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Trump's Latinx Repatriation

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ABSTRACT

Two historical episodes have indelibly influenced the development of Latinx identity and sense of belonging in the United States. During the Great Depression, state and local governments, with the support of the U.S. government, repatriated approximately one million persons of Mexican ancestry, including many U.S. citizen children and immigrant parents, to Mexico. Similarly, in 1954, the U.S. government launched Operation Wetback, a military-style campaign led by a retired general that removed another one million persons of Mexican ancestry, including many U.S. citizen children, from the southwest.

History rightly condemns these episodes of anti-Mexican intolerance, which both amount to forms of ethnic cleansing. Nonetheless, we may be seeing history repeat itself with even greater harm inflicted on larger numbers of Latinx peoples. Through breathtaking and unprecedented changes to immigration enforcement, President Donald J. Trump has boldly moved to reduce immigration to, and the number of immigrants in, the United States. This Article contends that, as part and parcel of his fervent anti-immigrant agenda, President Trump is engaging in a concerted effort to remove Latinx peoples, especially Mexicans and Central Americans, from the country. Just as the previous Mexican removal campaigns did, the new Latinx repatriation accomplishes mass removals and encourages Latinx noncitizens, along with U.S. citizen children, to leave the country and self-deport, or, alternatively, to never come to the United States in the first place.

But the new Latinx repatriation differs in important respects from the old removal campaigns. First, the new system is facially neutral and colorblind, not expressly targeting Latinx peoples. That is the case despite the fact that President Trump's words frequently—and mercilessly—attack Latinx immigrants. As a legal matter, colorblind policies pose formidable challenges to legal attacks.

Second, through President Trump's policy efforts, the new repatriation has become institutionalized into the fabric of immigration enforcement, which differs from the ad hoc and episodic nature of the Mexican repatriation and Operation Wetback. With the targeting of Latinx immigrants embedded in the institutional structure of immigration enforcement, one can expect many more Latinx noncitizens to be removed than in previous Mexican removal campaigns.

Ultimately, only political action and congressional reform of our immigration laws can meaningfully change the racial discrimination embedded in immigration law and enforcement. To do so, we must acknowledge and directly confront the racial impacts of the operation of the immigration laws and their enforcement. Put differently, an awareness of the



racialized nature of the problem is a precursor to bringing racial justice to immigration.

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INTRODUCTION

Although not as well-known as other racial blemishes on U.S. history, such as the internment of persons of Japanese ancestry during World War II,¹ two historical episodes have indelibly shaped the sense of belonging of persons of Mexican ancestry—and Latinx people generally—in the United States. First, during the economic devastation of the Great Depression in the 1930s, state and local governments, with the support of the federal government, sent to Mexico approximately one million persons of Mexican ancestry, including many U.S. citizen children of immigrant parents.² Second, in 1954, the U.S. government, with great fanfare, launched Operation Wetback,³ a military-style campaign led by a retired general that removed more than one million persons of Mexican ancestry, including many citizen children, from the southwest.⁴ Through actions of questionable legality, government in both instances engaged in the mass removal of Latinx citizens as well as immigrants.⁵

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1. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of persons of Japanese ancestry, both U.S. citizens and immigrants, during World War II), *overruled*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).
 2. See Part I.A. See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (rev. ed. 2006) (documenting the repatriation of an estimated one million persons of Mexican ancestry in the 1930s); CAMILLE GUERIN-GONZALES, *MEXICAN WORKERS AND THE AMERICAN DREAM: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR, 1900–1939* (1994) (analyzing repatriation of Mexican farm workers from California); ABRAHAM HOFFMAN, *UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929–1939* (1974) (reviewing the history of the Mexican repatriation).
 3. *Wetback* is a racial epithet generally used to refer to a Mexican immigrant or person of Mexican ancestry. See *infra* text accompanying notes 81–84.
 4. See Part I.B. For a detailed history of the emergence and operation of Operation Wetback, see JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980); KELLY LYTTLE HERNANDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* 169–217 (2010).
 5. See *supra* Part II. “Although many consider Latinos to be a monolithic group, Latinos in the United States are extremely heterogeneous, composed of persons of Mexican, Cuban, Puerto Rican, Central-American, and other Latin-American ancestry.” Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259, 1290 (1997) (footnotes omitted); see Cruz Reynoso, *A Survey of Latino Lawyers in Los Angeles County—Their Professional Lives and Opinions*, 38 U.C. DAVIS L. REV. 1563, 1577–79 (2005). Some observers persist in mistakenly viewing Latinx persons of different national origins as identical. See, e.g., Claire Atkinson, *Fox News Apologizes for Graphic About ‘3 Mexican Countries’*, NBC NEWS (Apr. 1, 2019, 9:55 AM), <https://www.nbcnews.com/business/business-news/fox-news-apologizes-graphic-about-3-mexican-countries-n989526> [<https://perma.cc/7SGR-N952>] (reporting that Fox News apologized for an on-screen graphic stating that President Trump was reducing aid

To paraphrase George Santayana (perhaps one time too many), we are condemned to repeat the past that we cannot remember.⁶ Sadly enough, the United States today finds itself replaying past historical episodes of mass deportations of Latinx peoples. This Article demonstrates that the anti-Latinx consequences of President Trump's concentrated, multi-pronged immigration enforcement campaign replicates past infamous anti-Latinx milestones in U.S. history.

While history is repeating itself, it is doing so in an even more systematic fashion than past discriminatory episodes. As a result, far more Latinx people may be injured in the modern incarnations of the Mexican repatriation and Operation Wetback. Ushering in brash and dramatic changes in immigration law and enforcement, President Donald J. Trump has boldly—some might say recklessly—acted to restrict immigration to, and the number of noncitizens in, the United States.⁷ This Article contends that through a series of unforgiving immigration measures, the Trump administration is engaged in nothing less than a concerted effort to remove Latinx people, specifically Mexicans and Central Americans,⁸ from the country in what can be characterized as a form of ethnic cleansing.⁹ This bold—some might reflexively think outlandish—assertion is justified by a review of the facts. As the previous anti-Mexican removal campaigns did, the new efforts further encourage Latinx immigrants to voluntarily leave the country or to never come to the United States even if lawfully eligible to do so.¹⁰ In the end, the mass repatriation of Latinx persons is a central

to “three Mexican countries” when he in fact had announced cuts in U.S. foreign assistance to Honduras, El Salvador, and Guatemala).

6. See 1 GEORGE SANTAYANA, *THE LIFE OF REASON* 284 (1905) (“Those who cannot remember the past are condemned to repeat it.”).

7. See Part II.B.

8. Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119 (2018) summarizes contemporary developments in immigration enforcement as follows:

President Trump's era of immigration enforcement harkens back to some of the United States' darkest, most nativist, racially, and ideologically-tinged immigration moments. The new administration's rhetoric and policies reinforces the myth of the Mexican or Central American “criminal alien.” Immigration detention of asylum seekers arriving via the U.S.–Mexico border is indicative of the inherently racialized response to migration from Central America and Mexico.

9. See *infra* text accompanying notes 64–67.

10. Some restrictionist advocates have called for states to adopt stringent immigration enforcement measures that effectively encourage undocumented immigrants to leave the country and self-deport. See, e.g., Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 157–62 (2008); Lucy Madison, *Romney on Immigration: I'm for “Self-Deportation,”* CBS NEWS (Jan. 24, 2012, 12:44 AM), <https://www.cbsnews.com/news/romney-on-immigration-im-for-self->

goal of the Trump administration's conscious concerted effort to transform the racial composition of the nation's immigrant and general populations.¹¹

The new Latinx repatriation differs in important respects from the old versions. First, the modern incarnation is facially-neutral and, by its terms, does not expressly target Latinx people; that is the case even though President Trump regularly makes racially-charged, if not downright racist, remarks about the negative consequences of Mexican and Central American immigration to the United States. Colorblindness has significant practical consequences as it renders the policies extremely difficult, and often impossible, to challenge in the courts. Second, through President Trump's policy initiatives, the new Latinx repatriation has become institutionalized into the very fabric of immigration enforcement, which makes it different from the ad hoc, episodic quality of both the Mexican repatriation and Operation Wetback. Consequently, more Latinx persons are likely to be affected than the millions removed in the 1930s and 1954. These two

deportation [<https://perma.cc/T79H-ZGBY>]; see also Rene R. Rocha, et al., *Policy Climates, Enforcement Rates, and Migrant Behavior: Is Self-Deportation a Viable Immigration Policy?*, 42 POL'Y STUD. J. 79, 79–100 (2014) (discussing various enforcement tactics intended to convince undocumented immigrants to leave the United States). For an extended critical assessment of self-deportation policies pursued throughout U.S. history, see K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1879 (2019).

11. See Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 151 (2019) (noting that “critics [have] accused[d] President Trump of being racist and anti-immigrant” in his immigration policies) (footnotes omitted). See generally Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity and the Resistance*, 53 WAKE FOREST L. REV. 575 (2019) (analyzing the Trump administration's efforts to generally decrease the racial diversity of immigrants to the United States). To that end, “[t]he Trump Administration has demanded a sharp uptick in the scope, scale, and variety of responses by the federal government to illegal immigration and a comprehensive version of its approach to illegal immigration.” Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1365 (2019). Professor Sohoni identifies three fundamental ideas about immigration that animate the enforcement measures: “that immigrants threaten public safety and national security; that immigrants steal Americans’ jobs; and that immigrants consume limited public resources . . .” *Id.* at 1366. Variations of the very same ideas influenced the Mexican repatriation and Operation Wetback. See Part I.

Other Trump administration policies have been motivated by concern with immigrants. For example, the administration proposed the addition of a question on U.S. citizenship to the 2020 Census, which critics claimed would lead to the undercounting of immigrant residents in the United States and resulting electoral districting, appropriations, and other consequences. In a challenge to the citizenship question, the U.S. Supreme Court ordered the Secretary of Commerce to offer a better explanation for adding the question. See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019). Ultimately, the Trump administration abandoned the attempt to add a U.S. citizenship question on the 2020 Census. See Michael Wines, *2020 Census Won’t Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES, July 2, 2019, <https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html>.

distinctions make necessary multifaceted and sustained resistance to the Latinx repatriation in the courts and political arena, with activism most likely to successfully challenge the racial underpinnings of the modern immigration laws.¹²

With a rhetorical flourish unmatched by any modern president, President Trump launched his presidential campaign by directing blistering—and now famous—criticism at Mexico for sending criminals to the United States: “When Mexico sends its people, they’re not sending their best . . . They’re sending people that have lots of problems, and they’re bringing those problems to the United States. *They’re bringing drugs. They’re bringing crime. They’re rapists.* And some, I assume, are good people.”¹³ Moreover, although avoiding use of its racist moniker, Trump went so far as to endorse the revival of Operation Wetback as an immigration enforcement measure.¹⁴ Moreover, as president, he crassly

12. See Part III.C.

13. 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> [<https://perma.cc/JM4L-TLQN>] (emphasis added); see also Jeannine Bell, *The Resistance & the Stubborn but Unsurprising Persistence of Hate and Extremism in the United States*, 26 IND. J. GLOBAL LEGAL STUD. 305, 306 (2019) (“[Candidate] Trump attacked immigration from non-White countries. He called Mexican immigrants ‘rapists’ who had brought crime into the United States and demanded ‘a total and complete shutdown of Muslims entering the United States.’”) (footnotes omitted); Amy L. Wax, *Debating Immigration Restriction: The Case for Low and Slow*, 16 GEO. J.L. & PUB. POL’Y 837, 837 (2018) (“No issue more starkly exemplifies our current political divide than immigration. Questions surrounding this issue were critical to the outcome of [the 2016] Presidential election. They continue to engender passion and controversy.”). Trump apparently is not the only person in the administration who sees immigration in racial terms. For example, Senior White House aide Stephen Miller distributed white nationalist, anti-immigrant commentary to others. See Southern Poverty Law Center, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails* (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails>; Katie Rogers & Jason DeParle, *The White Nationalist Websites Cited by Stephen Miller*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/us/politics/stephen-miller-white-nationalism.html>.

Consistent with his general “America First” approach to various policy issues, see *The New Nationalism*, ECONOMIST (Nov. 19, 2016), <https://www.economist.com/leaders/2016/11/19/the-new-nationalism> [<https://perma.cc/BPX5-SCXG>], President Trump in addressing immigration routinely focuses on perceived domestic interests, at the expense of global welfare, individual rights, national values, or compliance with the law. See Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1224–31 (2014) (discussing contrasting approaches to immigration law).

14. See Philip Bump, *Donald Trump Endorsed ‘Operation Wetback’—But Not By Name*, WASH. POST (Nov. 11, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/11/donald-trump-endorsed-operation-wetback-but-not-by-name> [<https://perma.cc/X9LK-LK5F>]; Yanan Wang, *Donald Trump’s ‘Humane’ 1950s Model for Deportation, ‘Operation Wetback’, Was Anything But*, WASH. POST (Nov. 11, 2015), <https://www.washingtonpost.com/news/morning->

objected to providing temporary safe haven to nationals of “s—hole countries,” specifically mentioning El Salvador,¹⁵ and subsequently stripped approximately 200,000 Salvadorans of Temporary Protected Status (TPS), a form of temporary relief from removal allowing them to remain in the United States.¹⁶

Given President Trump’s racially-charged public statements, we should not be surprised in the least that many of the administration’s flagship immigration enforcement initiatives are aimed at Mexican, Salvadoran, and other Latinx noncitizens. Through aggressive immigration enforcement and policies that restrict legal immigration, the Trump administration seeks no less than to reduce the number of Latinx persons, and immigrants of color generally, in the United States.¹⁷ The president’s policies would transform the nation’s racial demographics and make the country whiter than would result from continuation of the current immigration patterns.

Building on the Obama administration’s focus on crime-based removals, which led to record setting removal numbers,¹⁸ the Trump administration’s proclaimed zero tolerance policy relies heavily on the criminal justice system as the primary pipeline for removals.¹⁹ Well-known racial disparities in criminal law enforcement in the United States mean that Mexican and Central Americans likely will continue to comprise an overwhelming 90 percent of the noncitizens removed annually from the country.²⁰ Seeking to increase crime-based, and other, removals, the Trump administration has, among other things, reinstated Secure Communities,²¹ which President Obama had abandoned because of its overbreadth that resulted in the removal of tens of thousands of nonserious criminal offenders, including lawful permanent residents as well as undocumented immigrants.²² The program generated strident state and local

mix/wp/2015/09/30/donald-trumps-humane-1950s-model-for-deportation-operation-wetback-was-anything-but [https://perma.cc/3MVG-3WQU].

15. 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 [https://perma.cc/BE5H-3BBA].
16. See Miriam Jordan, *Trump Administration Says That Nearly 200,000 Salvadorans Must Leave*, N.Y. TIMES, Jan. 8, 2018, <https://www.nytimes.com/2018/01/08/us/salvadorans-tps-end.html>; *infra* Subpart II.C.4.
17. See Villazor & Johnson, *supra* note 11, at 578–80.
18. See *infra* text accompanying notes 125–30.
19. See Part II.C.
20. See *infra* text accompanying notes 128–30.
21. See *infra* text accompanying notes 194–201.
22. See *id.*

resistance after the U.S. government sought to compel states and cities to participate fully in the aggressive federal immigration enforcement efforts.²³

President Trump, however, has gone much further than President Obama in taking aggressive steps to facilitate Latinx removals. In ways very unlike the Obama administration, the U.S. government under President Trump has aggressively used workplace raids to target employers known to rely on low-wage undocumented Latinx immigrants.²⁴ In the midst of a series of measures unprecedented in modern U.S. history, the administration ignited a heated national controversy when it began separating Mexican and Central American migrant parents from minor children in immigration detention. Moreover, the Trump administration attempted to rescind President Obama's Deferred Action for Childhood Arrivals (DACA) policy, which had provided temporary respite from removal (and work authorization) to hundreds of thousands of Latinx migrants,²⁵ and eliminate Temporary Protected Status, another temporary and limited form of relief from removal, for Salvadorans, Hondurans, Nicaraguans, and Haitians.²⁶ Stripping persons from these countries of legal status opens the door to their possible removal from the United States. In combination, these affirmative steps by the Trump administration zero in on large numbers of Latinx noncitizens for possible removal.²⁷

In sum, through concentrated efforts to remove Latinx immigrants from the country, the Trump administration is building an institutional structure for a new

23. See *infra* text accompanying note 196.

24. See, e.g., Dianne Gallagher, Catherine E. Shoichet, & Madeline Holcombe, 680 *Undocumented Workers Arrested in Record-Setting Immigration Sweep on First Day of School*, CNN, Aug. 9, 2019, <https://www.cnn.com/2019/08/08/us/mississippi-immigration-raids-children/index.html>; Molly Hennessy-Fiske et. al., *Despite Weeks of Threats, ICE Raids Begin With a Whimper, But Still Stoke Fears*, L.A. TIMES (July 14, 2019), <https://www.latimes.com/local/lanow/la-me-ice-raids-immigration-trump-20190714-story.html>; 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> [<https://perma.cc/3P6L-FXYZ>]; see also Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1479–81 (2019) (discussing how the arrest of immigrant parents in workplace raids may result in the separation of families). Professor Leticia Saucedo perceptively characterizes the predominantly Latinx low-wage labor market as the “brown collar” workplace. See, e.g., Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004).

25. See Subpart II.C.2.

26. See Subpart II.C.4.

27. See *infra* Part II; U.S. COMM'N ON CIVIL RIGHTS, TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES (2019) (noting that the Trump administration's immigration enforcement policies disparately impact people of color, particularly Latinx immigrants), <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf>.

Mexican—or, more accurately, Latinx—repatriation campaign. It is somewhat subtler but more expansive than past Mexican-focused removal efforts and thus promises to remove many more Latinx peoples from the country than the Mexican repatriation and Operation Wetback. Although colorblind in most, but not all, respects,²⁸ the new campaign promises to have devastating impacts on Latinx peoples, in no small part due to the disparate impacts of the criminal justice system in the United States, the centerpiece of the modern removal system.

