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Build the Wall and Wreck the System: Immigration Policy in the Trump Administration

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ARTICLE

BUILD THE WALL AND WRECK THE SYSTEM: IMMIGRATION POLICY IN THE TRUMP ADMINISTRATION

ERNESTO SAGÁS* AND EDIBERTO ROMÁN**

INTRODUCTION

When Donald J. Trump launched his presidential bid in 2015, he promised: “I will build a great, great wall on our southern border. And I will have Mexico pay for that wall. Mark my words.”¹ He often repeated this promise at campaign rallies, sparking chants of “Build the wall! Build the wall!” from an ecstatic crowd.² However, as of early 2020, Trump’s wall has not been built, Mexico has refused to pay for it,³ and the likelihood that the wall will be built has decreased significantly.⁴ So far, only a handful of highly-touted wall prototypes have been erected and hyped to the American public as a cure-all for what President Trump has deemed as the United States’ social ills.⁵ In February 2019, he responded to challenges he

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1. Tamara Keith, *FACT CHECK: Mexico Isn’t Paying for the Border Wall, Military Unlikely to Build It*, NPR (Dec. 20, 2018), <https://www.npr.org/2018/12/20/678557749/fact-check-border-wall-funding> [<https://perma.cc/P8LS-FGQP>].

2. *Id.*

3. *Id.*

4. *See id.* (discussing the decline in Republican-congressional and conservative-media support for building the wall and that funding the wall will be more difficult with the flip to a Democrat-controlled House of Representatives in January 2019).

5. *See* Paul Koscak, *Construction Completed for Prototype Wall Designs*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/frontline/border-wall-prototype-designs> [<https://perma.cc/VC65-CVKS>] (stating that eight border-wall prototypes were first previewed by the public in San Diego, California).

has faced in building the border wall by declaring a national emergency to obtain funds to pay it—a measure contested in federal court.⁶

Build the wall! has become more than a political slogan widely used by Donald Trump and his followers during the presidential campaign in 2016. This slogan has come to symbolize a set of anti-immigrant policies, xenophobic discourse, and a cultural counteroffensive that embodies how the Trump Administration has handled United States immigration law and policy. Loaded with meaning, *Build the wall!* encapsulates the *whitelash* that Donald Trump tapped into and rode into office.⁷ After making immigration a central theme in his political campaign, he has sought to build walls—literally and metaphorically—to keep immigrants out of America. His xenophobic, anti-immigrant measures have been one of the few consistent policy objectives in an otherwise disorderly administration.⁸ While his successes in this arena have yet to create stone or metal barriers to entry at the United States' southern border, he has succeeded in erecting metaphorical barriers to entry. These successes include policies that have resulted in preventing thousands of individuals from entering the United States because of their religious affiliation or home country,⁹ and apprehending thousands of refugees and asylum seekers who have legally sought refuge in the United States.¹⁰ Thus, while hundreds of miles of actual walls are yet to be built, through executive order and policymaking, Trump has succeeded in building barriers to exclude people of color from coming to the United States.¹¹

6. See *Sierra Club v. Trump*, 379 F.Supp 3d 833, 928 (N.D. Cal. 2019) (granting in part an injunction enjoining federal officials from taking any action to build a border wall in areas designated for construction); see also Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

7. See Josiah Ryan, *'This Was a Whitelash': Van Jones' Take on the Election Results*, CNN (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/van-jones-results-disappointment-cnn/index.html> [<https://perma.cc/P8CP-T2GD>] (stating that the 2016 election results were in part the result of a white-voters' referendum against the Obama presidency).

8. *Editorial: The Only Consistent Thing About Trump's Immigration Policy Is His Animus Toward Migrants*, L.A. TIMES (June 25, 2019), <https://www.latimes.com/opinion/editorials/la-ed-trump-families-migrants-deportations-20190625-story.html> [<https://perma.cc/8CPZ-EEUZ>].

9. See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (suspending the issuance of visas and other immigration benefits to Nationals from "countries of particular concern"). The Executive Order prohibited individuals from seven predominately-Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States. *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017).

10. See CBP Enforcement Statistics Fiscal Year 2020, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> [<https://perma.cc/5JY7-3FX2>] (providing that in 2019, U.S. Customs and Border Patrol apprehended 859,501 individuals).

11. See Julissa Arce, *Trump's Anti-Immigrant Rhetoric Was Never About Legality—It Was About Our Brown Skin*, TIME (Aug. 6, 2019), <https://time.com/5645501/trump-anti-immigration-rhetoric-racism/> [<https://perma.cc/3PHN-8LKY>] (discussing President Trump's anti-immigrant rhetoric and how it has targeted Latinos and immigrants in the United States); David R. Jones, *A Racist Trump Declares War on Immigrants of Color*, CMTY. SERV. SOC.'Y, (Aug. 22, 2019), <https://www.cssny.org/news/entry/a-racist-trump-declares-war-on-immigrants-of-color> [<https://perma.cc/67TH-9FSZ>] (discussing how expanding the Department of Homeland Security's definition of "public charge" will negatively affect immigrants of color); Casey Harden, *How 3 of Trump's Executive Orders Target Communities of Color*, TIME (Feb. 27, 2017), <https://time.com/4679727/donald-trump-executive-orders-police/> [<https://perma.cc/US86-7375>] (discussing the racial implications of several of President Trump's executive orders).

In promulgating these policies, the Trump Administration has sought to undermine an immigration system that had replaced a previous, “nearly intolerable” quota-driven system.¹² Since the Immigration and Naturalization Act of 1965 (INA), family reunification—rather than national origin—has been a main driver behind United States immigration policy.¹³ This driver increased immigration from Africa, Asia, and Latin America—regions that prior to the INA had been subjected to the onerous quota system that limited their numbers in the United States.¹⁴ This increase in the arrival of millions of black and brown immigrants following the INA has transformed the demographic makeup of the United States, and more recently has sparked a backlash among nativist groups that proclaim that they “will not be replaced.”¹⁵

The Trump Administration has tried to curtail these long-term demographic trends by promulgating policies to limit both legal and unauthorized immigration. It has reduced the number of refugees allowed in the United States,¹⁶ has made asylum more difficult to obtain,¹⁷ has banned individuals of specific nationalities from entering the country,¹⁸ has increased the immigration application backlog,¹⁹ and has slowed the immigration system down to a crawl in the hopes of dissuading current and potential immigrants from coming to and staying in the United States.²⁰ However, President Trump’s immigration policies have also consisted of failed legal measures, lack of oversight, and bureaucratic dysfunctionality within

12. Jennifer Luden, *1965 Immigration Law Changed Face of America*, NPR (May 9, 2006), <https://www.npr.org/templates/story/story.php?storyId=5391395> [<https://perma.cc/9UD8-F2AD>] .

13. *Id.*

14. Tom Gjelten, *The Immigration Act that Inadvertently Changed America*, THE ATLANTIC (Oct. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409/> [<https://perma.cc/YWD2-SHMC>].

15. See Megan Garber, *Why Charlottesville?*, THE ATLANTIC (Aug. 12, 2017), <https://www.theatlantic.com/national/archive/2017/08/why-charlottesville/536700/> [<https://perma.cc/274E-PBSF>]. A white-nationalist rally was held in Charlottesville, Virginia in August 2017 to protest the removal of a statue of Robert E. Lee from Emancipation Park. See *id.* In the May prior, Richard Spencer, a white nationalist, led a group of protestors to the statue while saying to the crowd, “We will not be replaced from this park . . . [w]e will not be replaced from this world . . . [w]hites have a future . . . [w]e have a future of power, of beauty, of expression.” *Id.*

16. *Trump Administration Plans to Cap the Number of Accepted Refugees to 45,000*, NPR (Sept. 27, 2017), <https://www.npr.org/2017/09/27/554057375/trump-administration-plans-to-cap-the-number-of-accepted-refugees-to-45-000> [<https://perma.cc/D2GU-BJST>] .

17. Zolan Kanno-Youngs & Caitlin Dickerson, *Asylum Seekers Face New Restraints Under Latest Trump Orders*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/politics/trump-asylum.html> [<https://perma.cc/5NMU-DLEA>] .

18. *Fact Sheet: Protecting the Nation from Foreign Terrorist Entry to the United States*, DEP’T OF HOMELAND SEC. (Mar. 6, 2017), <https://www.dhs.gov/news/2017/03/06/fact-sheet-protecting-nation-foreign-terrorist-entry-united-states> [<https://perma.cc/CB3U-M98H>] .

19. Emily Price, *Trump Administration to Pause Hiring of Immigration Judges Amid Case Backlog*, FORTUNE (Mar. 7, 2019), <https://fortune.com/2019/03/07/immigration-judges-case-backlog/> [<https://perma.cc/J46F-46QN>] .

20. See Danae King, *Under Trump Policies, Immigrants are Waiting Years for Court Hearings: “A Senseless Waste of Taxpayer Money”*, USA TODAY (Nov. 25, 2019), <https://www.usatoday.com/story/news/nation/2019/11/25/trump-administration-immigration-court-backlog-has-nearly-doubled/4295394002/> [<https://perma.cc/9HJ9-N4UF>] (noting that in some cities applicants experience nearly a four-year wait for immigration hearings).

the government agencies that oversee immigration.²¹ These legal failures have nonetheless sown confusion, fear, and uncertainty among immigrants, furthering President Trump's strategy of dissuading them from coming to the United States, while scoring political points with his constituency.

The term "unprecedented" is used by the press and analysts to describe the policies, discourse, and overall demeanor of the Trump Administration.²² Its use implies that President Trump and his administration are breaking new ground, innovating, or doing things in a way that has never been done before. Yet, we argue that the Trump Administration's anti-immigrant measures are part of a long-term process, a backlash decades-long in the making, one that has been slowly simmering under the surface since the 1960s and has rapidly heated up in the 1990s through the 2000s.²³

Today, America's ongoing racial diversification and economic globalization have splintered the nation culturally and politically.²⁴ Questions of race, class, and gender divide Americans, but no issue is as polarizing and fraught with conflict in these culture wars as immigration.²⁵ This article examines immigration law and policy during the Trump Administration using case studies of President Trump's core immigration policies, to show continuities—as well as changes—in our nation's treatment of immigrants and their descendants. We survey the historical background that contextualizes both Candidate and President Trump's actions, and analyze some of his most notorious anti-immigration measures: the Muslim Bans, the family-separation policy for refugees, the construction of the border wall, the elimination of Deferred Action for Childhood Arrivals (DACA), and mass deportations. This article also examines the racial animus behind his actions. Immigration is rapidly becoming the civil rights issue of the twenty-first century, and we argue that Donald Trump is a symptom—not the cause—of this new reality.

