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The Trump Administration and the War on Immigration Diversity

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THE TRUMP ADMINISTRATION AND THE WAR ON IMMIGRATION DIVERSITY

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ABSTRACT

As candidate and President, Donald Trump has expressed his disdain for immigrants of color and an unmistakable commitment to restrict their immigration to the United States. Contemptuous words about immigrants have translated into concrete policies designed to limit immigrants from entering and remaining in the United States. The Trump administration's implementation of the Muslim bans, "zero tolerance" policies directed at Mexican and Central American noncitizens, and an assortment of other policies all further the goal of decreasing the population of immigrants of color. Moreover, proposals to restrict legal immigration underscore that the current administration seeks to substantially reduce the ability of noncitizens of color to immigrate to the United States.

This Article critically analyzes the Trump administration's immigration policies. First, we argue that the Trump administration's policies reveal the executive branch's war on immigration diversity in both admissions and deportations.

Second, when situated within the history of immigration laws and policies in the United States, the current war against immigration diversity furthers the administration's broader goal of returning to pre-1965 immigration policies designed to maintain a "white nation."

Third, and most importantly, we contend that the Trump administration's immigration policies must be met steadfastly resisted. Just as activists in the past fought discriminatory immigration policies, activists today must engage the racism animating the Trump administration's policies.

Part I of this Article provides a brief historical background, highlighting the ways in which immigration laws and policies

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explicitly and implicitly have sought to exclude noncitizens from the United States on the basis of race. Part I further underscores the ways in which various individuals and groups resisted those discriminatory laws and policies through law and policies, including pushing for the passage of the 1965 Immigration Act, which allowed for greater diversity in the immigrant stream and increased Latinx and Asian American immigration to the United States.

Part II critically examines contemporary policies issued by President Trump that illuminate his administration's war on immigration diversity. In Part II, we highlight laws that seek to restrict not only the entry of racial immigrants but also the policies designed to remove immigrants of color from the United States. Such policies not only violate the spirit, if not the letter, of the 1965 Immigration Act and Congress' goal of promoting diversity in immigration law. They also reveal the limits of the 1965 Immigration Act because it does not prohibit discrimination in immigration policies and enforcement.

Part III explores litigation challenging the Trump administration's immigration policies.

The Article concludes that legal and political attention must be paid to these policies in order to avoid the country's return to its pre-1965 immigration-law policy of establishing a white nation.

INTRODUCTION

During a bipartisan meeting in January 2018 about immigration, President Donald Trump reportedly commented, "Why are we having all these people from shithole countries come here?"[1] He further stated that the United States should admit more people from countries such as Norway.[2] President Trump also stated that people from Haiti must be left out of any immigration relief deals, reportedly saying, "Why do we need more Haitians? . . . . Take them out."[3] Although the White House did not officially deny that the President uttered these remarks, President Trump did so in a series of Tweets.[4] That the President may have uttered these words could hardly be deemed a surprise. Both as a presidential candidate and as president,

1. Josh Dawsey, *Trump Derides Protections for Immigrants from "Shithole" Countries*, WASH. POST (Jan. 12, 2018) (quoting President Trump), 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.

2. *See id.*

3. *Id.* (quoting President Trump).

4. *See* Caroline Kenny, *Trump Denies Making 'Shithole Countries' Comment*, CNN (Jan. 12, 2018, 4:46 PM), https://www.cnn.com/2018/01/12/politics/donald-trump-tweet-daca-rejection/index.html.

Trump has disparaged immigrants of color and expressed a desire to restrict them from immigrating to the United States.[5]

The Trump administration has taken aggressive actions on immigration that have gone well beyond mocking statements, however. In particular, the President's contemptuous words about immigrants have translated into policies that are designed to limit immigrants of color from entering and remaining in the United States. Through the adoption of a number of policies particularly geared towards arriving non-citizens—the Muslim bans,[6] "zero tolerance" policies,[7] and proposals to reduce legal immigration[8]—the Trump administration has made evident its goal of decreasing the population of immigrants of color who are entering or re-entering the United States. Combined with other polices that the administration has implemented, including the revocation of Deferred Action for Childhood Arrivals (DACA)[9] and cancellation of Temporary Protected Status (TPS) for El Salvadorans,[10] Haitians,[11] Nicaraguans,[12]

5. *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.

6. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2399–400 (2018) (examining the two executive orders and one proclamation that limited the travel of noncitizens from countries where the majority of the population are Muslims; *infra* Parts III.A, IV.A.); *see infra* Part II.A., IV.A.; *see also* Exec. Order No. 13, 780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (EO-2); Exec. Order No. 13,769, Protecting the Nation from Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017) (EO–1); Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sep. 24, 2017).

7. *See* JEFFERSON B. SESSIONS III, ATT'Y GEN. OF THE U.S., MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download.

8 RAISE Act, S. 1720, 115th Cong. (2017).

9. LETTER FROM JEFFERSON B. SESSIONS III, ATT'Y GEN. OF THE U.S., TO ELAINE DUKE, ACTING SEC'Y, U.S. DEP'T OF HOMELAND SEC. (Sept. 4, 2017), https://www.justice.gov/opa/speech/file/994651/download (rescinding DACA).

10. Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2654 (Jan. 18, 2018). In *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1131–32 (N.D. Cal. 2018), the district court issued an injunction halting the termination of TPS for Salvadorans as well as Haitians, Nicaraguans, and Sudanese.

11. Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648, 2648 (Jan. 18, 2018).

12. Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636, 59,636 (Dec. 15, 2017).

Sudanese,[13] and Hondurans,[14] the administration has also signaled its commitment to remove the ability of noncitizens of color to remain in the United States.[15]

This Article explores the Trump administration's immigration policies and aims to make three central points. First, we contend that the immigration policies that the Trump administration has adopted or seeks to deploy reveal the executive branch's war on immigration diversity in both the admissions and deportation contexts. To be sure, some of these policies do not explicitly exclude or expel immigrants on the basis of race or national origin. Yet, both in terms of goal and effect, the policies (as adopted or proposed) have reduced or are certain to decrease the racial and national-origin diversity of the immigrant population of the United States.

Second, when situated within the history of immigration laws and policies in the United States, the current war against immigration diversity exhibits the administration's broader goal of returning to pre-1965 immigration policies designed to maintain a "white nation."[16] Until 1965, the United States had several laws in place that explicitly restricted immigrants on the basis of race and national origin.[17] In 1965, Congress amended the Immigration and Nationality Act (INA) of 1952 to expressly prohibit discrimination in the issuance of visas on the basis of "race, sex, nationality, place of

13. Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228, 47,228 (Oct. 11, 2017).

14. Termination of the Designation of Honduras for Temporary Protected Status, 83 Fed. Reg. 26,074, 26,074 (June 5, 2018); *see infra* Part IV.B.4. (discussing elimination of TPS for nationals of many countries).

15. *See* Sen. Bill 354, 115th Cong. (2017) (calling for a reduction in family immigration, which the President has criticized as "chain migration," discussed *infra* Part III.C.); *Trump's Immigration Proposal Would Eliminate Green Card Lottery*, NPR (Jan. 31, 2018), https://www.npr.org/2018/01/31/582240526/trumps-immigration-proposal-would-elimiante-green-card-lottery (calling for the elimination of the diversity visa lottery). For the claim that "white nationalism" unifies the Trump administration's immigration policies, see Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, STAN. L REV. ONLINE, Mar. 2019, https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy/.

16. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 27 (2014); *see* Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. Ill. L. Rev. 525, 525–26 (2000); Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1392–95 (2011).

17. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279–88 (1996) (analyzing the history of immigration exclusion from the United States on the basis of race).

birth, or place of residence."[18] Passed on the heels of the Civil Rights Act of 1964, the 1965 Immigration Act repealed decades of expressed race and national-origin discrimination in the immigration laws.[19] Moreover, in amending the INA of 1952, Congress established a blueprint for immigration diversity, allowing millions of people of color to lawfully immigrate to the United States.[20] To be sure, although the 1965 Immigration Act prompted important civil rights gains by eliminating the national-origins quotas for Asian immigrants, it also led to negative consequences for Mexican immigrants.[21] Specifically, the 1965 Immigration Act established, for the first time, annual ceilings on the Western Hemisphere, which were designed to curb Latinx immigrants from coming to the United States.[22] Nevertheless, empirical data demonstrates that due to the 1965 Immigration Act, the immigrant stream since 1965 has been incredibly diverse. Indeed, such post-1965 immigration diversity has been a driving force of the changing racial and ethnic makeup of the United States that has been taking place in the last fifty years.[23] Indeed, demographers have predicted that by 2055, white Americans will no longer be considered the racial majority in the United States.[24] The trajectory towards a more diverse nation, however, is likely to

18. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered provisions of 8 U.S.C.).

19. *See* GABRIEL J. CHIN & ROSE CUISON VILLAZOR, THE IMMIGRATION AND NATIONALITY ACT OF 1965, LEGISLATING A NEW AMERICA 11–12 (2015).

20. The framework for immigration diversity, on which the current INA is based, established an official policy of family unification that enables U.S. citizens and lawful permanent residents ("LPR") to sponsor their family members to immigrate to the United States. *See* Rose Cuison Villazor, *The 1965 Immigration Act: Family Unification and Nondiscrimination Fifty Years Later*, *in* CHIN & VILLAZOR, *supra* note 18, at 204. Indeed, the majority of immigration visas issued per year are given to family members of U.S. citizens and LPR and, as discussed below, the family-based immigration visas have facilitated a diverse immigrant stream. *See generally id.* (explaining the relationship between family-based immigration and diversity in immigration law).

21. *See* Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of the Modern U.S.-Mexico Border State*, *in* CHIN & VILLAZOR, *supra* note 18, at 120 (discussing the impact of the 1965 Immigration Act on Mexican immigrants).

22. The annual ceilings limit the number of Mexican immigrants who are able to immigrate to the United States. *See id.*

23. *See Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RES. CTR. (Sept. 28, 2015), http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/.

24. *See* D'Vera Cohn & Andrea Caumont, *10 Demographic Trends That are Shaping the U.S. and the World*, PEW RES. CTR. (Mar. 31, 2016), http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/.

change due to the policies that President Trump has thus far implemented and seeks to adopt.

Third, and most importantly, we contend that the Trump administration's war on immigration diversity must be met head-on through political resistance and legal challenges. Just as people in the past fought back against racist immigration policies, so too today must people engage in directly addressing the racism animating the Trump administration's policies.

The Article proceeds in three parts. Part I provides a brief historical background, highlighting the ways in which immigration laws and policies explicitly and implicitly sought to exclude on the basis of race. Notably, this Part underscores the ways in which various individuals and groups resisted those racist laws and policies through legal and policy changes, including pushing for the passage of the 1965 Immigration Act. Although far from perfect, this law diversified the immigrant stream into the United States and especially increased the number of Latina/o and Asian American immigrants to the United States.

Next, Part II examines contemporary policies issued by President Trump that illuminate his administration's war on immigration diversity. In Part II, we highlight laws that seek to restrict not only the entry of racial immigrants but also the policies designed to remove immigrants of color from the United States. Importantly, we argue that such policies not only violate the 1965 Immigration Act and Congress' goal of promoting diversity in immigration law, but they also reveal the limits of the 1965 Immigration Act because it does not prohibit discrimination in immigration policies and enforcement.