Besides targeting undocumented immigrants, President Trump advocates reductions in legal immigration in ways that would disproportionately reduce the lawful migration of noncitizens from Latin America. Trump’s Muslim ban²⁹—which categorically barred legal entry by noncitizens from a group of predominantly Muslim nations—exemplifies the administration’s approach of targeting certain disfavored groups of noncitizens. The administration’s extreme vetting of immigrants in the name of national security has reduced admissions from the developing world.³⁰ In addition, the Trump administration has dramatically reduced refugee admissions,³¹ tightened restrictions on asylum to

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28. See generally Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313 (2012) (contending that, although U.S. immigration laws often are colorblind, they in operation have disparate impacts on Latinx people). An example of the stark anti-Latinx impacts of the race-neutral immigration laws can be seen in the operation of the Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965), which, besides eliminating discriminatory quotas, see *infra* text accompanying notes 41–43, imposed a per country ceiling on the number of immigrants from each nation that has significantly hindered legal immigration from Mexico and created incentive for undocumented immigrants. 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 *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* 116 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).
29. See Part II.B. As Justice Sotomayor observed in dissenting from the majority’s decision to uphold the ban, the president made numerous statements “from which a reasonable observer would readily conclude that the proclamation was motivated by hostility and animus toward the Muslim faith.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting). She viewed the national security rationale offered by the Trump administration for the ban as “window dressing [that] cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.” *Id.* at 2440.
30. See Stuart Anderson, *New Data Reveal State Department Visa Denials Surged in 2018*, FORBES (Mar. 1, 2019), <https://www.forbes.com/sites/stuartanderson/2019/03/01/state-department-visa-denials-surged-in-2018/#5b644d4c66d4>.
31. See Maanvi, Singh, *Trump Sets Cap for Refugee Admissions at an All-Time Low*, THE GUARDIAN (Sept. 26, 2019), <https://www.theguardian.com/us-news/2019/sep/26/trump-to-allow-just-18000-refugees-in-historically-low-cap-of-asylum-program> (reporting on President Trump’s reduction of refugee admission numbers for fiscal year 2020); 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->

reduce the number of Central American migrants coming to the United States,³² and proposed added restrictions to the requirements for the admission of low- and moderate-income immigrants, all of which would disparately impact Latinx noncitizens.³³ The president further supports dramatic restrictions on family immigration, which he disparages as “chain migration,” and advocates the expansion of “merit-based” migration that would favor immigration from Europe over immigration from Mexico and the rest of the developing world.³⁴ The end result would be to reduce legal immigration from Mexico, the nation that historically has sent the largest numbers of immigrants to the United States, as well as from other developing nations.³⁵

This Article proceeds in three parts. Part I summarizes previous campaigns to remove persons of Mexican ancestry from the United States, specifically what are known as the Mexican repatriation during the Great Depression and Operation Wetback in 1954. History rightly condemns these two Mexican removal campaigns as racist episodes of U.S. history. Part II considers how the Trump administration's efforts to remove noncitizens and drastically reduce legal immigration, has adversely impacted the Latinx community and, in effect, replicates the Mexican repatriation and Operation Wetback. Part III draws parallels and identifies differences between the new and old Latinx removal campaigns and argues that the new Latinx repatriation is more onerous and potent than its predecessors.

I. THE MEXICAN REPATRIATION AND OPERATION WETBACK

U.S. immigration history is chock filled with episodes of racism and nativism, with long stretches of discrimination and punitive action directed at immigrants. From the laws excluding Chinese immigrants passed by Congress in the late 1800s to the discriminatory national origin quotas system of the twentieth century,³⁶ U.S. immigration laws at various times have discriminated with impunity against disfavored groups of immigrants.³⁷ The U.S. Supreme Court

trump/570535 (reporting on Trump administration's dramatic reduction in refugee admissions for fiscal year 2019).

32. See *infra* Subpart II.C.3–4.

33. See *infra* Part II.D.

34. See *id.*

35. See *id.*

36. See generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN, 1860–1925, at 264–330 (2002 ed.) (discussing U.S. immigration history from 1860 through congressional enactment of the discriminatory national origin quotas system in 1924).

37. See generally BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY (2004) (documenting that discriminatory history); KEVIN R. JOHNSON, THE “HUDDLED MASSES”

facilitated those discriminatory efforts. *The Chinese Exclusion Case*,³⁸ for example, established a special form of deference to the immigration laws passed by Congress, known as the plenary power doctrine; that doctrine requires the courts to allow discrimination in the immigration laws to go unchecked and, in effect, encouraged Congress to embrace extreme policies.³⁹ In 1965, consistent with the civil rights movement's frontal assault on racial discrimination and white supremacy, Congress sought to remove the vestiges of invidious discrimination from the U.S. immigration laws.⁴⁰ Subsequent amendments to the immigration laws generally reflected similar nondiscrimination principles.⁴¹ That is not to suggest that discrimination against noncitizens of color in immigration law and enforcement is wholly something of the past. However, such discrimination

MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (same); ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2019) (reviewing various xenophobic episodes in U.S. history).

38. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604–06 (1889) (rejecting a constitutional challenge to the Chinese Exclusion Act, which generally barred the admission of Chinese immigrants into the United States). For analysis of the background, holding, and legacy of *The Chinese Exclusion Case*, see Gabriel J. Chin, *Chae Chan Ping and Fong Yue Tin: The Origins of Plenary Power*, in IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005). The Chinese Exclusion Act was part of a concerted effort to reduce the number of Chinese immigrants coming to, and living in, the United States. See generally BETH-LEW WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION AND THE MAKING OF THE ALIEN IN AMERICA* (2018) (documenting anti-Chinese efforts, beginning in late 1800s).
39. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”) (citations omitted); see also Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019) (offering an alternative to the complete deference required by the plenary power doctrine in the review of the constitutionality of immigration laws and policies); Rosenbaum, *supra* note 8 (analyzing impact of plenary power doctrine on due process rights of immigrants). See generally Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration* 46 UCLA L. REV. 1 (1998) (analyzing the continuing vitality of the plenary power doctrine and its effective immunization from legal attack of racial discrimination in the immigration laws).
40. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965); see also 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, 275 (1996) (“The revolutionary feature of the 1965 Act was its elimination of race and national origin as selection criteria for new Americans. Race neutrality was a significant development for American Immigration law . . .”). See generally The IMMIGRATION AND NATIONALITY ACT OF 1965, *supra* note 29 (offering a variety of perspectives on the 50th anniversary of enactment of the Immigration and Nationality Act of 1965, which removed a complex system of racial and national origin discrimination from the U.S. immigration laws).
41. See Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1935–38 (1996) (book review) (analyzing how, since passage of the Immigration Act of 1965, U.S. immigration law generally has moved in the direction of colorblindness without express racial and national origin discrimination).

generally has been driven underground, accomplished through colorblindness, in contemporary immigration law and the debate over reform.⁴²

U.S. immigration history reveals periodic incidents of harsh treatment of persons from Mexico. During the Great Depression, state and local governments, with the support of the federal government, forcibly removed an estimated one million persons of Mexican ancestry, including many U.S. citizens, from the United States.⁴³ By facilitating removals outside of applicable legal procedures, the stated intent of the campaign was to preserve scarce public resources and jobs for U.S. citizens in a time of severe economic distress.⁴⁴ The result was mass removal of persons of Mexican ancestry. To avoid forced removal, many persons of Mexican ancestry voluntarily departed the country. Today, that would be referred to—positively by some proponents of aggressive immigration enforcement—as self-deportation.⁴⁵

A few decades later, the U.S. government engaged in a military-style operation known officially as Operation Wetback to rid the southwest of immigrants from Mexico.⁴⁶ The campaign removed an estimated one million people, including U.S. citizen children of Mexican immigrants, from the United States.⁴⁷ Once again, to avoid forced removal, tens of thousands of Mexicans left the country on their own accord.⁴⁸

By targeting persons of Mexican ancestry, both the repatriation and Operation Wetback reflected deep antipathy toward persons of Mexican ancestry in the United States; such sentiments are remarkably similar to those voiced today by President Trump.⁴⁹ Both deportation campaigns also represent a sanitized form of ethnic cleansing.⁵⁰ There was little resistance to, and much political support for, the two Mexican removal campaigns, with persons of Mexican ancestry subject to widespread discrimination in American social life.⁵¹ Although the public today is generally unaware of the mass removal campaigns, the two

42. See *infra* Part III.A.

43. See Part I.A.

44. See *id.*

45. See *supra* text accompanying note 10 (citing sources discussing phenomenon of self-deportation).

46. See *infra* Part I.B.

47. See *id.*

48. See *id.*

49. See *infra* Parts II-III.

50. See Part I.A.-B.; see also Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 *UCLA L. REV.* 283, 304-05 (2003) (observing that, throughout U.S. history, “periods of economic weakness and surplus labor have resulted in the expulsion and repatriation of Mexican laborers, as during the Great Depression and during Operation ‘Wetback’ of the 1950s”) (footnote omitted).

51. See Part I.A.-B.

episodes have had a lasting impact on the Latinx community's sense of belonging in the United States.

A. The Mexican Repatriation

Legal scholarship has devoted relatively little attention to the Mexican repatriation during the Great Depression.⁵² Repatriation is the term often used to refer to the unrelenting campaign to remove persons of Mexican ancestry, including U.S. citizens, from the United States in the 1930s.

During the Mexican repatriation, hundreds of thousands of people were removed from California, Michigan, Colorado, Texas, Illinois, Ohio, and New York.⁵³ Persons of Mexican ancestry were “directly affected by this campaign because it was ‘aimed at only one racial group, which meant that the burden of proving one’s citizenship fell totally upon people of Mexican descent. Those unable to present such proof were arrested and returned to Mexico.’”⁵⁴ As historian Kelly Lytle Hernandez succinctly describes the campaign: “‘Deport the Mexicans’ became a battle cry of those attempting to create jobs and squeeze pennies from public services.”⁵⁵

In *Decade of Betrayal*, Francisco E. Balderrama and Raymond Rodriguez detailed the workings of the repatriation campaign⁵⁶ and the accompanying “atmosphere of pressing emergency, [in which] little if any time was spent on determining whether the methods infringed upon the rights of citizens.”⁵⁷ The term repatriation suggests that immigrants were returned to Mexico. In the

52. One exception is Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 PACE L. REV. 1 (2005).

53. See generally BALDERRAMA & RODRIGUEZ, *supra* note 2 (detailing the operation of the repatriation campaign).

54. *Id.* at 230–31 (footnote omitted).

55. HERNANDEZ, *supra* note 4, at 81 (footnote omitted). See generally MELITA M. GARZA, THEY CAME TO TOIL: NEWSPAPER REPRESENTATIONS OF MEXICANS AND IMMIGRANTS IN THE GREAT DEPRESSION (2019) (reviewing the newspaper depictions of persons of Mexican ancestry, including but not limited to immigrants, in the era of repatriation). Anti-immigrant sentiment and racism raged at the time. See, e.g., GARZA, *supra*, at 80 (quoting former member of Congress in 1930: “Practically all of the Mexicans that come to the U.S. are poor, illiterate, ignorant . . .”); *id.* at 91 (quoting newspaper editorial comparing immigrants to “vermin”: “the government of the United States should clean house and get rid of undesirable human vermin.”).

A study later determined that the repatriation’s removal of persons of Mexican ancestry, including immigrants, did not in fact result in higher employment rates for U.S. citizens. See Jongkwan Lee et al., *The Employment Effects of Mexican Repatriations: Evidence from the 1930s* 2 (Nat’l Bureau of Econ. Research Working Paper No. 23885, 2017).

56. See generally BALDERRAMA & RODRIGUEZ, *supra* note 2.

57. LEO GREBLER, MEXICAN AM. STUDY PROJECT, UNIV. OF CAL. L.A., ADVANCE REPORT NO. 2, MEXICAN IMMIGRATION TO THE UNITED STATES: THE RECORD AND ITS IMPLICATIONS 26 (1966).

1930s, however, federal, state, and local governments worked together to remove many U.S. citizens of Mexican ancestry from the country. Because some were born in the United States, they cannot be said to have been repatriated.⁵⁸ Indeed, many of the persons of Mexican ancestry removed to Mexico in the 1930s were U.S. citizens, including children who were effectively deported when their immigrant parents were forcibly returned there.⁵⁹ To avoid forced removal, thousands of immigrants self-deported and left the country.

Well known for its complexities, U.S. immigration law is crystal clear on one thing—U.S. citizens cannot be deported from the country. As the Supreme Court unequivocally stated in 1922, “[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship [in defense to deportation] is thus a denial of an essential jurisdictional fact.”⁶⁰ Although noncitizens may be subject to removal from the United States, due process generally protects all noncitizens in the country before they can be removed.⁶¹ The conduct of federal, state, and local officials in the repatriation campaign thus violated the due process rights of the noncitizens repatriated, as well as the equal

58. See U.S. CONST. XIV AMDT., § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

59. See LEE, *supra* note 38, at 180–81 (noting that undocumented and legal immigrants, as well as U.S. citizens, “were targeted and swept up as xenophobia hardened into both an anti-immigrant and a race-based anti-Mexican campaign. An entire generation of American citizens of Mexican descent were . . . exiled to the country of their parents’ birth.”); see also Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2522 (2007) (referring to the phenomenon of “alien citizenship,” in which U.S. citizens of color, including persons of Mexican ancestry during the repatriation, suffered the nullification of their citizenship rights).

60. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); accord *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133 (1924); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923); *Joseph v. Holder*, 720 F.3d 228, 230 (5th Cir. 2013); *Duarte-Ceri v. Holder*, 630 F.3d 83, 87 (2d Cir. 2010).

61. See, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.”) (citing *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100–01 (1903)). Procedural due process protections apply to removal cases because of the weighty liberty interests at stake; as the Supreme Court has emphasized, deportation may “deprive a man ‘of all that makes life worth living.’” *Galvan v. Press*, 347 U.S. 522, 530 (1954) (quoting *Ng Fung Ho*, 259 U.S. at 284), and “is a drastic measure and at times the equivalent of banishment or exile,” *id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)); accord *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947). The courts have been considerably more restrictive in extending substantive due process rights to noncitizens. See, e.g., *Rosenbaum*, *supra* note 8, at 119 (noting the “unique constitutional due process analysis where noncitizens in immigration jails have less due process protection compared to those in criminal custody, or other forms of civil preventative detention”) (footnote omitted).

protection rights of Latinx residents stopped, interrogated, and detained even if not removed from the country.⁶²

International law today condemns the forced deportation, or exile, of a nation's citizens.⁶³ The Universal Declaration of Human Rights, for example, provides expressly that “[n]o one shall be subjected to arbitrary . . . exile.”⁶⁴ The Mexican repatriation was a form of ethnic cleansing, a phrase that entered the international lexicon with the widespread atrocities in the former Yugoslavia in the 1990s.⁶⁵ The law creating the International Criminal Court defines a “crime against humanity” as engaging in the “[d]eportation or forcible transfer of population” from a country.⁶⁶ Because the repatriation constituted a forced removal of a disfavored racial minority from the United States, it today would violate international law.

The mass deportation campaign of the 1930s dislocated lives, families, and entire communities. In 1931, for example, the government sent Jose Lopez, a U.S. citizen by birth, and his family by train to Mexico. He later recounted the devastating impacts of the repatriation on his family and the challenges they faced adapting to life in Mexico.⁶⁷

The 1930s Mexican repatriation also had concrete long-term impacts on Latinx political power in the United States. With the removal of about one million persons of Mexican ancestry from the country,⁶⁸ the nation lost a large portion of

62. See Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 664–67.

63. See *id.* at 663 n.99 (citing authorities).

64. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 9 (Dec. 10, 1948).

65. See John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS L. REV. 341, 343 (1999) (“Criminal trials at The Hague for atrocities committed in the former Yugoslavia have focused public attention on legal liability for what has come to be called ‘ethnic cleansing.’”). In 2017, then–U.S. Secretary of State Rex Tillerson characterized the Burmese government’s violent removal of ethnic Rohingya from Burma as “ethnic cleansing.” *Responses by the United States to Attacks on the Rohingya in Burma*, 112 AM. J. INT’L L. 322, 322 (2018); see Payan Akhavan, *The Radically Routine Rohingya Case*, 17 J. INT’L CRIM. JUST. 325 (2019).

66. Rome Statute of the International Criminal Court, art. 7, sec. 1 (d).

67. Lopez offered the following details in his testimony to a California Senate committee investigating the repatriation:

While in Mexico, my mother passed away. Then my father passed away. Both were in their 40’s when they died. My oldest brother also died after an accident in which he fell. My brothers and sisters were living alone when my father died and no one was taking care of us. . . . We returned to Detroit after being absent from the United States for 14 years. We were lucky to come back But there are others that were not so fortunate

Johnson, *supra* note 52, at 7 (quoting Statement of José Lopez, *Deported on Repatriation Trains Pursuant to a Coordinated Michigan and Federal Repatriation Project*, California Senate Select Committee on Citizen Participation (July 15, 2003)).

68. See BALDERRAMA & RODRIGUEZ, *supra* note 2, at 151.

the Mexican population. As a result, the mass removal delayed for decades the Latinx community's emergence as a powerful political force in U.S. politics.