21. See *Editorial: The Only Consistent Thing About Trump's Immigration Policy Is His Animus Toward Migrants*, *supra* note 8 (describing inconsistencies in President Trump's immigration policy).

22. See, e.g., Anita Kumar, *Trump Administration Takes Unprecedented Steps to Process Border-Crossers*, POLITICO (May 27, 2019), <https://www.politico.com/states/california/story/2019/05/27/trump-administration-takes-unprecedented-step-to-process-border-crossers-1029718> [<https://perma.cc/FV6K-J6LR>] (demonstrating one such example of the use of "unprecedented" to describe President Trump's policies).

23. See Joseph S. Nye, *Is the Populist Tide Retreating?*, PROJECT SYNDICATE (Feb. 4, 2019), <https://www.project-syndicate.org/commentary/populist-wave-in-retreat-by-joseph-s-nye-2019-02> [<https://perma.cc/5QJ7-2C32>] (describing the history of populism in the United States).

24. See Juliana Menasce Horowitz, *Americans See Advantages and Challenges in Country's Growing Racial and Ethnic Diversity*, PEW RESEARCH CTR. (May 8, 2019), <https://www.pewsocialtrends.org/2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/> [<https://perma.cc/EU6V-3PQX>] (describing differences in views among Americans regarding growing racial and ethnic diversity in the United States).

25. See generally EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS: AMERICA'S HYSTERIA OVER UNDOCUMENTED IMMIGRATION* (2013) (discussing and dispelling criticisms of Latina/o immigration in the United States).

I. THE TRUMP CAMPAIGN, IMMIGRATION, AND THE NEW GOP

Donald Trump is not the first presidential candidate in the United States to rally his base around the fear of immigrants²⁶—and he will not be the last.²⁷ America has a long-blotted political record of villainizing immigrants for political gain. In the mid-nineteenth century, the American Party was created in reaction to the increase of German and Irish Catholics coming to the United States, and it won 22% of the popular vote in the 1856 presidential election.²⁸ At the end of the nineteenth century, an influx of Chinese immigrants caused both main parties to push for restrictions on immigration, eventually culminating in the Chinese Exclusion Act in 1882.²⁹ Alien anarchists, Communists, syndicalists, spies, and other foreign subjects were favorite scapegoats of electoral candidates during the first half of the twentieth century,³⁰ as well as Mexicans (and other “new” immigrants) towards the end of the century.³¹

In 1986, President Ronald Reagan signed a bipartisan immigration bill providing amnesty for thousands of unauthorized immigrants.³² Policymaking has since then shifted to take on a more restrictive stance on immigration. In 1994, California Governor Pete Wilson rose to political prominence by supporting Proposition 187, a ballot initiative designed to curtail social benefits to unauthorized immigrants in the state.³³ Though the Proposition was approved by California voters, it was ruled unconstitutional by a federal court in 1998.³⁴ Regardless, California had become a battleground for anti-immigration policies, and other states followed suit with similar measures.³⁵ Moreover, the end of the Cold War and the

26. See *id.* at 17 (“[M]edia, politicians, and conservative pundits all too often sound alarms of an effort to take over America . . .”).

27. See *id.* (suggesting that alarmist claims of so-called “mass invasions” and alleged crime waves are likely to be the focus of political and public policy debates for decades to come).

28. DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* 124, 128 (1988).

29. *Id.* at 162 (discussing both Democratic and Republican responses to Chinese immigration).

30. See ANDREW CORNELL, *UNRULY EQUALITY: U.S. ANARCHISM IN THE TWENTIETH CENTURY* 45 (2016) (discussing the “in between” social status of immigrant anarchists and their representation by nativists and conservative journalists as unfit for citizenship).

31. ROMAN, *supra* note 25, at 123.

32. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3394 (1986).

33. See *California Proposition 187, Illegal Aliens Ineligible for Public Benefits* (1994), BALLOTEDIA, [https://ballotpedia.org/California_Proposition_187,_Illegal_Aliens_Ineligible_for_Public_Benefits_\(1994\)](https://ballotpedia.org/California_Proposition_187,_Illegal_Aliens_Ineligible_for_Public_Benefits_(1994)) [<https://perma.cc/PK6P-Y8FP>].

34. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997) (holding that states have no power to legislate in areas that restrict alien ineligibility for public benefits); see also Patrick J. McDonnell, *Prop. 187 Found Unconstitutional by Federal Judge*, L.A. TIMES (Nov. 15, 1997), <https://www.latimes.com/archives/la-xpm-1997-nov-15-mn-54053-story.html> [<https://perma.cc/AKU9-C7LG>].

35. See generally ARMANDO NAVARRO, *A POST 187 STRATEGY FOR MOBILIZATION* (Jan. 13–14, 1995), https://library.ucsd.edu/dc/object/bb2526908j/_1.pdf [<https://perma.cc/76H6-FYY5>] (analyzing the nationwide aggravation of the general “war against the immigrant,” specifically the Latino community, induced by California’s Proposition 187).

September 11 terrorist attacks dampened support for immigration among Republican officials and sparked elevated fear of immigrants among Americans.

When President George W. Bush and prominent Senate Republicans attempted and failed to pass a comprehensive immigration-reform law in 2007, the Republican Party's mood on immigrants had further soured. Demographic and economic changes exposed more rural, small-town whites to immigrants, while gerrymandering created safer districts for reactionary Republicans.³⁶ Republican lawmakers saw an opening to support restrictions on immigration, and a new wave of attrition laws flooded states, counties, and towns across Middle America.³⁷

While immigration as a policy issue was growing for Republicans, the party was also looking for a way to increase its reach to voters just after its loss of the 2012 presidential election to Democrat Barack Obama. The Party blamed its 2012 loss on its lack of support among traditionally-marginalized groups, including African Americans, Latinos, women, and young voters.³⁸ A post-mortem report following Republican candidate Mitt Romney's loss to Barack Obama provoked soul-searching among strategists who realized that the party was—at its own peril—ignoring demographic and cultural shifts in the United States that were affecting support for the Party.³⁹ The report strongly recommended that the Republican Party reformulate its agenda and policies to broaden its electoral base and appeal to a segment of the electorate that more closely tracked the growing diversity of the nation.⁴⁰

Despite recommendations from the 2012 report to promote inclusivity and work towards solutions affecting underrepresented communities,⁴¹ Republican voters in 2016 selected a presidential candidate antithetical to these and other recommendations to reach out to traditionally marginalized groups. Instead, Donald Trump, as the Republican presidential candidate, appealed to blue-collar workers, rural folk, and poor whites, tapping their pent-up anger against Washington politicians, “the system,” globalization, and immigrants.⁴² He aptly

36. See *American Democracy's Built-In Bias Towards Rural Republicans*, THE ECONOMIST (July 12, 2018), <https://www.economist.com/leaders/2018/07/12/american-democracys-built-in-bias-towards-rural-republicans> [<https://perma.cc/3WLW-8V28>] (discussing incentives for these groups to vote Republican).

37. See JAMIE LONGAZEL, *UNDOCUMENTED FEARS: IMMIGRATION AND THE POLITICS OF DIVIDE AND CONQUER IN HAZLETON, PENNSYLVANIA* 3 (2016) (connecting the proliferation of the “Latino Threat Narrative” to a broader ideological project designed to subjugate poor and working-class people).

38. See REPUBLICAN NAT'L COMM., *GROWTH & OPPORTUNITY PROJECT 12* (2012) (recommending, after a review of the Republican performance in the 2012 election cycle, formation of an Inclusion Council to strengthen grassroots RNC programs to support ethnic minorities).

39. See *id.* at 7 (discussing how the nation's demographic changes have added urgency to the precariousness of the Republican party's situation).

40. *Id.* at 13.

41. *Id.*

42. See Ron Elving, *Trump Confounds the Pros, Connects with Just the Right Voters*, NPR (Nov. 9, 2016) <https://www.npr.org/2016/11/09/501387988/trump-confounds-the-pros-connects-with-just-the-right-voters> [<https://perma.cc/>]

portrayed himself as an anti-establishment candidate.⁴³ And most importantly, his identity as a disruptor—a one-man juggernaut aimed at the Capitol—was well-received among voters wanting to send a message to Washington politicians. Candidate Donald Trump found success by riding the emergent wave of a long-simmering white backlash.⁴⁴ Slowly but surely, opposition to immigration continued to grow as a core Republican issue, and again came to the forefront of American politics.⁴⁵

As a presidential candidate, Donald Trump attracted an electorate that felt alienated from Democrats but forgotten by establishment Republicans.⁴⁶ His Republican party has become unlike that of former Presidents Ronald Reagan, George H.W. Bush, and George W. Bush.⁴⁷ Candidate Trump made many promises to forgotten White Americans,⁴⁸ boasting he would do a great deal to return them to their “proper” privileged place in this society. Despite his largely racially-motivated promises, he has failed to deliver change for their lives. He nevertheless has made his base feel that he is one of them, and that his interests related to immigration align with White Middle-America. For instance, President Trump has so far failed to erect his southern wall, but he nevertheless has succeeded in creating barriers to

5636-LAAF] (discussing Trump’s electoral base and that he won the presidency by winning an unlikely coalition of voters that included those who did not recover from the 2008 recession, those who lost high-wage factory jobs, evangelical Christians, abortion opponents, gun owners, people angry with Washington politics and Wall Street, and voters fearful of terrorism and immigration).

43. See Danielle Kurtzleben, *People Keep Talking About ‘The Establishment.’ What Is It, Anyway?*, NPR (Feb. 11, 2016), <https://www.npr.org/2016/02/11/466049701/how-establishment-became-the-buzzword-of-the-2016-election> [https://perma.cc/39ZK-2RW7] (discussing anti-establishment coverage in the 2016 election, and calling Trump the biggest anti-establishment candidate of them all).

