Lessons About the Future of Immigration Law from the Rise and Fall of DACA

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

In no small part due to the prolonged stalemate in Congress combined with a sizable and stable undocumented population spread across the United States, immigration has become nothing less than a high-profile political battleground. Contemporary immigration touches on some of the most contentious divisions in modern American politics, including race, class, and national identity.
Taking an enforcement-oriented approach to immigration unparalleled in modern American history, Donald Trump successfully ran for President by making immigration a central plank of his campaign. In so doing, Trump forcefully criticized the Obama administration’s immigration record. Consequently, to place President Trump’s immigration agenda into proper perspective, we must consider his target — the immigration record of President Barack Obama.

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

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

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

Although his administration removed a record number of immigrants, President Barack Obama’s immigration record probably will be most remembered for his extension of deferred action as a form of relief from removal from the United States for young undocumented immigrants. Over five years, the Deferred Action for Childhood Arrivals (“DACA”) policy benefited hundreds of thousands of undocumented immigrants brought to the United States as children. In 2014, the President attempted to extend deferred action relief to undocumented parents of U.S. citizens and lawful immigrants through Deferred Action for Parents of Americans (“DAPA”). The proposed


2 See infra Part I.B.


expansion sparked robust political debate, along with legal challenges that permanently derailed the policy.\textsuperscript{5}

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

Most importantly, as President Obama emphasized,\textsuperscript{8} DACA did not purport to provide a path to a durable legal immigration status for the cohort of young undocumented immigrants who the program benefited. Lawful permanent resident status, which can ultimately lead to naturalization and full U.S. citizenship, is something that only Congress can bestow on noncitizens.\textsuperscript{9}

Bolstered by the support of proponents of more aggressive immigration enforcement, a new president with a dramatically different immigration agenda then President Obama changed directions. Proclaiming that it infringed on the power of Congress to designate the immigrants to target for removal from the United States, presidential candidate Donald Trump campaigned on the promise to

\textsuperscript{5} See infra notes 113–18 and accompanying text (discussing President Obama’s Deferred Action for Parents of Americans (“DAPA”) policy and the injunction blocking its implementation, which a deadlocked Supreme Court allowed to remain in place).

\textsuperscript{6} Tom Cohen, Obama Administration to Stop Deporting Some Young Illegal Immigrants, CNN (June 16, 2012, 1:17 PM), http://www.cnn.com/2012/06/15/politics/immigration/index.html (quoting President Obama’s announcement of DACA and explaining how it represented a response to the failure of Congress to pass immigration reform).


\textsuperscript{8} See supra note 6 and accompanying text.

\textsuperscript{9} See infra Part II.A.
dismantle DACA. After months of delay, considerable speculation, and much lobbying, Attorney General Jeff Sessions announced the rescission of DACA, thereby provoking controversy, protests, and legal challenges. Three federal district courts enjoined the Trump administration's attempted rescission. The failure to reach agreement to provide relief to the noncitizens threatened with loss of the protection of DACA resulted in a budget impasse in Congress and a temporary shutdown of the federal government.

10 See infra notes 94–96 and accompanying text.
12 See infra notes 111–14 and accompanying text.
Despite years of debate over immigration reform, Congress has been unable to forge consensus on whether and how to provide legal status to the approximately eleven million undocumented immigrants living in the United States. Nor has it been able to reform the immigration laws, or enforce them, to effectively prevent undocumented immigration in the future. The result has been criticism from across the political spectrum, with one side strongly advocating a path to legalization for the undocumented and the other just as adamantly calling for zealous enforcement of the immigration laws to remove all undocumented immigrants from the country. In no small part due to congressional inaction combined with a large undocumented population dispersed across the United States, immigration emerged as a volatile political battleground.

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

Based on this background, Part II considers the implications of the rise and fall of DACA for a long-overdue reform of the U.S.

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16 See infra Part I.A.2. (reviewing the years of unsuccessful efforts in Congress to pass comprehensive immigration reform).
17 See infra notes 94–103 and accompanying text.
18 See infra Part I.
19 See infra Part I.A.1.
20 See infra Part I.B.
21 See infra notes 94–114 and accompanying text.
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immigration laws. Such reform is much-needed to address the realities of immigration in a time of global migration pressures.

I. The Obama Immigration Legacy: Removal Records, Failed Immigration Reform, and DACA and DACA

Before the election of President Obama in 2008, few but the most experienced immigration practitioners knew much about deferred action as a form of relief from removal for undocumented immigrants. That changed forever with the 2012 announcement of DACA, a policy allowing “deferred action” for undocumented immigrants brought to the United States as children. The tumultuous rise and fall of DACA over the next five years became front-and-center in the contemporary debate over immigration reform.

Although limited in scope, DACA came to stand for much more than the limited relief that it extended to young undocumented immigrants. The policy ultimately became the focal point of a grassroots social movement seeking nothing less than a full vindication of the rights of immigrants; the movement emerged at the center of the national debate over immigration law, its enforcement, and reform.

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

Throughout the 2008 presidential campaign, Barack Obama unequivocally endorsed comprehensive immigration reform. As part of an overall strategy to convince Congress to pass reform legislation, the Obama administration initially took steps to ramp up the number

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22 See infra Part II.
23 See infra notes 79–80 and accompanying text (discussing the U.S. government’s longstanding use of deferred action as a form of relief for noncitizens from removal).
24 See supra note 3 (citing authority).
25 See infra Part II.
26 See infra Part I.B.
of deportations.\textsuperscript{27} Despite record numbers of removals, Congress failed to pass immigration reform legislation.\textsuperscript{28} The end result was what critics viewed as the worst of all possible outcomes for immigrant rights advocates. The nation saw record numbers of removals devastatingly injuring immigrant communities combined with the inability of Congress to move forward on immigration reform. The lack of legislation left millions of vulnerable undocumented immigrants in indefinite legal limbo and an array of unaddressed immigration policy problems. In measured fashion, President Obama responded to one aspect of the deficiencies in the current immigration system through expanded use of a limited form of relief for undocumented immigrants known as “deferred action.” Although deferred action did not create a path to legalization for the undocumented, it offered a limited respite from immediate removal from the United States for a segment of that community.\textsuperscript{29}