Only in the last few years has Latinx political power grown to a point where political leaders have had the support to fully investigate the Mexican repatriation.⁶⁹ In 2003, a California Senate committee held hearings to investigate the repatriation and its impacts.⁷⁰ In addition, a class action was filed seeking damages for persons unlawfully repatriated to Mexico.⁷¹ The California legislature passed a bill that, among other things, would have created a commission to document the events of the repatriation, but the California governor vetoed the legislation.⁷² Although that bill failed to become law, a number of formal governmental apologies for the repatriation followed.⁷³ The

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69. See Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917, 920–22 (2002). According to the 1930 Census, 1.3 million persons of Mexican ancestry lived in the United States. See U.S. Dep't of Commerce, *we the American . . . Hispanics* 2 (1993), http://maxweber.hunter.cuny.edu/pub/eres/BLPR102_PIMENTEL/latinos.pdf.
70. See BALDERRAMA & RODRIGUEZ, *supra* note 2, at 299–300 (discussing hearings on the Mexican repatriation before California Senate Select Committee on Citizen Participation in 2003).
71. A court later dismissed the case on statute of limitations grounds. See Eric L. Ray, Comment, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. MIAMI INTER-AM. L. REV. 171, 173 (2005). The suit was one of a number challenges to historical injustices against persons of Mexican ancestry in the Southwest. For example, many years after the event, involuntarily sterilized Latinx immigrant women brought suit against a Los Angeles county hospital. See Tre'vell Anderson, "No Más Bebés" Revives 1975 Forced-Sterilization Lawsuit in L.A., L.A. TIMES (Jun. 12, 2015), <https://www.latimes.com/entertainment/movies/la-et-laff-no-mas-bebes-20150612-story.html>; see also Natalia Molina, *Forced Sterilization of Mexican-Americans: When U.S. Law Makers Took a Page from the Nazi Playbook*, HISTORY, Oct. 23, 2017, <https://www.history.com/news/when-american-lawmakers-took-a-page-from-the-nazi-playbook> (reviewing history of forced sterilization of women of Mexican ancestry).
72. See Ray, *supra* note 71, at 172–73 (citing S.B. 427, 2003–04 Leg. (Cal. 2004)).
73. In 2005, California Governor Schwarzenegger signed a resolution apologizing for the repatriation. See Apology Act for the 1930s Mexican Repatriation Program, S.B. 670, 2005–06 Leg. (Cal. 2005) (codified at CAL. GOV'T CODE §§ 8720–23). Although their efforts were ultimately unsuccessful, Hilda Solis and Luis Gutiérrez in 2006 introduced a bill in the U.S. House of Representatives calling for a federal commission to study the repatriation; Solis also called for an apology from the federal government for its role in the repatriation. See Wendy Koch, *U.S. Urged to Apologize for 1930s Deportations*, USA TODAY (Apr. 5, 2006), https://usatoday30.usatoday.com/news/nation/2006-04-04-1930s-deportees-cover_x.htm [<https://perma.cc/YLC6-R5GL>]. In 2012, Los Angeles County issued an apology for the repatriation and held a memorial in downtown Los Angeles. See *Plaza to Commemorate Mass Deportations of 1930s in Wake of LA Apology*, SO. CAL. PUB. RADIO (Feb. 24, 2012), <https://www.scpr.org/news/2012/02/24/31374/plaza-commemorate-mass-deportations-1930s-wake-l-a>.

U.S. government has acknowledged the “often coercive[] repatriation programs directed by state and local governments and charitable aid agencies.”⁷⁴

In sum, the Mexican repatriation was a governmental response to an unquestionably severe national economic crisis. Under the sanction of law, government targeted and injured persons of Mexican ancestry, including U.S. citizens. The removal campaign encountered virtually no resistance. In fact, because Mexicans were a disfavored minority, the repatriation enjoyed widespread public support.⁷⁵

B. Operation Wetback

During World War II, the Bracero Program permitted Mexican labor to fill the void left by the war effort; the program allowed for the admission of guest agricultural workers into the United States.⁷⁶ Despite the demand for Latinx labor in the United States, discrimination against persons of Mexican ancestry was commonplace.⁷⁷ After the war ended and the country no longer had a pressing need for Latinx labor, the U.S. government put in place a much-publicized deportation program targeting Mexican immigrants.

Professor Kelly Lytle Hernandez summarized the rise and fall of Operation Wetback:

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74. *INS Records for 1930s Mexican Repatriations*, U.S. IMMIG. & CITIZENSHIP SERVS. (Mar. 3, 2014), <https://www.uscis.gov/history-and-genealogy/our-history/historians-mailbox/ins-records-1930s-mexican-repatriations> [<https://perma.cc/V4Y5-G593>].
75. See BALDERRAMA & RODRIGUEZ, *supra* note 2, at 89–91 (discussing the political pressures on government during the Great Depression to act to save jobs for U.S. citizens).
76. See generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992) (analyzing the emergence, and ultimate dismantling, of the Bracero Program, a program allowing for the admission of guest workers from Mexico).
77. See Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007) (analyzing widespread discrimination during the twentieth century against persons of Mexican ancestry in the United States); Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 159–69 (2005) (offering a brief summary of social discrimination against persons of Mexican ancestry); see, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (finding unconstitutional the exclusion of U.S. citizens of Mexican ancestry from juries in Jackson County, Texas); *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (holding that segregation of students of Mexican ancestry in California public schools was not lawful); see also George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994) (analyzing the litigation from 1930–80 seeking to vindicate the civil rights of persons of Mexican ancestry). See generally LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2d ed. 2018) (analyzing the history of the racialization of persons of Mexican ancestry in U.S. society).

The U.S. attorney general and the recently hired commissioner of the [Immigration and Naturalization Service (INS)], retired general Joseph Swing, chronicled the campaign as it unfolded. Beginning at dawn on June 10, 1954, hundreds of U.S. Border Patrol officers on detail from throughout the country set up roadblocks in California and western Arizona, where they nabbed almost eleven thousand unsanctioned Mexican immigrants in the next seven days. In the following three months, Border Patrol task forces swept through south Texas, Chicago, Illinois, and the Mississippi Delta in search of unsanctioned Mexican immigrants. By October, Commissioner Swing proudly proclaimed that more than one million unsanctioned immigrants, mostly Mexican nationals, had been removed from the United States. The “era of the wetback,” he declared, was over.⁷⁸

Although Professor Hernandez questions whether the program was as effective as the U.S. government claimed, she recognizes the “importance of the campaign” to the U.S. Border Patrol’s acceptance of its mission to combat “illegal immigration in the U.S.–Mexico borderlands.”⁷⁹

To fully understand the racial underpinnings of the enforcement operation, one needs to appreciate the meaning of the term *wetback*, a racial epithet generally referring to people of Mexican ancestry.⁸⁰ It is loosely tied to the crossing of the Rio Grande River by Mexican citizens into the United States.⁸¹ *Wetback* today is

78. HERNANDEZ, *supra* note 4, at 171.

79. *Id.* at 173.

80. See NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS 113 (2014) (“Wetback... was a racializing term . . . used . . . to describe Mexican immigrants and even Mexican Americans.”); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 950–51 (7th Cir. 2005) (“[W]e find it difficult to imagine epithets more offensive to someone of Hispanic descent [than wetback and spic].”). The epithet is at the center of numerous contemporary civil rights cases. See, e.g., *Castro v. DeVry Univ., Inc.*, 786 F.3d 559, 568 (7th Cir. 2015); *United States v. Makowski*, 120 F.3d 1078, 1080 (9th Cir. 1997); *Alvarado v. Shipley Donut Flour & Supply Co., Inc.*, 526 F. Supp. 2d 746, 751 (S.D. Tex. 2007); *Escalante v. IBP, Inc.*, 199 F. Supp. 2d 1093, 1100–01 (D. Kan. 2002); *Sanchez v. Board of County Comm’rs*, 948 F. Supp. 950, 954–55 (D. Col. 1996); see also *Partida v. State*, 506 S.W.2d 209, 211 (Tex. Crim. App. 1974) (referring to “so-called ‘wet-backs’ from the south side of the Rio Grande”); Brent K Nakamura & Lauren B. Edelman, *Bakke at 40: How Diversity Matters in the Employment Context*, 52 U.C. DAVIS L. REV. 2627, 2667–70 (2019) (discussing the frequent use of term wetback in hostile work environment case).

81. See Keith Cunningham-Parmeter, *Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1547 n.4 (2011); see, e.g., Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 L. & CONTEMP. PROBS. 334 (1956); Note, *Wetbacks: Can the States Act to Curb Illegal Entry?*, 6 STAN. L. REV. 287 (1954); see also STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 120–21 (2003) (noting the dehumanizing nature of the term); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1395 (1953) (lamenting dicta in a Supreme Court decision “say[ing], in effect, that a Mexican wetback who

generally considered to be a racial epithet. Nonetheless, some modern political leaders at times have employed the term.⁸² Generally speaking, *wetback* has been replaced over time with *illegal alien*, which although frequently used, has subtler yet similar racial connotations.⁸³

Not surprisingly, in light of its use of an epithet in its official name, Operation Wetback had an unquestionable racial purpose—“apprehending and deporting undocumented agricultural workers from the southwest, especially Texas and southern California.”⁸⁴ And those were Mexican workers. Professor Mae Ngai explains that “[t]he construction of the ‘wetback’ as a dangerous and criminal social pathogen fed the general racial stereotype of ‘Mexican,’” with no real distinction made between immigrants and U.S. citizens of Mexican ancestry.⁸⁵

Teams of Border Patrol agents, buses, planes, and temporary processing stations implemented Operation Wetback.⁸⁶ With nothing approximating due process of law, the U.S. government focused on summary removals of large

sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation” (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953))).

82. See, e.g., Marisa Gerber, *For Latinos, a Spanish Word Loaded with Meaning*, L.A. TIMES (Apr. 1, 2013), <http://articles.latimes.com/2013/apr/01/local/la-me-latino-labels-20130402> [<https://perma.cc/SGJ7-ZBH3>] (discussing use of the epithet by a member of Congress); Gregory Korte, *Mexican Slur Has Long History in Politics*, USA TODAY (Mar. 29, 2013), <https://www.usatoday.com/story/news/politics/2013/03/29/enerou-immigration-slur-history/2036329> [[https://perma.cc/UJ6\]-2W9Q](https://perma.cc/UJ6]-2W9Q)] (listing modern politicians who have used the epithet); see also *Rocha Virgil v. City of Las Cruces*, 119 F.3d 871, 874 (10th Cir. 1997) (Lucero, J., dissenting) (comparing the term to other racial slurs); Cunningham-Parmeter, *supra* note 81, at 1547–48 (discussing significance of Justice Rehnquist’s use of the term *wetback* in a conference of Supreme Court justices discussing the rights of immigrant children at issue in *Plyer v. Doe*, 457 U.S. 202 (1982)); Madeline St. Amour, *Longmont Man Sentenced for Harassing Hispanic Family at Apartment Pool*, DEN. POST (Jan. 9, 2019), <https://www.denverpost.com/2019/01/09/enerous-hispanic-family-harassment> [<https://perma.cc/2D7B-P3RZ>] (reporting on a plea agreement in a criminal harassment case in which a white man “began screaming ‘wetback’ and saying, ‘When Trump builds the wall, they are gonna need to know how to swim back home’”).
83. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1544–45 (1995). See generally MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (examining the emergence of the term *illegal alien* in the United States). For analysis of the use of the terms *alien* and *illegal alien* in the immigration laws and public discussion of immigration, see Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996); Cunningham-Parmeter, *supra* note 82; D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517.
84. NGAI, *supra* note 83, at 155.
85. *Id.* at 149.
86. See *id.* at 155–56.

numbers of people.⁸⁷ As occurred in the Mexican repatriation, many undocumented immigrants fled to Mexico to avoid apprehension, including about 500,000 from the state of Texas alone.⁸⁸ Discussing a 1950 raid that was a precursor to Operation Wetback, Professor Mae Ngai described the removals of Mexican families with U.S.-born—citizen—children.⁸⁹

In executing the operation, the Border Patrol officers acted with zeal, and force, to protect undocumented immigrants and used aggressive measures because they claimed to be combatting the equivalent of slave labor.⁹⁰ Enforcement tactics included “raids and airlifts, fences and concertina wire, and deportations and boatlifts to keep recalcitrant farmers and ranchers from thrusting the southwest into a slave past.”⁹¹ State and local officials and law enforcement officers assisted in the dragnet to apprehend and remove undocumented immigrants.⁹² When all was said and done, the U.S. government proclaimed that more than 1.3 million “illegals” were deported, repatriated, or voluntarily removed from the United States.⁹³

Public support for, and limited opposition to, Operation Wetback eased its implementation.⁹⁴ Surprisingly enough, embracing their Americanness in an effort to assimilate into the mainstream, a number of leading Mexican American advocacy groups of the day supported the mass deportation campaign as a means to protect U.S. citizens in the labor market.⁹⁵ The muted public resistance to Operation Wetback, as well as the repatriation, resulted in part from the limited political power of Latinx peoples and the immigrant rights movement. Although today's movement is vibrant,⁹⁶ that was not the case in the 1930s and 1954 when both movements were small, emerging, and politically weak.

87. See *id.* at 156. “To ensure the effectiveness of the expulsion process, many of those apprehended [in the repatriation] were denied a hearing to assert their constitutional rights and to present evidence that would have prevented their deportation.” U.S. COMM’N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN RULE: CIVIL RIGHTS ISSUES IN IMMIGRATION* 11 (1980). President Trump later sought to expand what are known as expedited removals, which, in effect, amount to summary deportations without a hearing and due process protections. See *infra* note 229 (citing authority).

88. See Ngai, *supra* note 84, at 156–57.

89. See *id.* at 160.

90. See HERNANDEZ, *supra* note 4, at 176–79.

91. See *id.*

92. See GARCIA, *supra* note 4, at 103–04.

93. See *id.* at 227.

94. See *id.* at 120–31.

95. See DAVID G. GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* 152–78 (1995) (analyzing the evolving positions during the Cold War period of Mexican American advocacy groups on immigration and immigrants).

96. See, e.g., *infra* text accompanying notes 200–03 (noting resistance by sanctuary jurisdictions to crime-based removals).

In short, Operation Wetback, like the repatriation, targeted Mexican immigrants, a group with little political support and subject to widespread discrimination. Resistance was futile to the massive tide of anti-immigrant, anti-Mexican sentiment. The epithet *wetback* in the operation's official name is testament to the racist antipathy that served as the foundation to the campaign.

C. Modern Incarnations

The repatriation campaign and Operation Wetback triggered a series of harmful consequences. They placed in question the status of all persons of Mexican ancestry in the United States. They also imposed strong pressures on Latinx people living in the country to assimilate into the mainstream, adopt Anglo values, and abandon their native language and cultural traditions.⁹⁷ For example, many Mexican Americans in pre-1960s Los Angeles, one of the epicenters of the repatriation, publicly denounced their Mexican roots in order to avoid discrimination.⁹⁸ The removal campaigns helped forge a deeply negative, and fearful, view of, immigration authorities among Latinx people in the United States.⁹⁹

The repatriation is part of a long history of aggressive enforcement of the U.S. immigration laws with little regard for the civil rights of persons of Mexican ancestry.¹⁰⁰ Consider a few contemporary examples. The great increase in border enforcement that commenced in the 1990s has resulted in the deaths of hundreds, if not thousands, of people, almost all from Mexico and Central America.¹⁰¹

97. For critical analysis of the assimilation pressures placed on persons of Mexican ancestry in the United States, as well as their impacts, see, e.g., Johnson, *supra* note 5; George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999); Sylvia R. Lazos Vargas, *Deconstructing Homol[genous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998). See generally EDWARD M. TELLES & VILMA ORTIZ, *GENERATIONS OF EXCLUSION: MEXICAN AMERICANS, ASSIMILATION, AND RACE* (2008) (analyzing the pattern of exclusion of Mexican Americans from U.S. society over generations).

98. See generally RODOLFO F. ACUÑA, *ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES* (1995) (analyzing efforts by persons of Mexican ancestry to appear “anything but Mexican” to avoid discrimination).

99. See Johnson, *supra* note 62, at 664–68. See generally RODOLFO F. ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (8th ed. 2014) (analyzing the history of discrimination against Chicanx peoples in the United States).

100. See generally S. DEBORAH KANG, *THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE U.S.–MEXICO BORDER, 1917–1954* (2017) (analyzing the early history of the Immigration & Naturalization Service and its focus on enforcing the laws restricting immigration from Mexico); ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1987) (documenting the history of the U.S. government's civil rights abuses of Mexican immigrants in immigration enforcement).

101. See TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.–MEXICO BORDER 1978–1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME* (1996); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27

Nonetheless, the U.S. government continues to aggressively enforce the U.S.-Mexico border and the death toll continues to mount. Moreover, the modern immigration laws, although generally colorblind, continue to have dramatic disparate impacts on citizens of Mexico.¹⁰² To offer one stark example, due to a general limit on immigrants from each nation in a year, a family-sponsored visa for unmarried sons and daughters of U.S. citizens from Mexico who filed their applications in August 1997 were being processed in April 2019, the same month applications filed in March 2013 by applicants from almost all other nations were being processed.¹⁰³

The mass roundup of persons of Mexican ancestry in Chandler, Arizona, a suburb of Phoenix, in 1997, demonstrates that incidents like the repatriation and Operation Wetback are not simply historical anomalies. In Chandler, local police, with the assistance of the U.S. Border Patrol, stopped, questioned, and detained persons of Mexican ancestry—including many U.S. citizens.¹⁰⁴ The police staked out public places thought to be frequented by undocumented immigrants and questioned people, including U.S. citizens, who spoke Spanish and fit a crude undocumented immigrant profile.¹⁰⁵

Similarly, a court later enjoined the Maricopa County, Arizona Sheriff's office, headed by immigration enforcement advocate Sheriff Joe Arpaio, from

POPULATION & DEV. REV. 661, 669 (2001); Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430, 431–32 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001); *America's Migratory Routes Reach Grim Milestone: Over 500 Deaths So Far in 2019*, STATE NEWS SERV. (Aug. 16, 2019), <https://www.iom.int/news/americas-migratory-routes-reach-grim-milestone-over-500-deaths-so-far-2019-3>; see, e.g., *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018), cert. granted, 139 S. Ct. 2636 (2019) (addressing a claim involving a border shooting of Mexican national by U.S. border officer). For detailed accounts of the travails of Mexican migrants attempting to cross the U.S.–Mexico border, see SONIA NAZARIO, ENRIQUE'S JOURNEY (rev. ed. 2007); LUIS ALBERTO URREA, THE DEVIL'S HIGHWAY: A TRUE STORY (2004).