44. See Zoltan L. Hajnal, *Opposition to Immigration Reform is a Winning Strategy for Republicans*, WASH. POST (Feb. 27, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/02/27/opposition-to-immigration-reform-is-a-winning-strategy-for-republicans/> [https://perma.cc/RSN7-HEQK] (describing immigration reform as a winning strategy for Republican candidates, as their base is primarily white, and whites increasingly care about immigration).

45. See MARISA ABRAJANO & ZOLTAN HAJNAL, *WHITE BACKLASH: IMMIGRATION, RACE, AND AMERICAN POLITICS* 40–41 (2015) (analyzing the coupling of the immigrant threat with increasingly clear partisan choices since the 1990s).

46. See generally HILLARY CLINTON, *WHAT HAPPENED* (2018) (discussing various internal and external factors influencing Hillary Clinton’s defeat in the 2016 presidential election and the view that Trump’s strategy would fail).

47. See Harry Enten, *Donald Trump Is No Ronald Reagan*, ABC NEWS (Mar. 29, 2016), <https://fivethirtyeight.com/features/donald-trump-is-no-ronald-reagan/> [https://perma.cc/9GYG-ZVH9] (discounting the Trump–Reagan comparison during the 2016 presidential race based on candidate popularity at the relevant times); see also Jennifer Finney Boylan, *The New Know-Nothings*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/opinion/republican-party-trump-know-nothings.html> [https://perma.cc/8ZTV-C7NY] (discussing Trump’s creation of a “new Republican Party” with a different platform than the previously understood Republican party). But cf. Todd Blogett, *Why ‘the Donald’ is ‘the New Ronald’: Parallels Between Trump and Reagan*, DES MOINES REGISTER (June 10, 2019), <https://www.desmoinesregister.com/story/opinion/columnists/2019/06/10/parallels-between-trump-reagan-show-why-donald-new-ronald/1367579001/> [https://perma.cc/7HPY-JM49] (noting similar factual occurrences in the political lives of Trump and Reagan).

48. See *Trump’s Campaign Promises—Has He Delivered on Them?*, BBC (Dec. 24, 2018), <https://www.bbc.com/news/world-us-canada-37982000> [https://perma.cc/C55A-9TSL] (listing various campaign promises and whether or not President Trump had yet delivered on them).

entry directed against people of color seeking admission into the United States.⁴⁹ He continues to promise—and attempts to build—barriers between “us” and “them,” through policies such as the Muslim Bans, family separation, and other exclusionary efforts targeted at individuals seeking entry, including women and children trying to obtain asylum.

In the end, Donald Trump’s political narrative conflates perceived enemies at home and abroad into a monolithic adversarial camp. Using his framework, immigration is complex: immigrants have a foreign origin, but immigrants also live among us. His solution to his constituents’ immigration concerns provides for a simplistic, two-pronged line of attack: first, build a massive, impenetrable wall to stem immigration;⁵⁰ and second, deport immigrants already in the United States,⁵¹ or make their lives so untenable that they leave the country.⁵² Combatting immigration by physically removing immigrants and preventing more from coming in is a cure-all that Donald Trump has sold to Americans who feel displaced by cultural and demographic changes in the country.⁵³ By making these promises, Trump has created a distinct political brand in an otherwise generic and indistinguishable pool of Republican contenders, all of whom resembled the traditional politicians that Trump and his supporters denigrate and deride.⁵⁴

II. PRESIDENT TRUMP’S ANTI-IMMIGRANT POLICIES

Donald Trump’s most notorious anti-immigrant policies revolve around five highly-visible immigration themes: Muslims in the United States, Central American refugees, the border wall, the Deferred Action for Childhood Arrivals (DACA) program, and mass-deportations—with each theme and respective policy being embedded with symbolism as to Trump’s sentiment towards people of color in the United States. For Donald Trump and his followers, Muslims represent the latest foreign archenemy: the terrorists who attacked America on September 11, 2001. Refugees from Central America are a more recent threat; brown, unknown, arriving in waves, and disrupting ideas of American opportunity that

49. See *id.*

50. Keith, *supra* note 1.

51. Nick Gass, *Trump’s Immigration Plan: Mass Deportation*, POLITICO (Aug. 17, 2015), <https://www.politico.com/story/2015/08/donald-trump-immigration-plan-121420> [<https://perma.cc/9URV-J5KF>].

52. See Christie Thompson & Andrew R. Calderon, *The Surprising New Effect of Trump’s Immigration Crackdown*, POLITICO Magazine (May 8, 2019), <https://www.politico.com/magazine/story/2019/05/08/self-deportation-trump-immigration-policy-trend-226801> [<https://perma.cc/7QE7-MGJ2>] (describing the “voluntary departure” phenomenon among undocumented immigrants in the United States).

53. See Daniel Cox et al., *Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump*, PUB. RELIGION RESEARCH INST. (May 9, 2017), <https://www.prri.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump/> [<https://perma.cc/G6LX-V249>] (discussing, among other factors, fear of immigration, cultural displacement, and economic hardship as a predictors for voting for Trump).

54. See *id.*

Trump's followers believe belong to them. President Trump's border wall symbolizes the ultimate solution that will seal off America from these foreign threats. DACA provided Dreamers with the best hope that undocumented immigrants could acquire a normal, undisrupted life in the United States. However, President Trump's elimination of the program sends a signal that no immigrant is safe in America. Finally, President Trump's strategy for mass-deportations symbolizes an attempt to clean house by removing the unwanted foreigners who live amongst us. This section examines in detail each one of these thematic case studies and discusses the impact that President Trump's immigration policies have had on people of color in the United States.

A. *The Muslim Bans*

Donald Trump first called to keep immigrants outside of the United States by promising on the campaign trail to create legal barriers to entry, “[a] total and complete shutdown of Muslims entering the United States.”⁵⁵ In August 2016, Candidate Trump furthered the call for a ban, calling for “extreme vetting” of all Muslim immigrants coming into the United States, making this policy the cornerstone of his campaign.⁵⁶ When Candidate Trump became President Trump, he unilaterally took measures to effectuate this policy proposal. Under the guise of national security, and in spite of the United States’ welcoming ethos depicted in iconic references on the Statue of Liberty,⁵⁷ he issued a series of executive orders—the Muslim Bans—effectively excluding a whole segment of the world from entering the United States.⁵⁸

55. Associated Press, *Trump Urges ‘Shutdown’ on Muslims Entering US*, YOUTUBE (Dec. 7, 2015), <https://www.youtube.com/watch?v=YUK2aMYGMCg> [<https://perma.cc/9M65-HFN9>] (showing Candidate Trump calling for a “total and complete shutdown of Muslims entering the United States during a rally in South Carolina”).

56. Khaled Beydoun, *Muslim Bans and the Remaking of Political Islamophobia*, 2017 U. OF ILL. L. REV. 1734, 1735 (2017).

57. See Emma Lazarus, *The New Colossus*, NAT’L PARK SERV., (Nov. 2, 1883), <https://www.nps.gov/stli/learn/historyculture/colossus.htm> [<https://perma.cc/3HAG-BU6E>] . “Give me your tired, your poor, your huddled masses yearning to breathe free” is depicted on a bronze plaque at the base of the Statue of Liberty. *Id.*

58. While most in the media and academic circles refer to the measure as a ban, in reality, there was more than one ban. See *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [<https://perma.cc/3DWN-SE5T>]. The term “bans” here refers to the Orders by the Executive Branch that prohibit foreign nationals from entering the United States. See, e.g., Exec. Order No. 13,769, 82 Fed. Reg. § 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The Administration and some in the media prefer to refer to the bans as the “travel ban” in an effort to appear less inflammatory. See *U.S. Expands Travel Ban to Include N. Korea*, BBC NEWS (Sept. 25, 2017), <https://www.bbc.com/news/world-us-canada-41382585> [<https://perma.cc/P8CC-SZHN>] (referring to the third Muslim Ban as a “travel ban”). However, others—including the authors here—prefer the term “Muslim” bans or “Muslim/Refugee” bans because the restrictions imposed by the bans directly impact or block the admission of nationals from countries with majority Muslim populations or refugees. See *Trump Travel Ban: Tough Questions in US Appeals Court Hearing*, BBC NEWS (Feb. 8, 2017), <https://www.bbc.com/news/world-us-canada-38902650> [<https://perma.cc/34Z5-ZR8A>] (stating that the ban impacts individuals from majority-Muslim countries). Furthermore, the term “travel ban” is simply inaccurate. The bans do not merely restrict some people from traveling; they exclude people from majority-Muslim countries from entering the United States. See Farhana Khera & Jonathan

The first Muslim Ban order was issued on January 27, 2017.⁵⁹ This ban suspended the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Sudan, Somalia, Yemen, and Syria—for 90 days.⁶⁰ It suspended the United States’ refugee admissions program for 120 days,⁶¹ slashed refugee numbers by one half, and indefinitely suspended Syrian refugee admissions.⁶² Because the Ban went into effect immediately, and without appropriate guidance in applying it to certain classes, such as lawful permanent residents,⁶³ chaos erupted in airports around the country.⁶⁴ The havoc at airports resulted in thousands of potential entrants being detained and denied entry into the United States, while family members waited outside of airports to see if they would be allowed in.⁶⁵ And while media and protestors witnessed the live effects of the Ban, immigration attorneys heroically raced to local airports to aid those detained.⁶⁶

Civil rights advocates, scholars, and immigration experts condemned what they considered to be Trump’s openly racist ban. As a leading civil rights scholar observed:

[T]he Ban imposes a blanket restriction on immigrants from Syria, the Levantine nation ravaged by a brutal civil war that spawned a global population of nearly 13 million refugees, restricting all immigrant and nonimmigrant visas. Iran, a nation maligned by the Trump Administration, has the next most sweeping prohibitions, with the Ban restricting all forms of immigrant and nonimmigrant visas except student visas. For Chad, Libya, and Yemen, the Ban restricts all

Smith, *Don't Be Fooled, Trump's New Muslim Ban Is Still Illegal*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/opinion/dont-be-fooled-trumps-new-muslim-ban-is-still-illegal.html> [<https://perma.cc/LX9X-LN5G>] (clarifying that the given the populations of the countries excluded from travel to the United States, the President Trump’s revised executive order is a Muslim Ban).