Part III explores the many lawsuits challenging the Trump administration's immigration policies. First, Part III discusses *Trump v. Hawaii*[25] and the implications of the Supreme Court's decision to uphold the travel ban on Muslim noncitizens and other noncitizens of color. Second, it explores the current litigation concerning the federal administration's "zero tolerance" policies. As Part III explains, courts have played important roles in halting the administration from engaging in racially charged policies designed to exclude Latinx families from immigrating to the United States. In particular, under what is known as the *Flores* settlement, courts have upheld immigrant children's rights concerning unlawful detainment.[26] Immigrant rights litigators have sought to enforce the court-approved settlement. Third, Part III explains the extent to which the Trump Administration is fighting back against the court rulings and proposing to undo the *Flores* settlement.

25. 138 S. Ct. 2392 (2018).

26. *See* Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjunction in Family Detention*, 106 CALIF. L. REV. 785, 794 (2018).

The Article concludes that legal and political attention must be paid to these policies in order to avoid the country's return to its pre-1965 immigration-law policy of establishing a white nation.

I. THE 1965 IMMIGRATION ACT AND TRUMP'S IMMIGRATION POLICIES

By outlining the same immigration history, this Part helps place the Trump administration's immigration policies into proper historical perspective.

A. *Brief History of Racially Discriminatory Immigration Laws*

The iconic poem on Ellis Island—etched and mounted beneath the Statue of Liberty—declaring "give me your tired, your poor," reinforces the ideal of the United States as a country that welcomes immigrants.[27] Contrary to these powerful words, the history of immigration laws and policies in this country demonstrate a story of exclusion. In 1875, Congress passed one of its first immigration laws—the Page Act—that sought to limit Asian immigrants, specifically female "prostitutes" and "cooly laborers" from entering the United States.[28] A few years later, Congress passed the Chinese Exclusion Act, the country's first travel ban that explicitly discriminated on the basis of race.[29] The exclusion of Chinese was later expanded in 1917 to exclude most immigrants from Asia and the Pacific Islands, except for those from Japan.[30] That year, Congress also adopted literacy tests designed to exclude southern Europeans, Russians, and Asians.[31] In 1924, Congress passed a permanent national-origins quota, which aimed to limit the number of issued immigration visas to no more than two percent of the total population of nationals of each country based on the 1890 Census.[32] Thus, immigrants from Asia were severely restricted in 1890; the 1924 quotas system further restricted their entry of Asian immigrants into the United States. In addition, the 1924 Immigration Act prohibited the entry of immigrants that were not eligible for citizenship.[33]

27. Emma Lazarus, *The New Colossus*, NAT'L PARK SERV., https://www.nps.gov/stli/learn/historyculture/colossus.htm (last updated Jan. 31, 2018).

28. *See* Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

29. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (repealed 1943).

30. Immigration Act of 1917, ch. 29, 39 Stat. 876 (repealed 1952). The U.S. government and Japan informally agreed that Japan would restrict the ability of its citizens to leave the country for the United States. *See* Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 335–36 (2009).

31. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, 465–68, 481–83 (1981) (explaining the purpose of literacy tests passed during 1917).

32. Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952).

33. *See id.*

Between 1790 and 1952, only white noncitizens generally were eligible to naturalize.[34] Congress began lifting racial barriers to naturalization in 1943,[35] and then effectively eliminated such barriers when it passed the INA of 1952,[36] the current comprehensive immigration law. However, the INA of 1952 continued to impose national-origins quotas against Asians, such as limits of 105 Chinese nationals and 100 Filipinos and Indians.[37] It was not until Congress passed the 1965 Immigration Act, which amended the INA of 1952, that Congress abolished discrimination on the basis of race and national origin in immigration law.[38]

B. *The 1965 Immigration Act's Nondiscrimination Provision*

Congress passed the 1965 Immigration Act[39] on the heels of two important civil rights milestones—the Civil Rights Act of 1964[40] and the Voting Rights Act of 1965.[41] President Lyndon Johnson, in signing the 1965 Act, commented that the bill "is not a revolutionary bill. It does not affect the lives of millions. It will not reshape the structure of our daily lives."[42] Yet, the 1965 Immigration Act did precipitate a revolution by undoing, as discussed in Part II.A, nearly a century old immigration legal policy of admissions preferences for white Europeans. Specifically, the 1965 Immigration Act explicitly provided that, "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[43] Thus, the 1965 Immigration Act not only repealed the national-origins

34. *See generally* IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th ann. ed. 2006) (analyzing whiteness requirement for citizenship). After the Civil War, Congress later extended eligibility for naturalization to persons of African ancestry. *See* Naturalization Act of 1870, ch. 254, 16 Stat. 254, 256 (providing that aliens of African nativity and persons of African descent are eligible for naturalization).

35. *See* Act of July 2, 1946, Pub. L. No. 79-483, 60 Stat. 416, 416 (allowing Filipinos and Indians the ability to naturalize); Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600, 601 (1943) (allowing Chinese nationals to become eligible to naturalize).

36. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 239.

37. *See* Chin, *supra* note 16, at 286–87 (discussing the ongoing exclusion of Asians after the passage of the INA of 1952).

38. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911.

39. *Id.*

40. Pub. L. No. 88-352, 78 Stat. 241.

41. Pub. L. No. 89-110, 79 Stat. 437.

42. *See* Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359, 378 (2013) (quoting President Johnson's statement upon signing the 1965 Immigration Act).

43. 8 U.S.C. § 1152(a)(1)(A) (2012).

discrimination against Asian immigrants but also broadened the scope of the nondiscrimination norm by ensuring that other groups, including women, would not be discriminated against in their quest to immigrate to the United States.

Crucially, the 1965 Immigration Act established that family ties would provide the primary basis through which noncitizens may immigrate to the United States. Specifically, the 1965 Immigration Act provided that 170,000 visas would be available per year and that seventy-five percent of them would be allocated for certain family members.[44] It further established family-based visas for either "immediate relatives" (spouses, children and parents of U.S. citizens), for whom visas would be immediately available, or "family-sponsored" immigrants (unmarried sons and daughters of U.S. citizens, spouses and children of lawful permanent residents, married sons and daughters and siblings of U.S. citizens), for whom visas would be subject to a preference system.[45] As discussed below, the combination of both the family-based immigration system and nondiscrimination principle facilitated a substantial increase of Asian and Latin American immigrants.

The 1965 Immigration Act, however, was not without faults. The civil rights promises of the 1965 Immigration Act were limited in it least two significant ways. First, the legislation led to a restriction of entry for at least one group of immigrants—Mexicans.[46] Prior to the 1965 Immigration Act, through an agreement between Mexico and the United States that became known as the "Bracero Program," Mexican nationals were able to enter the United States to work as agricultural guest workers.[47] As scholars have noted, most of these Braceros were paid very little, experienced racial discrimination, and faced abuse and exploitation by their employers.[48] Yet, through the Bracero Program, more than 4.5 million Mexicans were able to legally work in the United States.[49] However, this opportunity ended in 1964 when the United States canceled the Bracero Program.[50] In particular, the country ended the primary vehicle through which

44. *See* Villazor, *supra* note 19, at 205 (discussing the visa program established by the 1965 Immigration Act).

45. *See id.* at 205–06.

46. *See* Johnson, *supra* note 20, at 120 (stating that the 1965 Immigration Act "unmistakably intended to cap immigration from Latin America to the United States," including immigration from Mexico).

47. *See* Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841, 878–79 (2008) (explaining that in 1942, the United States established the Bracero Program, which initially allowed Mexicans to enter as guest workers to work in the agricultural industry but was soon expanded to the railroad industry).

48. *See* Ronald L. Mize, Jr., *Reparations for Mexican Braceros? Lessons Learned from Japanese and African American Attempts at Redress*, 52 CLEV. ST. L. REV. 273, 287 (2005) (listing the abuses of Bracero workers).

49. *See* Román, *supra* note 46, at 879.

50. *See* Mize, *supra* note 47, at 273.

Mexican workers were able to find lawful employment in the United States.[51] Demand for guest workers continued, and thus workers from Mexico continued to enter the country, only this time they began to do so without authorization.[52]

A year after the dismantling of the Bracero Program, Congress enacted the 1965 Immigration Act and imposed an annual quota of 120,000 people from the Western Hemisphere, the half of the world that includes Mexico.[53] Thus, no longer could Mexican immigrants enter as they were able to previously. Many ended up overstaying in the United States, which contributed to the population of undocumented Mexican immigrants in the United States.

Second, although the 1965 Immigration Act prohibited discrimination on the basis of national origin with respect to entry, it did not prohibit similar forms of discrimination with respect to deportation. Long before 1965, the government's deportation efforts discriminated on the basis of race and national origin. For example, the Chinese Exclusion Act not only banned Chinese from entering the United States but also provided that those immigrants who were in the country could be deported if they did not register within a year of entrance.[54] No doubt, this provision was included to further limit the number of Chinese immigrants by facilitating the expulsion of those Chinese persons already in the country. Furthermore, the fact that federal, state, and local governments deported between 400,000 and 2,000,000 Mexican immigrants and their children—children who were U.S. citizens—between 1929 and 1936, demonstrates the country's deportation enforcement on the basis of race and national origin."[55]

Despite the shortcomings of the 1965 Immigration Act, it nevertheless diversified the immigration stream. In 1965, the foreign-born population was 9.6 million.[56] By 2015, as reported by the Pew Research Center, this number rose to 45 million.[57] While the immigrant population constituted 5 percent of the U.S. population in

51. *See* Johnson, *supra* note 20, at 139.

52. *See id.* at 139–40.

53. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 921.

54. *See* Fong Yue Ting v. United States, 149 U.S. 698, 724–26 (1893) (examining the constitutionality of a statute that subjected to deportation Chinese nationals who failed to register with the United States within one year of entering the country).

55. *See* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1, 4–5 (2005).

56. *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, *supra* note 22.

57. *Id.*

1965,[58] by 2015, this population increased to 14 percent.[59] Significantly, about 60 percent of the current immigrant population comes from countries populated by people of color, including Mexico, India, the Philippines, and China.[60] The diversity in the immigrant stream in turn has diversified the U.S. population on racial and ethnic lines. In 1965, 84 percent of the U.S. population was white, and Latinx persons accounted for 4 percent and Asians less than 1 percent of the population.[61] By 2015, the white population decreased to 62 percent, and Latinx and Asian populations increased to 18 percent and 6 percent, respectively.[62] Demographers predict that by 2065, white Americans will account for about 46 percent of the population while Latinx and Asians will account for 24 percent and 14 percent, respectively.[63] Notably, by then, 78 million members of the population will be foreign born.[64]

II. TRUMP'S WAR ON DIVERSITY

More than fifty years after the passage of the 1965 Immigration Act, policies adopted by the Trump administration threaten to rollback the gains brought by the law and the effort to eliminate discrimination from the immigration laws. Indeed, in running for President, Donald Trump made restrictive immigration policies and aggressive immigration enforcement goals centerpieces of his successful, campaign.[65] Committed to keep his campaign promises, President Trump has pursued a full assortment of tough enforcement measures, which he ultimately labeled a "zero tolerance" policy.[66]

Part II examines three of Trump administration's policies that seek to limit immigrants of color from coming to and/or remaining in the United States: the Muslim travel bans; a proposal to change the

58. *Id.*

59. *Id.*

60. *See* Gustavo López, Kristen Bialik & Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RES. CTR. (Nov. 30, 2018), http://www.pewresearch.org/fact-tank/2018/11/30/key-findings-about-u-s-immigrants/.