\textbf{A. Prelude to DACA}

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

1. Record Numbers of Removals

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

\textsuperscript{27} See infra Part I.A.1.
\textsuperscript{28} See infra Part I.A.2.
\textsuperscript{29} See infra Part I.B.
\textsuperscript{30} See infra Parts I.A–B.
To boost the number of removals, the Obama administration revamped a pre-existing program known as “Secure Communities,” which placed noncitizens who had brushes with state and local criminal justice systems in the federal removal pipeline. As reconfigured, that program required state and local law enforcement agencies to share information with the U.S. government about noncitizens, lawful permanent residents as well as undocumented immigrants, arrested by state and local law enforcement. Secure Communities further called on law enforcement agencies to detain noncitizens arrested for crimes (even those eligible for release from state and local custody); federal immigration authorities could, at their discretion, directly take custody of noncitizens for possible removal from the United States.

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

With Secure Communities operating at full tilt during President Obama’s first term, the U.S. government expanded removal efforts to (documenting the emergence of the Immigration and Naturalization Service and its emphasis on immigration enforcement along the U.S./Mexico border).


include virtually all criminal noncitizen offenders. During that same time period, the Supreme Court regularly rejected removal orders aggressively defended by the Obama administration for running afoul of the immigration statute. A series of rejections of deportation orders by a moderate-to-conservative Court led by Chief Justice John Roberts compels the conclusion that the administration’s efforts, at least at times, went too far.

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

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

35 See infra notes 44–47 and accompanying text.


40 See infra Part I.A.1.

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

The aggressive removal campaign had stark disparate racial consequences. In 2013, “Mexican nationals accounted for seventy-two percent of all aliens removed . . . Latina/os thus comprised virtually all of the noncitizens removed from the United States.44 The next leading


43 Id. (footnote omitted); see Kari Hong, The Costs of Trumped-Up Immigration Enforcement Measures, 2017 CARDozo L. REV. De NOvo 119, 124-40.

countries were Guatemala (eleven percent), Honduras (8.3 percent), and El Salvador (4.7 percent). These four countries accounted for ninety-six percent of all removals...”

In essence, removals fell almost exclusively on Latina/os, even though Latina/os comprised a much smaller percentage of the overall immigrant population. The racial impacts of the modern removal system are entirely consistent with the long history of reliance on crime-based removals as a tool for removing noncitizens of disfavored races and national origins from the United States.

The explanation for one-sided contemporary removal statistics is readily apparent. Critics long have accused state and local law enforcement agencies of targeting Latina/os and African American men


in law enforcement efforts. Consistent with that criticism, controversies over claims of racially discriminatory policing and violence regularly make the national news. Not surprisingly, the Executive Branch’s targeting of immigrants caught up in the racially-skewed state and local criminal justice systems generated a pattern of racially-skewed removals. Despite the racially discriminatory impacts, “the goal of criminal-alien removal enjoys almost universal support . . . .” The widespread public popularity of the removal of “criminal aliens” persists even though the empirical evidence demonstrates “that non-citizens commit fewer crimes and reoffend less than citizens . . . .”

Political leaders and policy-makers have paid little attention to the racially disparate impacts of the U.S. government’s tying removals to criminal law enforcement. At the same time, immigrant and Latina/o advocacy groups have protested the modern removal efforts and, in fact, have characterized the administration’s immigration record as a “betrayal” by President Obama.

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50 See supra text accompanying notes 44–47.


53 See Johnson, Doubling Down, supra note 33, at 1036 (“Little attention has been paid to the racially disproportionate impacts of the criminal justice system combined with the contemporary immigration enforcement focus of the federal government on ‘criminal aliens.’

Record numbers of deportations by the Obama administration generated state and local government resistance. Resistance manifested itself in laws and policies declaring that those jurisdictions would provide “sanctuary” to undocumented immigrants.55 Growing


“Sanctuary laws,” and the lawsuits challenging them, can be understood as efforts between coordinate governments to draw the appropriate line between state laws protecting immigrant residents and those that intrude on federal power to regulate immigration. Although the U.S. government undisputedly has the exclusive power over the admission and removal of immigrants, see Chamber of Commerce v. Whiting, 563 U.S. 582, 588 (2010) (“recogniz[ing] that the ‘[p]ower to regulate immigration is unquestionably . . . a federal power’” (quoting DeCanas v. Bica, 424 U.S. 351, 354 (1976))), states unquestionably play an important role with respect to the law and policy involving the health, safety, and welfare of immigrant residents. See Leticia M. Saucedo, States of Desire: How Immigration Law Allows States to Attract Desired Immigrants, 52 UC. DAVIS L. REV. 471 (2018); Kevin R. Johnson, California Dreaming? The Integration of Immigrants into American Society, BOOM CAL. (Oct. 29, 2017), https://boomcalifornia.com/2017/10/29/california-dreaming-the-integration-of-immigrants-into-american-society.