102. See Katie Kelly, Comment, *Enforcing Stereotypes: The Self-Fulfilling Prophecies of U.S. Immigration Enforcement*, 68 UCLA L. REV. DISCOURSE 36, 54 (2018); Part II; see also Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1136–40 (1998) (documenting the disparate impacts of the U.S. immigration laws and their enforcement on Latinx peoples).
103. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN FOR NOVEMBER 2019 (2019), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-november-2019.html>.
104. See OFFICE OF THE ATTORNEY GENERAL GRANT WOODS, ARIZ., RESULTS OF THE CHANDLER SURVEY (1997); Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2004).
105. See Romero & Serag, *supra* note 104, at 81–85.

racial profiling in immigration enforcement.¹⁰⁶ That office was well known for the violation of Latinx civil rights in the name of the enforcement of the immigration laws. As Professor Mary Romero put it, “[t]he violation of human rights of immigrants and civil rights of Latino citizens is a common feature in urban and rural areas across the country. However, the most egregious violations are exemplified by Sheriff Joe Arpaio’s immigration law enforcement.”¹⁰⁷ Consistent with Sheriff Arpaio’s racially discriminatory immigration enforcement record, the Arizona legislature in 2010 passed S.B. 1070, a law designed to facilitate immigration enforcement that was challenged as, among other things, racially discriminatory.¹⁰⁸ S.B. 1070 fits neatly into the long history of racial discrimination against Latinx peoples in Arizona.¹⁰⁹

Developments in Arizona and other states reveal how persons of Mexican ancestry in the United States continue to be stereotyped as foreigners who are presumptively subject to the immigration laws.¹¹⁰ In response to the racial impacts of immigration enforcement, Latinx activists today consistently resist aggressive enforcement measures and fight for justice for immigrants.¹¹¹

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106. See *Melendres v. Maricopa County*, 897 F.3d 1217, 1224 (9th Cir. 2018) (upholding injunction). Arpaio later was found guilty of criminal contempt for multiple violations of court orders in *Melendres*; President Trump pardoned Arpaio. See Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html> [https://perma.cc/9QQH-S3J3].
107. Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and “America’s Toughest Sheriff”*, 14 HARV. LATINO L. REV. 337, 345 (2011) (footnotes omitted); see Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 630–31 (2012).
108. See, e.g., *Arizona v. United States*, 567 U.S. 387, 416 (2012) (invalidating core provisions of Arizona’s controversial immigration enforcement law, S.B. 1070, as preempted by federal law). Other states passed similar laws, which the courts similarly invalidated. See, e.g., *United States v. South Carolina*, 720 F.3d 518, 530–33 (4th Cir. 2013) (striking down South Carolina law); *Ga. Latino All. For Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012) (to the same effect for Georgia law).
109. See generally Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood*, 24 BERKELEY LA RAZA L.J. 1 (2014) (analyzing history of racial discrimination in Arizona).
110. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 118–29 (1997).
111. See, e.g., Kathryn Abrams, *Contentious Citizenship: Undocumented Activism in the Not1More Deportation Campaign*, 26 BERKELEY LA RAZA L.J. 46 (2016); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1468–90 (2017); Laura Corrunder, *“Coming Out of the Shadows”: DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEGAL STUD. 143 (2012); Karen J. Pita Loor, *A Study on Immigrant Activism, Secure Communities, and Rawlsian Civil Disobedience*, 100 MARQ. L. REV. 565 (2016); Vasanthi Venkatesh, *Mobilizing Under “Illegality”: The Arizona Immigrant Rights Movement’s Engagement with the Law*, 19 HARV. LATINO L. REV. 165 (2016); see also Susan Bibler Coutin, *“Otro Mundo Es Posible”: Tempering the Power of Immigration Law*

Constitutional law has facilitated the targeting of persons of Mexican ancestry in immigration enforcement, including through racial profiling. In *United States v. Brignoni-Ponce*,¹¹² the Supreme Court stated that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor” in an immigration stop.¹¹³ The Court in *Brignoni-Ponce* held that the immigration stop in question violated the Fourth Amendment because Border Patrol officers relied exclusively on the “apparent Mexican ancestry” of the occupants of an automobile.¹¹⁴ Nonetheless, the Court’s explicit statement and assumption about the relevance of one’s “Mexican appearance” permits the contemporary reliance on race in immigration enforcement. With basis in fact, many Latinx persons believe that “race is determinative to immigration officers investigating alleged violations of the U.S. immigration laws.”¹¹⁵

II. PRESIDENT TRUMP AND LATINX IMMIGRATION

President Trump has pursued a series of immigration policy measures that in combination constitute the equivalent of a new Latinx repatriation. The Trump version follows squarely in the footsteps of the Mexican repatriation of the

Through Activism, Advocacy, and Action, 67 BUFF. L. REV. 653 (2019) (analyzing immigrant resistance to enforcement of the immigration laws); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 899 (2008) (“The efforts of Mexican-American groups to attack systemic segregation reflected the emerging model of public interest law reform that would come to be identified with the civil rights period. This law reform strain, in addition to responding to the dynamics of U.S. immigration, was also notably influenced by U.S. foreign relations.”). See generally CHRIS ZEPEDA-MILLÁN, *LATINO MASS MOBILIZATION: IMMIGRATION, RACIALIZATION, AND ACTIVISM* (2017) (analyzing the emergence of Latinx activism on the issue of immigration).

112. 422 U.S. 873 (1975).

113. *Id.* at 886–87; see Pablo Chapablanco, Note, “Traveling While Hispanic”: *Border Patrol Immigration Investigatory Stops at TSA Checkpoints and Hispanic Appearance*, 104 CORNELL L. REV. 1401, 1403 (2019) (noting that this language in *Brignoni-Ponce* “has evolved without any explanation in the courts into its current vague and all-encompassing form: ‘Hispanic appearance’”) (footnote omitted). *But see* *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) (holding that “Hispanic appearance” was not indicative of undocumented immigrant status and could not be employed by the Border Patrol in immigration stops in the U.S.–Mexico border region).

114. See *Brignoni-Ponce*, 422 U.S. at 885–87.

115. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1036–37 (2010) (footnote omitted). For further critical analysis of racial profiling in contemporary immigration enforcement, see Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U.L. Q. 675 (2000); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 230–33 (1983).

1930s and Operation Wetback, as well as the long history of immigration enforcement measures that target Latinx people for removal from the United States.¹¹⁶

This part of the Article explains how the Trump administration's Latinx-focused immigration enforcement efforts have built on institutional structures and programs put into place by the Obama administration. Thus, to fully appreciate the Trump immigration enforcement efforts, a brief discussion of the Obama administration's immigration record is necessary.

Today, an estimated eleven million undocumented immigrants live in the United States, which has been a relatively stable number in recent years.¹¹⁷ Initially, the Obama administration sought to demonstrate a firm commitment to immigration enforcement, with a specific focus on the removal of immigrants with criminal records. The political goal was for the successful enforcement record to improve the likelihood that Republicans in Congress would agree to a compromise immigration reform package.¹¹⁸ Congress has debated immigration reform for more than a decade.¹¹⁹

To boost removal numbers, the Obama administration revamped a preexisting program known as Secure Communities, which relied on state criminal justice systems to place noncitizens who had been arrested into the federal removal pipeline.¹²⁰ That program required state and local law enforcement to

116. See *supra* Part I.

117. See U.S. *Unauthorized Population Estimates by State, 2016*, PEW RES. CTR. (Feb. 5, 2019), <http://www.pewhispanic.org/interactives/u-s-unauthorized-immigrants-by-state> [<https://perma.cc/BY2H-W6FL>].

118. See Elisha Barron, Comment, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 637 (2011); see also Kristina M. Campbell, *Dreamers Deferred: The Broken Promise of Immigration Reform in the Obama Years*, 25 TEX. HISP. J.L. & POL'Y (2018) (analyzing critically President Obama's immigration initiatives and impacts on immigration reform).

119. See David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 161 n.258 (2018); David A. Super, *The Future of U.S. Immigration Law*, 53 U.C. DAVIS L. REV. 509, 520–33 (2019); see also Howard F. Chang, *The Economics of Immigration Reform*, 52 U.C. DAVIS L. REV. 111, 137–40 (2018) (analyzing 2013 immigration reform bill). See generally Symposium, *Stalemate on Immigration Reform*, 18 CHAP. L. REV. 315 (2015) (analyzing from a variety of perspectives current gridlock on immigration reform in Congress); Symposium, *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions*, 56 WAYNE L. REV. 1599 (2009) (collecting articles analyzing the possibility of Congress passing pragmatic and comprehensive immigration reform).

120. See Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 207–08 (2013) (summarizing the operation of the Obama administration's revitalized Secure Communities program). For critical analysis of Secure Communities and other initiatives designed to increase the roles of state and local government in federal immigration enforcement, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579–98 (2010); Ming H. Chen, *Trust*

share information with U.S. immigration authorities about arrests of all noncitizens—lawful permanent residents as well as undocumented immigrants. As a result of the operation of Secure Communities, the nation saw the removal of hundreds of thousands of immigrants annually, including many who had been arrested for—but not necessarily convicted of—relatively minor criminal offenses, including motor vehicle violations.¹²¹ The fact that the Supreme Court led by Chief Justice John Roberts, regularly rejected removal orders for running afoul of the immigration statute, lends support to the claim that the Obama administration pushed the envelope in its enforcement efforts.¹²²

Critics claimed that the Secure Communities program undermined state and local law enforcement priorities by, among other things, discouraging cooperation by immigrants with the police. They also pointed to its adverse impacts on immigrants as well as their families and communities.¹²³

As intended, Secure Communities generated an increase in the number of removals. During its first six years, the Obama administration removed in the neighborhood of 400,000 noncitizens annually.¹²⁴ 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 annual removal totals in the early 1990s.¹²⁵

in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities, 91 CHI.-KENT L. REV. 13, 22–42 (2016); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842–58 (2011).

121. See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1015–16, 1015 n.92 (2016); see also Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (noting that “[i]mmigration enforcement officials [today] use arrests as a screening tool” for removals). For examples, see cases cited *infra* note 123.
122. See, e.g., *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989–91 (2015) (vacating an order for the removal of a lawful permanent resident based on a single criminal conviction for possession of drug paraphernalia, a sock used to conceal a prescription drug); *Moncrieffe v. Holder*, 569 U.S. 184, 206–07 (2013) (same for the order of removal of a long-term lawful permanent resident with U.S. citizen children founded on a single conviction for simple marijuana possession); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581–82 (2010) (same for drug conviction based on simple possession of one pill of a prescription drug).
123. See, e.g., Katlyn Brady, *Sanctuary Cities and the Demise of the Secure Communities Program*, 23 TEX. HISP. J.L. & POL’Y 21, 23–25 (2017); Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 616–28 (2016); Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in US Immigration and Customs Enforcement’s “Secure Communities” Program*, 10 SEATTLE J. SOC. JUST. 327, 337–38 (2011).
124. See 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> [<https://perma.cc/EL5B-UR76>].
125. See JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 3 (2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [<https://perma.cc/5XY3-MVPW>]. The claim has been

Despite greatly increased enforcement efforts, the undocumented immigrant population more than doubled from the 1990s¹²⁶ and remained roughly the same during the Obama presidency.

Besides increasing the number of removals, President Obama's aggressive removal campaign resulted in stark racial disparities. In 2013, Mexico, Guatemala, Honduras, and El Salvador accounted for 96 percent of all removals.¹²⁷ In essence, removals fell almost exclusively on Latinx noncitizens,¹²⁸ even though they comprise a considerably smaller percentage of the overall immigrant population. The racial impacts of the removals are entirely consistent with the long history in the United States of employed crime-based removals to remove disfavored groups of immigrants.¹²⁹

Record numbers of removals by the Obama administration generated considerable resistance from state and local governments. Such resistance manifested itself through growing numbers of laws and policies declaring that those jurisdictions would provide some kind of sanctuary to immigrants.¹³⁰ The

made that the Obama administration inflated its removal figures. See Brian Bennett, *High Deportation Figures Are Misleading*, L.A. TIMES (Apr. 1, 2014), <http://www.latimes.com/nation/la-na-obama-deportations-20140402-story.html> [https://perma.cc/7Z6U-L6R4].

126. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 246 (2003).

127. SIMANSKI, *supra* note 125, at 6. Besides being subject to removals, noncitizens convicted of crimes in the United States, “[n]early all of them . . . Latino,” are held in “all-foreign prisons.” Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1381–82 (2019).

128. See Johnson, *supra* note 121, at 1016–17; Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 646 (2015). For a sampling of the voluminous criticism of the reliance on the criminal justice system for removals, frequently referred to as crimmigration law, see Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 630–40 (2012); 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); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006).

129. See generally Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018) (analyzing the history of the reliance on crime-based removal grounds under the U.S. immigration laws to target disfavored racial minority and national origin groups for removal from the United States). More generally, racism has historically deeply influenced the U.S. immigration laws and their enforcement. See generally Johnson, *supra* note 102 (analyzing the historical influence of race on U.S. immigration law and its enforcement from the initial federalization of immigration law through to the modern era).

130. See, e.g., Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433 (2018); Trevor George Gardner, *Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism*, 119 COLUM. L. REV. 1 (2019); Pratheepan Gulasekaram, Rick Su, & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019); Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703 (2018); Rose Cuison Villazor & Pratheepan

resistance of sanctuary cities contributed significantly to the Obama administration's decision to dismantle Secure Communities.¹³¹ The administration replaced the program with the Priority Enforcement Program, which restricted state and local law enforcement agencies assistance of the U.S. government to holding noncitizens *convicted of serious crimes*, rather than those *arrested for any crime*.¹³²

With healthcare reform the administration's top legislative priority, President Obama failed to make immigration reform a priority in his legislative agenda in his first term.¹³³ Not surprisingly, Congress failed to enact immigration reform. In 2013, the U.S. Senate passed a comprehensive immigration reform bill, which would have created a path to legalization for undocumented immigrants, increased immigration enforcement, and expanded avenues for legal immigration; the Republican leadership in the U.S. House of Representatives, however, prevented a vote on the compromise proposal.¹³⁴

Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209 (2019); Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMUL 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; Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 735–43 (2013).

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 laws for unconstitutionally intruding on the federal power to regulate immigration. See *supra* note 108 (citing cases).

131. See *Hearing on the Oversight of the United States Department of Homeland Security Before the House Comm. on the Judiciary*, 114th Cong. 21–22 (2015) (statement of Jeh Charles Johnson, U.S. Secretary of Homeland Security); see also Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 130–34 (2015) (examining the Obama administration's dismantling of Secure Communities in light of the constitutional concerns with the use of the state criminal laws as a tool for federal immigration enforcement).
132. See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, Megan Mack, Officer, Office of Civil Rights & Civil Liberties, & Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs, U.S. Dep't of Homeland Sec. 2–3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communitie_s.pdf [<https://perma.cc/HXG7-R7K2>].
133. See Josh Hicks, *Obama's Failed Promise of a First-Year Immigration Overhaul*, WASH. POST (Sept. 25, 2012), https://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258_blog.html [<https://perma.cc/H2Y6-U5SB>].
134. See Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation Beyond Our Borders*, 39 YALE J. INT'L L. 37, 37–8 (2014) (describing the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S.B. 744, as "written by a bipartisan group of eight senators" and "designed to streamline the admission of 'desirable' immigrants while addressing the challenges posed by approximately 11.2 million undocumented migrants"); Dara Lind, *The Summer 2014 Death of Immigration Reform in Congress*, VOX (June 4, 2015), <https://www.vox.com/policy-and>

Congress also failed to pass the Development, Relief, and Education for Alien Minors (DREAM) Act,¹³⁵ a version of which had been introduced many times for well over a decade; the act would have created a path to legalization for undocumented college students and others.

President Trump's immigration enforcement efforts have built significantly on President Obama's. The Trump administration's approach, however, is different in kind, with policy initiatives often announced in harsh, unforgiving, and disturbing tones. Through a variety of policy initiatives, President Trump has sought to reduce the racial diversity of the immigrant stream to, as well as immigrants in, the United States.¹³⁶ Mexican immigrants—who President Trump has demonized as “criminals” and “rapists”—are one of the primary targets.¹³⁷ Contemporary enforcement efforts also place immigrants from Central America in the cross hairs.¹³⁸ The Trump administration's immigration enforcement measures unquestionably affect Latinx noncitizens, as well as U.S. citizens, in the largest numbers.

Everily reminiscent of the crisis mentality that served as the foundation for the Mexican repatriation and Operation Wetback,¹³⁹ President Trump repeatedly has sought to convince the nation that a U.S.–Mexico border crisis necessitated decisive and aggressive action.¹⁴⁰ He, for example, berated the “caravans” of “criminals” and “terrorists” from Central America, the alleged abuse of the asylum system by Central Americans, and the laws that protect immigrants.¹⁴¹

politics/2014/6/30/18080446/immigration-reform-congress-2014-house-john-boehner-obama (discussing the failure of recent immigration reform efforts in Congress).

135. See Catalina Camia, *Senate Blocks DREAM Act*, USA TODAY (Dec. 19, 2010), <https://usatoday30.usatoday.com/communities/onpolitics/post/2010/12/senate-dream-act-1#.WzphEU2ouinfraUk> [<https://perma.cc/ESM7-8FLM>].
136. See generally Villazor & Johnson, *supra* note 11 (outlining how the Trump administration's immigration policies reduce the number of immigrants of color in the United States); Robert Tsai, *Immigration Unilateralism and American Ethnonationalism*, 51 LOY. U. CHI. L.J. (forthcoming 2019), Social Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469218 (contending that the Trump administration's immigration and refugee policies constitute part of a resurgent ethnonationalism movement).
137. See Ross, *supra* note 13.
138. See *infra* Parts II.A.–D.
139. See *supra* Part I.A.–B.
140. See Peter Baker, *Trump's National Address Escalates Border Wall Fight*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/politics/donald-trump-speech.html> [<https://perma.cc/PSY9-SY3X>].
141. See, e.g., Robert Donachie, *Trump: Caravan Migrants Are 'Not Legitimate Asylum Seekers'*, WASH. EXAMINER (Nov. 1, 2018), <https://www.washingtonexaminer.com/news/white-house/trump-caravan-migrants-are-not-legitimate-asylum-seekers> [<https://perma.cc/KE56-63M5>]; Jennifer Epstein & Justin Sink, *President Trump Admits He Has 'No Proof' Terrorists Are in the Migrant Caravan*, TIME (Oct. 23, 2018), <http://time.com/5432702/president->

Major television networks, including conservative Fox News, refused to air a President Trump television spot on immigration and the caravan, which linked Central American asylum seekers to crime; the advertisement was widely considered to be racist.¹⁴² In addition, President Trump frequently railed that crimes by immigrants justified increasingly aggressive enforcement proposals.¹⁴³ In that vein, he equated all Salvadorans with MS-13 members, a violent criminal gang whose members he characterized as nothing less than “animals.”¹⁴⁴ And his administration declared an emergency on the U.S.–Mexico border to justify reallocation of funds appropriated by Congress to build a wall along the border.¹⁴⁵ In so doing, he emphasized that “[t]he southern border is a major entry point for criminals, gang members, and illicit narcotics.”¹⁴⁶ In January 2019, the administration announced the Migrant Protection Protocols, which allowed

trump-admits-he-has-no-proof-terrorists-are-in-the-migrant-caravan
[<https://perma.cc/6PAG-426A>].