61. *See Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, *supra* note 22.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See infra* text accompanying notes 194–96.

66. *See infra* text accompanying notes 197–208. For summaries of President Trump's initial immigration initiatives and executive orders, see Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. FORUM 243, 254–67 (2017); Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 254 (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).

definition of "public charge"[67]; and a proposed law to eliminate "chain migration."[68] As we detail below, these policies together run afoul of Congress's goal, revealed by its adoption of the 1965 Immigration Act, of ensuring non-discrimination and diversity in U.S. immigration law.

A. *Banning Muslims*

The emergence of the "Muslim" or "travel ban" reveals the animus for people of color characteristic of the Trump administration's immigration policies.[69] President Trump issued three versions of a "Muslim" or "travel" ban directed primarily at noncitizens from several predominantly Muslim nations.[70] In response to numerous legal challenges, the ban was narrowed and limited in its scope.[71] In addition, the nation saw a public outcry that the ban was anti-Muslim.[72] As we shall see, successful legal challenges to the first two versions required significant refinements to the travel ban before the Supreme Court upheld the third version.[73]

Within days of his inauguration, President Trump announced the first travel ban in an executive order titled "Protecting the Nation from Foreign Terrorist Entry Into the United States," which temporarily suspended (1) all refugee admissions and (2) admissions exclusively from seven predominantly Muslim nations (Iran, Iraq,

67. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

68. Reforming American Immigration for Strong Employment Act, S. 354, 115th Cong. (2017).

69. For analysis of the travel ban, see Johnson, *supra* note 65, at 630-32.

70. *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*, 883 F.3d 233, 250 (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. 2710, 2710 (2018); *see also* Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611 (2019) (reviewing the three travel bans and questioning the Supreme Court's decision to uphold the third one). *See generally* KHALED A. BEYDOUN, AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR (2018) (analyzing the history of "Islamophobia" in the United States).

71. *See* Family, *supra* note 69, at 611–24 (summarizing the various challenges and explaining how the third ban narrowed in scope).

72. *See, e.g.*, Ruth Sherlock & Harriet Alexander, *US Court Questions Whether President Trump's Travel Ban is Anti-Muslim*, TELEGRAPH (Feb. 8, 2017, 8:53 AM),
https://www.telegraph.co.uk/news/2017/02/07/donald-trump-says-haters-going-crazy-support-putin-live/.

73. See *infra* Part IV.A.

Libya, Somalia, Sudan, Syria, and Yemen).[74] The U.S. Court of Appeals for the Ninth Circuit enjoined implementation of core provisions of the first version of the travel ban as unconstitutional.[75]

In response, President Trump replaced the original ban with a narrower executive order.[76] The second travel ban also was challenged; courts enjoined the revised travel ban on constitutional and statutory grounds.[77] A number of President Trump's anti-Muslim statements, including those on Twitter, featured prominently in the judicial scrutiny of the travel ban.[78]

In September 2017, President Trump issued a "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,"[79] which barred entry into the United States of nationals from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. The final travel ban added two predominantly non-Muslim countries (North Korea and Venezuela) and removed two (Iraq and Sudan) from the list of nations subject to the first two versions.[80] The executive order provided that the countries subject to the ban included those that the Secretary of Homeland Security, Attorney General, and Secretary of State determined had inadequate identity-management and information-sharing capabilities.[81] The Supreme Court, in a 5-4 decision, upheld the ban.[82]

74. *See* Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). *See generally* Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669 (2017) (providing an overview of the administrative and executive treatment of persons traveling from these countries prior to President Trump assuming office).

75. *See* Washington v. Trump, 847 F.3d 1151, 1156–57 (9th Cir. c*ert. denied*), 138 S. ct. 448 (2017).

76. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

77. *See* Hawaii v. Trump, 859 F.3d 741, 755 (9th Cir. 2017) (deciding on statutory grounds), *vacated and remanded* 138 S. Ct. 377 (2017); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 604 (4th Cir. 2017) (deciding on constitutional grounds), *vacated and remanded*, 138. S. Ct. 353 (2017).

78. *See* Adam Liptak & Peter Baker, *Trump Promotes Original "Travel Ban," Eroding His Legal Case*, N.Y. TIMES (June. 5, 2017), https://www.nytimes.com/2017/06/05/us/politics/trump-travel-ban.html; Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide – Why the Very Text of the Travel Ban Shows It's Unconstitutional*, JUST SECURITY (June. 9, 2017), https://www.justsecurity.org/41953/facially-legitimate-bona-fide-why-unconstitutional-travel-ban/.

79. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

80. *See id.*

81. *See id.*

82. Trump v. Hawaii, 138 S. Ct. 2392 (2018); *see infra* Part IV.A. (analyzing Court's travel ban decision).

Focused on Muslim noncitizens, the travel ban represents just one of many efforts by the Trump administration to restrict noncitizens of color from coming to the United States.

B. *Broadening the Definition of Public Charge to Increase Denial of Admission of Immigrants*

In addition to preventing Muslims from entering the United States, the Trump administration has sought to limit who may enter the country by expanding the definition of immigration law's "likely to become a public charge" provision.[83] Historically grounded on the policy view that immigrants who cannot support themselves may be excluded,[84] the concept of "likely to become a public charge" today facilitates both the denial of entry and deportation of noncitizens from the United States. The Trump administration proposes to expand the meaning of "likely to become a public charge," a change that would increase the number of immigrants of color who would be deemed inadmissible to or deportable from the United States.

A brief historical review of the "likely to become a public charge" provision reveals its roots in excluding not only poor people but also immigrants of color. Despite the poetic invitation—-"Give me your tired, your poor"—famously associated with the Statue of Liberty, the United States has historically denied entry to poor noncitizens."[85] The first exclusionary immigration statute that Congress passed in 1882 explicitly excluded immigrants who were "unable to take care of himself or herself without becoming a public charge."[86] Congress did not define what it meant to be a "public charge," however, but afforded immigration inspectors discretion to determine whether a noncitizen should be excluded on public-charge grounds.[87] As a result of such discretionary power, Asian immigrants, particularly women, experienced discriminatory exclusion.[88] In 1891, Congress broadened its exclusion by providing for the deportation of "any alien who becomes a public charge within one year after his arrival in the

83. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248) [hereinafter Public Charge Regulation].

84. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1846 (1993).

85. *See* Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214. Indeed, even before the federal government began excluding people on economic grounds, states historically did so. *See* Neuman, *supra* note 83, at 1846.

86. *See* Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

87. *See id.*

88. *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 87 (1903) (denying admission to a Japanese woman because she was deemed likely to become a public charge); Ekiu v. United States, 142 U.S. 651, 652 (1892) (denying admission to a Japanese woman because she was deemed likely to become a public charge).

United States from causes existing prior to his landing."[89] In 1917 Congress amended the statute to provide that noncitizens would be deportable if they became public charges at any time within five years of their arrival.[90] When Congress passed the INA of 1952, it retained the public-charge limitation relevant to exclusion and deportation.[91]

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which made it more likely that certain noncitizens would be excluded on economic grounds.[92] The law explicitly provided that consular officers may deny visas to immigrants based on the likelihood that they would become public charges.[93] Immigrants had the burden of overcoming the inadmissibility provision, although in some instances consular officers reportedly denied visas to noncitizens who "looked poor."[94] IIRIRA also required sponsors of immigrants to sign an "affidavit of support" that made them financially responsible for their sponsored immigrant.[95]

Today, the INA continues to include "likely to become a public charge" as both a basis for exclusion and deportation. Specifically, Section 212(a)(4) of the INA makes inadmissible a noncitizen who is "likely at any time to become a public charge."[96] The provision applies to noncitizens seeking to enter the United States and those already within the country who are applying to adjust their status to become lawful permanent residents.[97] As an inadmissibility ground, the public-charge provision also applies to noncitizens seeking to enter the United States as nonimmigrants.[98] Section 212(a)(4) of the INA does not define "public charge" but provides that while considering who is likely to become a public charge, immigration officers must, "at a minimum consider . . . the alien's age, health, family status, assets, resources, and financial status, and education and skills."[99] Section 237(a)(5) of the INA also renders a lawfully admitted noncitizen deportable on "public charge" grounds.[100]

89. *See* Immigration Act of 1891, ch. 551, § 11, 26 Stat. 1084, 1086.

90. *See* Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

91. *See* Immigration and Nationality Act of 1952, ch. 2, § 212(a)(15), Pub. L. No. 82-414, 66 Stat. 163, 183.

92. Division C of Pub. L. No. 104-208, 110 Stat. 3009 (IIRIRA).

93. *See id.* § 531.

94. Philip Shenon, *Judge Denounces U.S. Visa Policies Based on Race or Looks*, N.Y. TIMES, (Jan. 23, 1998), https://www.nytimes.com/1998/01/23/world/judge-denounces-us-visa-policies-based-on-race-or-looks.html.

95. IIRIRA, *supra* note 91, § 531(a)(4)(C)(ii).

96. *See* 8 U.S.C. § 1182(a)(4)(A) (2012).

97. *See id.*

98. *See id.*

99. *See id.* § 1182(a)(4)(B).

100. *See id.* § 1227(a)(5) (2012).

Because Congress did not define "public charge," implementation of the public-charge provision is left up to two federal agencies—the Department of Homeland Security (DHS), which enforces the public-charge provision primarily in the context of adjustment of status and deportation,[101] and the Department of State (DOS), which implements the provision mainly during the admissions process for immigrants and nonimmigrants.[102]

Currently, the DHS and DOS employ agency guidelines that define "public charge" as a person who is likely to become "primarily dependent on the government for subsistence, as demonstrated by either [1] the receipt of public cash assistance for income maintenance or [2] institutionalization for long-term care at government expense."[103] Public cash assistance includes Supplemental Security Income ("SSI"), Temporary Assistance to Needy Families (TANF), and other state and local cash-assistance programs.[104] Until recently, the DOS utilized the same guidance. However, in January 2018, the DOS expanded the "public charge" factors to include reliance on *any* public assistance by the noncitizen or someone in the noncitizen's household.[105] To overcome the inadmissibility ground of public charge, noncitizens must submit an affidavit in which the immigrant's sponsor agrees to financially support the noncitizen annually up to not less than 125% of the poverty level and to reimburse the government for "means-tested" public benefits upon which the noncitizen relies.[106] Moreover, not only would the Trump administration's proposed public charge rule impact noncitizens of color directly but it would also affect their family members. Although the proposed rule applies to a noncitizen's reliance on cash and noncash benefits, as commentators have pointed out, it would likely have a chilling effect on family members of noncitizens who are entitled to certain benefits.[107]

Precise empirical data that documents the relationship between inadmissibility findings and race or nationality are unavailable. Currently, the federal government releases every year its

101. *See Public Charge*, IMMIGRANT LEGAL RES. CTR., https://www.ilrc.org/public-charge (last visited Mar. 15, 2019).

102. *See* Charles Wheeler, *State Department Redefines Public Charge Standard*, CATH. LEGAL IMMIGR. NETWORK, INC., https://cliniclegal.org/resources/state-department-redefines-public-charge-standard (last visited Mar. 15, 2019).

103. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

104. *See* Steve Wamhoff & Michael Wiseman, *The TANF/SSI Connection*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/ssb/v66n4/v66n4p21.html, (last visited Feb. 9, 2019).