In sharp contrast to the approach taken by “sanctuary” jurisdictions, a number of states and localities, most notably Arizona, during the Obama presidency passed laws designed to facilitate immigration enforcement. Courts invalidated numerous state immigration enforcement efforts for unconstitutionally infringing on the federal power to regulate immigration. See, e.g., Arizona v. United States, 567 U.S. 387 (2012) (invalidating core provisions of Arizona’s controversial immigration enforcement law (S.B. 1070) as preempted by federal immigration law); United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013) (same for South Carolina immigration
numbers of “sanctuary cities” contributed significantly to the Obama administration’s decision in 2014 to end Secure Communities. As Department of Homeland Security Secretary Jeh Johnson explained, the abolition of the “controversial” program responded to “[a] rapidly expanding list of city, county and state governments” enacting laws that restricted state and local cooperation with federal immigration enforcement authorities.56 While dismantling Secure Communities, the administration simultaneously announced that the policy would be replaced with the “Priority Enforcement Program” (“PEP”). PEP narrowed the instances in which the U.S. government demanded state and local law enforcement agencies to hold immigrants and focused removal efforts on noncitizens convicted of serious crimes, not merely arrested for virtually all crimes.57 In sum, by restricting the scope of the U.S. government’s criminal removal efforts, PEP responded to strong state and local concerns with Secure Communities.58


58 See supra notes 55–57 and accompanying text.
The end of Secure Communities received little public attention. Commentators and political pundits instead focused criticism on the announcement of the controversial Deferred Action for Parents of Americans (“DAPA”) policy.59

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

2. Immigration Reform

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

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

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

(2) new avenues for lawful immigration to the United States through, among other steps, eliminating the lengthy backlogs in various immigrant visa categories and allowing increased migration of

59 See infra Part I.B.
61 See supra note 7 and accompanying text.
62 For analysis of the creation of a possible path to legalization for undocumented immigrants in immigration reform legislation and the fractious debate over any “amnesty,” see Muneer I. Ahmad, Beyond Earned Citizenship, 52 HARV. C.R.-C.L. L. REV. 257, 259, 271-72 (2017). “[D]uring the 2013 congressional debates about comprehensive immigration reform, the most contentious issue debated was whether to provide an eventual pathway to citizenship for currently undocumented migrants.” Stella Burch Elias, Immigrant Covering, 58 WM. & MARY L. REV. 765, 852-53 (2017); see infra note 70 and accompanying text.
low- and medium-skilled workers through temporary worker programs; and
(3) various steps designed to improve and expand the enforcement of the immigration laws.  

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

President Obama failed to make immigration reform a top priority during his first term, with health care instead dominating the administration’s legislative agenda. Congress failed to pass immigration reform. That failure generated considerable discontent among supporters of reform who had overwhelmingly voted for President Obama because of his promise to push immigration reform through Congress. Many Latina/os felt betrayed by the dramatic

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64 See infra Part II.B (discussing efforts to enforce the prohibition of the employment of undocumented immigrants).

65 Gerald P. López, Don’t We Like Them Illegal?, 45 UC DAVIS L. REV. 1711, 1793 (2012) (quoting Senator Barack Obama, Address at the National Council of La Raza (July 15, 2008)).


increase in removals, falling almost exclusively on Latino/as, combined with the lack of congressional action on immigration reform.69

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

Despite congressional failure to enact immigration reform legislation, the prolonged push for reform contributed to the emergence and maintenance of a potent grassroots political movement, including many undocumented college students,


69 See supra note 68.


advocating the extension of legal protections to immigrants. The movement supported, among other reforms, the DREAM Act, President Obama’s deferred action policies, and comprehensive immigration reform. Importantly, the organized and energetic advocacy of immigrant rights activists grew from simple enactment of the reform proposals to address broader challenges to the mass deportations pursued by the Obama administration. This spirited activism proved to be one of the most exciting and surprising grassroots political developments of the early twenty-first century. Part II discusses that robust political movement, which at this historical moment appears to have staying power, and unquestionably will shape the future of immigration reform.

B. DACA and DAPA

With dramatically increased removals failing to move Congress to pass immigration reform, President Obama weighed the available options that could provide relief for undocumented immigrants. As the 2012 election approached, some Obama supporters expressed deep


73 See supra note 72.


75 See supra notes 72–74 and accompanying text.

76 See supra Part I.A.2.
unhappiness with the President's first-term immigration record. The administration felt pressure to act.\textsuperscript{77}

With much fanfare, the Obama administration announced and quickly implemented Deferred Action for Childhood Arrivals ("DACA") in 2012.\textsuperscript{78} DACA made undocumented immigrants brought to the United States as children eligible to apply for a form of relief from removal known as "deferred action."

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

\textsuperscript{77} See supra notes 67–69 and accompanying text.

\textsuperscript{78} See supra note 3 and accompanying text; see also Bianca Figueroa-Santana, Note, Divided We Stand: Constitutionalizing Executive Immigration Reform through Subfederal Regulation, 115 COLUM. L. REV. 2219, 2220 (2015) ("Frustrated by congressional paralysis, the [Obama] Administration initiated Deferred Action for Childhood Arrivals (DACA) in 2012 . . . .").

\textsuperscript{79} See generally Shoba Sivaprasad Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases (2015) (analyzing the history of the exercise of prosecutorial discretion by the U.S. government in immigration enforcement through deferred action and other mechanisms). One famous case that revealed the use of deferred action by the U.S. government involved the musician John Lennon of the rock band the Beatles. See generally Leon Wilde, John Lennon vs. the U.S.A.: The Inside Story of the Most Bitterly Contested and Influential Deportation Case in United States History (2016) (discussing the Lennon case).

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

As the Obama administration made clear in announcing DACA, the policy exempted certain noncitizen youth without serious criminal convictions from the U.S. government’s removal efforts. The Secretary of Homeland Security, Janet Napolitano, explained that the policy would ensure that federal “enforcement resources are not expended” on “low priority [removal] cases.” That approach, in turn, allowed the federal government to focus its limited enforcement resources on

81 See infra Part II.B. (discussing the employer sanctions provisions in immigration reform legislation passed by Congress in 1986 that prohibit the employment of undocumented immigrants); see also Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12(c)(14) (2018) (implementing statutory bar on the employment of undocumented immigrants).