142. See Michael M. Grynbaum & Niraj Chokshi, *Even Fox News Stops Running Trump Caravan Ad Criticized as Racist*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/us/politics/nbc-caravan-advertisement.html> [<https://perma.cc/96PJ-NK2Q>].
143. See, e.g., Ryan Sabalow, “Build the Wall!” Trump Tweets About Immigration Status of California Officer’s Alleged Murderer, SACRAMENTO BEE (Dec. 27, 2018), <https://www.sacbee.com/news/state/california/article223636980.html> [<https://perma.cc/RGM6-YKR4>]; Hannah Darden, *President Trump Stirs Controversy on Twitter With Video of Sacramento Cop Killer*, SACRAMENTO BEE (Nov. 1, 2018, 12:41 PM), <https://www.sacbee.com/news/local/article220928885.html> [<https://perma.cc/3ZL6-GMUJ>].
144. See Julie Hirschfeld Davis & Niraj Chokshi, *Trump Defends ‘Animals’ Remark, Saying It Refers to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html> [<https://perma.cc/W7WT-MRX>]hearin]; see also Shani M. King, *Child Migrants and America’s Evolving Immigration Mission*, 32 HARV. HUM. RTS. J. 59, 65 (2019) (“Frequently invoking the transnational gang MS-13 as a symbol of the dangers of immigration as a whole, Trump’s favourite theme is that immigrants pose a direct threat to all the things that make America great (i.e. white).”).
145. See Proclamation No. 9844, Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019) (“The current situation at the southern border presents a border security and humanitarian crisis that threatens national security interests and constitutes a national emergency.”). The President’s emergency declaration was challenged as unlawful. See Priscilla Alvarez, *16 States File Lawsuit to Stop Trump’s National Emergency Declaration*, CNN (Feb. 19, 2019, 4:26 PM), <https://www.cnn.com/2019/02/18/politics/xavier-becerra-lawsuit-national-emergency/index.html> [<https://perma.cc/4VUL-TZP7>].
146. Proclamation No. 9844, 84 Fed. Reg., *supra* note 146, at 4949. For a debunking of the contemporary attacks on undocumented immigrants, including the claim that they are prone to crime, see EDIBERTO ROMAN, *THOSE DAMNED IMMIGRANTS: AMERICA’S HYSTERIA OVER UNDOCUMENTED IMMIGRATION* (2013).

certain asylum seekers to be returned to Mexico while the U.S. government processed their claims.¹⁴⁷

President Trump's incendiary rhetoric on immigration and immigrants and his aggressive enforcement policies differ from that employed by any president in the post-World War II era and harken back to the Mexican repatriation, Operation Wetback, and discriminatory laws of the late nineteenth and early twentieth century.¹⁴⁸ Designed to inflame the public and rationalize extreme enforcement actions, his words and policies appeal to immigration hawks of the Republican Party. Importantly, President Trump's harsh statements serve as the justification for a series of tough immigration policies primarily targeting Latinx noncitizens.

A. The Campaign and the Presidency

The Obama administration's record number of removals failed to satisfy Trump. In his successful run for president, Trump vigorously attacked President Obama's immigration enforcement record. From day one of his presidential campaign, he made aggressive immigration enforcement the cornerstone of his platform.¹⁴⁹ Pro-enforcement forces of the Republican Party responded enthusiastically to Trump's fervent pledge to build a wall along the U.S.–Mexico

147. See Press Release, U.S. Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/T49F-AGD8>]. A district court enjoined implementation of the Migrant Protection Protocols, see *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), but the court of appeals stayed the injunction, see *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019). The administration later issued a policy designed to remove Central American asylum seekers from the country who failed to apply in countries en route to the United States. See Nicole Narea, *The Trump Administration Will Start Sending Migrants Back to Guatemala Under a New Rule*, VOX, Nov. 19, 2019, <https://www.vox.com/policy-and-politics/2019/11/19/20970868/asylum-rule-agreement-guatemala-el-salvador-honduras-safe-third-deport-dhs-doj>.

148. See Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53, 98–99 (2018) (“Vociferous rhetoric from the [Trump] administration, especially President Trump himself, mirrors that from the turn of the twentieth century, branding noncitizens as undesirable and threats to American values.”); see also Richard Delgado, *Rodrigo's Rebuke: Originary Violence and U.S. Border Policy*, 53 U.C. DAVIS L. REV. ONLINE 33 (2019) (contending that immigration law and its enforcement constitute two separate forms of violence).

149. See *supra* text accompanying notes 13; see also Rebecca A. Delfino, *The Equal Protection Doctrine in the Age of Trump: The Example of Unaccompanied Immigrant Children*, 84 BROOKLYN L. REV. 73, 73 (2018) (“President Trump has made no secret of his desire to unwind policies of the prior administration in the areas of civil rights, voting rights, immigration, environmental protection, international relations, and health care.”).

border,¹⁵⁰ as well as his promise to create a “special deportation task force.”¹⁵¹ Trump’s forceful objections to President Obama’s deferred action policies, which benefited many Latinx noncitizens, fit naturally within his pro-immigration enforcement agenda.¹⁵²

Unlike other contemporary presidents, President Trump, as his comments demonstrate, focused on specific groups of immigrants for criticism and tough immigration enforcement. Among those groups subject to severe and repeated attacks were Mexicans, Central Americans, and Muslims.¹⁵³ The attacks were a precursor to the most aggressive immigration enforcement measures taken by a modern American president.¹⁵⁴

Mexican and Central American immigrants were time and again disparaged in the Trump administration’s call for action. In a defining statement offering insights into his views about Mexican immigrants, Trump—in announcing his presidential campaign—famously said that Mexicans brought crime to the

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150. See *Donald Trump, Campaign Speech in Phoenix, AZ*, WASH. POST (Aug. 31, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/08/31/heres-what-donald-trump-said-in-his-big-immigration-speech-annotated/?noredirect=on&utm_term=.f5ad8f209ec1 (quoting Donald Trump campaign speech: “On day one, we will begin working on an impenetrable, physical, tall, powerful, beautiful southern border wall.”); 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> [<https://perma.cc/5RDT-R6UT>] (“‘Build that wall’ . . . became synonymous with Donald Trump’s high-intensity campaign rallies, an expression that became more rallying cry than policy proposal . . .”); see also Ayelet Shachar, *Bordering Migration/Migrating Borders*, 37 BERKELEY INT’L L.J. 93, 95 (2019) (“From Donald Trump’s campaign promise to build an ‘impenetrable, physical, tall, powerful, beautiful border wall,’ to the brisk construction of barbed-wire fences by European countries . . . , border walls and razor fences signal that . . . physical barriers are still considered powerful measures to regulate migration and movement.”) (footnotes omitted). For analysis of the symbolic importance of a wall along the U.S.–Mexico border, see Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147, 158–81 (2012). Despite the substantial costs, it is doubtful that construction of a border wall in fact would provide any true immigration enforcement benefits. See *id.* at 151–58.
151. *Transcript: Donald Trump’s Full Immigration Speech, Annotated*, L.A. TIMES (Aug. 31, 2016) <https://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmstory.html> [<https://perma.cc/SJB6-PRVX>] (quoting President Trump: “Within ICE I am going to create a new special deportation task force focused on identifying and quickly removing the most dangerous criminal illegal immigrants in America who have evaded justice just like Hillary Clinton has evaded justice, OK?”).
152. See Nick Anderson, *Hundreds of Colleges Mobilize to Defend Immigrant Students*, WASH. POST (Nov. 23, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/11/23/hundreds-of-colleges-mobilize-to-defend-immigrant-students> [<https://perma.cc/DYD4-BAZE>] (“The Trump campaign pledged to ‘immediately terminate’ [President] Obama’s ‘illegal executive amnesties.’”).
153. See *infra* Part II.A.–C.
154. See *infra id.*

United States.¹⁵⁵ Although immigration scholars refer to Operation Wetback as a dark chapter in U.S. immigration history,¹⁵⁶ Trump called for its revival (although avoiding use of the racial epithet in its official name).¹⁵⁷ In an interview with Trump, one television reporter observed that many people recall the 1954 enforcement operation as a “shameful chapter in American history”; Trump’s response was revealing: “Well some people do, and some people think it was a very effective chapter And it was very successful, everyone said. So I mean, that’s the way it is. Look, we either have a country, or we don’t. If we don’t have strong borders, we have a problem.”¹⁵⁸

As his public statements on immigration make clear, race figures prominently in President Trump’s mindset on immigration enforcement. His actions reflect a commitment to return the nation to a time when immigration was much lower and the immigrants to the United States were much less racially and culturally diverse.¹⁵⁹ And President Trump’s words are having a violent impact; his harsh rhetoric has been accompanied by a rise in hate crimes against Latinx peoples.¹⁶⁰ The ACLU claimed that one vigilante group, which detained

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155. See *supra* text accompanying note 13 (quoting Donald Trump). Trump later claimed that a federal judge who was a U.S.-born citizen was biased against him because of his “Mexican heritage.” Tom Kertscher, *Donald Trump’s Racial Comments About Hispanic Judge in Trump University Case*, POLITIFACT, June 8, 2016, <https://www.politifact.com/wisconsin/article/2016/jun/08/donald-trumps-racial-comments-about-judge-trump-un>; Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict’*, WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curriel-1464911442> [<https://perma.cc/BR4C-NTEA>].
156. See, e.g., Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 277 (2018) (“Operation Wetback is another infamous chapter in the deportation of Mexicans from the United States.”); 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, 194 (2016) (“Operation Wetback [was] a massive, quasi-military operation that resulted in over a million deportations to Mexico under egregious conditions that often bypassed formal administrative proceedings. Those rounded up in Operation Wetback were deported en masse with little opportunity to raise defenses to deportation or claims for relief.” (footnotes omitted)).
157. See Bump, *supra* note 14.
158. Maeve Reston, *How Trump’s Deportation Plan Failed 62 Years Ago*, CNN (Jan. 19, 2016, 2:08 PM), <https://www.cnn.com/2016/01/19/politics/donald-trump-deportation-mexico-eisenhower/index.html> [<https://perma.cc/9E43-7B9M>].
159. See Villazor & Johnson, *supra* note 11, at 595–616.
160. See DAVID SCOTT FITZGERALD, GUSTAVO LÓPEZ, & ANGELA Y. MCCLEAN, MEXICAN IMMIGRANTS FACE THREATS TO CIVIL RIGHTS AND INCREASED SOCIAL HOSTILITY 64 (2019), https://ccis.ucsd.edu/_files/conference_papers_present/CNDH-final-3.4.19.pdf; Jaweed Kaleem, *Hate Crimes Dip Slightly, but Surge Against Latinos, FBI Reports*, L.A. TIMES, Nov. 12, 2019, https://www.latimes.com/world-nation/story/2019-11-12/hate-crimes-fbi-2018?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+lanowblog+%28L.A.+Now%29;N%27dea+Ynacey-Bragg,+Utah+Man+Who+Wanted+to+Kill+Mexicans%27+Charged+With+Federal+Hate+Crimes, USA TODAY (Feb. 20, 2019).

migrants on the border, “was a product of the Trump administration’s ‘vile racism’ that ‘has emboldened white nationalists and fascists to flagrantly violate the law.’”¹⁶¹ Hate crimes against Latinx persons are nothing new. Just a few years ago, hate crimes accompanied the rancorous national debate over immigration reform.¹⁶²

Shortly after his inauguration, President Trump issued executive orders that called for greatly ramping up immigration enforcement along the U.S.–Mexico border as well as the interior of the country.¹⁶³ Arrests of deferred action

<https://www.usatoday.com/story/news/nation/2019/02/20/utah-man-allegedly-wanted-kill-mexicans-charged-hate-crimes/2934909002> [https://perma.cc/LUW8-FBLB]; Dennis Romero, *In the Era of Trump, Anti-Latino Hate Crimes Jumped 69% in L.A.*, LA WEEKLY (Sept. 29, 2016), <https://www.laweekly.com/news/in-the-era-of-trump-anti-latino-hate-crimes-jumped-69-in-la-7443401> [https://perma.cc/4ELC-K8LF]; Sarah Ravani, *FBI: Hate Crimes in U.S., CA Surge in First Year of Trump’s Presidency*, S.F. CHRON. (Nov. 14, 2018), <https://www.sfchronicle.com/crime/article/FBI-Hate-crimes-in-U-S-CA-surge-in-first-year-13389522.php> [https://perma.cc/7ZFY-XSEN]; Maria Hinojosa, *Hate Crimes Against Latinos Increase in California*, NPR (July 15, 2018), <https://www.npr.org/2018/07/15/629212976/hate-crimes-against-latinos-increase-in-california> [https://perma.cc/57D9-VYTL]; Lizzie Dearden, *Donald Trump’s Victory Followed by Wave of Hate Crime Attacks Against Minorities Across US—Led by His Supporters*, INDEPENDENT, (Nov. 10, 2016), <https://www.independent.co.uk/news/world/americas/us-elections/donald-trump-president-supporters-attack-muslims-hijab-hispanics-lgbt-hate-crime-wave-us-election-a7410166.html> [https://perma.cc/VU5J-H7UF]. In addition, the administration’s enforcement measures have led to an increase in voluntary departure in removal cases, which could be seen as a form of self deportation. See Christie Thompson & Andrew R. Calderón, *More Immigrants Are Giving Up Court Fights and Leaving the U.S.*, MARSHALL PROJECT, May 8, 2019, <https://www.themarshallproject.org/2019/05/08/more-detained-immigrants-are-giving-up-court-fights-and-leaving-the-u-s>.

161. *Rights Group Condemns U.S. ‘Vigilante’ Treatment of Migrants on Border*, REUTERS, (Apr. 18, 2019), <https://www.reuters.com/article/us-usa-immigration-militia/rights-group-condemns-us-vigilante-treatment-of-migrants-on-border-idUSKCN1RV0C5> [https://perma.cc/7L35-ZJ2B]. In 2019, a young man shot at Latinx people at a shopping center in El Paso, Texas, only hours after posting an on-line screed about the “Hispanic invasion,” language similar to that used by President Trump. See Alexia Fernandez Campbell, *Trump Described an Imaginary ‘Invasion’ at the Border 2 Dozen Times in the Past Year*, VOX, Aug. 7, 2019, <https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>; see also Ediberto Roman, *The Alien Invasion?*, 45 HOUS. L. REV. 841 (2008) (analyzing popular concerns with “invasion” of the United States by Latinx persons).
162. See generally Kevin R. Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate Over Immigration Reform*, 91 N.C. L. REV. 1613 (2013) (analyzing the relationship between the rise in the number of hate crimes against Latinx peoples and the rancorous national debate over immigration reform).
163. See Exec. Order No. 13,767, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13,768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799 (Jan. 25, 2017). For analysis of President Trump’s initial immigration enforcement executive orders, see Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 260–65 (2017); Hing, *supra* note 156, at 311–16; Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration*:

recipients,¹⁶⁴ workplace raids,¹⁶⁵ and the deployment of the National Guard to the U.S.–Mexico border¹⁶⁶ followed. As part of what the Trump administration characterized as a zero-tolerance approach, the administration implemented a policy of separating families in detention along the U.S.–Mexico border, which generated great controversy before it was abandoned.¹⁶⁷ The families affected were Central American asylum seekers fleeing widespread violence in their nations of origin.

Put simply, striving to keep his campaign promises, President Trump has pursued an assortment of tough enforcement measures.¹⁶⁸ 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*

Law and Policy Making by Executive Order, 57 SANTA CLARA L. REV. 611, 628–51 (2017). From back of p. 6 (examining immigration enforcement during the first eighteen months of the Trump administration).

164. See, e.g., Christine Hauser, *A Young Immigrant Spoke Out 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> [<https://perma.cc/2TBG-FNEC>]; see also Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L.J. 525 (2017) (analyzing immigration law and its enforcement as a form of social control).
165. See, e.g., Kitroeff, *supra* 24; 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 [<https://perma.cc/6HGP-UUCP>]. Commentators have criticized the use of workplace raids in immigration enforcement 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 (2008); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008); Karla Mari McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. 1 (2010); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants’ Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 862–88 (2008).
166. 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 [<https://perma.cc/564L-24G7>].
167. 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-> [<https://perma.cc/H7N9-QK5H>].
168. See *infra* Part II.C.

precedent.¹⁶⁹ The impacts of those policies have fallen disproportionately on noncitizens of color, with Latinx—the largest immigrant group by far—affected in the largest numbers.¹⁷⁰ Resistance through litigation and protests has grown. Indeed, an extraordinary grass roots political movement emerged to “Abolish ICE [Immigration and Customs Enforcement].”¹⁷¹

B. The Muslim Ban

Latinx immigrants have not been the only group of immigrants harshly targeted by the Trump administration. In one of his highest profile immigration measures, President Trump issued three versions of a travel ban, frequently referred to as the Muslim ban, directed primarily at noncitizens from a group of predominantly Muslim nations.¹⁷² Challenged for being motivated by anti-Muslim animus,¹⁷³ the ban faced numerous legal challenges that delayed its implementation and resulted in a significant narrowing of its scope.