105. *See* U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 302.8-2(B)(2)(f)(1)(b)(i) (2018).

106. *See* 8 U.S.C. § 1182(a)(4)(C) (2012).

107. *See id.* at 2.

inadmissibility findings for immigrants and nonimmigrants. For example, during the 2017 fiscal year, the DOS deemed initially inadmissible on public-charge grounds more than three million people.[108] Of that group, a little over two million overcame the public-charge finding, leaving about one million noncitizens who were excluded from the country.[109] However, the DOS did not release data providing the countries of origin of those noncitizens initially and ultimately found inadmissible.[110] Yet, as one of us has pointed out in previous work, the public-charge provisions have a disproportionate impact on noncitizens of color, particularly those from developing nations.[111]

Indeed, data released by the federal government every year regarding inadmissibility findings demonstrate that inadmissibility grounds in general disproportionately impact immigrants of color. Between 2014 and 2016, Mexico, Cuba, the Philippines, Haiti, Guatemala, and El Salvador have the highest number of noncitizens deemed inadmissible from the United States.[112]

~~Not only would the Trump administration's proposed public charge rule impact noncitizens of color directly but it would also affect their family members. Although the proposed rule applies to a noncitizen's reliance on cash and noncash benefits, as commentators have pointed out, it would likely have a chilling effect on family members of noncitizens who are entitled to certain benefits.~~[113]

The Trump administration's recent proposal to expand the definition of "public charge" will exacerbate the racial and national-origins impact of the current law.[114] The proposed rule continues to

108. *See* U.S. DEP'T OF STATE, TABLE XX, IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES (BY GROUNDS FOR REFUSAL UNDER THE IMMIGRATION AND NATIONALITY ACT), FISCAL YEAR 2017 (2017), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf.

109. *See id.*

110. *See id.*

111. *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1512–19 (1995); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1134–35 (1998).

112. *See Aliens Determined Inadmissible by Region and Country of Nationality: Fiscal Years 2014 to 2016*, U.S. DEP'T OF HOMELAND SEC. (2016), https://www.dhs.gov/immigration-statistics/yearbook/2016/table37.

113. *See id.* at 2.

114. Public Charge Regulation, *supra* note 82. The notice and comment period expired on December 10, 2018. *Id.* The proposed regulation received over 150,000 comments. *See* Dara Lind, *Trump's Controversial "Public Charge" Proposal that Could Change the Face of Legal Immigration, Explained*, VOX, Dec. 2019, https://www.vox.com/2018/9/24/17892350/public-charge-immigration-food-stamps-medicaid-trump-comments.

consider a noncitizen's reliance on cash benefits for income maintenance.[115] However, the proposed rule also seeks to include a noncitizen's reliance on noncash benefits such as Medicaid, Medicare Part D, and public housing.[116] The proposed rule also expands the application of the public-charge inadmissibility grounds to nonimmigrants seeking to change to another nonimmigrant visa.[117]

The proposed rule, if adopted, would increase the number of people who would be deemed inadmissible on public-charge grounds. The nonpartisan Migration Policy Institute reported that the proposed rule could increase the number of people deemed inadmissible by up to forty-seven percent.[118] And, given the relationship between race, nationality, and class, this expanded rule would be certain to affect primarily immigrants of color.

C. *Proposal to End "Chain Migration"*

President Trump's efforts to reduce the number of immigrants of color is not limited to undocumented immigration.[119] Another proposal that would limit the diversity of the immigrant stream focuses on what President Trump has disparaged as "chain migration."[120] "Chain migration" is the pejorative term that the President has used to describe the current immigration law policy of promoting family reunification that, as discussed in Part II, has lead to the current racial demographics of immigration to the United States, which includes many people of color from the developing world.[121]

Mexico, China, and India are currently the three nations that send the most immigrants to the United States.[122] A majority of visas under the U.S. immigration laws—laws that Congress generally

115. *See* Public Charge Regulation, *supra* note 82.

116. *See id.*

117. *See id.*

118. *See* JEANNE BATALOVA, MICHAEL FIX & MARK GREENBERG, MIGRATION POLICY INST., CHILLING EFFECTS: THE EXPECTED PUBLIC CHARGE RULE AND ITS IMPACT ON LEGAL IMMIGRANT FAMILIES' PUBLIC BENEFITS USE 1 (2018).

119. *See* Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 382-85 (2018).

120. *See supra* text accompanying notes 14–15.

121. *See infra* text accompanying note 126.

122. *See* U.S. DEP'T OF HOMELAND SEC. , LEGAL IMMIGRATION AND ADJUSTMENT OF STATUS REPORT FISCAL YEAR 2017, QUARTER 2 (2017) [hereinafter HOMELAND SECURITY REPORT], https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#LPR ("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 also the top six countries for the first and second quarters of Fiscal Year 2016.").

designed to promote the reunification of families[123]—are allocated to applicants who have family members who are U.S. citizens or lawful permanent residents.[124]

In 2017, one immigration proposal, which would greatly reduce legal immigration, garnered the support of President Trump.[125] The Reforming American Immigration for Strong Employment (RAISE) Act[126] 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 five hundred thousand visas a year, the RAISE Act would restrict family immigrant visas. The Act's reduction of family immigration visas would likely reduce 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.[127]

Besides drastically cutting family-based immigration, the RAISE Act would modify the current immigrant visa scheme by adding a "points" system ostensibly based on "merit."[128] Under the system, visa applicants would earn points for having high-paying job offers, advanced degrees, and the ability to make investments of more than one million dollars in the United States.[129] Persons in their twenties with English language proficiency would receive more points than other visa applicants.[130] An applicant with sufficient points would be eligible for a merit-based immigrant visa.[131]

123. *See* STEPHEN H. LEGOMSKY & CRISTÍNA 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* text accompanying notes 132–35.

124. *See* HOMELAND SECURITY REPORT, *supra* note 120 ("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.").

125. *See infra* text accompanying notes 129–31.

126. RAISE Act, S. 1720, 115th Cong. (2017).

127. *See* José Calderón, Opinion, *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/.

128. *See* RAISE Act, *supra* note 124, § 5.

129. *See id.*

130. *See id.*

131. *See id.*

The RAISE Act in all likelihood would transform the racial demographics of the legal immigration stream.[132] The reduction in family visas would restrict the flow of immigrants from developing nations populated predominately by nonwhites currently sending large numbers of immigrants to the United States. Moreover, the "merit" system, with a focus on educational attainment and English language ability, would redirect migration flows to the United States away from the developing world populated by people of color.[133]

The RAISE Act[134], which has been the subject of considerable criticism,[135] has stalled in Congress. Nonetheless, given President Trump's stated preference for immigrants from Europe,[136] he can be expected to support future reform proposals that redirect immigration visas to Europeans and away from noncitizens in the developing world.

As the President's support of the RAISE Act reveals, the Trump administration is determined to reshape legal immigration as well as end undocumented immigration. Besides President Trump's support, proposed tightening of the "public charge" exclusion would also restrict lawful immigration.[137] Reductions in refugee admissions[138]

132. *See supra* text accompanying notes 129–31; *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 (reviewing President Trump's immigration reform proposal in response to the congressional budget impasse and how it would reduce the immigration of persons of color).

133. *See* Johnson, *supra* note 117, at 382-85.

134. S. 354, 115th Cong. (2017); *see* Dorothy Hanigan Basmaji & Alyssa Yeip-Lewerenz, *Building Walls in More Ways Than One: The Face of Business Immigration Under the Trump Administration*, 97 MICH. B.J. 24, 26–27 (2018).

135. *See, e.g.*, 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 an economic criticism of the RAISE Act, see Howard F. Chang, *The Economics of Immigration Reform*, 52 UC DAVIS L. REV. 111, 111 (2018).

136. *See* Nurith Aizenman, *Trump Wishes We Had More Immigrants from Norway. Turns Out We Once Did*, NPR (Jan. 12, 2018, 6:32 PM), https://www.npr.org/sections/goatsandsoda/2018/01/12/577673191/trump-wishes-we-had-more-immigrants-from-norway-turns-out-we-once-did.

137. *See supra* Part III.B.

138. *See* Priscilla Alvarez, *The U.S. Sends an Unwelcoming Signal to Refugees*, ATLANTIC (Sept. 18, 2018), https://www.theatlantic.com/politics/archive/2018/09/refugee-admissions-trump/570535/.

and enhanced vetting of visa applicants[139] by the Trump administration also serve to reduce legal immigration, especially from the developing world. President Trump also called for elimination of the diversity visa program.[140] All of these measures, which face resistance, would have adverse impacts on immigrants of color.

III. CHALLENGES TO TRUMP'S WAR ON IMMIGRATION DIVERSITY

As argued in Part III, the various immigration policies adopted by the Trump administration have disproportionately impacted noncitizens of color.[141] Part IV demonstrates that such policies have not gone unchallenged. In fact, the administration's immigration measures have been met with forceful political resistance as well as formidable legal challenges. Indeed, the Trump administration might be credited with energizing a new wave of immigrant rights activism—activism built on a movement that has been active at various times for years.[142]

As we have seen, organized resistance to discriminatory immigration policies have a long history. Nearly a century after litigation challenging the ban on Chinese laborers, the "sanctuary movement" of the 1980s sought to provide safe haven to Central Americans fleeing violent civil wars in Central America, to which the U.S. government responded with tough measures, including mass immigrant detention and criminal prosecutions of some individuals who assisted asylum-seekers.[143] In 2006, a harsh immigration reform bill passed by the House of Representatives provoked immigrants and their supporters to take to the streets in cities across the United

139. *See e.g.*, Carol Morello, *U.S. Embassies Start New Vetting of Visa Applicants*, WASH. POST (June 1, 2017), https://www.washingtonpost.com/world/national-security/us-embassies-start-new-vetting-of-visa-applicants/2017/06/01/6b08c55a-46ec-11e7-bcde-624ad94170ab_story.html?noredirect=on&utm_term=.05321ef8aedc; Stephen Smalley & Melissa Manna, *Foreign Students Face Hurdles Under New USCIS Policies*, LAW360 (June 26, 2018, 11:23 AM), https://www.law360.com/articles/1055529/foreign-students-face-hurdles-under-new-uscis-policies.

140. *See Diversity Visa Are a Trump Target, and That Could Hurt Employers*, BLOOMBERG, Nov. 14, 2018, https://news.bloomberglaw.com/daily-labor-report/diversity-visas-are-a-trump-target-and-that-could-hurt-employers.

141. *See* Dara Lind, *The Trump Administration is Waging War on Diversity*, VOX (Aug. 4, 2017, 11:20 AM), https://www.vox.com/policy-and-politics/2017/8/4/16091406/raise-act-diversity-trump.

142. *See* Matthew R. Segal, *America's Conscience: The Rise of Civil Society Groups Under President Trump*, 65 UCLA L. REV. 1574, 1576, 1582–83 (2018).

143. *See generally* SUSAN BIBLER COUTIN, THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM AND THE U.S. SANCTUARY MOVEMENT (1993) (summarizing the history of the 1980's "sanctuary movement"); ANN CRITTENDEN, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND LAW IN COLLISION (1988) (same).

States.[144] The prolonged push for immigration reform contributed to the emergence and maintenance of a potent grassroots political movement, which includes many undocumented college students, advocating for the extension of legal protections to immigrants.[145] This spirited activism proved to be one of the most dynamic —and surprising—mass political movements of the early twenty-first century.