82 Ming H. Chen, Beyond Legality: The Legitimacy of Executive Action in Immigration Law, 66 SYRACUSE L. REV. 87, 96 & n.27 (2016) (citing authority about DACA); see also Leticia M. Saucedo, Employment Authorization and Immigration Status: The Janus-Faced Immigrant Worker, 43 OHIO N.U. L. REV. 471, 478 (2017) (“The authority to grant employment authorization became controversial during the Obama administration because it struck a collective nerve about the availability of work, the right to job security, and the centrality of work to an individual's identity.”).


the removal of serious noncitizen criminal offenders.\footnote{See id.} Despite the fact that DACA allowed the Executive Branch to target its immigration enforcement efforts at noncitizens who placed public safety at risk, critics nonetheless charged the policy as unconstitutional.\footnote{See supra notes 81–83 and accompanying text.}


The top five countries of origin for DACA recipients were as follows:\footnote{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-undocumented-immigrants-enrolled-in-daca/ft_17-09-25_daca_topcountries.}

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<tr>
<th>Country</th>
<th>Total</th>
<th>% of total DACA recipients</th>
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<tbody>
<tr>
<td>Mexico</td>
<td>548,000</td>
<td>79.4</td>
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<tr>
<td>El Salvador</td>
<td>25,900</td>
<td>3.7</td>
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<tr>
<td>Guatemala</td>
<td>17,700</td>
<td>2.6</td>
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<tr>
<td>Honduras</td>
<td>16,100</td>
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Nearly ninety percent of the DACA recipients were Latina/o. Consequently, just as they have been dramatically affected by removals, Latina/os noncitizens were the group that gained the most from DACA and stood to be injured in the largest numbers by its rescission.

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

As a presidential candidate, Donald Trump from the beginning of his campaign made tough immigration enforcement a central issue, thus tapping into the popular anti-immigrant impulse that has flared sporadically in the United States. He also criticized DACA as an unconstitutional exercise of executive power by President Obama.

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91 See supra Part I.A.1.


93 See supra notes 72–75 and accompanying text.


95 See, e.g., James Pfiffner & Joshua Lee, Trump Pledged to Reverse Obama’s Executive
Candidate Trump promised to abolish the policy and, as President, ultimately did just that.\textsuperscript{96}

However, before moving to rescind DACA, President Trump shortly after his inauguration issued Executive Orders that established a blueprint for greatly ramping up immigration enforcement.\textsuperscript{97} News reports of arrests of DACA recipients,\textsuperscript{98} including one who reportedly


\textsuperscript{96} See supra note 11 and accompanying text.


President Trump’s tough immigration enforcement measures also included three versions of a “Muslim” or “travel” ban directed primarily at noncitizens from several predominantly Muslim nations. See \textit{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, \textit{Int’l Refugee Assistance Project v. Trump}, 883 F.3d 233 (4th Cir. 2018) (holding that the third version of the travel ban violated the Establishment Clause), vacated and remanded, 138 S. Ct. 2710 (2018). See generally \textit{Khaled A. Beydoun, American Islamophobia} (2018) (analyzing the history of “Islamophobia” underlying President Trump’s Muslim bans). The Supreme Court stayed an injunction preventing some provisions of the travel ban from being implemented, thus allowing President Trump’s third version of the ban to go into effect. See \textit{Int’l Refugee Assistance Project}, 138 S. Ct. at 542. A 5–4 Court ultimately upheld the third version of the travel ban. See Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

was deported,\textsuperscript{99} generated palpable fear in immigrant communities. The Trump administration later engaged in much-publicized workplace raids,\textsuperscript{100} and ordered the deployment of the national guard to the U.S. Mexico border.\textsuperscript{101} As part of a “zero tolerance” approach, the administration implemented a policy of separating families in detention along the U.S./Mexico border but abandoned it in the wake of a firestorm of controversy.\textsuperscript{102} As one observer summarized, “the [Trump] administration’s sweeping, high profile immigration enforcement initiatives — along with its inflammatory anti-immigrant


rhetoric—mark the ascendance of immigration restrictionism to the highest levels of the executive branch to an extent that is entirely without modern precedent.\textsuperscript{103}

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

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

After much speculation, Attorney General Jeff Sessions announced the rescission of DACA.\textsuperscript{110} That announcement generated immediate political and legal responses. The nation saw protests across the country calling for congressional action to provide relief to DACA


\textsuperscript{104} See supra notes 97–103 and accompanying text.

\textsuperscript{105} See supra note 11 and accompanying text.

\textsuperscript{106} See supra text accompanying notes 72–75 (noting the emergence of an organized undocumented student movement demanding immigration reform).


\textsuperscript{109} See id. (citing authorities).

\textsuperscript{110} See supra note 10 and accompanying text.
recipients. Congress began reconsidering a version of the DREAM Act and more far-reaching immigration reform. In addition to widespread public condemnation of DACA’s elimination, New York and a number of other states, including California, filed legal challenges to the Trump administration’s rescission of DACA. The University of California, the nation’s largest public university system, did as well.

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

The Obama administration’s announcement of DAPA provoked nothing less than a firestorm of controversy. The most stridently made objections centered on claims that President Obama had violated the separation of powers between Congress and the Executive Branch and

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116 See supra notes 84–86 and accompanying text.
usurped the lawmaking power of Congress. The courts enjoined the implementation of the expanded deferred action policy, and a deadlocked Supreme Court allowed the injunction to stand. Consequently, DAPA never was implemented.

C. New Directions: President Trump’s Immigration Enforcement Agenda

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


118 See United States v. Texas, 136 S. Ct. 2271, 2272 (2016); see also Amanda Frost, Cooperative Enforcement in Immigration Law, 103 IOWA L. REV. 1, 2-3 (2017) (observing that United States v. Texas was “one of the most important immigration cases in decades”). 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).

119 See supra notes 94–103 and accompanying text.

120 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-build-that-wall-at-hispanics-during-high-school-volleyball-match/ (“Build that wall . . . became synonymous with Donald Trump’s high intensity campaign rallies, an expression that became more rallying cry than policy proposal during his rise to political power.”). For analysis of the symbolic importance of the border wall, see Pratheepan Gulasekaram, Why a Wall?, 2 UC IRVINE L. REV. 147, 158-81 (2012). Despite the substantial costs, it is uncertain whether construction of a wall along the U.S./Mexico border in fact would provide any true immigration enforcement benefits. See id. at 151-58.