In September 2017, President Trump issued the third version of the Muslim ban titled “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.”¹⁷⁴ It barred entry into the United States of nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Somalia, and Yemen. The countries subject to the third iteration of the travel ban included those that the Secretary of Homeland Security, Attorney General, and Secretary of State determined had inadequate identity-management and information-sharing capabilities.¹⁷⁵

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

170. See *infra* Part II.C.

171. See Allison Crennen-Dunlap, Comment, *Abolishing the ICEberg*, 96 DENV. L. REV. ONLINE 148 (2019), <http://www.denverlawreview.org/dlr-online-article/2019/1/3/abolishing-the-iceberg.html> [<https://perma.cc/MF6M-PR9K>]; see also Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 40, 40–41 (2019) (analyzing the calls to abolish ICE and offering alternatives to its dismantling). One scholar has gone so far as to call for the abolition of deportation. See Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (forthcoming 2020), Social Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415707.

172. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–06 (2018).

173. See, e.g., Ruth Sherlock & Harriet Alexander, *US Court Questions Whether President Trump's Travel Ban is Anti-Muslim*, TELEGRAPH (Feb. 8, 2017), <https://www.telegraph.co.uk/news/2017/02/07/donald-trump-says-haters-going-crazy-support-putin-live> [<https://perma.cc/N7MM-5SPY>].

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

175. See *id.*

In *Trump v. Hawaii*, a 5–4 Supreme Court, polarized along partisan lines, upheld the third version of the travel ban.¹⁷⁶ Finding that the executive order was within the statutory authority delegated by Congress to the president to deny a class of noncitizens entry into the United States, the Court employed rational basis review in upholding the constitutionality of the ban and accepted the justification of the ban as protecting national security.

The Court's holding in *Trump v. Hawaii* has been, and no doubt will continue to be, criticized.¹⁷⁷ It cannot be disputed that the Court 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 sentiment. Justice Sotomayor's dissent outlined in detail Trump's many expressions of anti-Muslim animus and concluded that the national security rationale for the travel ban was mere "window dressing."¹⁷⁸

The targeting of a particular group of immigrants in the travel ban is an indication of the direction of the Trump administration's immigration policies. In announcing the ban, President Trump relied upon a rarely-used statutory provision that authorized the categorical denial of admission of groups of immigrants.¹⁷⁹ He later relied on the same provision in an order seeking to deny admission of persons at the U.S.–Mexico border.¹⁸⁰

C. Zero Tolerance

From the beginning of the 2016 presidential campaign, Donald Trump promised to target Mexican immigrants, who he characterized as criminals and

176. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Although citing cases that might have been invoked to immunize the president's executive order from judicial review, the Court did not invoke the plenary power doctrine, see *supra* text accompanying notes 39–40, to preclude review of the travel ban but instead engaged in rational basis review. See *Trump v. Hawaii*, 138 S. Ct. at 2420.

177. See, e.g., 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 (2018); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018); Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611 (2019). See generally KHALED A. BEYDOUN, AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR (2018) (analyzing the foundations for the emergence of anti-Islamic animus in the United States).

178. *Trump v. Hawaii*, 138 S. Ct. at 2433, 2440 (Sotomayor, J., dissenting); see *supra* note 29 (quoting from Justice Sotomayor's dissent).

179. See *Trump v. Hawaii*, 138 S. Ct. at 2407–10 (discussing 8 U.S.C. § 1182(f), which allows presidents in certain circumstances to suspend entry of classes of noncitizens into the United States).

180. See *infra* text accompanying note 184.

“bad hombres,” for removal.¹⁸¹ His fervent commitment to immigration enforcement is exemplified by the deep and enduring advocacy for building a wall along the U.S.–Mexico border; indeed, President Trump’s insistence upon congressional funding for the wall precipitated a record long shutdown of the entire federal government.¹⁸² The president also sought to deny noncitizens who unlawfully enter the United States from applying for asylum, which primarily affected Central Americans; a federal district court promptly enjoined that attempt.¹⁸³

Shortly after his inauguration, President Trump issued two executive orders, which together established a blueprint for greatly ramping up immigration enforcement.¹⁸⁴ That was just the beginning. The Trump administration, for example, engaged in much-publicized workplace raids,¹⁸⁵ deployed the National Guard along the U.S.–Mexico border,¹⁸⁶ and publicly denounced sanctuary cities that did not fully cooperate with U.S. immigration authorities and threatened to strip them of federal funding.¹⁸⁷

As proverbial icing on the cake, Attorney General Jeff Sessions announced a zero tolerance policy under which all adult noncitizens unlawfully entering the United States would be subject to criminal prosecution and, if accompanied by a

181. See Ross *supra* note 13.

182. See Felicia Sonmez, Josh Dawsey & Paul Farhi, *Trump to Make Prime-Time Address, Visit U.S.–Mexico Border Amid Shutdown Stalemate*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/politics/trump-to-visit-us-mexico-border-amid-shutdown-stalemate/2019/01/07/114fc580-129d-11e9-b6ad-9cfd62dbb0a8_story.html [<https://perma.cc/8L6P-4K7T>].

183. See *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (granting a preliminary injunction against Proclamation No. 9822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661 (Nov. 15, 2018)). The President had sought to assert authority under 8 U.S.C. §§ 1182(f), 1185(a) to suspend “[t]he entry of any alien into the United States across the international boundary between the United States and Mexico.” 83 Fed. Reg. at 57,663.

184. See *supra* note 164 (citing executive orders).

185. See, e.g., Gallagher, Shoichet, & Holcombe, *supra* note 24 (reporting on immigration raids at numerous Mississippi food processing plants).

186. See Tai Kopan, *Trump Orders National Guard Troops to the U.S.–Mexico Border*, CNN (Apr. 4, 2018), <https://www.cnn.com/2018/04/04/politics/trump-national-guard-troops-border/index.html>.

187. See, e.g., *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (affirming an injunction barring federal defunding of sanctuary cities in California and vacating “the injunction to the extent it applies outside California”); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017) (enjoining the implementation of provisions of Trump executive order seeking to strip sanctuary jurisdictions of federal funding); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (to the same effect); see also Kit Johnson, *The Mythology of Sanctuary Cities*, 28 S. CAL INTERDIS. L.J. 589 (2019) (challenging various popularly-voiced misconceptions about sanctuary cities).

minor child, would be detained and separated from that child.¹⁸⁸ The family separation policy generated nothing less than a firestorm of bi-partisan criticism, which compelled the administration to quickly abandon it.¹⁸⁹

In addition, using a rarely-employed procedural device to intervene in a series of Board of Immigration Appeals matters, Attorney General Jeff Sessions overruled the board, prodded the immigration courts to ramp up removals, and narrowed the eligibility requirements for asylum.¹⁹⁰ He also imposed a controversial quota system on immigration judges tied to annual performance reviews, which could be expected to encourage the judges to close cases by ordering removals.¹⁹¹

The various Trump enforcement measures contribute to the fact that more than 92 percent of the noncitizens removed in fiscal year 2018 were from Mexico, Guatemala, Honduras, and El Salvador.

188. See *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, U.S. DEP'T JUST. (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/AWV9-E2EF>]. For careful review of the array of zero tolerance policies, see Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum Seekers*, 51 COLUM. HUM. L. REV. 1 (2019).

189. See McCammon, *supra* note 167.

190. See *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (AG 2018) (restricting immigration courts' authority to terminate or dismiss removal proceedings); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (AG 2018) (restricting immigration court discretion to grant continuances of removal proceedings); *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018) (overruling Board of Immigration Appeals precedent and narrowing eligibility to establish membership in a "particular social group" for asylum seekers who claim to have fled domestic or gang violence), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018); *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (AG 2018) (rejecting the practice of administrative closure of removal proceedings in the immigration courts and instructing immigration courts to expeditiously decide cases), *abrogated by* *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). Session's successor as Attorney General, William Barr, has similarly intervened in BIA matters to narrow the avenues for relief from removal. See, e.g., *Matter of Castillo-Perez*, 27 I. & N. Dec. 664 (AG 2019) (interpreting narrowly the good moral character requirement for cancellation of removal); *Matter of L-E-A*, 27 I. & N. Dec. 581 (AG 2019) (narrowing asylum based on persecution on account of membership in a particular social group).

191. See Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, BROOKINGS INST. (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> [<https://perma.cc/PDH3-HV8K>].

Table 1: FY 2017 and FY2018 ICE Removals—Top 10 Removals by Country¹⁹²

Country of Citizenship	FY2017	FY2018
Mexico	128,765	141,045
Guatemala	33,570	50,390
Honduras	22,381	28,894
El Salvador	18,838	15,445
Dominican Republic	1,986	1,769
Brazil	1,413	1,691
Ecuador	1,152	1,264
Colombia	1,082	1,162
Haiti	5,578	934
Nicaragua	832	879

1. Crime-Based Removals

Through Secure Communities, the Obama administration greatly expanded removal efforts, targeting for removal virtually all noncitizens arrested for any and all crimes, including relatively minor ones.¹⁹³ The aggressive removal campaign had one-sided consequences on Latinx noncitizens.¹⁹⁴ Facing formidable, and sustained, state and local resistance, the Obama administration ultimately abandoned Secure Communities.¹⁹⁵ Nonetheless, along with an array of steps to bolster immigration enforcement,¹⁹⁶ President Trump brought back Secure Communities.¹⁹⁷ The reinstatement of that program can be expected to disproportionately impact Latinx noncitizens, just as it did in the Obama years.¹⁹⁸

As seen during the Obama administration, some state and local governments have responded to the Trump administration's enforcement measures through sanctuary laws that attempt to distance themselves from

192. U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 17–22 (2018), <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [<https://perma.cc/4G89-J566>]. For discussion of the Trump administration's efforts to influence the disposition of cases by the immigrant courts, see Fatima E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707 (2019).

193. See *supra* text accompanying notes 120–33.

194. See *id.*

195. See *id.*

196. See, e.g., *supra* notes 164 (citing two presidential immigration executive orders).

197. Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

198. See *supra* text accompanying notes 125–30.

federal immigration enforcement.¹⁹⁹ Indeed, the number of such laws virtually exploded in number. California passed several laws that, among other things, limited state and local involvement in federal immigration enforcement.²⁰⁰ The U.S. Department of Justice unsuccessfully challenged most of these laws as intruding on the federal power to regulate immigration.²⁰¹ The Trump administration also sought to cut federal funding to state and local sanctuary jurisdictions, which the courts also enjoined.²⁰²

2. The Rescission of DACA

With dramatically increased removals failing to move Congress to pass immigration reform, the Obama administration in 2012 implemented Deferred Action for Childhood Arrivals (DACA).²⁰³ That policy allowed undocumented immigrants brought to the United States as children to apply for a form of relief from removal known as deferred action. Deferred action constitutes to the exercise of prosecutorial discretion by the U.S. government in selecting undocumented noncitizens to prioritize for removal from the United States; serious criminal offenders generally are given the highest priority.²⁰⁴ Critics

199. See Pham & Van, *supra* note 11; *supra* text accompanying notes 131–33.

200. See, e.g., California Values Act, S.B. 54, 2017–2018 Reg. Sess. (Cal. 2017); Inspection and Review of Facilities Housing Federal Detainees, A.B. 103, 2017–2018 Reg. Sess. (Cal. 2017); Immigrant Workers Protection Act, A.B. 450, 2017–2018 Reg. Sess. (Cal. 2017).

201. See *United States v. California*, 921 F.3d 865 (9th Cir. 2019) (affirming, for the most part, denial of a motion to enjoin California’s sanctuary laws).

202. See *supra* note 188 (citing cases).

203. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/8SK7-TDHA>] (last updated Feb. 14, 2018); see also Kevin R. Johnson, *Lessons About the Future of Immigration Law From the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343 (2018) (analyzing the implications of the rise and fall of DACA for future developments in immigration law); Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. (forthcoming 2020) (analyzing evolution of approaches to protect education rights of young undocumented persons).

204. See Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 507–14 (2017) (reviewing the history of deferred action as a form of prosecutorial discretion in removal); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL OF RTS. J. 463, 482–84 (2012) (explaining nature of deferred action); see also Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 378–412 (2017) (examining executive action on immigration matters); Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 502–27 (2018) (arguing that the executive branch can and should play a larger role in enforcing constitutional norms in immigration law). See generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (evaluating President

vociferously attacked DACA as an amnesty for undocumented immigrants that unlawfully intruded on the power of Congress to determine which noncitizens are subject to removal.²⁰⁵ Legal challenges to DACA failed.²⁰⁶

Over its five-year life span, DACA provided relief to hundreds of thousands of young undocumented immigrants. As the data in the table shows, close to ninety percent of all DACA recipients were Latinx.

Table 2: Top Four Countries of Origin for DACA²⁰⁷

Country	Total	% of Total DACA recipients
Mexico	548,000	79.4
El Salvador	25,900	3.7
Guatemala	17,700	2.6
Honduras	16,100	2.3

In 2014, the Obama administration announced another deferred action policy, Deferred Action for Parents of Americans and Lawful Permanent

Obama’s deferred action policies in light of the power of the president over immigration); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168 (2018) (proposing arrangements that could effectively check the exercise of presidential power in immigration). See generally SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (analyzing history of the U.S. government’s use of prosecutorial discretion in removal matters).

205. Critical assessments of the constitutionality of DACA and DAPA can be found in Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015). For defense of the lawfulness of President Obama’s deferred action policies, see, for example, Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255 (2013); Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama’s Executive Actions on Immigration*, 92 WASH. U.L. REV. 1083 (2015); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action in Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015); Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59 (2013); see also Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 662–71 (2015) (contending that the Obama administration’s deferred action policies added necessary discretion to the contemporary immigration enforcement system).
206. See, e.g., *Arpaio v. Obama*, 797 F.3d 11 (D.C Cir. 2015) (dismissing challenge to DACA on standing grounds); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (same).
207. *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 [https://perma.cc/9TU8-L6AZ].

Residents (DAPA).²⁰⁸ This policy initiative would have made undocumented parents of lawful permanent residents and U.S. citizens eligible for deferred action. Building on DACA, DAPA sought to further narrow the federal government's immigration enforcement efforts in order to devote limited enforcement resources to removing convicted serious criminal immigrant offenders.

The announcement of DAPA provoked controversy. As was the case with DACA, the most strident objections claimed that DAPA was unconstitutional and intruded on the congressional power to regulate immigration.²⁰⁹ Legal challenges to DAPA followed. A court enjoined the implementation of the policy and a deadlocked U.S. Supreme Court allowed the injunction to stand.²¹⁰ DAPA was never implemented.

As DACA remained in place, it provided limited relief to a subset of the undocumented population, namely young undocumented immigrants brought to the United States as children. Claiming that the policy infringed on the power of Congress to define the noncitizens designated for removal from the United States, Donald Trump campaigned on the promise to dismantle DACA.²¹¹

Some Republican leaders advocated for continuation of the policy.²¹² Nevertheless, Attorney General Jeff Sessions in September 2017 announced DACA's rescission.²¹³ In response, protests called for congressional action to provide relief to DACA recipients.²¹⁴ Finding that DACA's rescission was

208. See *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/2014-executive-actions-immigration> [<https://perma.cc/742U-A9BP>] (last updated Apr. 15, 2015).

209. See Joseph Tanfani, *Obama Faces High Stakes in Rollout of Controversial Immigration Program*, L.A. TIMES (Feb. 10, 2015), <http://www.latimes.com/nation/la-na-immigration-rollout-20150210-story.html> [<https://perma.cc/EY55-5K4D>]; see also Raquel Aldana, *Congressional Dysfunction and Executive Lawmaking During the Obama Administration*, 91 CHI.-KENT L. REV. 3, 3 (2016) (observing that President Obama's announcement of DAPA generated "simultaneous reactions of tamed enthusiasm and anger").

210. See *United States v. Texas*, 136 S. Ct. 2271 (2016); see also Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 279–303 (2016) (analyzing issues presented in *United States v. Texas*); 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").

211. See Amita Kelly, *Here is What Donald Trump Wants to Do on His First Hundred Days in Office*, NPR (Nov. 9, 2016), <https://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days> (noting Trump's plan to end DACA).

212. See Johnson, *supra* note 203, at 368.

213. See Press Release, U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks on DACA (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

214. See Scott Neuman, *Protesters in D.C., Denver, LA, Elsewhere Demonstrate Against Rescinding DACA*, NPR (Sept. 5, 2017, 5:58 PM), <http://www.npr.org/sections/thetwo-way/2017/09/05/>

arbitrary and capricious, three federal courts enjoined the Trump administration's attempt to rescind the policy.²¹⁵ In light of the President's use of "racial slurs" and "epithets" in discussing immigrants, one district court allowed an action to proceed challenging the rescission of DACA as racially discriminatory in violation of the Equal Protection Clause.²¹⁶ The Supreme Court has accepted review of three DACA challenges.²¹⁷ In response to the Trump administration's rescission of DACA, Congress reconsidered a version of the DREAM Act and other legislative reforms.²¹⁸

As highlighted earlier,²¹⁹ close to 90 percent of the DACA beneficiaries were Latinx noncitizens. Thus, its rescission would primarily affect Latinx noncitizens. Although the courts to this point have enjoined the wholesale rescission of DACA, no new DACA applications currently are being accepted. Latinx noncitizens in all likelihood are the group most impacted by the current hold on applications and the threatened rescission of DACA.²²⁰

3. Detering Central American Asylum-Seekers

The United States periodically has seen influxes of asylum seekers fleeing violence in Central America. At various times, the U.S. government has employed detention in its attempts to manage and deter Central American migration. In the 1980s, for example, President Reagan responded with mass detention to migration from Central America, where violent civil wars had

548727220/protests-in-d-c-denver-la-elsewhere-protest-rescinding-daca [https://perma.cc/8ELZ-LWT3].

215. See *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019); *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018), *cert. granted*, 139 S. Ct. 2779 (2019); *Vidal v. Nelson*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *cert. granted sub nom.* 139 S. Ct. 2773 (2019).