Political resistance by the immigrant rights movement, combined with a flurry of lawsuits, significantly slowed the Trump administration's enforcement measures.[146] Besides protests and legal actions, some immigrant rights advocates have called for the outright abolition of Immigration and Customs Enforcement (ICE), the agency with primary responsibility for enforcing the U.S. immigration laws.[147] An organization known as "Abolish ICE" goes

144. *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, 99–100 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780, 781–82 (2007).

145. *See* 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 immigration laws and their enforcement). *See generally* WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE (2013); EILEEN TRUAX, DREAMERS: AN IMMIGRANT GENERATION'S FIGHT FOR THEIR AMERICAN DREAM (2015); LAURA WIDES-MUÑOZ, THE MAKING OF A DREAM: HOW A GROUP OF YOUNG UNDOCUMENTED IMMIGRANTS HELPED CHANGE WHAT IT MEANS TO BE AMERICAN (2018).

146. *See* Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1468–90 (2017); Enid Trucios-Haynes & Marianna Michael, *Mobilizing a Community: The Effect of President Trump's Executive Orders on the Countries Interior,* 22 LEWIS & CLARK L. REV. 577 (2018). *See generally* LEILA KAWAR, CONTESTING IMMIGRATION POLICY IN COURT: LEGAL ACTIVISM AND ITS RADIATING EFFECTS IN THE UNITED STATES AND FRANCE (2015) (analyzing the role of legal challenges to immigration measures as part of immigration activism). For an analysis of the role of lawyers seeking to secure social change, see Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 205 (1999).

147. *See* Matt Ford, *OK, Abolish ICE. What Then?*, NEW REP. (July 18, 2018), https://newrepublic.com/article/149945/ok-abolish-ice-then; Elaine Godfrey, *What "Abolish ICE" Actually Means*, ATLANTIC (July 11, 2018), https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/; *see also* Justin Jouvenal, *County by County, ICE Faces a Growing Backlash*, WASH. POST (Oct. 1, 2018),

so far as to seek "to abolish ICE and create an immigration system divorced from white supremacy, and that respects the dignity of all human beings."[148]

In short, the Trump administration's efforts to reduce racial diversity in immigration has met with fierce resistance. In important respects, the modern immigration rights movement has emerged as a powerful movement for the civil rights of immigrants.

A. *The Travel Ban and* Trump v. Hawaii

In *Trump v. Hawaii,* a 5-4 Supreme Court upheld the third version of the travel ban.[149] The Court found that the President's order was within the statutory authority delegated by Congress to the president and applied deferential rational basis review in upholding the constitutionality of the ban.[150] This was one of many cases in which the courts scrutinized the Trump administration's immigration policies.

Chief Justice Roberts, joined by Justices Kennedy, Thomas, Alito, and Gorsuch, wrote for the majority of the Court.[151] At the outset, the Court neutrally characterized the executive order as "impos[ing] entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks."[152] Addressing the U.S. government's threshold claim that the doctrine of consular nonreviewability barred judicial review, the Court, consistent with its recent decisions ensuring judicial review of immigration decisions,[153] reviewed the

https://www.washingtonpost.com/local/public-safety/county-by-county-ice-faces-a-growing-backlash/2018/10/01/81052754-a64f-11e8-97ce-cc9042272f07_story.html?utm_term=.8e99e4b09b4b (reporting on resistance to ICE immigration enforcement efforts).

148. Debra J. Saunders, Opinion, *Democrats Embrace of 'Abolish ICE' Seen as Risky Move to the Left*, LAS VEGAS REV.-J. (July 2, 2018, 5:44 PM), https://www.reviewjournal.com/opinion/opinion-columns/debra-saunders/democrats-embrace-of-abolish-ice-seen-as-risky-move-to-the-left/ (quoting statement adopted by Abolish ICE).

149. Trump v. Hawaii, 138 S. Ct. 2392, 2402–04, 2423 (2018); *see supra* Part III.A.

150. *See Trump v. Hawaii*, 138 S. Ct. at 2423. Although mentioning cases that might have been invoked to immunize the president's executive order from judicial review, the Court did not employ the "plenary power" doctrine to bar review of the travel ban but engaged in rational basis review. *See id.* at 2418–19 (citing, inter alia, Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 81 (1976); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)). For an analysis of the possible benefits of rational basis review, see Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 112 (2018).

151. *Trump v. Hawaii*, 138 S. Ct. at 2402.

152. *Id.* at 2403 (citation omitted).

153. *See, e.g.*, INS v. St. Cyr., 533 U.S. 289, 299–300 (2001) (finding that Congress had not repealed habeas corpus jurisdiction over removal order).

order "assum[ing] without deciding that plaintiffs' statutory claims are reviewable."[154]

The Court next considered whether the order was authorized by the immigration statute, specifically 8 U.S.C. § 1182(f), which allows the president to "suspend the entry of all aliens or any class of aliens" when he finds that their entry "would be detrimental to the interests of the United States."[155] The Court found that the plain language of the statute "grants the President broad discretion to suspend the entry of aliens into the United States" and "exudes deference to the President in every clause."[156] Concluding that the executive order falls within the statutory delegation, the Court refused to engage in "a searching inquiry into the persuasiveness of the President's justifications" for the ban.[157]

The Court further rejected the claim that the travel ban violated 8 U.S.C § 1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[158] Noting that previous presidents had barred entry into the United States of citizens of Iran and Cuba on foreign-policy grounds,[159] the Court concluded that the statutory restriction was limited to visa issuance and not the entry of noncitizens into the United States.[160]

Finally, finding that the constitutional challenge was justiciable, the Court rejected the claim that the travel ban was unconstitutional.[161] Although recognizing that President Trump

154. *Trump v. Hawaii*, 138 S. Ct. at 2407. The doctrine of consular nonreviewability historically has barred judicial review of consular officer denials of visa applications. *See, e.g.*, Saavedra Bruno v. Albright, 197 F.3d 1153, 1159–63 (D.C. Cir. 1999). Commentators have long criticized the doctrine and recommended possible reforms. *See, e.g.*, Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 114–17 (2010); James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 6–7 (1991). Courts, including the Supreme Court, had moved toward restricting the doctrine of consular nonreviewability. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972); Bustamante v. Mukasey, 531 F.3d 1059 1062–63 (9th Cir. 2008).

155. *See Trump v. Hawaii*, 138 S. Ct. at 2407–15.

156. *Id.* at 2408.

157. *Id.* at 2409.

158. *See id.* at 2413–15. In the hey-day of the civil rights movement, Congress passed the Immigration and Nationality Act of 1965, Pub L. No. 89-236, 79 Stat. 911 (1965), which added 8 U.S.C. § 1152 (a)(1)(A) and removed various forms of discrimination from the immigration laws. *See generally* CHIN & VILLAZOR, *supra* note 18 (compiling essays analyzing the 1965 Immigration Act on its fiftieth anniversary).

159. *See Trump v. Hawaii*, 138 S. Ct. at 2415.

160. *See id.* at 2414–15.

161. *See id.* at 2416, 2423.

made public statements supporting the claim that the order targeted Muslims,[162] the Court declined to inquire into whether anti-Muslim bias motivated the order, the focal point of the two dissents.[163]

Importantly, although the Court recognized presidential power over immigration matters, it found room—albeit limited in scope—for judicial review: "[A]lthough foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen."[164] For that proposition, the Court relied on *Kleindienst v. Mandel*[165] in which the Court limited review of the denial of admission to the United States of a Marxist intellectual "to whether the Executive gave a '*facially legitimate and bona fide'* reason for its action."[166] In engaging in "rational basis review," the Court observed that it "may consider . . . extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[167]

Applying the deferential rational basis standard, the Court upheld the third version of the travel ban. At the same time, in response to Justice Sotomayor's claim that the majority's analysis was eerily reminiscent of *Korematsu v. United States,*[168] the widely criticized decision upholding the U.S. government's internment of persons of Japanese ancestry during World War II,[169] the Court overruled *Korematsu*.[170]

Cautioning that government officials are not free to disregard the Constitution even if their decisions are not subject to judicial review, Justice Kennedy concurred.[171] Justice Thomas also concurred, discussing the deficiencies in the challenges to the travel ban and arguing in detail that district courts lacked the authority to issue nationwide injunctions (as the district court did in this case).[172]

162. *See id.* at 2417–18.

163. *See infra* text accompanying notes 184–92.

164. *Trump v. Hawaii*, 138 S. Ct. at 2419.

165. 408 U.S. 753 (1972).

166. *Trump v. Hawaii*, 138 S. Ct. at 2419 (quoting Kleindienst v. Mandel, 408 U.S. 753, 769) (emphasis added).

167. *Id.* at 2420 (footnote omitted).

168. 323 U.S. 214 (1944); *Trump v. Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

169. *See generally* ERIC K. YAMAMOTO, IN THE SHADOW OF *KOREMATSU*: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY (2018) (analyzing the legacy of the *Korematsu* decision for modern civil liberties).

170. *Trump v. Hawaii*, 138 S. Ct. at 2423.

171. *See Trump v. Hawaii*, 138 S. Ct. at 2423–24 (Kennedy, J., concurring).

172. *Trump v. Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring). Justice Thomas squarely challenged the power of the federal district courts to issue nationwide injunctions. *See id.* at 2424–29. This power has arisen in a number of immigration cases involving President Obama's deferred action policies. *See,*

Justice Breyer, joined by Justice Kagan, dissented.[173] Identifying the crucial question as whether the ban was based on national security concerns or anti-Muslim animus, he found the application of the waivers and exemptions to the ban as the key to discerning its true purpose.[174] Because very few Muslims had been able to gain admission through those exceptions and there was evidence that immigration officers in fact lacked the authority to grant waivers,[175] Justice Breyer concluded that the evidence of anti-religious bias underlying the travel ban required its invalidation.[176]

Justice Sotomayor, joined by Justice Ginsburg, dissented separately.[177] Offering evidence of President Trump's anti-Muslim statements beyond those acknowledged by the majority,[178] she found that the order violated the Establishment Clause of the First Amendment. Her blunt assessment: "[T]he Proclamation was motivated by hostility and animus toward the Muslim faith."[179]

Justice Sotomayor powerfully observed that the majority's opinion had significant parallels with the much-criticized *Korematsu* decision: "By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."[180]

The Court's holding in *Trump v. Hawaii* has been, and no doubt will continue to be, criticized.[181] It cannot be disputed that the

e.g., Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2096, 2146–47 (2017). In 2018, Attorney General Sessions issued "litigation guidelines [to] arm Department [of Justice] litigators . . . to present strong and consistent arguments in court against the issuance of nationwide injunctions." Press Release, Dep't of Justice, Office of Pub. Affairs, Attorney General Sessions Releases Memorandum on Litigation Guidelines for Nationwide Injunctions Cases (Sept. 13, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions.

173. *Trump v. Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting).

174. *See id.* at 2429–33.

175. *See id.* at 2431–33.

176. *See id.* at 2433.

177. *Id.* (Sotomayor, J., dissenting).

178. *See id.* at 2435–39.

179. *Id.* at 2435.

180. *Id.* at 2448; *see* Robert S. Chang, *Whitewashing Precedent: From the* Chinese Exclusion Case *to* Korematsu *to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1187–89, 1209–13 (2018) (analyzing parallels between these cases).