59. Exec. Order No. 13,769, 82 Fed. Reg. § 8977 (Jan. 27, 2017).

60. *Id.* at 8977–78. The seven countries are not expressly listed in the Executive Order, but instead calls for the Secretary of State to submit a list to the President of countries recommended for inclusion in the proclamation. *See id.* at 8977.

61. *Id.* at 8979–80.

62. *See id.*

63. *See id.* Permanent residents are not mentioned in the executive order.

64. *See* Press Release, U.S. Dep’t of Homeland Sec., Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents into the United States (Jan. 29, 2017), <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states> [<https://perma.cc/24SV-73LA>] (clarifying the national interest in permitting lawful permanent residents to enter the country); *see also* OFF. OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-18-37, DHS IMPLEMENTATION OF EXECUTIVE ORDER #13769 “PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES” (2017) (discussing that Customs and Border Protection and the Department of Homeland Security were caught by surprise and had little opportunity to respond to President Trump’s executive order).

65. *See* OFF. OF INSPECTOR GEN., *supra* note 64, at 23–26 (describing the state of travelers affected by the executive order and stranded at the airport). *See also* Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> [<https://perma.cc/7X8R-AB92>] (discussing the lawyer response in the airports following the first travel ban).

66. *See id.* (discussing the response of attorneys providing services at the airports).

immigrant visas, and does not allow nonimmigrants to come to the U.S. on business or tourist visas.

. . . .

The Ban imposes a blanket suspension on immigrants from Somalia. Extreme vetting, or “additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States,” is also applied to *all* nonimmigrants—with no visa exceptions made.”⁶⁷

The legal uncertainty of the first Muslim Ban was not limited to the utter chaos at airports throughout the country; the chaos also extended to the White House when it was revealed that its officials had not consulted with their own attorneys before issuing the Ban.⁶⁸ A federal judge issued a nationwide injunction that barred in large measure its implementation.⁶⁹ Thereafter, significant portions of the Ban and its subsequent iterations were blocked by federal courts.⁷⁰ Shortly after the first federal court enjoined the government from implementing the Ban, the White House—perhaps realizing its defects—rescinded it.⁷¹

After the first ban was challenged in the courts and rescinded, the White House promulgated the second Muslim Ban.⁷² This order suspended the entry of foreign nationals from six countries—Iran, Libya, Sudan, Somalia, Yemen, and Syria—for 90 days.⁷³ Like the first ban, it froze the refugee admissions program for a period of 120 days,⁷⁴ and slashed refugee numbers in half.⁷⁵ However, the second ban differed from the first in that it dropped the indefinite ban on Syrians, removed the ban on Iraqis, and delayed the order’s effective

67. Khaled A. Beydoun, *The Ban and the Borderlands Within: The Travel Ban as a Domestic War on Terror Tool*, 71 STANFORD L. REV. 251, 254 (2019).

68. See Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), <https://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> [<https://perma.cc/5KZ2-B4KV>] (explaining that Administration officials weren’t immediately sure which countries’ citizens would be barred from entering the United States and that the Department of Homeland Security was left making a retroactive legal analysis on the order after Trump signed it into law).

69. *Washington v. Trump*, 847 F.3d 1151, 1164–69 (9th Cir. 2017) (finding that the federal government did not show a likelihood of success on the issue of due process and failed to demonstrate a necessity to stay the order).

70. NAT’L IMMIGRATION LAW CTR., *Understanding Trump’s Muslim Bans*, <https://www.nilc.org/wp-content/uploads/2018/01/understanding-the-Muslim-bans.pdf> [<https://perma.cc/7QYP-HPW3>] (explaining President Trump’s immigration ban and subsequent federal court orders blocking them).

71. See generally *Hawai’i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); *Hawai’i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017); see also Andrew C. McCarthy, *On Travel Order, Trump Will Rescind and Replace*, NAT’L REV. (Feb. 16, 2017), <https://www.nationalreview.com/blog/corner/travel-order-trump-will-rescind-replace/> [<https://perma.cc/BY7L-RHX5>] (discussing President Trump’s plan to revise and replace the first Muslim Ban).

72. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (implementing revisions to the first Muslim Ban executive order).

73. *Id.* at 13,213.

74. *Id.* at 13,215–16.

75. *Id.* at 13,216.

date for ten days.⁷⁶ The new version provided more clarity as to who qualified for exemptions from the ban, presumably to prevent similar chaos that resulted from the first ban.⁷⁷ A new waiver scheme was included in the new ban, available for individuals who could demonstrate that denying their entry would cause an undue hardship, that they do not pose a threat to the national security or public safety of the United States, and that their entry would be in the national interest.⁷⁸ The text of the order listed ten examples of individuals who might qualify for a waiver, but indicated that such waivers would be granted only on a case-by-case basis.⁷⁹ Immigration lawyers and advocates denounced the Ban, calling it a rebranded version of the executive order issued just two months prior.⁸⁰

Each version of the Ban has been challenged in federal courts around the country.⁸¹ Similar to challenges to the first Ban, a Hawai'i federal court blocked the second version from going into effect.⁸² The next day, a Maryland judge also blocked the ban's implementation.⁸³ Thus, within days of attempting to implement the new version of the ban, two federal courts halted the Administration's efforts to bar Muslims from entering the United States.⁸⁴ Both of the injunctions stemming from Hawai'i and Maryland were appealed by the federal government to the circuit courts.⁸⁵ The Fourth Circuit, in a 10-3 ruling, upheld the injunction, while the decision from the Ninth Circuit is still pending at the time that this

76. Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1486 (2018).

77. *Id.* These exemptions included lawful permanent residents, green card holders, parolees and others lawfully admitted into the United States, individuals with permission to travel and dual nations to enter the country. *Id.*

78. *Id.* "Undue hardship," "national security," and "national interest," were not defined in neither the executive order nor in the relevant immigration statutes and regulations.

79. See Exec. Order No. 13,780, 82 Fed. Reg. 8977 (2017). The waiver categories include foreign nationals previously admitted to the United States for a continuous basis; foreign nationals with significant contacts in the United States but who were outside the country at the time of the order; foreign nationals with business or professional obligations in the United States; foreign nationals with close a family member in the United States whom not being able to visit will cause undue hardship; infants, young children, or adoptees needing urgent medical care; foreign nationals employed by, or on behalf of, the United States Government; foreign nationals traveling for purposes related to an international organization designated under the International Organizations Immunities Act, 22 U.S.C. § 288 et seq., for purposes of conducting meetings or business with the United States Government; foreign nationals who are landed Canadian immigrants; or foreign nationals traveling as a United States Government-sponsored exchange visitor. *Id.*

80. See Wadhia, *supra* note 76, at 1487.

81. See, e.g., *Travel Ban Challenge Puts Hawaii's Few Muslims in Spotlight*, VOA (Mar. 10, 2017), <https://www.voanews.com/a/travel-ban-challenge-puts-hawaii-few-muslims-in-spotlight/3761158.html> [<https://perma.cc/ZZ9W-H53R>] ("Hawaii has 5,000 or so Muslims—less than 1 percent of the state's population—who are finding themselves thrust into an international spotlight after the state's top lawyer launched a challenge to President Donald Trump's revised travel ban . . .").

82. *Hawai'i v. Trump*, 241 F. Supp. 3d 1122, 1123 (D. Haw. 2017).

83. *Federal Court Blocks President Trump's New Travel Ban*, ACLU (Mar. 16, 2017), <https://www.aclu.org/press-releases/federal-court-blocks-president-trumps-new-travel-ban> [<https://perma.cc/ZEF5-5ZC7>].

84. See generally *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd* 138 S. Ct. 2392; see also *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *aff'd in part*, 137 S. Ct. 2080.

85. See *Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017), *rev'd* 138 S. Ct. 2392; see also *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017), *aff'd in part*, 137 S. Ct. 2080.

article is being written.⁸⁶ The Government asked the Supreme Court to continue these bans in their entirety and filed petitions for appeal.⁸⁷

In June and July of 2017, the Supreme Court issued rulings on portions of the ban in response to the Government's requests, and effectively narrowed the scope of the ban.⁸⁸ In these rulings, the Court barred the Government from applying the 90-day ban on nationals from the six listed countries, and from applying the 120-day ban on refugees if they are able to credibly claim a "bona fide relationship" with a person or entity in the United States.⁸⁹ Its July ruling left in place a lower-court order exempting grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews and cousins of people in the United States from the Muslim Ban.⁹⁰ The Court also issued an order allowing refugees with formal assurances from resettlement organizations to be banned unless they could demonstrate other ties to people or entities in the United States, pending further proceedings.⁹¹ Primary arguments against the Ban were that it violated the Establishment Clause of the First Amendment, which prohibits the government from passing laws that give preference to, or force the belief in, any one religion.⁹² The plaintiffs challenging the Ban in the courts argued that it was motivated by animus towards Islam, and not by concerns regarding national security.⁹³ The other primary argument challenging the Ban was that it violated section 202(a)(1) of the Immigration and Nationality Act prohibiting discrimination with regard to the issuance of immigrant visas.⁹⁴

Meanwhile, the Department of Justice advanced several arguments in defense of the Ban. It argued that the courts have no right to review the terms of the Ban, citing *Kleindienst v. Mandel*,⁹⁵ which held that "when the Executive exercises [immigration authority] negatively on the basis of a facially legitimate and bona-fide reason, the courts will [not] look

86. See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017). See also ACLU WASH. *supra* note 58.

87. See generally *Petition for Writ of Certiorari, Trump v. Hawaii*, 878 F.3d 662 (9th Cir. 2017) (No. 17-17168); *Petition for Writ of Certiorari, Trump v. Int'l Refugee Assistance Project*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351).

