary decisions required for eligibility criteria and procedures for a path to legalization and related matters, make Congress the logical and natural place for comprehensive immigration reform.<sup>218</sup> Because congressional action is needed to establish the basic ground rules for legal immigration and any path to legalization for undocumented immigrants, political action would seem to be the appropriate place to focus efforts for durable change to the immigration laws. The Executive Branch would be obligated to implement the reforms. As in other areas of law, the courts would be expected to enforce statutory and constitutional norms with respect to the laws passed by Congress and enforced by the Executive Branch.<sup>219</sup>

By seeking to rescind DACA, President Trump provided Congress with a historic opportunity to enact immigration reform that is fair, enforceable, and lives up to the nation's ideals. The nation has long needed such reform. Forged at the height of the Cold War, the Immigration and Nationality Act,<sup>220</sup> the omnibus immigration law, created an immigration system for a bygone era. The law no longer adequately serves the contemporary labor and other needs of the nation in an increasingly global economy.<sup>221</sup>

At the same time, not any congressional action will address the deficiencies in the current immigration system. Enforcement of the immigration laws pose complex political and policy challenges, especially when it comes to enforcing the prohibition on the employment of undocumented immigrants.<sup>222</sup> Employment is an unquestionable magnet for undocumented immigrants. Proposals such as the RAISE Act that reduce legal immigration but fail to deal with employment and the regularization of the status of undocumented immigrants, will do little to reduce, and likely will increase, the pressures for undocumented immigration.<sup>223</sup>

## CONCLUSION

By virtually all accounts,<sup>224</sup> the nation needs long term, far-reaching immigration reform. Such reform can only be enacted by Congress. A prolonged political stalemate has left an antiquated immigration law on the books for decades.<sup>225</sup>

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<sup>217</sup> See Alan Gomez, *What is "Chain Migration" and Why Does President Trump Want to End It*, USA TODAY (Jan. 11, 2018, 10:39 AM), <https://www.usatoday.com/story/news/world/2018/01/11/what-chain-migration-and-why-does-trump-want-end/1022479001/>; Dara Lind, *What "Chain Migration" Really Means and Why Donald Trump Hates It So Much*, VOX (Jan. 30, 2018, 12:48 PM, 2017), <https://www.vox.com/policy-and-politics/2017/12/29/16504272/chain-migration-family-how-trump-end>.

<sup>218</sup> See *supra* Part II.A.

<sup>219</sup> See *supra* notes 137–41 and accompanying text.

<sup>220</sup> Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (as amended).

<sup>221</sup> See *supra* note 7 and accompanying text (noting the general consensus that the contemporary immigration system is "broken").

<sup>222</sup> See *supra* Part II.B.

<sup>223</sup> See *supra id.*

<sup>224</sup> See *id.*

<sup>225</sup> See *supra* Part I.A.2.

The failure of Congress to pass comprehensive immigration reform that regularizes the status of undocumented immigrants and reduces the likelihood of the emergence of a new undocumented immigrant population, has required the Executive Branch to search for answers. President Obama's deferred action programs, with all their limitations, represent one possible policy response.<sup>226</sup> Increasingly aggressive immigration enforcement, the preferred approach of President Trump, is another very different possibility.<sup>227</sup> However, to this point, dramatically increased enforcement alone has failed to meaningfully reduce, much less eliminate, the undocumented immigrant population.<sup>228</sup>

Sensible and meaningful immigration reform requires a reasoned national discussion about an immigration system that is most consistent with the nation's history, needs, and values. In a political environment dominated by hyperbole, accusations, suspicion, and ill will, such discussions are difficult to come by. President Trump's high-pitched, and at times incendiary and insulting, attacks on immigrants have not facilitated reasoned dialogue.<sup>229</sup>

In the face of the challenges to engaging in a rational and robust national discussion about immigration reform, the rise and fall of DACA creates the historic opportunity for Congress to pass comprehensive reform legislation. Executive actions by Presidents Obama and Trump with respect to DACA have made the status of undocumented immigrants in the United States front page news and placed immigration reform at the forefront of the national consciousness. The political energy brought by the emerging, and powerful, group of young undocumented immigrants and their supporters increases the likelihood of constructive change through the political process. Put simply, the rise and fall of DACA galvanized this movement. Only time will tell whether Congress capitalizes on the opportunity to modernize the U.S. immigration law.

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<sup>226</sup> See *supra* Part I.B.

<sup>227</sup> See *supra* notes 94–103 and accompanying text.

<sup>228</sup> See *supra* notes 40–43 and accompanying text.

<sup>229</sup> See, e.g., *supra* note 44 (noting Donald Trump's call for the mass deportation of Mexican immigrants).