181. *See, e.g.*, Jed Shugerman, *A New* Korematsu*: The Travel Ban Ruling Will Be the Roberts Court's Shameful Legacy*, SLATE (June 26, 2018, 3:42 PM), https://slate.com/news-and-politics/2018/06/trump-v-hawaii-the-travel-ban-ruling-will-be-the-roberts-courts-shameful-legacy.html; Family, *supra* note 70; Chang, *supra* note 180.

holding allowed a policy to remain in place that disproportionately affected Muslim noncitizens and, at least in the eyes of four Justices, was motivated by anti-Muslim animus. However, although failing in the end, the legal challenges to the Trump administration's travel ban significantly narrowed the scope of the original executive order and required repeated changes before the Supreme Court found that it passed legal muster. Following the Court's lead, courts have subjected the Trump administration's immigration policies to meaningful judicial review.

B. *Challenging "Zero Tolerance"*

Like no other presidential candidate in modern U.S. history, Donald Trump made immigration enforcement the cornerstone of his 2016 presidential campaign.[182] From the beginning of his successful campaign, Trump promised to target for removal Mexican immigrants, whom he characterized broadly as criminals and "bad hombres."[183] His fervent support for building a wall along the U.S.-Mexico border exemplifies his fanatical commitment – which has led to consistent friction between the President and Congress[184] – to immigration enforcement.[185] The border wall has been one of the symbols of the Trump presidency, leading to budget shutdowns, an emergency declaration, and debate and controversy.

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182. *See* Tamara Keith, *Presidential Campaign Strategies Shaped Early by Immigration*, NPR (Aug. 10, 2016, 5:03 AM), https://www.npr.org/2016/08/10/489433629/presidential-campaign-strategies-shaped-early-by-immigration.

183. *See* Ross, *supra* note 5.

184. *See* Lisa Mascaro, *Trump Reviving his Border Wall Fight with New Budget Request,* WASH. POST (Mar. 11, 2019), available https://www.washingtonpost.com/business/trump-reviving-his-border-wall-fight-with-new-budget-request/2019/03/11/08140cd6-43ff-11e9-94ab-d2dda3c0df52_story.html?utm_term=.c82fddf31a14. (reporting on more than $8.6 billion request for border wall in President Trump's proposed budget); Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, White House Blog, Feb. 15, 2019, available at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/ (declaring, after a government shutdown due to inability to reach a budget agreement, a national emergency in order to bypass Congress and direct emergency funds to constructing the border wall).

185. *See* Peter Holley, *White Texas Teens Chant "Build That Wall" at Hispanics During High School Volleyball Match*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/11/17/white-texas-teens-chant-buildthat-wall-at-hispanics-during-high-school-volleyball match/?utm_term=.537e7749f740_("'[B]uild that wall' . . . became synonymous with Donald Trump's high-intensity campaign rallies . . . ."). For analysis of the symbolism of the U.S.-Mexico border wall and its debatable immigration enforcement benefits, see Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147, 151–57, 161–73 (2012).

Within days his inauguration, President Trump issued executive orders to increase immigration enforcement.[186] Those orders, combined with arrests of DACA recipients,[187] including a recipient who reportedly was deported,[188] "generated palpable fear in immigrant communities."[189] The Trump administration also engaged in much-publicized workplace raids[190] and ordered the deployment of the national guard along the U.S.-Mexico border.[191]

186. *See* Exec. Order 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017) [hereinafter Border Security Executive Order]; Exec. Order 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017) [hereinafter Interior Enforcement Executive Order]. For discussion about how heightened immigration enforcement may result in increased exploitation of undocumented immigrant workers, see Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1619 (2018).

187. *See, e.g.*, 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; Jenny Jarvie, *Mississippi 'Dreamer' Daniela Vargas Released from Detention but Deportation Order Stands*, L.A. TIMES (Mar. 10, 2017, 2:55 PM), http://www.latimes.com/nation/la-na-mississippi-dreamer-20170310-story.html; *see also* Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L.J. 525, 527 (2017).

188. *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.

189. Johnson, *supra* note 117, at 367.

190. *See, e.g.*, 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; 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. Commentators have criticized workplace raids pursued by previous administrations. *See, e.g.*, Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1086–87 (2008); Hing, *supra* note 29, at 308; Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1160–62 (2008); Karla Mari McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER, RACE & JUST. 1, 2–3 (2010); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 392–93 (2008); *see also* Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 863–88 (2008) (analyzing the rights of noncitizens in workplace enforcement of the U.S. immigration laws).

191. *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.

In 2018, Attorney General Jeff Sessions announced a formal "zero tolerance" policy under which all adults unlawfully entering the United States would be subject to criminal prosecution and, if accompanied by a minor child, separated from that child.[192] The administration was compelled to abandon the family separation policy after a firestorm of criticism of the policy's harsh consequences.[193] This policy and its rescission will be discussed later in this Part.[194] In addition, the attorney general exercised a rarely used power to intervene in several Board of Immigration Appeals matters and issued rulings designed to prod the immigration courts to ramp up removals.[195] The Department of Justice also imposed a controversial quota system tied to annual performance reviews of immigration judges to incentivize the disposal of cases.[196]

As one observer cogently concluded, "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*."[197]

Formidable resistance to aggressive immigration enforcement directed at noncitizens of color has included an array of legal challenges to the administration's policies, political protests and

192. *See* Jefferson B. Sessions, U.S. Attorney General, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), (transcript available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions).

193. *See* Sarah McCammon, *After Family Separation Policy Reversal, Trump Says "Zero Tolerance" Should Remain in Effect*, NPR (June 21, 2018, 4:34 PM), https://www.npr.org/2018/06/21/622361876/after-family-separation-policy-reversal-trump-says-zero-tolerance-should-remain-.

194. *See infra* Part IV.B.3.

195. *See* Matter of S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 463 (A.G. 2018) (restricting immigration courts' authority to terminate or dismiss removal proceedings); Matter of L-A-B-R-, 27 I. & N. Dec. 405, 405–06 (A.G. 2018) (restricting immigration courts' discretion to grant continuances of removal proceedings); Matter of A-B-, 27 I. & N. Dec. 316, 317 (A.G. 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, 278 (A.G. 2018) (rejecting the practice of administrative closure of removal proceedings in the immigration courts and instructing immigration courts to expeditiously decide cases).

196. *See* Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, BROOKINGS (June 18, 2018), http://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/.

197. Anil Kalhan, *Revisiting the 1996 Experiment in Comprehensive Immigration Severity in the Age of Trump*, 9 DREXEL L. REV. 261, 262 (2017) (emphasis added).

activism (including resistance at the state and local levels), organization, and collaboration.[198]

1. *Crime-Based Removals*

Removals based on crimes long have been subject to criticism.[199] Crime-based removals have racial impacts, impacts that could be characterized as creating a minority removal machine.[200] That certainly was the case before the election of Donald Trump.[201] The Obama administration removed in the neighborhood of 400,000 noncitizens a year during the first six years of the Obama presidency.[202] Pursuing removals as a means of prodding Congress to pass immigration reform, the Obama administration touted the

198. *See* Jayashri Srikantiah, *Resistance and Immigrants' Rights*, 13 STAN. J. C.R. & C.L. 5, 7, 10–11 (2017) (analyzing various forms of resistance to President Trump's aggressive immigration enforcement policies); *see also* Anthony S. Winer, *Action and Reaction: The Trump Executive Branch and their Reception by the Federal Courts*, 44 WM. MITCHELL L. REV. 907 (2018) (analyzing judicial responses to Trump Administration's executive orders.)

199. 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); 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 CALIF. L. REV. 149 (2016).

200. *See* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1016–17 (2016); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 647–48 (2015).

201. *See* Johnson, *supra* note 117, at 619-22; *see also* Alina Das, *Inclusive Immigrant Justice: Racial Animus and The Origins of Crime-Based Deportation*, 52 UC DAVIS L. REV. 173, 177-94 (2018) (analyzing discriminatory origins of crime-based removals).

202. *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.

removal records as a success.[203] Based on his removal record, President Obama was "[d]ubbed the 'Deporter-in-Chief.'"[204]

The Obama administration's removal campaign had one-sided racial consequences. For example, Mexico, Guatemala, Honduras and El Salvador "accounted for 96 percent of all removals in 2012 . . . ."[205] Removals fell almost exclusively on Latinx noncitizens, even though they comprise a much smaller percentage of the overall immigrant population.

Record numbers of deportations by the Obama administration generated state and local government resistance, which included a growing number of cities that through law and policy declared that they would provide "sanctuary" to immigrants.[206] This new sanctuary

203. *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).

204. Terri R. Day & Leticia M. Diaz, *Immigration Policy and The Rhetoric of Reform: "Deport Felons Not Families,"* Moncrieffe v. Holder, *Children at the Border, and Idle Promises*, 29 GEO. IMMIGR. L.J. 181, 182 (2015) (footnote omitted).

205. U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 6 (2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

206. *See, e.g.*, Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Networks*, 103 MINN. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3038943; Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1704 (2018); Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and The Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 546-56 (2017); Rose Cuison Villazor, *What is a "Sanctuary?"*, 61 SMU L. REV. 133, 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. 433, 435 (2018) (analyzing the legitimacy afforded immigration enforcement by state and local "sanctuary" laws that seek to protect noncitizens from removal).

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. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 392–93 (2012). Courts invalidated numerous state immigration enforcement efforts for unconstitutionally infringing on the federal power to regulate immigration. *See, e.g.*, *id.* at 403–39 (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, 530–33 (4th Cir. 2013) (same for South Carolina immigration enforcement law); United States v. Alabama, 691 F.3d 1269, 1282 (11th Cir. 2012)

movement contributed significantly to the Obama administration's decision in 2014 to eliminate Secure Communities a policy focusing on crime-based removals.[207]

Along with numerous steps to bolster immigration enforcement,[208] President Trump brought back Secure Communities.[209] The Trump administration's resurrection of that program has disparately impacted Latinx noncitizens in a manner similar to that seen in the Obama years, an outcome that would be consistent with President Trump's disparaging statements toward noncitizens from Mexico and Latin America.[210] In both fiscal years 2017 and 2018, Mexico, Guatemala, Honduras, El Salvador, and the Dominican Republic led the nations with citizens removed from the United States, accounting for approximately 93 percent of all removals.[211]

Since the election of President Trump, some states through sanctuary laws have acted to, within legal limits, restrict their role in federal immigration enforcement.[212] One prominent example, California, passed a series of laws to limit state and local involvement

(same for Alabama law); Georgia Latino All. for Human Rights v. Governor of Georgia, 691 F.3d 1250, 1267 (11th Cir. 2012) (same for Georgia law).

207. As Department of Homeland Security Secretary Jeh Johnson explained, the abolition of the "controversial" Secure Communities program responded to "[a] rapidly expanding list of city, county and state governments" enacting laws that restricted state and local cooperation with federal immigration enforcement authorities. *Hearing on the Oversight of the United States Department of Homeland Security Before the H. Comm. on the Judiciary*, 114th Cong. 11–12 (2015) (statement by the Hon. Jeh Charles Johnson, Secretary, Department of Homeland Security), http://docs.house.gov/meetings/JU/JU00/20150714/103734/HHRG-114-JU00-Wstate-JohnsonJ-20150714.pdf.

208. *See, e.g.*, *supra* notes 184 (citing two immigration executive orders in January 2017).