88. See ACLU WASH. *supra* note 58.

89. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017); see also *id.*

90. See ACLU Wash. *supra* note 58.

91. See *id.*; see also *Supreme Court Gives Mixed Signals on Muslim Ban Implementation*, ACLU, (Mar. 19, 2017), <https://www.aclu.org/press-releases/supreme-court-issues-mixed-order-muslim-ban-implementation> [<https://perma.cc/TB8G-5QJX>].

92. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2084–86 (2017) (discussing the constitutional challenges in the lower courts).

93. *Id.* at 2084.

94. See *id.* at 2085 (discussing the challenges to President Trump's executive orders for violating provisions of the Immigration and Nationality Act). The act states "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

95. 408 U.S. 753, 770 (1972).

behind the exercise of that discretion.”⁹⁶ The Department also turned to section 212 of the Immigration and Nationality Act as a source of authority for providing the President with general power to exclude nationals from certain countries.⁹⁷ In response to these arguments, the Supreme Court granted a partial implementation of the second Muslim Ban.⁹⁸ The partial stay affirmed that individuals from the six countries,⁹⁹ and all refugees, can be blocked from entering the United States if they lack a “bona fide” relationship to a person or organization in the United States.¹⁰⁰ The Court granted *certiorari* with respect to the legality of the Ban in its entirety.¹⁰¹

On September 24, 2017, following criticism, and more importantly, injunctions issued by federal appellate courts against the second Ban,¹⁰² the Trump Administration issued a third version of the Muslim Ban.¹⁰³ This version blocked the entry for individuals from eight countries—Iran, Libya, Chad, North Korea, Syria, Somalia, Venezuela, and Yemen—for an indefinite period of time.¹⁰⁴ These countries were ostensibly chosen because of the perceived threat these countries posed to the national security of the United States.¹⁰⁵ Like the second version, the third Muslim Ban included exemptions for lawful permanent residents, refugees, those granted asylum, and dual nationals, among others.¹⁰⁶ The third Ban also provided a waiver scheme and examples similar to the second version of the Ban.¹⁰⁷ Like the second

96. *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017).

97. *See id.* at 1161. 8 U.S.C. § 1152(f) provides that “Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.” Immigration and Nationality Act, 8 U.S.C. § 1182(f)(2012).

98. *See Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (finding that the Government’s petitions for *certiorari* were granted, and that the stay applications regarding the suspension of refugee admissions were granted).

99. Notably, all of these countries except Somalia have Muslim populations of more than 90%. *See Interactive Data Table: World Muslim Population by Country*, PEW RESEARCH CTR. (Nov. 17, 2017), <https://www.pewforum.org/chart/interactive-data-table-world-muslim-population-by-country/> [<https://perma.cc/R5N2-G3LM>] . Somalia is still a Muslim-majority country, with a population of 71.3%. *Id.*

100. 137 S. Ct. 2080, 2088.

101. *Id.* at 2089.

102. *See, e.g., Ilya Somin, Thoughts on the Appellate Courts’ Striking Down Trump’s Revised Muslim Ban*, WASH. POST (Sept. 30, 2019) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/25/appellate-court-upholds-injunction-against-trumps-revised-travel-ban/> [<https://perma.cc/C3LP-JL2U>] (stating that the revised travel ban fails to correct the “flaws” of the original).

103. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (adding countries to the restricted entry lists in Executive Orders 13,769 and 13,870).

104. *Id.* at 45,163.

105. *See id.* at 45,164. (“[A]lthough immigrants generally receive more extensive vetting than nonimmigrants, such vetting is less reliable when the country from which someone seeks to emigrate . . . presents risks to the national security of the United States.”).

106. *Id.* at 45,167 (listing exceptions to restricted entry into the United States).

107. *Id.* at 45,168 (setting forth the waiver scheme for granting entry to foreign nationals on a case-by-case basis).

ban, the third did not provide guidance as to how often, by whom, or the means by which the waivers would be adjudicated.¹⁰⁸

Hence, like its predecessors, the third Muslim Ban was immediately subject to legal actions in the federal district courts upon its promulgation by President Trump.¹⁰⁹ On December 4, 2017, the Supreme Court granted the Administration's request to temporarily allow the third Muslim Ban to take full effect while its legality was being litigated before two separate appellate courts.¹¹⁰

As before, the legal attacks on the Ban focused on two primary arguments: (1) that it violated the immigration laws prohibiting discrimination with regard to the issuance of immigrant visas, and (2) that it violated the Establishment Clause of Constitution.¹¹¹ Those who opposed the ban, including the writers here, argue that section 202(a)(1)(A) of the Immigration Nationality Act (INA), prohibiting race-based discrimination in the issuance of immigration visas,¹¹² and with the doctrine of constitutional avoidance,¹¹³ provide ample basis to reject the implementation of the Muslim Ban. On June 26, 2018, the Supreme Court disagreed with the plaintiffs to the challenges to the Ban in an opinion that many believe to have turned upon party, or political-philosophical grounds, and allowed the third version of the Muslim Ban to go into effect in its entirety.¹¹⁴

108. See Wadhia, *supra* note 76, at 1488 (explaining the lack of guidance as to how the waiver scheme will be utilized).

109. See generally *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017); see also *Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order, Hawaii v. Trump*, 2017 WL 6547034 (D. Haw.) (No. 1:17-cv-00050-DKW-KSC).

110. See *Trump v. Hawaii*, 138 S. Ct. 542 (2017).

111. See 241 F. Supp. 3d at 548–49; see also *Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order, supra* note 109, at 13, 30.

112. See David J. Bier, *Trump's Ban on Immigration from Certain Countries is Illegal*, CATO INST. (Dec. 8, 2016), <https://www.cato.org/blog/trumps-presidential-ban-immigration-certain-countries-illegal> [https://perma.cc/VQR6-XEJM] (discussing that while section 212 of the INA grants a president the general power to exclude certain immigrants, section 202 limits this power. Section 202 states that “no person shall . . . be discriminated against in the issuance of an immigrant visa because of a person's race, sex, nationality, place of birth, or place of residence.”).

113. Constitutional avoidance provides that when the constitutionality of an act is raised, it is the cardinal principle that the Court will first look to whether the construction of the statute is fairly possible so that the question may be avoided by the Court. See ANDREW NOLAN, CONG. RESEARCH SERV., R43706, *THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW* 10 (2014).

114. See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2017) (holding that (1) President Trump fulfilled INA requirements delegating authority to the President to suspend entry by aliens or classes of aliens, upon finding that their entry would be harmful to U.S. interests; (2) the INA provision prohibiting discrimination by national origin in issuing visas does not limit the President's authority to suspend entry by certain classes of aliens; (3) that rational basis review should be applied to the Establishment Clause claim concerning the entry of foreign nationals; (4) that the Proclamation did not violate the establishment clause; and (5) that forceable relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively lawful and outside the scope of Presidential authority); see also Shoba Sivaprasad Wadhia, *Ban 3.0 at the Supreme Court: What You Need to Know*, MEDIUM (Dec. 5, 2017), <https://medium.com/@shobawadhia/supreme-court-issues-orders-on-ban-3-0-what-this-means-db7c8e83c04c> [https://perma.cc/LM6M-5U7H] (explaining the effect that the Court's decision would have). As Professor Wadhia in a restrained fashion correctly noted, “the decision was remarkable to the extent that a broad ban was reinstated in full without a ruling by the

Despite the legal attacks and the questionable legitimacy of the Bans, the Supreme Court's decision ultimately allowed President Trump to erect and fortify a metaphorical barrier to outsiders entering the United States. This virtual wall he erected under the pretext of national security effectively prohibits millions of Muslims from coming to the United States, following the animus and bigotry against Muslims that he demonstrated on the campaign trail as a presidential candidate.¹¹⁵ President Trump's penchant for executive orders conflicts with his prior condemnations of President Obama for using executive orders in a "dictatorial fashion,"¹¹⁶ as the Muslim Bans have changed United States immigration policy from one that has historically welcomed immigrants and refugees,¹¹⁷ to one that is presumptively unreceptive to individuals from Muslim countries. While the pillars of United States immigration policy expressly prohibit discriminating against entrants based on race or national origin,¹¹⁸ the system under President Trump's Bans seeks to exclude an entire religion—one that happens to be largely comprised of people of color.¹¹⁹ And despite the calls that these bans are in the interest of national security, ironically, the national security and terrorist threat to our homeland has most recently come not from Muslims, but from homegrown right-wing terrorists—who are most often angry, disaffected White males.¹²⁰

appellate courts and without specific guidance by the implementing agencies about how the ban would apply in practice." Wadhia, *supra* note 76, at 1496.

115. See Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, WASH. POST. (Dec. 7, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/> [https://perma.cc/97UJ-4EU4] (quoting Candidate Donald Trump calling for a "total and complete shutdown of Muslims entering the United States" at a rally in South Carolina in December 2015. His campaign released a statement on the same day that included poll findings that Trump said showed that a large segment of the Muslim population had "great hatred towards Americans.").

116. Michelle Mark, *Trump's 2014 Comments Criticizing Obama for Taking Executive Action 'Because He is Unable to Negotiate w/Congress' Are Coming Back to Haunt Him*, BUS. INSIDER (Feb. 19, 2019), <https://www.businessinsider.com/trump-2014-tweet-obama-executive-action-hypocrisy-2019-2> [https://perma.cc/F9HD-V8N4].

117. See Lazarus, *supra* note 57.

118. See 8 U.S.C. § 1152(a)(1)(A)(1952) (providing that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence").

119. Most Muslims live in the Middle East, Asia, and Africa. See Jeff Diamant, *The Countries with the 10 Largest Christian Populations and the 10 Largest Muslim Populations*, PEW RESEARCH CTR. (Apr. 1, 2019), <https://www.pewresearch.org/fact-tank/2019/04/01/the-countries-with-the-10-largest-christian-populations-and-the-10-largest-muslim-populations/> [https://perma.cc/39M4-ESVY] (showing that the ten countries with the largest Muslim populations are Indonesia, India, Pakistan, Bangladesh, Nigeria, Egypt, Iran, Turkey, Algeria, and Iraq).