122 See supra notes 94–103 and accompanying text.
II. LESSONS FROM THE RISE AND FALL OF DACA ABOUT THE FUTURE OF U.S. IMMIGRATION LAW

As outlined in Part I, President Obama’s deferred action policies responded to: (1) Congress’s prolonged failure to pass comprehensive immigration reform; and (2) the fact that more than eleven million undocumented immigrants live and work in the United States. So long as Congress fails to pass reform legislation and the undocumented population numbers in the millions, pressure in all likelihood will persist for the U.S. government to act. The threatened rescission of DACA added pressure on Congress to reform the immigration laws.

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

Second, besides only addressing the status of one segment of the undocumented population, DACA did nothing to change the immigration laws in a meaningful way that would reduce the pressures leading to the future emergence of a new undocumented population. Access to employment is the primary magnet for undocumented immigration. DACA did nothing to change the economic dynamics fueling undocumented immigration.

Last but not least, DACA provided only limited relief from removal to the beneficiaries of the policy. Most importantly, that relief did not confer lawful permanent residence status, and thus a direct path to a permanent legal immigration status, for undocumented immigrants. DACA recipients experienced the lack of durability of deferred action relief with full force after the election of President Trump and uncertainty lingered about the future of DACA. That uncertainty, combined with the Trump administration’s persistent drum beat of

123 See supra Part I.A.2.
124 See supra note 15 and accompanying text (citing authority).
125 See supra Part I.B.
126 See infra Part II.B.
127 See infra Part II.B.
128 See supra notes 104–14 and accompanying text.

Despite the rescission of DACA, deferred action remains a viable form of relief for undocumented immigrants. In the future, however, one would strongly suspect that the U.S. government under President Trump might exercise deferred action only on an individual, case-by-case basis. Indeed, shortly after his inauguration, the President issued an Executive Order requiring that any relief from removal, including deferred action, be awarded on an individual basis.\footnote{See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017).} Consequently, any new categorical deferred action policy providing relief similar to DACA and DAPA is currently off the table. In any event, any deferred action policy could be expected to generate significant political and legal controversy, just as President Obama’s policies did.\footnote{See supra Part I.B.}

\section{A. The Need for Congressional Action}

At this historical moment, a social change strategy that focuses on persuading Congress to pass immigration reform, which would avoid the various political and legal limitations of relief provided by the Executive Branch, would seem to be the preferable way to address the nation’s various immigration challenges.\footnote{See Hiroshi Motomura, The DREAM Act Could Bring the Rule of Law back to Immigration Policy, L.A. TIMES (Dec. 7, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-motomura-dream-act-20171207-story.html.} Through legislation, Congress could allow for more durable relief for undocumented immigrants than any kind of deferred action policy. It also could avoid the heated controversy generated by executive action providing relief to undocumented immigrants, and take affirmative steps to avoid the growth of future undocumented populations.

The political response to the rise and fall of DACA bolsters the argument that political action directed at Congress should be the focal point of efforts to bring about lasting and meaningful change to the U.S. immigration laws. Despite its limitations and ultimate attempted
rescission, the advent of DACA added considerable political force and urgency to the burgeoning grassroots immigrants’ rights movement.\textsuperscript{133}

Political pressure directed at the Executive Branch, rather than Congress, can be expected to result in, at best, limited relief of uncertain duration. Consider that President Obama’s creation of DACA directly responded to that political pressure and energized the immigrant rights movement. At the same time, after immigration restrictionists vociferously complained about President Trump’s initial failure to dismantle DACA,\textsuperscript{134} the administration in the end acceded to political pressure and rescinded the policy.\textsuperscript{135} President Trump’s rescission of DACA appealed to his pro-immigration enforcement base and demonstrates the potency of conservative political activism.\textsuperscript{136}

Like executive action on immigration,\textsuperscript{137} the power of the judiciary to address deficiencies in the immigration laws has institutional constraints. Generally speaking, the courts have grown increasingly protective of the rights of immigrants.\textsuperscript{138} For example, resort to the courts by immigrants and their defenders has provided protections to noncitizens with respect to some of President Trump’s executive

\textsuperscript{133} See supra notes 72–75 and accompanying text.
\textsuperscript{134} See supra text accompanying note 107 (noting that a number of states threatened lawsuits if President Trump did not rescind DACA).
\textsuperscript{135} See Press Release, U.S. Dep’t of Justice, supra note 11 and accompanying text.
\textsuperscript{136} See supra notes 81–83 and accompanying text.
\textsuperscript{137} See supra Part I.B.
orders. Through the legal system, lawyers can protect the rights of immigrants. In a number of important instances, including for a time blocking the rescission of DACA, courts have intervened to ensure compliance with the law. That important role, however, has limits and cannot change the laws. Consequently, the judiciary cannot be expected to solve the formidable problems generated by immigration laws that are not particularly well-equipped for the global migration pressures of the twenty-first century.

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

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

139 See, e.g., supra note 56 (citing court decisions in litigation challenging the Trump administration’s attempt to de-fund “sanctuary” cities).
140 See supra note 13 (citing authorities).
142 See supra note 115–118 and accompanying text.
143 At the same time, however, states possess the constitutional responsibility to take steps to integrate immigrants into the greater community. See supra note 55 (citing authorities); see, e.g., Rosenbaum, supra note 44 (analyzing the California TRUST Act that limits state and local law enforcement cooperation with federal immigration enforcement agencies). States, of course, cannot directly regulate the admission and removal of immigrants, a power exclusively reserved for the U.S. government. See, e.g., Arizona v. United States, 567 U.S. 387 (2012) (invalidating provisions of Arizona’s S.B. 1070 found to intrude on the federal power to enforce the U.S. immigration laws).
Indeed, as regularly seen in some states, and in many of President Trump’s immigration enforcement actions, popular pressure to punish immigrants, especially the undocumented and those who have brushes with the criminal justice system, often prevails in the political process.