209. *See* Interior Enforcement Executive Order, *supra* note 184, § 5; *see also* Rachel E. Rosenbloom, *Beyond Severity: a New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663, 666 (2018) (stating that Trump administration immigration policies build on previous ones but go beyond them: ("[A]t the heart of the Trump Administration's approach to immigration lies an across-the-board restrictionism and an overtly racialized nativism that have not found mainstream acceptance in the United States since the early twentieth century: the notion that *all* forms of immigration should be drastically limited, and that *all* non-white immigrants are potentially suspect") (emphasis in original) (footnote omitted).

210. *See supra* text accompanying notes 5, 80.

211. *See* U.S. Immigration & Customs Enforcement, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* 16, https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf.

212. *See* Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 93 N.Y.U. L. REV., at 39 (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171663.

in federal immigration enforcement.[213] The Department of Justice filed suit seeking to invalidate these laws.[214] The administration also has sought to restrict state and local sanctuary laws, measures that to this point have been successfully challenged in the courts.[215]

Resistance to crime-based removals can be seen in state and local jurisdictions seeking to distance themselves from the perceived overaggressiveness of the federal immigration enforcement efforts.[216] Sanctuary policies, as well as litigation challenging the Trump administration's efforts to defund sanctuary cities, represent part of the resistance to federal immigration enforcements efforts that target noncitizens of color.[217]

2. *DACA*

Despite record numbers of removals,[218] President Obama's immigration record may be most remembered for its DACA policy,[219] which provided limited relief to young undocumented immigrants who were brought to the United States as children. The rise and fall of DACA will have long term impacts on immigration reform. [220] It also will have disparate racial impacts, with hundreds of thousands of Latinx beneficiaries threatened with loss of relief.

Presidential candidate Donald Trump campaigned on the promise to dismantle DACA.[221] Attorney General Jeff Sessions

213. S.B. 54, Cal. Legis. 2017-18, signed by Governor Oct. 5, 2017, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB54.

214. *See* United States v. California, 314 F. Supp. 3d 1077, 1086 (E.D. Cal. 2018) (refusing to enjoin most of the laws challenged).

215. *See* City and County of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018) (affirming in part injunction barring federal de-funding of sanctuary cities); City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 593 (E.D. Pa. 2017) (enjoining the implementation of provisions of Trump executive order seeking to de-fund "sanctuary" cities); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 936–37 (N.D. Ill. 2017) (to the same effect). For analysis of the issues raised by sanctuary jurisdictions, see Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1 (2018).

216. *See supra* text accompanying note 226.

217. *See supra* text accompanying note 229.

218. *See supra* text accompanying note 211.

219. *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (last updated Feb. 14, 2018), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

220. *See* Johnson, *supra* note 117, at 363-69.

221. *See, e.g.*, James Pfiffner & Joshua Lee, *Trump Pledged to Reverse Obama's Executive Orders. Here's How Well Past Presidents Have Fulfilled that Pledge*, 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-

announced the policy's rescission,[222] thereby provoking controversy, protests, and legal challenges.[223] Federal district courts enjoined the Trump administration's attempt to rescind DACA.[224]

Over its first five years, DACA provided relief to hundreds of thousands of young undocumented immigrants.[225] The top four countries of origin for DACA recipients were Mexico, El Salvador, Guatemala, and Honduras, constituting nearly ninety percent of all recipients.[226] Latinx noncitizens thus were the policy's most numerous beneficiaries and thus will be the group most adversely affected by its elimination. In light of the President's use of "racial slurs" and "epithets" in discussing immigrants, a district court allowed an action to proceed challenging the rescission of DACA as

have-fulfilled-that-pledge/?utm_term=.021829d4d67c. Commentators have debated DACA's lawfulness. *Compare* Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1757–58 (2016) (questioning lawfulness of President Obama's deferred action policies); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U.L. REV. 1183, 1198–99 (2015) (to the same effect), *with* Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 256 (2013) (defending the lawfulness of the policies); Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U.L. REV. 1083, 1087 (2015) (to the same effect); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 58 (2015) (same).

222. *See supra* text accompanying notes 202–03.

223. *See supra* text accompanying note 208.

224. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 215–16 (D.D.C. 2018); Regents of Univ. of Cal. v. United States, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018); Vidal v. Nielsen, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018).

225. *See* Jens Manuel Krogstad, *DACA Has Shielded Nearly 790,000 Young Unauthorized Immigrants from Deportation*, PEW RES. CTR. (Sept. 1, 2017), http://www.pewresearch.org/fact-tank/2017/09/01/unauthorized-immigrants-covered-by-daca-face-uncertain-future/. 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). *See 2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (last updated Apr. 15, 2015), https://www.uscis.gov/archive/2014-executive-actions-immigration. The proposed expansion sparked robust political debate, along with legal challenges that permanently derailed the program. *See* United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (affirming, by an equally divided court, injunction barring DAPA's implementation); *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"). For analysis of the complex legal issues presented by *United States v. Texas*, see Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 279–302 (2016).

226. *See 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/.

racially discriminatory in violation of the Equal Protection guarantee.[227]

As we have seen, various Trump administration immigration enforcement measures, including the ending of DACA, would have racial impacts. The attempted rescission of DACA thus fits neatly into President Trump's anti-diversity, anti-noncitizen of color approach to immigration enforcement.

3. *Detention and the* Flores *Settlement*

As a historical matter, the influx of asylum seekers fleeing violence in Central America has periodically generated concern in the United States. Immigrant detention historically has formed part of a concerted effort to manage Central American migration. In the 1980s, for example, President Ronald Reagan's administration employed detention as a device to deter migration from Central America, where violent civil wars had caused hundreds of thousands of people to flee.[228] The U.S. government detained Central American asylum seekers who feared persecution if returned to their homelands.[229] Immigrant rights groups successfully challenged various aspects of the detention policies for going too far to deter migration, including denying access of migrants to legal counsel, taking steps to encourage them to "consent" to deportation, and detaining them in isolated locations far from families, friends, and attorneys.[230]

Similarly, in 2014, the Obama administration employed detention, including the detention of families, to respond to a new

227. *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.

228. *See generally* Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 L. & SOC. INQUIRY 569 (2011) (reviewing history of U.S. government's treatment of Central American asylum seekers from the 1980s through 2010).

229. Carly Goodman, *Like Donald Trump, Ronald Reagan Tried to Keep Out Asylum Seekers. Activists Thwarted Him*, WASH. POST (July 2, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/02/line-donald-trump-ronald-reagan-tried-to-keep-out-asylum-seekers-activists-thwarted-him/?noredirect=on&utm_term=.422a5e2cdda5.

230. *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 559–65 (9th Cir. 1990).

wave of Central Americans fleeing violence.[231] That detention strategy faced legal challenges.[232]

As in the past, many migrants from Central America today cross the U.S.-Mexico border to seek asylum, relief for which the U.S. immigration laws provide.[233] Although the immigration statute requires detention of some immigrants,[234] current immigration laws generally afford the executive branch considerable discretion to decide which immigrants to detain and which to release from custody pending a hearing.[235] In the past when someone was apprehended by U.S. immigration authorities, he or she was allowed the opportunity to post a bond for release while awaiting a removal hearing.[236] In fact, the Supreme Court consistently has held in non-immigration

231. *See* Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016) ("In 2014, in response to a surge of Central Americans attempting to enter the United States without documentation, the government opened family detention centers in Texas and New Mexico."). For analysis of the Obama administration's response to a wave of Central American migration, see Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjunction in Family Detention*, 106 CALIF. L. REV. 785, 795 (2018); Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135, 137 (2018) (analyzing access to counsel for immigrants in family detention); Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 963–65 (2016) (discussing the mass detention of Central American women and children by the Obama administration); Scott Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337, 341–42 (2015) (analyzing the Obama administration's tough response to the increase in the number of Central American women and children seeking asylum in the United States); Rebecca Sharpless, *Cosmopolitan Democracy and the Detention of Immigrant Families*, 47 N.M. L. REV. 19, 19 (2017) (noting an increase in "family detention by over 3000 percent" in one year as a response to a "surge in unauthorized border crossings by Central American families and unaccompanied children"); Margaret H. Taylor & Kit Johnson, *"Vast Hordes . . . Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of* Chae Chan Ping, 68 OKLA. L. REV. 185, 192–207 (2015) (analyzing the Obama administration's mass detention and expedited immigration processing of Central American women and children).

232. *See Flores*, 828 F.3d at 910 (affirming order to enforce *Flores* settlement and limiting President Obama's efforts to detain families).

233. *See* Immigration & Nationality Act § 208, 8 U.S.C. § 1158.

234. *See supra* note 213.

235. *See* Matter of Patel, 15 I. & N. Dec. 666, 666 (BIA 1976) ("An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk.") (internal citation omitted); Matter of Adeniji, 22 I. & N. Dec. 1102, 1103 (BIA 1999) (finding that "an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight[,]" or a danger to persons or property).

236. *See* Immigration & Nationality Act § 236(a)–(b), 8 U.S.C. § 1226(a)(b).

contexts that a hearing is a general constitutional requirement when the government detains a person.[237]

Working to deliver on his campaign promises to increase immigration enforcement, President Trump has taken a number of steps, including the employment of detention, to implement his "zero tolerance" policy.[238] His administration has employed its discretion in an all-out effort to deter Central Americans from coming in large numbers to the United States—first, by adopting a mandatory detention policy, followed by a family-separation policy, and then abandoning it for a policy that seeks to detain immigrant families together.[239] In implementing and changing detention policies, President Trump has struggled to establish a policy that goes to the legal limits.[240] His administration's use of detention has encountered formidable and sustained resistance.

In essence, the Trump administration responded to Central American asylum seekers through measures tougher than the policies of any modern president. President Trump rejected the conventional approach, which he denigrated as "catch and release," of allowing noncitizens to post bonds for release.[241] Detention under the Trump administration's "zero tolerance" policy is mandatory, without the possibility of release on bond. That approach was adopted even though the vast majority of families who under previous practice had bonded out subsequently appeared at their removal hearings.[242]

Many Central American asylum seekers today are parents with minor children.[243] No previous administration resorted to the separation of families as a device to deter migration from Central America.[244] The Trump administration, at least for a time, pursued such a policy even though it had other policy options at its disposal.

237. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (allowing civil commitment of sex offenders after a jury trial); Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (requiring individualized findings of mental illness and dangerousness before civil commitment); United States v. Salerno, 481 U.S. 739, 741 (1987) (upholding pretrial detention of criminal defendants only after individualized findings of dangerousness or flight risk at bond hearings).

238. *See supra* text accompanying notes 6–13.

239. *See supra* text accompanying notes 202–03.

240. *See infra* text accompanying notes 286–90.

241. *See* Border Security Executive Order, *supra* note 184, § 6.

242. *See Myth vs. Fact: Immigrant Families' Appearance Rates in Immigration Court*, HUM. RTS. FIRST (July 31, 2015), https://www.humanrightsfirst.org/resource/myth-vs-fact-immigrant-families-appearance-rates-immigration-court; *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, TRAC IMMIGRATION (Sept. 14, 2016) http://trac.syr.edu/immigration/reports/438/.

243. *See* Sofia Martinez, *Today's Migrant Flow is Different*, ATLANTIC (June 26, 2018) https://www.theatlantic.com/international/archive/2018/06/central-america-border-immigration/563744/.

244. *See supra* text accompanying notes 202–03.