120. See Jennifer Williams, *White American Men are a Bigger Domestic Terrorist Threat than Muslim Foreigners*, VOX (Oct. 2, 2017), <https://www.vox.com/world/2017/10/2/16396612/las-vegas-mass-shooting-terrorism-islam> [https://perma.cc/HRQ8-5P2F] (written in the aftermath of a Las Vegas attack in which over 50 people were killed); see also Evan Perez, *FBI Has Seen Significant Rise in White Supremacist Domestic Terrorism in Recent Months*, CNN (June 28, 2019), <https://www.cnn.com/2019/05/23/politics/fbi-white-supremacist-domestic-terror/index.html> [https://perma.cc/3F36-3J3Y] (citing about 150 arrests for domestic terror in 2017, about 120 in 2018, and white-supremacist extremist violence as an increasing concern and threat in the United States).

B. Placing Refugee Children in Cages

President Trump's most horrific immigrant attack has not only sought to wreck the United States' historical commitment to welcoming immigrants, but has also single-handedly—and perhaps irrevocably—harmed the United States' reputation as a righteous land made up of immigrants. In doing so, President Trump has targeted the humanitarian and family unification basis for immigration.¹²¹ His most infamous policy—family separation—has stripped children from the arms of mothers and fathers seeking political asylum.¹²² In doing so, he is responsible for caging the children of immigrants in conditions that have repeatably been deemed nothing short of horrific.¹²³ Some of these innocent children locked in cages have been as young as infants.¹²⁴ President Trump's Zero Tolerance policy—which targets legal entrants seeking political asylum—has separated families, destroyed lives, subjected victims to danger, and has even cost the lives of numerous children caged in detention centers.¹²⁵ Indeed, his indefensible family-separation policy has been condemned as an all-out attack on immigrant women and children.¹²⁶ His attack on families seeking refuge is a stain on the United States that will last for decades, if not longer.

Until the Trump presidency, United States immigration policy has rested on three pillars: humanitarian-based immigration,¹²⁷ economic-based immigration¹²⁸ and family-unification immigration.¹²⁹ Family unification has sought to ensure that families in the United States and elsewhere remain together and not be separated by borders.¹³⁰ The humanitarian

121. Philip E. Wolgin, *Family Reunification is the Bedrock of U.S. Immigration Policy*, CTR. FOR AM. PROGRESS (Feb. 12, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/02/12/446402/family-reunification-bedrock-u-s-immigration-policy/> [<https://perma.cc/2MNW-VGNN>] (describing Trump Administration restrictions on immigration).

122. Nicole Acevedo, *Mothers Separated From Their Children at the Border Sue Trump Admin Over 'Clear Abuse'*, NBC (Sept. 24, 2019), <https://www.nbcnews.com/news/latino/mothers-separated-their-children-border-sue-trump-admin-over-clear-n1058146> (describing family separation experiences) [<https://perma.cc/9FQ2-FMHV>].

123. See Nicole Acevedo, *Why Are Migrant Children Dying in U.S. Custody?*, NBC (May 29, 2019), <https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316> [<https://perma.cc/UR4J-2G67>] (describing death cases of migrant children).

124. See *id.* (citing a one-year-old who died in CBP custody).

125. See *id.* At the time of this publication, seven children are known to have died in CBP custody. *Id.*

126. Congress: *Stop Trump's Attacks on Immigrant Children and Women*, ULTRAVIOLET <https://act.weareultraviolet.org/sign/attacks-immigrant-women/> [<https://perma.cc/4TXE-WQ7Y>] (last visited Sept. 30, 2019).

127. Stephen H. Legomsky, *Immigration Policy from Scratch: The Universal and the Unique*, 21 WM. & MARY BILL RTS. J. 339, 355 (2012) (referring to family reunification, labor immigration, and refugees as the “three main pillars” of immigration policy, but also acknowledging other considerations) (emphasis added); see also *Humanitarian*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian> [<https://perma.cc/B34R-ELGA>]; see also *Humanitarian-Based Immigration Resources*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/humanitarian-based-immigration-resources> [<https://perma.cc/4NDR-U7BR>].

128. Legomsky, *supra* note 127. This includes HB-1 visa specialty workers. *Id.*

129. See Kyle Rabin, *The Zero Child Policy*, 101 NW. U. L. REV. 965, 988 (2007) (“[F]amily unification has long been a primary policy goal of the INS and of the INA . . .”).

130. See *id.*

basis has historically been available to those with a well-founded fear of persecution.¹³¹ However, President Trump's administration endangered these pillars in May 2018, when the Department of Justice issued a Memorandum for Federal Prosecutors Along the Southwest Border, opting for a form of mass incarceration by mandating a Zero Tolerance policy for immigrants crossing into the United States.¹³² This policy makes a mockery of domestic immigration's entrenched humanitarian goal. Rather than seeking to protect individuals facing persecution, the children of parents crossing the border in search of humanitarian relief have been caged in conditions compared to concentration camps.¹³³

Starting immediately after the Department of Justice announced the Zero Tolerance policy for illegal border crossings from Mexico into the United States, children were separated from their parents, rather than being kept together in detention centers, as they previously had been.¹³⁴ "If you are smuggling a child then we will prosecute you, and that child will be separated from you as required by law," Attorney General Sessions stated at an event discussing the policy in San Diego, California.¹³⁵ "If you don't like that, then don't smuggle children over our border."¹³⁶ This Zero Tolerance policy separated about 1,995 children from roughly as many caretakers at the U.S.–Mexico border from April 19, 2018 to May 31, 2018.¹³⁷ The children were held in makeshift facilities run by the Office of Refugee Resettlement within the Department of Health and Human Services.¹³⁸ Toddlers were sent to "tender age" shelters in South Texas.¹³⁹

131. See *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (stating that the "persecution or well-founded fear of persecution" standard governs whether an individual is eligible for asylum).

132. See Memorandum from the Att'y Gen. for Fed. Prosecutors Along the Southwest Border (Apr. 6, 2018) (calling for the prosecution of adults believed to have unlawfully entered the United States).

133. See Charles M. Blow, *Trump's 'Concentration Camps'*, N.Y. TIMES (June 13, 2019), <https://www.nytimes.com/2019/06/23/opinion/trump-migrants-camps.html> [<https://perma.cc/QS2R-9UYD>]; see also Jack Holmes, *An Expert on Concentration Camps Says That's Exactly What the U.S. Is Running at the Border*, ESQUIRE (June 13, 2019), <https://www.esquire.com/news-politics/a27813648/concentration-camps-southern-border-migrant-detention-facilities-trump/> [<https://perma.cc/58ZQ-FDWQ>].

134. See Maya Rhodan, *Here Are the Facts About President Trump's Family Separation Policy*, TIME (June 20, 2018), <http://time.com/5314769/family-separation-policy-donald-trump/> [<https://perma.cc/C7SS-7Y3K>] (describing the effect the Zero Tolerance policy had on separating families).

135. See U.S. Att'y Gen., *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/HX6B-BNMD>].

136. *Id.*

137. *Id.*

138. The facilities include a converted Walmart in Texas housing young boys. See Michael Miller et al., *Inside a Former Walmart on the Texas–Mexico Border that Holds Nearly 1,500 Immigrant Boys*, STAR TELEGRAM (June 19, 2018), <https://www.star-telegram.com/news/state/texas/article213325319.html> [<https://perma.cc/R3BH-BZV4>]. Another makeshift facility was made from a former warehouse, leading to outcry among people opposed to the Zero Tolerance policy. See Rhodan, *supra* note 134.

139. See Rhodan, *supra* note 134.

This controversial policy prompted high-ranking officials from five different agencies that were involved in implementing the Zero Tolerance and subsequent family separation policies to be called to testify before the Senate Judiciary Committee in July 2018.¹⁴⁰ United States Customs and Border Protection Chief Carla Provost said her agency was simply enforcing the law, and officials from ICE and the Justice Department also refused to cite any mistakes.¹⁴¹ This response was met with condemnation from members of the committee. “The family separation policy is more than a bureaucratic lapse in judgment,” Senator Dick Durbin, of Illinois, responded.¹⁴² “It is and was a cruel policy inconsistent with the values of this nation. Someone, someone in this administration has to accept responsibility,”¹⁴³ he said, calling for Homeland Security Secretary Kirstjen Nielsen to step down to take responsibility for carrying out the policy.¹⁴⁴ Nielsen eventually did resign,¹⁴⁵ but by that time, the damage to these families was done; sadly, these mothers, fathers, and children are still far from being united.

When a federal court ordered the Trump Administration to reunify migrant families separated at the border,¹⁴⁶ no one in the government was sure where the families were located.¹⁴⁷ Customs and Border Protection databases lacked categories to effectively classify the more than 2,600 children who had been taken from their families and placed in government shelters, making their whereabouts difficult, if not impossible to obtain.¹⁴⁸ Caseworkers and government health officials manually searched files of over 12,000 migrant children in the Department of Health and Human Services’ custody to determine at what point family separations had occurred in an attempt to unify families.¹⁴⁹ After a 30-day deadline for reunification passed, the Government was lambasted for its lack of preparation and coordination.¹⁵⁰ “Each (department) was like its own stovepipe, each had its own boss, and they did

140. Joel Rose, *Lawmakers Question Trump Officials on Family Separation Policy*, NPR (July 31, 2018), <https://www.npr.org/2018/07/31/634396006/lawmakers-question-trump-officials-on-family-separation-policy> [https://perma.cc/JC35-KKJL].

141. *Id.*

142. Press Release, Senator Dick Durbin, Durbin Statement on HHS OIG Report on Family Separation Policy (Jan. 17, 2019), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-statement-on-hhs-oig-report-on-family-separation-policy-> [https://perma.cc/7T7R-YUH6].

143. *Id.*

144. *Id.*

145. See Letter from Kirstjen M. Nielsen, Sec’y of Homeland Sec., to President Trump (Apr. 7, 2019), https://www.dhs.gov/sites/default/files/publications/19_0407_s1_nielsen-resignation-letter.pdf [https://perma.cc/8AXT-7K89] (offering her resignation as Secretary of Homeland Security).

146. See *Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1133, 1149 (June 26, 2018) (S.D. Cal. 2018).

147. Nick Miroff et al., *‘Deleted’ Families: What Went Wrong With Trump’s Family-Separation Effort*, WASH. POST (July 28, 2018), https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html?utm_term=.cd20816214a9 [https://perma.cc/SPJ9-SU7X] (explaining the difficulties Customs agents experienced reunifying families).