This defect in the political process differentiates immigration law from other bodies of law. It militates in favor of more careful judicial review of the immigration laws to ensure the adequate protection of immigrant rights in the face of the recurring anti-immigrant impulse that often prevails in the American political process.

The constitutional constraints in the realm of immigration law could not have been lost on President Obama, a Harvard-educated lawyer who once taught constitutional law at the University of Chicago.

See United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938) (observing that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”). For contemporary arguments that the courts should carefully review laws that disadvantage discrete and insular minorities, see Bertrall L. Ross II & Su Li, Measuring Political Power: Suspect Class Determinations and the Poor, 104 CALIF. L. REV. 323, 329-50 (2016); Nicholas O. Stephanopoulos, Political Powerlessness, 90 N.Y.U. L. REV. 1527, 1530-36 (2015). Aaron Tang, Reverse Political Process Theory, 70 VAND. L. REV. 1427, 1429-30 (2017) summarizes the current state of the political process scholarship, including that which criticizes the theory as the basis for exacting judicial review. The Supreme Court’s choppy equal protection decisions involving the rights of immigrants are analyzed in Jenny Brooke-Condon, Equal Protection Exceptionalism, 69 RUTGERS U. L. REV. 563, 571-603 (2017); Brian Soucek, The Return of Noncongruent Equal Protection, 83 FORDHAM L. REV. 133, 173-86 (2014).

See supra note 55 (citing cases invalidating state immigration enforcement laws).

See supra notes 94–103 and accompanying text.


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

Lamenting the lack of congressional action on immigration reform and admittedly acting in a limited fashion, President Obama took a limited step toward offering relief to undocumented immigrants through DACA. As with the administration’s tough stance on enforcement, the long-term goal could only be to prod Congress to pass legislation that would provide fuller, more permanent relief to undocumented immigrants. President Trump’s rescission of DACA returned the nation to the status quo ante for undocumented youth that existed before the creation of the program and, in so doing, also increased the pressure on Congress to act.

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

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

DACA’s trajectory starkly illustrates the nexus between law reform efforts and movements for social change. The contemporary movement for immigrant rights crystallized with the nationwide protests in 2006 of a tough enforcement-oriented immigration reform bill passed by the House of Representatives. That movement,

151 See supra note 6 and accompanying text (citing authority).
152 See supra Part I.A.1.
153 See supra Part I.B.
154 See supra note 63 and accompanying text (citing authorities discussing immigration reform proposals).
156 See supra Part I.A.2.
157 See Kevin R. Johnson & Bill Ong Hing, The Immigrant Rights Marches of 2006
combined with the congressional failure to enact immigration reform, ultimately fueled pressures for action that resulted in President Obama’s announcement of DACA and DAPA. In turn, the implementation of DACA helped reaffirm, energize, and consolidate the political movement. That activism forcefully, but unsuccessfully, opposed the Trump administration’s rescission of DACA and pushed Congress to extend lasting legal protections to DACA recipients. In fact, the power of the immigrant rights movement led to a temporary shutdown of the entire federal government, an immigration political moment unprecedented in modern American history.

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

\[\text{and the Prospects for a New Civil Rights Movement, 42 Harv. C.R.-C.L. L. Rev. 99, 102-09 (2007) (analyzing the implications of mass protests in cities across the country in 2006 in response to a tough immigration enforcement bill passed by the U.S. House of Representatives); Sylvia R. Lazos Vargas, The Immigrant Rights Marches (Las Marchas): Did the “Gigante” (Giant) Wake Up or Does It Sleep Tonight?, 10 Nev. L.J. 685 (2007) (to the same effect).}\]

\[\text{158 See supra Part I.B.}\]

\[\text{159 See supra notes 72–75 and accompanying text.}\]

\[\text{160 See David Nakamura & Ed O'Keefe, “This is the Moment”: Dreamers Face Make-or-Break Push on Immigration Fight with Trump, Wash. Post (Dec. 4, 2017), https://www.washingtonpost.com/politics/this-is-the-moment-dreamers-face-make-or-break-push-on-immigration-fight-with-trump/2017/12/03/d02aab0-d6a3-11e7-95b0-df7c19270879_story.html?utm_term=.6f90253b9b46 (reporting that the aggressive push for relief for DACA recipients “has reactivated a nationwide political network honed over the past decade”).}\]

\[\text{161 See supra note 14 and accompanying text (discussing this development and subsequent adoption of a budget without an immigration component). Anti-immigrant outbursts often spur political responses. In California, for example, voter passage of the anti-immigrant landmark Proposition 187 in 1994, which would have denied undocumented immigrants access to the public schools and most benefit programs, see Kevin R. Johnson, An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race, 70 Wash. L. Rev. 629, 632 (1995), triggered a political transformation in the Golden State that ultimately led the legislature in 2017 to declare the state of California to be a “sanctuary state.” See supra note 55 (citing authority).}\]
It is worth emphasizing that President Obama created DACA only after Congress failed for years to enact comprehensive immigration reform. As the President candidly acknowledged at the time, the deferred action policy was a limited response to that prolonged congressional gridlock. DACA thus was at most a second best approach taken by the Executive Branch to narrow the enforcement of the immigration laws and to offer limited relief to a subset of the undocumented immigrant population. Only congressional action could make more enduring changes to the immigration laws that provide durable relief to a larger group of undocumented immigrants and also reduce future pressures for undocumented immigration.