The Trump administration, for example, could have continued the policy of allowing bond hearings for migrant families and releasing them if they were not a flight risk or a danger to the community.[245] Children thus could have been bonded out with their families so that families could have remained intact. Alternatively, devices such as ankle bracelets could have been used to help ensure compliance with bonds and court appearances.[246]

Deterring future migrants from Central America was the motivation behind the Trump administration's original decision to separate migrant parents from their children.[247] After considerable political pressure (including from Republican congressional leaders) and mass protests, the administration backed down and issued an executive order ending the policy but seeking to detain entire families together.[248]

The Trump administration's detention of women and children from Central America brought into play the "*Flores* settlement."[249] For more than twenty years, that settlement set minimum guidelines for detaining migrant children and governed the detention of Central American minors. [250]

The settlement arose from the case of Jenny Lisette Flores, a fifteen-year-old from El Salvador who fled violence in her home country to live with an aunt in the United States; Flores claimed that her indefinite detention violated the U.S. Constitution and the

245. *See supra* text accompanying notes 265–66.

246. The Department of Homeland Security has increased the use of electronic ankle monitoring with women and children apprehended at the border. *See* E.C. Gogolak, *Ankle Monitors Weigh on Immigrant Mothers Released from Detention*, N.Y. TIMES (Nov. 15, 2015), https://www.nytimes.com/2015/11/16/nyregion/ankle-monitors-weigh-on-immigrant-mothers-released-from-detention.html?_r=1[https://perma.cc/75E3-YFW7].

247. *See* Philip Bump, *Here are the Administration Officials Who Have Said That Family Separation is Meant as a Deterrent*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?noredirect=on&utm_term=.a342a3da91b0.

248. *See* Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html.

249. *See* Salvador Rizzo, *The Facts About Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm_term=.6f64e58a5d50.

250. *See* Flores v. Lynch, 828 F.3d 898, 902–03 (9th Cir. 2016).

immigration laws.[251] In 1993, the Supreme Court upheld a regulation that allowed the U.S. government to release a migrant child to a close family member or legal guardian in the United States.[252]

In 1997, the U.S. government, under President Bill Clinton, settled the *Flores* case in a consent decree that established standards for the treatment of unaccompanied minors who were in immigration detention.[253] The decree requires the federal government to place children with a close relative or family friend "without unnecessary delay," rather than indefinitely detaining them, and to keep immigrant children who are in custody in the least restrictive conditions possible.[254] Although the *Flores* settlement was agreeable to the Clinton administration, the Trump administration has sought to abrogate the settlement and indefinitely detain families, including children.[255]

President Donald Trump blamed the *Flores* settlement for his initial policy choice of separating families.[256] Although legal challenges sought to end family separation,[257] the political response ultimately forced the Trump administration to end its policy.[258] In ending its policy, the White House announced that the Trump administration would seek to replace the family-separation policy with a policy allowing for the detention of entire families.[259] Courts ordered the Trump administration to reunite separated migrant families, an order that the administration found difficult to implement.[260]

Keeping families in detention during the pendency of legal proceedings would require changes to the *Flores* settlement. Section 3(e) of the executive order ending family separation instructed the attorney general to modify the *Flores* agreement "in a manner that would permit the Secretary, under present resource constraints, to

251. *See* Rebeca M. López, Comment, *Codifying the* Flores *Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1648–49 (2012) (reviewing facts of the *Flores* litigation case).

252. *See* Reno v. Flores, 507 U.S. 292, 315 (1993).

253. *See* López, *supra* note 249, at 1642.

254. *See* Lauren Paulk & Karla Torres, *Resilience at the Texas Border: Migrant Children, Reproductive Health, and Legal Harms*, 31 GEO. IMMIGR. L.J. 93, 96 (2017).

255. *See infra* text accompanying notes 283–98.

256. *See* Rizzo, *supra* note 247.

257. *See, e.g.*, Ms. L. v. U.S. Immigration & Customs Enforcement, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018).

258. *See* Exec. Order 13,841, 83 Fed. Reg. 29,435 (June 25, 2018) [hereinafter Family Separation Executive Order].

259. *See* Adam Edelman, *Trump Signs Order Stopping His Policy of Separating Families at the Border*, NBC NEWS (June 20, 2018, 12:24 PM), https://www.nbcnews.com/politics/immigration/trump-says-he-ll-sign-order-stopping-separation-families-border-n885061.

260. *See Ms. L.*, 310 F. Supp. 3d at 1149–50.

detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings."[261]

As directed by the executive order, the administration proposed regulations that would terminate the *Flores* settlement.[262] The changes would allow for indefinite detention of minors and end judicial oversight of the detention of minor children.[263] Secretary of Homeland Security Kristjen Nielsen explained that:

> Today, legal loopholes significantly hinder the department's ability to appropriately detain and promptly remove family units that have no legal basis to remain in the country[.] . . . This rule addresses one of the primary pull factors for illegal immigration and allows the federal government to enforce immigration laws as passed by Congress.[264]

The Trump administration faced legal challenges to indefinite detention of minors through family detention. President Obama met resistance to a similar approach.[265] In 2018, the Supreme Court in *Jennings v. Rodriguez*[266] sent a case back to the lower courts to decide whether detention without a bond hearing and possible release violated due process.[267] The Court currently has before it another challenge to immigrant detention.[268]

Detention and family separation were not the end of the Trump administration's immigration enforcement efforts directed at Central Americans. In 2018, the Trump administration moved to limit asylum to noncitizens who seek relief at a port of entry, which a court promptly enjoined.[269] That approach was unprecedented in modern U.S. history, arguably going beyond U.S. and international law.

In short, the Trump administration's detention policies have been directed at Central American migration and, not surprisingly, have directly and adversely impacted Central Americans. Political and legal resistance has shaped the use of detention and has thus far

261. Family Separation Executive Order, *supra* note 256, at § 3(e).

262. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018).

263. *See id.*

264. Caitlin Dickerson, *Trump Administration Moves to Sidestep Restrictions on Detaining Migrant Children*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html (quoting Secretary Nielsen).

265. *See supra* text accompanying note 235.

266. 138 S. Ct. 830 (2018).

267. *Id.* at 852.

268. *See* Preap v. Johnson, 831 F.3d 1193 (9th Cir. 2016) (addressing mandatory immigrant detention), *cert. granted sub nom.*, Nielsen v. Preap, 138 S. Ct. 1279 (2018).

269. See East Bay Sanctuary Covenant v. Trump. 349 F. Supp. 3d 838 (N.D. Cal. 2018)

restricted the Trump administration's use of immigrant detention of minors. Nonetheless, the administration has adopted a string of aggressive policies designed to deter Central American asylum seekers from coming to the United States.

4. *TPS*

The end of Temporary Protected Status (TPS) a form of relief providing noncitizens fleeing natural disaster or civil strife with temporary safe haven in the United States, for certain Latin American and other developing nations would have racial impacts.[270] The Trump administration's announcement of the end of TPS for nearly two hundred thousand Salvadorans will have adverse impacts on a large subgroup of Latina/o noncitizens currently living in the United States,[271] a group that the President has previously—and quite specifically—disparaged.[272] The administration also ended TPS for Haitians, Hondurans, Nicaraguans, and Sudanese.[273] The mass elimination of TPS will reduce the overall number of TPS recipients, which is generally consistent with the administration's efforts to reduce the noncitizen population in the United States.[274] Noncitizens of nations stripped of TPS are almost exclusively populated by people of color.

Once again, this plan demonstrates the Trump administration's use of executive power to eliminate and deny relief to noncitizens of color. Ending TPS for Salvadorans, Haitians, and nationals of other countries will reduce racial diversity among noncitizens in the United States. If departure from the country follows, fewer noncitizens of color will live in the United States.

However, the administration plan has encountered criticism and resistance.[275] Bills in Congress have been introduced in support of

270. *See* Immigration and Nationality Act § 244, 8 U.S.C. § 1254a(a)(1); *see* Johnson, *supra* note 117, at 365 n. 92.

271. *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.

272. *See* Dawsey, *supra* note 1.

273. *See* Termination of the Designation of Honduras for Temporary Protected Status, 83 Fed. Reg. 26,074 (June 5, 2018); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648 (Jan. 18, 2018); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636 (Dec. 15, 2017). The administration also ended TPS for citizens of Sudan but extended it for noncitizens from South Sudan. *See* Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed Reg. 47,228 (Oct. 11, 2017); Extension of South Sudan for Temporary Protected Status, 82 Fed. Reg. 44,205 (Sept. 21, 2017).

274. *See supra* Part III.B.

275. *See, e.g.*, Susan Ferriss, *Trump's TPS Cancellations Could Lead More than 300,000 to Become Undocumented*, CTR. FOR PUB. INTEGRITY (May 5, 2018)

these concerns.[276] A lawsuit challenged the administration's decision to end TPS for Salvadorans and Haitians as racially discriminatory.[277] A U.S. district court enjoined the end of TPS for citizens of El Salvador, Haiti, Nicaragua, and Sudan, finding that the change in policy and possible racial discrimination raised substantial legal questions.[278] In so doing, the court recounted various discriminatory statements about immigrants made by President Trump.[279] Thus, organized resistance has delayed the Trump administration's efforts to deny temporary legal status to noncitizens from the developing world.

CONCLUSION

By targeting noncitizens of color from the developing world, the Trump administration has focused on immigration enforcement as the foundation of its war on the diversity of noncitizens in the United States. As this symposium attests, it is one of many fronts in the Trump administration's war on diversity.

Scrutiny of President Trump's immigration policies shows that his policies would disparately impact noncitizens of color. That cannot be unintended. The president himself has frequently voiced concern about the immigration of Mexicans, Muslims, and other noncitizens from the developing world.[280] With an array of technical rules and procedures, immigration law is an ideal place to conduct a war on diversity, attack people of color, and seek to transform the racial demographics of the entire nation—and thus its overall war on diversity as documented in this symposium—while simultaneously denying that racial discrimination motivates the policies.

Resistance, through litigation and political activism, continues as the nation is enmeshed in a battle over nothing less than its heart and soul. Such resistance will continue to hamper the Trump

https://www.publicintegrity.org/2018/05/04/21736/honduras-temporary-protected-status.

276. *See* Rafael Bernal, *Trump Immigration Measures Struggle in the Courts*, HILL (Oct. 5, 2018, 6:00 AM), https://thehill.com/latino/410012-trump-immigration-measures-struggle-in-the-courts (referring "to six legislative proposals in the current Congress that would either extend TPS benefits or give current beneficiaries permanent residency").

277. *See Black and Latino Immigrants File Federal Lawsuit to Block Trump's Termination of TPS*, LAWYERS' COMM. FOR CIV. RTS. & ECON. JUST., http://lawyerscom.org/black-and-latino-immigrants-file-federal-lawsuit-to-block-trumps-termination-of-tps (last visited Feb. 12, 2019).

278. *See* Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1097–98 (N.D. Cal. 2018).

279. *See id.* at 1098; *see also* Centro Presente v. U.S. Dep't of Homeland Security, 332 F. Supp. 3d 393, 400–01 (D. Mass. 2018) (reviewing evidence of racial animus motivating the decision to end TPS for nationals of El Salvador, Haiti, and Honduras).

280. *See supra* text accompanying notes 191–92.

administration's efforts to reduce immigration generally and to change the modern racial demographics of immigration in particular.