148. *Id.*

149. *Id.*

150. *Id.*

not communicate,” United States District Judge Dana Sabraw said at a court hearing in San Diego.¹⁵¹ “What was lost in the process was the family.”¹⁵² The parents didn’t know where the children were, and the children didn’t know where the parents were. And the Government didn’t know either. Meanwhile, President Trump’s officials insisted that they were not doing anything extraordinary and were simply upholding the law.¹⁵³ The Trump Administration, in promulgating the Zero Tolerance policy and in believing that the effect of separations would be to deter the illegal border crossings, apparently did not anticipate the raw emotional backlash that separating thousands of families crossing the border would have, and ostensibly did not have a plan for reunification once it was ordered to do so.

Public backlash and a subsequent court order caused the Trump Administration to stop separating migrant families in June 2018.¹⁵⁴ In April 2019 the Government admitted it could take up to two more years to reunite all of the children with their parents,¹⁵⁵ and faced criticism from both Democrats and Republicans. “We ought to be disturbed. And I’m disturbed by these allegations,” Judiciary Committee Chairman Charles Grassley, of Iowa commented.¹⁵⁶ Grassley stated that he understood why the Trump Administration took a Zero Tolerance stance against illegal border crossing,¹⁵⁷ but he also expressed disappointment that “like many well-intentioned policies, there were unintended consequences.”¹⁵⁸ However, this comment failed to acknowledge that those consequences were not a mere oversight on paper; they resulted in parents effectively having their children taken away, to the extent that parents did not know where their children were. Furthermore, parents were imprisoned in federal detention centers, and children were sent to shelters.¹⁵⁹ In a further—perhaps more troubling—response ignoring the graveness of the situation, Grassley and other Republicans suggested that the solution would be for Congress to change the law so that immigrant families could be detained together.¹⁶⁰

Outside of Senate hearings, President Trump’s Zero Tolerance policy has generally been met with support from his followers, who have responded to family separation by blam-

151. Elliot Spagat, *Judge Credits, Faults Administration on Family Reunification*, ASSOCIATED PRESS (July 27, 2018), <https://apnews.com/a564bdbddb2947efaf75a50dc5a36a64/Judge-credits-faults-administration-on-family-reunification> [<https://perma.cc/QJ7F-JEZ7>].

152. *Id.*

153. See Miroff, *supra* note 147.

154. See *Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1133, 1149 (June 26, 2018) (S.D. Cal. 2018).

155. See Julia Jacobs, *U.S. Says It Could Take 2 Years to Identify Up to Thousands of Separated Immigrant Families*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html> [<https://perma.cc/6BL4-7V6A>] (detailing how long the U.S. government said it would take for all the children to be reunited with parents).

156. Rose, *supra* note 140.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

ing immigrant parents for putting their children in peril as they sought refuge in the United States.¹⁶¹ Similarly, President Trump's enablers in the right-wing media have concocted various stories to justify family separations.¹⁶² Just as he expected, his Republican base has dug in and defended his policies,¹⁶³ only proving that xenophobic sectors within the United States who have historically racialized and dehumanized immigrants are very willing to do it again. By portraying refugees and asylum-seekers as outsiders, President Trump's supporters have been able to justify to themselves this atrocious family-separation policy.¹⁶⁴ In Donald Trump's world, playing the race card has surely been an effective strategy.

C. *Build the Wall!*

Whereas today many Americans imagine the United States border with Mexico as an interminable wall stretching across a desert, historically, the border has been less of a divide than a stitch that unites two nations. Decades after the U.S.–Mexico War,¹⁶⁵ the border was mostly an abstraction; a line existing only in maps and in treaties. The United States Border Patrol was not created until 1924, and at the time its primary concern was apprehending Chinese nationals trying to enter the United States in defiance of the 1882 Chinese Exclusion Act, as well as dealing with liquor smuggling during Prohibition.¹⁶⁶ Interior enforcement¹⁶⁷ was also a priority for the agency since its inception and—save for a few checkpoints—the border was lightly patrolled for most of the twentieth century.¹⁶⁸ This approach changed in the most dramatic fashion in the 1990s, with Operation Gatekeeper resulting in constructing new border fencing along the San Diego sector in response to the increased number of undocumented crossings in this sector.¹⁶⁹ Mexico's debt crisis in the 1980s, the North America

161. See Martin Savidge, *What Trump Supporters Think of Family Separations at the Border*, CNN (June 19, 2018), <https://www.cnn.com/2018/06/19/us/trump-voters-family-separation/index.html> [<https://perma.cc/E6MH-RDU5>] (discussing perspectives of Trump supporters regarding family separations).

162. Luke O'Neil, *'Essentially Summer Camps': How the Right is Defending Family Separations*, THE GUARDIAN (June 19, 2018), <https://www.theguardian.com/us-news/2018/jun/19/border-separations-children-families-trump-supporters-defence-breitbart-fox-news> [<https://perma.cc/M237-6EJD>] (explaining the conservative media response to family separations).

163. PBS NewsHour, *Amid Outrage at Family Separations, Trump Supporters Dig In*, YOUTUBE (June 24, 2018), https://www.youtube.com/watch?v=y8dZFinx_Ms [<https://perma.cc/R5UY-AWDU>] (discussing Trump-base reactions to immigration).

164. German Lopez, *The Research on Race That Helps Explain Trump's Use of Family Separation at the Border*, VOX (June 19, 2018), <https://www.vox.com/identities/2018/6/19/17478970/trump-family-separation-immigration-policy-racism> [<https://perma.cc/D5SK-Z3UP>] (explaining the history of the dehumanization of people of color).

165. RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.–MEXICO BORDER* 5 (2011).

166. *Id.* at 151–53.

167. *Id.* at 186. (Nowadays, interior enforcement includes the arrest of undocumented workers and sanctioning their employers.).

168. *Id.* at 187.

169. JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE REMAKING OF THE U.S.–MEXICO BOUNDARY* 61–62 (2001).

Free Trade Agreement (NAFTA) in 1994, and the economic expansion at the turn of the century sparked a wave of renewed Mexican migration to the United States.¹⁷⁰ Border states, and cities throughout the Southwest and the South became the main destinations for this generation of young migrants.¹⁷¹ Just like the prior generations, Mexicans came to the United States attracted by jobs in agriculture, and increasingly to new jobs in construction and the service industry as the United States economy expanded.¹⁷² So thousands of Mexican *braceros*,¹⁷³ construction workers, maids, nannies, busboys, cooks, and landscapers joined a changing labor force as the United States economy moved away from manufacturing and into services and technology.¹⁷⁴ Many of these workers followed a circular migratory pattern, going home for the winter and returning to the United States in the spring.¹⁷⁵

The September 11, 2001 terrorist attacks changed that pattern.¹⁷⁶ As the United States identified new threats abroad, the border felt like a vulnerable point in defending the homeland—even though the September 11 terrorists flew into the United States with valid visas, and no terrorists have been apprehended at the U.S.–Mexico border.¹⁷⁷ The attacks resulted in an eponymously named new cabinet position—the Secretary of Homeland Security¹⁷⁸—and the Border Patrol and other immigration-related agencies were placed under it.¹⁷⁹ Public anxiety about the attacks—combined with generalized xenophobia—made foreigners and foreign-looking individuals into terrorist suspects, including millions of Mexicans

170. See DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 76–83 (2002).

171. See HELEN MARROW, *NEW DESTINATION DREAMING: IMMIGRATION, RACE, AND LEGAL STATUS IN THE RURAL AMERICAN SOUTH* 3–8 (2011).

172. See *id.* at 49, 58, 98, 103.

173. *Bracero*, which translates to “farm laborer” in Spanish, refers to Mexican guest workers who came to the United States in the mid-twentieth century as part of a series of bi-lateral agreements between Mexico and the United States. See *The Bracero Program*, UCLA LABOR CTR., <https://www.labor.ucla.edu/what-we-do/research-tools/the-bracero-program/> [<https://perma.cc/XE4R-B22X>].

174. See MARROW, *supra* note 171, at 58.

175. MASSEY ET AL., *supra* note 170, at 76–83.

176. *Post-9/11*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Dec. 4, 2019), <https://www.uscis.gov/history-and-genealogy/our-history/overview-ins-history/post-911> [<https://perma.cc/9C74-8XTX>] (explaining changes in United States immigration policy after 9/11).

177. See Alan Gomez, *Trump Administration Officials Admit Mistakes While Trying to Tie Terrorism to Southern Border*, USA TODAY (Jan. 8, 2019), <https://www.usatoday.com/story/news/world/2019/01/08/trump-team-admits-mistakes-while-trying-tie-terrorism-southern-border/2512115002/> [<https://perma.cc/R7PC-L594>] (explaining data showing no terrorism threats along the southern border).

178. See *Creation of the Department of Homeland Security*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/creation-department-homeland-security> [<https://perma.cc/2KGP-9AUM>].

179. See *Secure U.S. Borders and Approaches*, U.S. DEP’T OF HOMELAND SEC. (July 5, 2019), <https://www.dhs.gov/secure-us-borders-and-approaches> [<https://perma.cc/4R39-WQ95>] (listing U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, Transportation Security Administration, U.S. Citizenship and Immigration Services, and the U.S. Coast Guard as related components to the Department of Homeland Security).

and other individuals of color.¹⁸⁰ Conservative political leaders tapped these fears and called for the building, expansion, and reinforcement of a border wall with Mexico.¹⁸¹ Legislation was passed, including the Real ID Act of 2005¹⁸² and the Secure Fence Act of 2006,¹⁸³ authorizing the construction of 700 miles of fencing along the border with Mexico, and waiving laws interfering with its construction.¹⁸⁴ The Border Patrol prioritized fencing along urban corridors, in the belief that “funneling” would-be immigrants through harsh terrain in the borderlands would deter them from crossing.¹⁸⁵ However, immigrants continued to attempt to cross, despite these topographical challenges, resulting in thousands dying in the deserts of the Southwest.¹⁸⁶

Unlike the Trump Administration, the previous administration under Barack Obama did not emphasize border fencing; it focused instead on apprehending unauthorized immigrants with criminal records.¹⁸⁷ Under the Obama Administration, Customs and Border Patrol removed more than 2.5 million individuals through immigration orders between 2009 and 2015, more than all of the presidents of the twentieth century combined.¹⁸⁸ President Trump, in not acknowledging that the Obama Administration faced criticism for the number of arrests and deportations of unauthorized immigrants,¹⁸⁹ has repeatedly attacked Obama for a “lax” attitude towards immigration, and has promised to build a wall to show his staunch commitment to immigration reform.¹⁹⁰

180. Rey Koslowski, *Immigration and Insecurity: Post-9/11 Fear in the United States*, SOC. SCI. & RES. COUNCIL (July 28, 2006), <https://items.ssrc.org/border-battles/immigration-and-insecurity-post-911-fear-in-the-united-states/> [<https://perma.cc/QE83-42ZP>] (explaining public fear of the southern border and minorities after 9/11).