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

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

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162 See supra Part I.A.2.
163 See supra note 6 and accompanying text; supra Part I.A.2.
164 See supra notes 128–129 and accompanying text.
165 See supra note 7 and accompanying text.
166 See supra notes 81–83 and accompanying text.
167 See supra notes 81–83 and accompanying text.
B. Regulating Employment: A Barrier to Comprehensive Immigration Reform

Few knowledgeable observers would disagree that the revamping of the nation’s immigration laws is complex. The near-misses with comprehensive immigration reform efforts illustrate the formidable political challenges. In 2013, for example, a bipartisan group of the Senate passed a compromise piece of legislation aimed at reforming the legal immigration system, bolstering border enforcement, and providing a path to legalization for undocumented immigrants in the United States. As a compromise, that legislation, as one might expect, had components that were not altogether satisfying to everyone. Ultimately, the leadership of the Republican-controlled House of Representatives blocked a vote on that legislation.

Likewise, the policy challenges of immigration reform, especially reducing the pressures for undocumented immigration, also are formidable. It goes without saying that, as seen in the United States, immigration reform that would remedy the system’s current shortcomings is hard to come by. The Immigration Reform and Control Act (“IRCA”), passed by Congress in 1986, was the last piece of legislation that truly attempted to address the nation’s immigration system in a holistic fashion. Amnesty programs in IRCA regularized the status of hundreds of thousands of undocumented immigrants. Although increasing enforcement measures, including sanctions imposed on employers of undocumented immigrants designed to prevent the emergence of a new undocumented population, the Act proved to be unsuccessful at preventing the emergence of a new undocumented population. The

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168 See supra Part I.A.2.
169 See supra notes 70–71 and accompanying text.
170 See supra notes 70–71 and accompanying text.
171 See López & Lacoste, supra note 70.
172 See supra Part I.A.2.
174 See Cházaro, Beyond Respectability, supra note 70, at 386-92.
175 See Ahmad, supra note 62, at 266-72 (discussing one “legacy of IRCA” as the avoidance of using the word “amnesty” to describe any proposal that would provide for the regularization of the immigration status of undocumented immigrants).
new employer sanctions program proved difficult to enforce, resulting in the growth of a new and significantly larger undocumented immigrant population.\textsuperscript{177}

To provide a long-term solution to undocumented immigration, contemporary immigration reform would need to: (1) address the status of the existing undocumented immigrant population (legalization); and (2) prevent the growth of a new one (enforcement).\textsuperscript{178} Experience teaches that the nation can implement a path to legalization for undocumented immigrants.\textsuperscript{179} However, as seen with IRCA, measures that avoid the growth of a new undocumented immigrant population pose formidable policy challenges.\textsuperscript{180}

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


\textsuperscript{178} See supra notes 70–71 and accompanying text (discussing immigration reform bill passed by the Senate in 2013 but not debated in the House).


\textsuperscript{180} See supra notes 176–177 and accompanying text.


\textsuperscript{182} Jessica A. Clarke, Identity and Form, 103 CALIF. L. REV. 747, 781 (2015).
enacted any of those proposals, but some states require use of the E-Verify system by employers.183

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

The deficiencies in the current employment verification system militate in favor of consideration of alternatives that allow for improved workplace enforcement of the immigration laws. Creating an alternative through a national identification card, improved employment verification database, or some other mechanism, would increase the likelihood of convincing a majority of Congress to enact a new piece of comprehensive immigration reform legislation that includes a path to legalization for undocumented immigrants.187 Unfortunately, creating such an enforcement mechanism is not an


185 See supra note 184.


187 See supra notes 168–186 and accompanying text.
easy task as a political matter. Some possible alternatives have been the subject of intense debate:

While there are administrative and national security arguments for universal registration, Americans have historically rebuffed the idea of a national ID card. In recent years, national identification cards have been proposed to deal with an array of national security and immigration-related issues, all of which . . . were rejected as threats to traditional values of liberty and freedom from undue government interference. The specter of a national identification card has come up most recently in debates over comprehensive immigration reform. The reform bill that passed the Senate in the summer of 2013 includes a provision making use of the E-Verify program mandatory for employers, a proposition which requires the federal government to maintain an inventory of all those eligible to work in the United States, including citizens . . . \[C]ritics from both sides of the aisle have come out against E-Verify because they perceive it as leading to universal registration.\footnote{Nancy Morawetz & Natasha Fernández-Silber, \textit{Immigration Law and the Myth of Comprehensive Registration}, 48 UC Davis L. Rev. 141, 198-99 (2014) (emphasis added) (footnotes omitted); see Jonathan Weinberg, \textit{Providing Identity}, 44 PEPPE L. Rev. 731, 736-37 (2017) (analyzing the history of national identification proposals in the United States); Margaret Hu, \textit{Biometric ID Cybersurveillance}, 88 Ind. L.J. 1475, 1480-83 (2013) (analyzing how a biometric identification system raises the potential of governmental cybersurveillance).}

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

\textbf{C. A Solution? The RAISE Act}

Since early in the twenty-first century, Congress has regularly considered immigration reform proposals. In 2017, one new proposal, which would greatly reduce legal immigration, garnered the support of President Trump and attracted national attention.\footnote{See infra notes 193–196 and accompanying text.} However, rather than solve problems of the current American immigration system, it would in all likelihood exacerbate them. Moreover, by reducing immigrant visas in reducing overall legal immigration, the Act would
change the racial demographics of contemporary immigration by disfavoring prospective immigrants from developing nations.

Today, the U.S. government allows approximately one million immigrants to legally immigrate each year as lawful permanent residents. Mexico, China, and India currently are the three nations that send the most immigrants to the United States. A majority of visas under today's U.S. immigration laws, which Congress generally designed to promote the reunification of families, are allocated to visa applicants who have U.S. citizen and lawful permanent resident family members living in the United States.

The Reforming American Immigration for Strong Employment ("RAISE") Act would reshape American immigration by dramatically reducing family-based legal immigration. Designed to cut legal immigration by one-half over the next decade from roughly one million to 500,000 a year, the RAISE Act eliminates a number of family immigrant visa categories. The Act specifically would limit family immigrant visas to spouses and minor children of U.S. citizens.