216. 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> [https://perma.cc/U6PA-BKTK].

217. See *supra* note 215.

218. See, e.g., American Dream and Promise Act, 116th Cong. (2019–20), <https://www.congress.gov/bill/116th-congress/house-bill/6/text>; Nolan D. McCaskill, *Trump Ends DACA—and Pressures Congress to Pass Immigration Reform*, POLITICO (Sept. 5, 2017, 10:57 AM), <https://www.politico.com/story/2017/09/05/trump-dreamers-daca-work-permits-242323> [https://perma.cc/TMQ4-L4DH].

219. See *supra* text accompanying notes 207 & Table 2.

220. See Johnson, *supra* note 203, at 364–65 (reviewing data showing that nearly 90 percent of DACA recipients were Latinx).

caused hundreds of thousands of people to flee.²²¹ Immigrant rights groups successfully challenged various aspects of the detention and related policies.²²²

More recently, the Obama administration in 2014 responded to an influx of Central American asylum seekers fleeing widespread criminal violence by employing detention, including the detention of entire families.²²³ That detention strategy faced formidable legal challenges.²²⁴

Since President Trump's inauguration, migrants from Central America have continued to cross the U.S.–Mexico border and apply for asylum.²²⁵ By all accounts, uncontrolled and widespread violence in Central America has fueled the latest stream of migrants.

U.S. immigration law generally affords the executive branch considerable discretion in deciding which immigrants to detain and which to release from

221. See Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 LAW & SOC. INQUIRY 569 (2011) (reviewing history of U.S. government's treatment of Central American asylum seekers from 1980s through 2010). See generally SUSAN BIBLER COUTIN, *THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM* (1993) (summarizing the history of the 1980s sanctuary movement to assist Central American asylum seekers); ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION* (1988) (to the same effect).
222. See, e.g., *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990); see also *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (approving a settlement in a case allowing for reassessment of thousands of asylum applications of Salvadorans and Guatemalans); Bill Ong Hing, *Ethics, Morality, and Disruption of U.S. Immigration Laws*, 63 KAN. L. REV. 981, 1019–27 (2015) (analyzing the positive effects of immigration impact litigation, with *Orantes-Hernandez* one example).
223. See, e.g., *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 critical analysis of the Obama administration's detention of Central American asylum seekers, see Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785 (2018); Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135 (2018); Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 963–65 (2016); Scott Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337 (2015); Rebecca Sharpless, *Cosmopolitan Democracy and the Detention of Immigrant Families*, 47 N.M.L. REV. 19, 19 (2017); 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, 192–208 (2015). See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019) (analyzing critically the contemporary vast expansion of immigrant detention).
224. See *Flores*, 828 F.3d at 907–08 (affirming order to enforce *Flores* settlement and limiting the Obama administration's ability to detain entire families); see also Aaron Korthuis, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L.J. F. 238 (Nov. 25, 2019) (showing historical antecedents to modern use of detention, including the detention of Asian immigrants in the late 1800s and early 1900s).
225. See Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2012).

custody pending a removal hearing.²²⁶ The established practice of the U.S. government had been to allow a noncitizen apprehended by U.S. immigration authorities to post bond and be released from custody while awaiting a removal hearing.²²⁷ That practice was consistent with the Supreme Court decisions in nonimmigration contexts holding that the U.S. Constitution requires a hearing with the possibility of release.²²⁸

To implement his zero tolerance policy, President Trump zealously employed immigrant detention like no other president in recent history.²²⁹ Denigrating the conventional approach as “catch and release,” he stopped allowing noncitizens to post bonds for release, even if they seek asylum and do not pose a risk of absconding or to public safety.²³⁰ His administration has consistently exercised its discretion to detain migrants in an effort to deter Central Americans from coming to the United States—first adopting a mandatory detention policy followed by a family separation policy and then a policy of detaining entire immigrant families.²³¹ Through these policies, President Trump

226. See *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1103 (BIA 1999) (ruling that “an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight. But we agree . . . that an assessment of an alien’s danger to property or persons is a relevant consideration”), *abrogated on other grounds by* *Pensamiento v. McDonald*, 315 F. Supp. 3d 684 (D. Mass 2018).

227. See Immigration and Nationality Act § 236(a)–(b), 8 U.S.C. § 1226(a)–(b) (2012).

228. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (finding that the civil commitment of sex offenders after a jury trial could be lawful); *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, 755 (1987) (upholding pretrial detention of a criminal defendant only upon individualized findings of dangerousness or flight risk at a bond hearing).

229. See *infra* text accompanying notes 229–48. The Trump administration has taken many other steps to bolster enforcement. See, e.g., *Asylum Rule and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019) (rejecting asylum claims by noncitizens who failed to apply for asylum in countries they travel through in coming to the United States, which a federal court enjoined, see *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019), *stay granted sub nom.*, *Barr v. East Bay Sanctuary Covenant*, 204 L.Ed. 2d 1189 (U.S. 2019); *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019) (expanding greatly expedited (summary) removal of noncitizens seeking entry at ports of entry) and enjoined by *Make a Road New York v. McAleenan*, No. 19-cv-2369 (KBJ), memorandum opinion (D.D.C. Sept. 27, 2019), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv2369-40; *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, White House Blog, <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states> (proclaiming that the United States would return asylum seekers to Mexico while asylum claim was being processed, which a federal court enjoined, see *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019) (per curiam)).

230. See Exec. Order No. 13,767, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017).

231. See *supra* text accompanying notes 233–48.

has sought to establish one that goes to the legal and political limits in deterring migrants from seeking asylum.²³² Going to where no administration had previously gone in modern U.S. history, the administration proposed to deny the ability to seek asylum to any noncitizen who does not apply at a port of entry.²³³

Whatever the precise policy, detention under the administration's zero tolerance policy is mandatory, without the possibility of release on bond. That approach was adopted even though detention is costly and the vast majority of families who, under previous practice, had bonded out subsequently appeared at their removal hearings.²³⁴ Devices such as ankle bracelets, which the U.S. Department of Homeland Security has increasingly used, could be employed to help ensure compliance with bonds and appearances in immigration court.²³⁵

Deterring future asylum seekers has been the motivation behind the Trump administration's decision to separate migrant parents from their children,²³⁶ as well as the later detention policies. After political pressure and mass protests, the administration issued an executive order ending the controversial family separation policy but now seeks to detain entire families together.²³⁷

The administration's across the board detention of women and children from Central America brought into play what is known as the *Flores* settlement. For more than twenty years, that settlement set minimum guidelines for

232. *See id.*

233. *See* *Al Otro Lado Inc., v McAleenan*, 2019 U.S. Dist. LEXIS 12173 (S.D. Cal. July 29, 2019).

234. *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> [<https://perma.cc/NMY2-D8UN>]; *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, TRAC (Sept. 14, 2016), <http://trac.syr.edu/immigration/reports/438> [<https://perma.cc/N9BW-BSG5>].

235. *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> [<https://perma.cc/5G3L-DFXH>].

236. *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> [<https://perma.cc/HBG2-V5HN>]; *see also* Nelson Renteria, *Honduras, El Salvador Decry U.S. Border Separations Impact on Kids*, REUTERS (June 18, 2018), <https://www.reuters.com/article/us-usa-immigration-centam/honduras-el-salvador-decry-u-s-border-separations-impact-on-kids-idUSKBN1JF0DP> ("Trump administration officials have defended the policy as a way to secure the border and deter illegal immigrants.").

237. *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> [<https://perma.cc/RU34-JZU7>].

detaining migrant children.²³⁸ In 1997, President Bill Clinton's administration settled the *Flores* case, which challenged the detention of migrant minors, through a consent decree that established standards for the detention of minors.²³⁹ The decree requires the U.S. government to place children with a close relative or family friend in the United States "without unnecessary delay" and to detain immigrant children in the least restrictive conditions possible.²⁴⁰

Trump administration officials blamed the *Flores* settlement for the initial decision to separate families.²⁴¹ The heated political response forced the end of the family separation policy.²⁴² Courts ordered the Trump administration to reunite separated migrant families, an order that the administration found difficult to implement.²⁴³

In ending family separation, President Trump announced that his administration would seek to detain entire families.²⁴⁴ Section 3(e) of the executive order halting family separation instructed the attorney general to seek to modify the *Flores* agreement "in a manner that would permit the secretary, under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings."²⁴⁵ In response to the executive order, the U.S. Department of Homeland Security and the U.S. Department of Health and Human Services proposed regulations that would terminate the *Flores* settlement.²⁴⁶ The administration currently seeks to indefinitely detain minors and to end judicial oversight of the detention of minor children.

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

239. See *id.*

240. See *id.*

241. 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> [https://perma.cc/54D7-WKGJ].

242. See Exec. Order No. 13,841, *Affording Congress an Opportunity to Address Family Separation*, 83 Fed. Reg. 29,435 (June 20, 2018).

243. See *L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018).

244. See Press Release, U.S. Dep't of Homeland Sec., *Fact Sheet: Zero-Tolerance Prosecution & Family Reunification* (June 23, 2018), <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification> [https://perma.cc/C899-DGTB].

245. 83 Fed. Reg. at 29,436.

246. See *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 83 Fed. Reg. 45,486 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. pt. 212, 236; 45 C.F.R. pt. 410). The court monitoring the *Flores* settlement rejected the Trump administration's effort to abrogate the consent decree. See Miriam Jordan, *Judge Blocks Trump Administration Plan to Detain Migrant Children* N.Y. TIMES, Sept. 28, 2019, <https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html>.

The Trump administration should not be surprised by legal challenges to indefinite detention of minors through family detention. Litigation challenged the Obama administration's attempt to implement a similar approach.²⁴⁷ Immigrant detention has been subject to repeated legal challenges. In 2018, the Supreme Court in *Jennings v. Rodriguez* remanded a case to the court of appeals to decide whether detention of noncitizens without a bond hearing and possible release, which the court found to be authorized by the immigration statute, violated due process.²⁴⁸ In a 2019 decision, the Court expanded the executive's authority to detain migrants.²⁴⁹

In short, the Trump administration's detention policies admittedly are aimed at deterring Central American migration. Political and legal resistance has shaped the use of detention and, to this point in time, restricted the Trump administration's detention of minors, almost all of whom came from Central America.

4. Ending TPS

Temporary Protected Status (TPS) is a statutory form of relief from removal in which the Executive Branch may provide noncitizens fleeing natural disaster or civil strife with temporary safe haven in the United States.²⁵⁰ In 2018, the Trump administration announced the end of TPS for nearly 200,000 Salvadorans,²⁵¹ a group that the president had previously, and quite specifically, disparaged.²⁵² Within months, the administration also ended TPS for Hondurans, Nicaraguans, and Haitians, all of whom had TPS status throughout the Obama administration.²⁵³ Through eliminating TPS, the Trump administration seeks to reduce the overall number of TPS recipients in the United States.²⁵⁴

247. See *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

248. 138 S. Ct. 830, 851–52 (2018).

249. See *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (expanding power of executive under immigration statute to subject certain immigrants to mandatory detention).

250. See Immigration and Nationality Act § 244A, 8 U.S.C. § 1254a (2012).

251. See Press Release, U.S. 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> [<https://perma.cc/8VMK-PGVJ>].

252. See Dawsey, *supra* note 15.

253. 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 to natives of 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).

254. See *supra* text accompanying notes 249–52.

As with DACA, the Trump administration has sought to exercise the power of the executive to eliminate relief previously extended to Latinx noncitizens. Ending TPS for Salvadorans, Nicaraguans, Hondurans, and nationals of other countries continues the administration's efforts to reduce the number of Latinx noncitizens, as well as other people of color, in the United States.²⁵⁵ Though accomplished through a different approach, the end result of the measures would have the same disparate impacts on Latinx noncitizens as the Mexican repatriation and Operation Wetback.

The administration's end of TPS for noncitizens from many developing nations has encountered stiff resistance.²⁵⁶ Legislation in Congress has been introduced to protect TPS recipients from losing their legal status.²⁵⁷ In addition, a lawsuit challenged the administration's decision to end TPS for Salvadorans and Haitians as racially discriminatory.²⁵⁸ A district court enjoined the end of TPS for persons from El Salvador, Haiti, Nicaragua, and Sudan, finding that the challenge to the policy founded on racial animus raised substantial legal questions.²⁵⁹ In so ruling, the court emphasized President Trump's many racially-charged statements about immigrants.²⁶⁰

D. Restricting Legal Immigration

The Muslim ban sought to restrict admission of noncitizens from certain countries who otherwise were legally authorized to enter the United States.²⁶¹ It can be seen as furthering the administration's overarching goal of reducing legal immigration to the United States. In that vein, President Trump has vehemently

255. *See id.*

256. *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, 9:13 AM), <https://www.publicintegrity.org/2018/05/04/21736/honduras-temporary-protected-status> [<https://perma.cc/WP6N-T9V2>].

257. *See* Rafael Bernal, *Trump Immigration Measures Struggle in the Courts*, THE HILL (Oct. 5, 2018, 6:00 AM), <https://thehill.com/latino/410012-trump-immigration-measures-struggle-in-the-courts> [<https://perma.cc/U3CR-CQUX>] (referring "to six legislative proposals in the current Congress that would either extend TPS benefits or give current beneficiaries permanent residency").

258. *See Black and Latino Immigrants File Federal Lawsuit to Block Trump's Termination of TPS*, Law. Committee for C.R. & Econ. Just. (Feb. 22, 2018), <http://lawyersforcivilrights.org/our-impact/racial-justice/black-and-latino-immigrants-file-federal-lawsuit-to-block-trumps-termination-of-tps> [<https://perma.cc/G9P8-U2LW>].

259. *See Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108–09 (N.D. Cal. 2018).

260. *See id.* at 1100–01; *see also* *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 414–15 (D. Mass. 2018) (reviewing the evidence that racial animus motivated the Trump administration's decision to terminate TPS for nationals of El Salvador, Haiti, and Honduras).

261. *See* Part II.B.

attacked “chain migration”²⁶² authorized by the current U.S. immigration laws. In so doing, he directly challenges the family reunification system created by Congress, a system that contributes significantly to the contemporary racial demographics of immigration to the United States, which includes many people of color from Mexico and other developing nations.²⁶³

Congress designed the contemporary U.S. immigration laws to promote the reunification of families.²⁶⁴ Under the law, a majority of visas annually are allocated to applicants who have U.S. citizen and lawful permanent resident family members in the United States.²⁶⁵ In recent years, approximately one million noncitizens have immigrated lawfully each year as lawful permanent residents, a majority of them on family visas. Not surprisingly, given the long history of immigration from Mexico to the United States, as well as the proximity of the two nations, Mexico regularly sends the most immigrants of all nations to the United States.²⁶⁶

In 2017, President Trump expressed support for a bill that would dramatically reduce legal immigration and reduce chain immigration by further restricting the family-based visa categories.²⁶⁷ The Reforming American Immigration for Strong Employment (RAISE) Act²⁶⁸ would reduce family-based legal immigration and, by so doing, change the modern racial demographics of immigration. Designed to cut legal immigration by half over the next decade, from roughly one million to 500,000 persons a year, the act would restrict family immigrant visas to spouses and minor children of U.S. citizens and lawful

262. See Dara Lind, *What “Chain Migration” Really Means—and Why Donald Trump Hates It So Much*, VOX (Jan. 30, 2018, 12:48 PM), <https://www.vox.com/policy-and-politics/2017/12/29/16504272/chain-migration-family-how-trump-end> [<https://perma.cc/4878-Z7L9>].

263. See Villazor & Johnson, *supra* note 11, at 592–96.

264. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND 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)).

265. See U.S. DEP’T OF HOMELAND SEC., *LEGAL IMMIGRATION AND ADJUSTMENT OF STATUS REPORT FISCAL YEAR 2017, QUARTER 2* (2017), <https://web.archive.org/web/20170628121619/https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration> [<https://perma.cc/8VB9-PS67>] (noting that nearly one-half of all lawful permanent residents in fiscal year 2017 came as immediate relatives of U.S. citizens and approximately two-thirds obtained legal status under a family preference category).

266. See *id.* (“More than 40 percent of [the approximately 550,000] new [lawful permanent residents] 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,” which were the same top six countries in the first and second quarters of fiscal year 2016).

267. See Johnson, *supra* note 203, at 382–85.

268. RAISE Act, S. 354, 115th Cong. (2017); see Johnson, *supra* note 203, at 382–85 (discussing RAISE Act).

permanent residents; parents, adult children, and brothers and sisters of U.S. citizens and lawful permanent residents would no longer be eligible for immigrant visas.²⁶⁹ The RAISE Act's reduction of family immigration visas would have the largest impact on legal migration from Mexico, the nation that currently sends the most legal immigrants to the United States.²⁷⁰

The RAISE Act would likely transform the racial demographics of the legal immigration stream to the United States.²⁷¹ The drastic reduction in family visas would restrict the flow of immigrants from Mexico and other developing nations populated predominately by non-whites 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.

Facing stiff criticism,²⁷² the RAISE Act has stalled in Congress. Nonetheless, given President Trump's stated preference for immigrants from Europe,²⁷³ he can be expected to support future reform proposals that redirect legal immigration to European nations and away from noncitizens in the developing world. Latinx noncitizens would be negatively affected in the largest numbers by such reforms.

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269. See S. 354 § 4; Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment-Based System*, MIGRATION POL'Y INST. (Aug. 2017), <http://www.migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-so-employment-based-system> [<https://perma.cc/W8TQ-4TXZ>].
270. See 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> [<https://perma.cc/P5NW-7VRR>]; see also José Calderón, *The RAISE Act Reveals What Trump Really Thinks About Immigrants*, THE HILL (Aug. 14, 2017, 1:30 PM), <http://thehill.com/blogs/congress-blog/homeland-security/346480-the-raise-act-reveals-what-trump-really-thinks-about> [<https://perma.cc/KJA3-SBVE>] (reviewing how the bill, which President Trump supported, reflected President's desire to reduce legal immigration).
271. See 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> [<https://perma.cc/MW4M-9CEZ>] (reviewing President Trump's immigration reform proposal in response to the congressional budget impasse and noting that it would reduce the immigration of persons of color).
272. For critical analysis of the RAISE Act, see 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> [<https://perma.cc/N8PB-WZAR>]; Michelle Mark, *Trump Just Unveiled a New Plan to Slash Legal Immigration*, BUS. INSIDER (Aug. 2, 2017, 12:10 PM), <http://www.businessinsider.com/trump-legal-immigration-bill-tom-cotton-2017-8> [<https://perma.cc/QZA2-S8CY>]. Howard F. Chang, *The Economics of Immigration Reform*, 52 U.C. DAVIS L. REV. 111 (2018), criticizes the RAISE Act from an economics perspective.
273. 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> [<https://perma.cc/AJ6Q-KMT8>].

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 supporting the RAISE Act, the administration proposed tightening the public charge exclusion barring noncitizens found likely to use public benefits, which would restrict the lawful immigration of low- and moderate-income people; noncitizens of color from developing nations would likely be affected in the largest numbers.²⁷⁴ The Trump administration's reductions in refugee admissions²⁷⁵ and enhanced vetting of visa applicants²⁷⁶ also can be expected to reduce legal immigration to the United States. Prospective Latinx immigrants will be most heavily impacted because they today seek visas in the largest numbers.²⁷⁷

III. COMPARING THE OLD AND THE NEW OF THE NEW LATINX REPATRIATION

Part II of this Article established that the Trump administration's various immigration enforcement policies have commenced the equivalent of a new Latinx repatriation campaign. The Trump version of repatriation, however, has the potential to have more far-reaching impacts than previous incarnations. It is a more comprehensive and institutionalized immigration enforcement approach than the 1930s Mexican repatriation and Operation Wetback of 1954. The racial impacts, as well as their magnitude, of the Trump administration's immigration program deserve attention.

274. See Lind, *supra* note 262; Press Release, U.S. Dep't of Homeland Sec., DHS Announces New Proposed Immigration Rule to Enforce Long-Standing Law that Promotes Self-Sufficiency and Protects American Taxpayers (Sept. 22, 2018), <https://www.dhs.gov/news/2018/09/22/dhs-announces-new-proposed-immigration-rule-enforce-long-standing-law-promotes-self> [https://perma.cc/KS4-BWJY]. The Trump administration also commenced the investigation of 700,000 naturalized U.S. citizens for possible denaturalization. See Amanda Frost, *Alienating Citizens*, 114 NW. U.L. REV. ONLINE 241, 242 (2019); Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 404 (2019).

275. See *supra* note 32; 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> [https://perma.cc/6KAC-ZHB2].

276. 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 [https://perma.cc/7PLF-HGNV]; 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>.

277. See *supra* text accompanying notes 263–65.

Importantly, the new Latinx repatriation differs in at least two significant ways from the old versions. Those differences reinforce and institutionalize the racial impacts of immigration enforcement through race-neutral means. Consequently, unless checked, Trump's new Latinx repatriation will affect many thousands more noncitizens than the repatriation and Operation Wetback and, as the number of removals mounts over time, further warp the sense of belonging of generations of Latinx persons in the United States.

A. A Colorblind Repatriation of Latinx Noncitizens

Even though President Trump's words often impugn and attack immigrants from Mexico and Central America,²⁷⁸ the official policies and programs constituting the new Latinx repatriation generally are facially neutral and colorblind. Put differently, new enforcement measures do not on their face target Latinx people. Enforcement policies instead focus on noncitizens convicted of crimes, undocumented immigrants, and asylum seekers, along with narrowing forms of relief from removal; despite being facially neutral, all have disparate impacts on Latinx noncitizens. The Trump administration justifies aggressive enforcement with claims that the administration is simply enforcing the immigration laws and, in response to claims of racial discrimination, argue that race has nothing to do with enforcement of the laws. In this respect, the new Latinx repatriation mirrors the colorblindness generally found in the modern immigration laws as well as U.S. constitutional law generally.²⁷⁹

The absence of express racial markers in the immigration laws and the Trump administration enforcement policies similar to those exemplified by the Mexican repatriation and Operation Wetback, represent an improvement of sorts in immigration law and policy as well as the public discussion of immigration. Importantly, the colorblind and on its face racially neutral nature of the new Latinx repatriation allows supporters to deny that the policies are founded on racial animus or have anything to do with race, while at the same time claiming the moral high ground by expressing the simple desire to enforce the law. However, colorblind immigration laws and policies long have had racially disparate impacts that are deeply problematic. The Trump administration's do too. Indeed, despite claims that the policies are not driven by racial animus, the racial impacts are preferred outcomes for some Americans, who decry the nation's changing racial demographics.

278. See *supra* text accompanying notes 13–16.

279. See *supra* text accompanying note 28.

Moreover, President Trump's repeated racially-charged attacks on Latinx people strongly suggest that the colorblind façade for the administration's immigration measures is, to use Justice Sotomayor's phrase, mere "window-dressing."²⁸⁰ Colorblind or not, the enforcement measures have stark impacts on Latinx residents of the United States that have resulted in mass deportations of Latinx immigrants and terrified the Latinx community. Importantly, similar to the 1930s repatriation and Operation Wetback, the mass removals of Latinx immigrants from the United States threaten to have long term impacts on the Latinx sense of belonging in U.S. society, relegating them to second class status for generations to come.

Even though accomplished through race-neutral means, a number of the Trump administration's immigration enforcement policies in fact place Latinx immigrants squarely in the crosshairs.²⁸¹ Nor is it the only time that the administration's policies have targeted a disfavored group. The administration invoked a national security rationale for subjecting Muslims to a blanket travel ban, an across the board approach to groups of immigrants that is intellectually consistent with the categorical approach employed by a number of policies directed toward Mexicans, Central Americans, and other communities of color.²⁸² As it turns out, the administration's attacks on Muslim noncitizens represents the tip of the proverbial iceberg. The most numerous contingent of immigrants in the United States, the Latinx population finds itself time-and-again the primary group subject to removal because of the myriad of race-neutral immigration enforcement policies of the Trump administration. Not coincidentally, Latinx immigrants also are the frequent focus of vociferous verbal attacks by anti-immigrant groups and political leaders, including President Trump.²⁸³

The fact that the new Latinx repatriation for the most part is on its face colorblind has significant practical consequences for immigrant and civil rights groups that seek to challenge the policies in the courts as race-based and therefore unlawful. Systems that do not expressly mention race are more difficult to challenge as a legal matter than race-based ones. Contemporary equal protection doctrine requires proof of a discriminatory intent, not simply starkly one-sided racial impacts, to establish a constitutional violation.²⁸⁴ Such proof, generally

280. See *supra* note 30 (quoting Justice Sotomayor's dissent in *Trump v. Hawaii*).

281. See *supra* Part II.

282. See Part II.

283. See, e.g., *supra* text accompanying note 13 (quoting President Trump).

284. See *infra* text accompanying notes 300–01 (reviewing the Supreme Court decisions articulating the discriminatory intent requirement for an Equal Protection violation).

speaking, is hard to come by in most instances. Racial animus and a discriminatory intent, of course, were self-evident with respect to the Mexican repatriation and Operation Wetback, both of which explicitly targeted Mexicans.²⁸⁵ Such race-based campaigns flourished in a time when the rights of immigrants (as well as minority citizens) were far more limited and less developed than they are today; consequently, few legal roadblocks stood in the way of those unabashedly anti-Mexican campaigns, which enjoyed widespread public support.²⁸⁶

Examples abound of resilient and enduring colorblind systems in U.S. society that have stark disparate impacts. Public recognition of the racial disparities in arrests, prosecution, convictions, and sentences (including imposition of the death penalty), as well as deaths at the hands of police, has not brought about meaningful reform to the nation's law enforcement and criminal justice systems.²⁸⁷ Similarly, the racially disparate consequences of removals in the Obama administration went largely unacknowledged and unchecked.²⁸⁸ Similarly, in the Muslim ban case, a majority of the Supreme Court ignored the discriminatory justifications for the policy offered by no less than President Trump and instead accepted the administration's race-neutral national security justification for the policy.²⁸⁹

In sum, colorblind immigration enforcement policies are legally difficult to challenge even if they have one-sided discriminatory impacts. Politically, despite the stark racially disparate outcomes, colorblind policies have been defended as race-neutral and colorblind enforcement of the race-neutral and colorblind immigration laws.

285. See *supra* Part I.A.–B.

286. See *id.*

287. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (finding that dramatic racial disparities in crack cocaine prosecutions between African Americans and whites did not give rise to an Equal Protection claim); *McCleskey v. Kemp*, 481 U.S. 279, 286, 293–95 (1987) (holding that statistical evidence showing that African Americans who killed whites were more than seven times as likely to be sentenced to death as whites who killed African Americans was not considered stark enough to infer a finding of discriminatory intent in the imposition of the death penalty); see also Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178 (2007) (reviewing contemporary strategies to challenge racial disparities in contemporary criminal justice system); Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 AM. J. CRIM. L. 95 (2018) (analyzing racial disparities in decisions to charge suspects with crimes).

288. See *supra* text accompanying notes 124–30.

289. See Part II.B.

B. The Institutionalization of the Trump Repatriation

Through President Trump's dedicated efforts, the new Latinx repatriation has become institutionalized into the ordinary structures of immigration enforcement, which differs from the ad hoc, episodic nature of the Mexican repatriation and Operation Wetback.²⁹⁰ Recall that the repatriation was a loosely organized effort among state, local, and federal agencies to facilitate and encourage Mexican removals.²⁹¹ Operation Wetback was a single deportation campaign, which ended with the U.S. government's emphatic declaration of victory.²⁹² In contrast, the Trump approach has employed the full extent of the immigration enforcement machinery to facilitate the removal of Latinx noncitizens from the country.

Because of the nature of the new Latinx repatriation, we can expect—absent meaningful changes—they to have lasting power and growing impacts. The large number of removals, with their enduring destabilization of the Latinx community in the United States, garners support from advocates of immigration enforcement, including President Trump, and those resisting the changing racial demographics of the United States.²⁹³ Institutionalized into the fabric of immigration enforcement, colorblind, and part of a massive, fast-moving immigration removal system, the new Latinx repatriation will remain in place indefinitely absent successful intervention. Consequently, the enforcement measures will likely affect greater numbers of Latinx immigrants than previous removal campaigns, which themselves had devastating impacts on the Latinx community.²⁹⁴ Year in and year out, more and more Latinx noncitizens will be removed from the United States. Not just today but for generations, Latinx peoples' sense of belonging in U.S. society will be undermined.

Put simply, the new Latinx repatriation will likely affect a great many more people than its twentieth century predecessors. Through crime-based removals and other mechanisms, the colorblind criminal justice system systematically feeds Latinx noncitizens into the removal pipeline.²⁹⁵ Rather than one million Latinx persons removed as occurred in both the Mexican repatriation and Operation Wetback, the removal numbers could be in many millions through a

290. See Part I.

291. See Part I.A.

292. See Part I.B.

293. See *supra* Part II.C.

294. See Part I.A.–B.

295. See *supra* Subpart II.C.1.

brutally efficient, if not fair, system that annually produces and perpetuates racially disparate outcomes and the mass removal of Latinx noncitizens.

Moreover, the numbers of Latinx people affected will be far greater than those noncitizens, and U.S. citizen children, removed from the country. As occurred in the Mexican repatriation and Operation Wetback,²⁹⁶ the harsh actions accompanying the crisis mentality promoted by the Trump administration to justify its strict enforcement measures terrify immigrant communities. Such fears contribute to an overall hostile environment in the United States for Latinx immigrants that makes self-deportation, like that which accompanied the Mexican repatriation and Operation Wetback, appear to be a preferable option to many Latinx noncitizens than remaining in a hostile United States.²⁹⁷ Moreover, that unwelcoming environment, combined with increasing rates of visa denials and heightened vetting of (and denial of visas to) noncitizens seeking entry into the country,²⁹⁸ serves as a powerful deterrent to prospective immigrants considering migrating to the United States; that is especially the case for those from nations, such as Mexico, El Salvador, Guatemala, and Honduras, whose citizens regularly find themselves pilloried by the president and other high-level administration officials and subject to ever-tightening scrutiny in the admissions process.

C. The Solution

The courts can halt, as they have done, some of the excesses of President Trump's removal campaign on Latinx noncitizens. As is well known, however, race-based challenges to the immigration laws face formidable legal barriers, such as the plenary power doctrine²⁹⁹ and the requirement under the Equal Protection Clause that, to be found unconstitutional, a governmental initiative be taken with a discriminatory intent,³⁰⁰ a requirement that long has been, and continues to be, subject to scholarly criticism.³⁰¹ Only change accomplished through the political

296. See *supra* Part I.

297. See *id.*

298. See *supra* text accompanying note 275.

299. See *supra* text accompanying notes 37–40.

300. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

301. See, e.g., Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of*

process can dismantle some of the immigration enforcement policies that have had devastating impacts on the Latinx community.

Political activism challenging immigration enforcement has grown by leaps and bounds in recent years.³⁰² A surge of political resistance and activism has emerged at the state and local levels, which contributed to the Obama administration's decision to end the criminal removal program known as Secure Communities.³⁰³ Such activism ultimately may bring meaningful reform to the immigration laws. Reform, which could address the uncertain legal status of undocumented immigrants as well as expand opportunities for legal immigration, will be essential to bringing about enduring change to the racially-disparate impacts of immigration law and its enforcement.³⁰⁴

But not any political response will do. Mere incremental tinkering with the immigration laws will not change their disparate racial impacts.³⁰⁵ To this point in time, however, the issue of race and the racially skewed impacts of the immigration laws for the most part have not generally been part of immigration reform discussions. Unless the racially disparate impacts of the law are addressed in reform efforts, racial impacts will likely replicate themselves in new immigration laws. To reduce the racially disparate impacts of the immigration laws, one might consider, for example, eliminating the uniform per country ceilings that apply the same ceiling to high immigration countries, such as Mexico, and low immigration countries, like Iceland, and create long, unrealistic lines for prospective Mexican immigrants, as well as others from the developing world, to lawfully come to the United States.³⁰⁶ Creating greater avenues for the migration of low- and moderate-skilled workers could reduce incentives for such workers, including many from the developing world, to come without authorization to the United States.³⁰⁷ Narrowing the criminal removal grounds

Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978); Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211 (2018); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

302. See *supra* text accompanying notes 131–33 (discussing resistance of “sanctuary” jurisdictions to U.S. government removal efforts).

303. See *supra* text accompanying note 132.

304. See *supra* text accompanying notes 134–36 (discussing failure of recent efforts at immigration reform).

305. See Delgado, *supra* note 156 (calling for progressives to develop a new theory of immigration law).

306. See *supra* note 28 (noting disparate impacts of per country ceilings on prospective Latinx immigrants).

307. See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 131–37 (2007).

to minimize the impacts of the racial skew of the criminal justice system on removals also warrants serious consideration.³⁰⁸

Ultimately, the racialized nature of immigration law will not be going away anytime soon. Rather, the racial impacts of current immigration law, as well as the fact that the bulk of the potential immigrants come from the developing world populated by people of color, must be acknowledged and addressed in reform of the laws and their enforcement. Only then will it be possible for the system to generate nondiscriminatory—and racially just—results.

CONCLUSION

President Trump seeks to radically remake immigration law and immigration enforcement. In so doing, the administration has taken a series of steps that would reduce the racial diversity of immigrants to the United States.³⁰⁹ At bottom, the United States is slowly but surely being taken back by the Trump administration to a dark time before the Immigration Act of 1965³¹⁰ when discriminatory quotas severely restricted immigration of people of color from the developing world.

Although President Trump has emphasized his unbridled disdain for immigrants and the general hope of dramatically transforming the immigration laws and their enforcement, the administration has adopted policies that result in the removal of a long-disfavored group in U.S. social life—Latinx immigrants, who for generations have suffered harsh treatment and, at times, violence. By ramping up immigration enforcement efforts to levels not previously seen in modern U.S. history, the Trump administration has put in place a modern and more potent Mexican repatriation and Operation Wetback.³¹¹

Two characteristics of President Trump's efforts should be deeply disturbing to persons concerned with racial equality.³¹² The contemporary removal campaign is much broader than the past, expanding the target to all Latinx noncitizens, not just Mexicans. In addition, the Trump administration is making institutional changes that will have impacts for an indefinite duration on larger numbers of people of color than the Mexican repatriation and Operative

308. See *supra* Subpart II.C.1.; Fan, *supra* note 128; Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067 (2017); see also Cházaro, *supra* note 172 (advocating the elimination of deportation).

309. See Part II.

310. See *supra* note 28.

311. Compare Part I with Part II.

312. See Part III.

Wetback. The colorblind nature of immigration law and enforcement often obscure the racial impacts and make legal challenges more difficult.

Courts are pushing back on the excesses of the Trump administration's immigration enforcement efforts. However, the judiciary is not the only, or the most effective, avenue for challenges to the modern Latinx repatriation.³¹³ Resistance to the immigration enforcement measures by states and cities, immigrant and civil rights advocates, and others have flourished. In no small part, this activism arose from the realization of the racial justice issues at stake.³¹⁴ The future of racial justice in the United States will require the nation to squarely confront the racial impacts of the immigration laws and enforcement and their consequences.

313. See, e.g., *supra* note 228 (citing various cases enjoining Trump immigration enforcement initiatives).

314. See Luz Herrera & Pilar Margarita Hernandez Escontrias, *The Network for Justice: Pursuing a Latinx Civil Rights Agenda*, 65 HARV. LATINO L. REV. 65, 213–24 (2018). See generally Kevin R. Johnson, *The End of "Civil Rights" as We Know It? Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002) (analyzing the emergence of immigration as a national civil rights issue). For discussion of the possibility that the Trump administration's immigration enforcement measures may trigger a political response ultimately transforming the nation, see Kevin R. Johnson, *Proposition 187 and Its Political Aftermath: Optimistic Lessons for U.S. Immigration Politics After Trump*, 53 U.C. DAVIS L. REV. (forthcoming 2020).