190 See U.S. DEPT OF HOMELAND SEC., LEGAL IMMIGRATION AND ADJUSTMENT OF STATUS REPORT FISCAL YEAR 2017, QUARTER 2 (2017), http://archive.is/MuCfi ("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.").

191 See Stephen H. Legomsky & Cristina M. Rodríguez, IMMIGRATION & REFUGEE LAW & POLICY 269 (6th ed. 2015) ("[O]ne central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity."). President Trump has attacked family immigration as "chain migration," and has demanded that Congress replace the current family-based immigration system with a "merit-based" one. See infra notes 196–197 and accompanying text.

192 See U.S. DEPT OF HOMELAND SEC., supra note 190 ("Nearly half of all [lawful permanent residents] in Fiscal Year 2017 obtained status as immediate relatives of U.S. citizens and approximately two-thirds obtained status either as immediate relatives or under a family preference category.").


and lawful permanent residents; consequently, parents, adult children, and brothers and sisters of U.S. citizens and lawful permanent residents would not be eligible for visas.195 The RAISE Act’s reduction of family immigration visas would likely lead to reductions in legal migration from the nations that currently send the largest numbers of immigrants to the United States, namely people of color from Mexico, China, and India.196

Besides drastically cutting family-based immigration, the RAISE Act would modify the current immigrant visa scheme with a “points” system ostensibly based on “merit.”197 Under the system, visa applicants would earn points for high-paying job offers, advanced degrees, and the ability to make investments of more than one million dollars in the United States. Persons in their twenties with English language proficiency would receive more points than other visa applicants. An applicant with sufficient points under the statute would be eligible for a merit-based immigrant visa.198

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

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195 See id.
199 See supra notes 197–198 and accompanying text.
therefore will do nothing to reduce the pressures for undocumented immigration.\textsuperscript{201}

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

Moreover, the RAISE Act in all likelihood would change the racial demographics of the legal immigration stream.\textsuperscript{205} The reduction in family visas would reduce the flow of immigrants from the developing nations populated predominately by non-whites currently sending large numbers of immigrants to the United States. Moreover, the “merit” system would redirect migration flows away from the developing world (with large populations of people of color) to this country.

\begin{footnotesize}

\textsuperscript{202} See \textsc{Johnson}, \textit{Opening the Floodgates}, supra note 155, at 72, 168-79.

\textsuperscript{203} See supra text accompanying notes 176–177 (analyzing inability to enforce IRCA’s employer sanctions provisions).

\textsuperscript{204} See supra text accompanying notes 202–203 (identifying how passage of the RAISE Act might create pressures that fuel undocumented immigration).

\textsuperscript{205} See supra notes 190–192 and accompanying text; see also Jeff Stein & Andrew Van Dam, \textit{Trump Immigration Plan Could Keep Whites in U.S. Majority for Up to Five More Years}, \textsc{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 proposal in response to the budget impasse, see supra note 14, and how it would reduce the immigration of persons of color).
\end{footnotesize}
Even though the Obama administration deported record numbers of immigrants, President Trump endeavored to keep his campaign promise of dramatically increasing immigration enforcement. As President, Trump has greatly redirected immigration law and policy and increased immigration enforcement. In his first weeks in office, in addition to the first iteration of the “travel” or “Muslim” ban, President Trump issued two executive orders geared toward enhancing border and interior enforcement of the U.S. immigration laws. In pursuit of a “zero tolerance” policy, they set in motion efforts to strip federal funding from “sanctuary cities,” expansion of detention as a tool of immigration enforcement, increase the number of immigration enforcement officers, widen the scope of “expedited removal” (i.e., removals with limited procedural protections), and more. High level officials in the Trump administration repeatedly made statements about how all undocumented immigrants were subject to removal. The administration has aggressively employed the enforcement machinery refined during the Obama presidency, with a particular focus on noncitizens who have had brushes with the criminal justice system. The Trump administration also announced the phasing out of the DACA program, which led to a push for Congress to provide relief to the DACA recipients.

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

Nor are President Trump’s immigration concerns limited to undocumented immigration. The administration has tightened visa requirements for legal entry into the United States. In addition,
President Trump endorsed the RAISE Act, which would aim to reduce legal immigration by one-half. The President also has called on Congress to end “chain migration,” which is another way of calling for the end of family reunification as a primary goal of the U.S. immigration laws.

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

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

At the same time, not any congressional action will address the deficiencies in the current immigration system. Enforcement of the


See supra Part II.C.

See supra notes 137–141 and accompanying text.

See supra notes 171–174 and accompanying text.


See supra note 7 and accompanying text (noting the general consensus that the contemporary immigration system is “broken”).
immigration laws pose complex political and policy challenges, especially when it comes to enforcing the prohibition on the employment of undocumented immigrants. Employment is an unquestionable magnet for undocumented immigrants. Proposals such as the RAISE Act that reduce legal immigration but fail to deal with employment and the regularization of the status of undocumented immigrants, will do little to reduce, and likely will increase, the pressures for undocumented immigration.

CONCLUSION

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

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

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

222 See supra Part II.B.
223 See supra Part II.B.
224 See supra Part I.A.2.
225 See supra Part I.A.2.
226 See supra Part I.B.
227 See supra notes 94–103 and accompanying text.
228 See supra notes 40–43 and accompanying text.
229 See, e.g., supra note 43 (noting Donald Trump’s call for the mass deportation of Mexican immigrants).
In the face of the challenges to engaging in a rational national discussion about immigration reform, the rise and fall of DACA creates the historic opportunity for Congress to pass comprehensive reform legislation. Executive actions by Presidents Obama and Trump with respect to DACA have made the status of undocumented immigrants in the United States front page news and placed immigration reform at the forefront of the national consciousness. The political energy brought by the emerging, and powerful, group of young undocumented immigrants and their supporters increases the likelihood of constructive change through the political process. Put simply, the rise and fall of DACA galvanized this movement. Only time will tell whether Congress capitalizes on the opportunity to modernize the U.S. immigration law.