181. Geraldo Cadava, *How the Border Wall Divided the GOP*, WASH. POST (Feb. 15, 2019), <https://www.washingtonpost.com/outlook/2019/02/15/how-border-wall-divided-gop/> [<https://perma.cc/AS4Y-2AGN>] (discussing the long history of a border wall policy battle within the GOP). These calls for the border wall were led by Republican Duncan L. Hunter, a staunch supporter of the wall since the 1990s. See Candidate Statement: Duncan Hunter, YOUTUBE (Dec. 12, 2007), <https://www.youtube.com/watch?v=yFIjWpPtSi8> [<https://perma.cc/LU5G-3FGK>] (describing Duncan Hunter’s anti-immigration stance and commitment to finish the border wall during a 2008 debate for the Republican presidential nomination).

182. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

183. Secure Fence Act of 2006, H.R. 6061, 109th Cong. (2006).

184. *Id.*

185. Mary D. Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC’Y REV. 701, 707 (2008).

186. NEVINS, *supra* note 169, at 144–45.

187. See Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<https://perma.cc/2FWH-U6VW>] (stating that in fiscal year 2015, 91% of individuals removed from the United States were previously convicted of a crime).

188. *Id.*

189. *Id.*

190. BILL O. HING, AMERICAN PRESIDENTS, DEPORTATIONS, AND HUMAN RIGHTS VIOLATIONS: FROM CARTER TO TRUMP 1, 251 (2019).

Following through with his promise to build a wall has not been easy for President Trump, despite Republicans controlling both the House and the Senate during part of his time in office.¹⁹¹ Building a wall at the border has proved to be expensive, complicated, and experts have stated that it is not a guarantee to deter would-be immigrants.¹⁹² It has many detractors in Congress—including Republicans—and its construction has alienated constituents whose land would be seized by the federal government to build the wall.¹⁹³ Yet, for President Trump, the wall represents one of his core campaign promises, one that he must keep.¹⁹⁴ Therefore, when President Trump failed to convince Democrats in 2019 to fund the wall, he declared a national emergency to build it.¹⁹⁵ Ultimately, President Trump backed off his demand for \$5 billion from Congress to fund his wall;¹⁹⁶ instead, he has sought alternate methods to find funding for his pet project. His latest effort to find funding has been to divert billions of dollars from the Pentagon's budget towards the project.¹⁹⁷

As plans for construction of wall segments continue, the usefulness of a wall is increasingly questioned, further raising the specter of this policy being used to target immigrants of color.¹⁹⁸ The purpose for the wall was to keep Mexican and Central American migrants out—to stop them in their tracks as they attempt to cross the southern border. However, since the 2008 recession, unauthorized migration has been at a decade low,¹⁹⁹ and

191. See *Why Does Donald Trump Want to Build a Wall?*, BBC (May 23, 2019), <https://www.bbc.co.uk/newsround/46811167> [<https://perma.cc/H4JB-4N4K>] (discussing opposition to Trump's border wall policy).

192. *Id.*

193. Rachel Adams-Heard, *Trump's Border Wall Faces Texas-Sized Backlash From Land Owners*, THE DENVER POST (Feb. 18, 2019), <https://www.denverpost.com/2019/02/18/trumps-mexico-border-wall-texas-backlash/> (describing the impact the border wall will have on landowners near the U.S.–Mexico border).

194. Thom Poole, *Trump's Border Wall: A Broken Promise, a Second Term, or Both?*, BBC (Oct. 7, 2019), <https://www.bbc.com/news/world-us-canada-49805982> [<https://perma.cc/M2A5-CQBW>] (describing Trump's political strategy for building the border wall).

195. Proclamation No. 9844, 84 Fed. Reg. 34, 4949 (Feb. 15, 2019).

196. See Erica Werner et al., *Trump Backs Off Demand for \$5 Billion for Border Wall, But Budget Impasse Remains Ahead of Shutdown Deadline*, WASH. POST (Dec. 19, 2018), https://www.washingtonpost.com/business/economy/white-house-signals-its-backing-down-in-shutdown-dispute-will-find-other-ways-to-fund-border-wall/2018/12/18/159994dc-02d9-11e9-9122-82e98f91ee6f_story.html [<https://perma.cc/5PW4-3YQY>] (describing President Trump's turn-around from demanding Congress to fund the border wall).

197. Emily Cochrane, *Administration to Divert Billions From Pentagon to Fund Border Wall*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/border-wall-funds-pentagon.html> [<https://perma.cc/364V-7SMF>] (discussing the Pentagon's plans to divert \$3.8 billion intended for military equipment to the construction of the southern border wall).

198. See William Cummings, *'You Can Cut Through Anything': Trump Dismisses News of Smugglers Sawing Through New Border Wall*, USA TODAY (Nov. 3, 2019), <https://www.usatoday.com/story/news/politics/2019/11/03/smugglers-cut-trump-mexico-border-wall/4148552002/> [<https://perma.cc/DYK8-VV43>] (describing security breaches at the border wall, including smugglers cutting through tall sections that were labeled by President Trump as fundamental to border security).

199. See Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RESEARCH CTR. (Nov. 27, 2018), <https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/> [<https://perma.cc/W2WP-LQGM>] (stating that the number of unauthorized immigrants living in the U.S. decreased from 12.2 million in 2007 to 10.7 million in 2016).

President Trump's border wall proposal does not address the larger percentage of undocumented immigrants who come to the United States on airplanes and overstay their visas, rather than from crossing on foot at the border.²⁰⁰ His fixation with the border wall and what it symbolizes appears to be merely another manifestation of his goals to demonize brown immigrants,²⁰¹ and to keep out poor immigrants, while wealthier individuals who have arrived on visas and are not targeted by President Trump's plan are implicitly permitted to stay.²⁰²

None of this seems to matter to President Trump and his staunchest supporters. For them, the wall *will* be built, and it *will* stop immigrants. Crime *will* go down, and immigrants *will not* take Americans jobs.²⁰³ However, despite these fears, undocumented immigrants are in reality far less likely to commit crimes than domestic residents; undocumented immigrants do not take jobs, lower wages, or otherwise hurt the economy.²⁰⁴ But this does not seem to matter to President Trump and his base. In his world, the wall is more than a concrete barrier—it is a metaphor, an alternate reality, a simple device that will resolve complex problems. It embodies a longing for an America now gone—but one that could return if the United States insulates itself from the rest of the world by keeping immigrants out. That longing explains the wall's popularity in places far away from the border, where Trump supporters will never see it in person or experience the reality of living in the U.S.–Mexico borderlands.²⁰⁵ The wall itself is immaterial to these supporters; what really matters is to keep racialized “Others” away—away from their jobs, their families and their country. For these supporters, the wall will separate *them* from *us*.

200. See Dean DeChiaro, *Border Wall Debate Ignores Biggest Source of Illegal Immigration: Visa Overstays*, ROLL CALL (Feb. 1, 2019), <https://www.rollcall.com/news/congress/border-illegal-immigration-visa-overstays> [<https://perma.cc/3ZLE-GHYY>] (stating that in fiscal year 2017, the Border Patrol apprehended just over 310,000 undocumented border crosses while more than 700,000 foreigners overstayed their visas).

201. Immigrants at the southern border are largely from Central and South America and are thus construed as people of color, whereas visa-overstay undocumented immigrants are a diverse group and are not construed wholly as people of color. See DEP'T OF HOMELAND SEC., FISCAL YEAR 2018 ENTRY/EXIT OVERSTAY REPORT 31 (2018), https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf [<https://perma.cc/55JW-ZHL2>] (comparing the number of visa overstays between visa waiver program countries, non-visa waiver program countries, and Canada and Mexico).

202. See Michael D. Shear & Eileen Sullivan, *Trump Policy Favors Wealthier Immigrants for Green Cards*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/us/politics/trump-immigration-policy.html> [<https://perma.cc/CX8D-PGCF>] (describing how Trump's policies help wealthy immigrants and hurt poor immigrants).

203. But cf. Anna Getmansky et al., *Will a U.S.–Mexico Border Wall Reduce Crime? Here's What We Know From Israel's West Bank*, WASH. POST (Oct. 9, 2019), <https://www.washingtonpost.com/politics/2019/10/09/will-us-mexico-border-wall-reduce-crime-heres-what-we-know-israels-west-bank/> [<https://perma.cc/M2D3-MBMS>] (comparing President Trump's proposed border wall to the partial wall constructed along the West Bank, where it was found that crime was not reduced in Israel as a result of the wall).

204. See ROMÁN, *supra* note 25, at 40

205. Bill Ketter, *Heartland Remain Solid for Trump: Support Outweighs Chaos in Washington*, THE DAILY ITEM (Mar. 31, 2018), https://www.dailyitem.com/news/heartland-remains-solid-for-trump-support-outweighs-chaos-in-washington/article_65623d90-3523-11e8-87d4-e70df7101c13.html [<https://perma.cc/3JX2-ZQWA>] (providing interviews with voters not living near the border who express support for President Trump).

D. *The Deferred Action of Childhood Arrivals Program*

On June 15, 2012, Janet Napolitano, Secretary of Homeland Security under President Obama, announced guidelines for the Deferred Action of Childhood Arrivals (DACA) program.²⁰⁶ DACA is a temporary program that defers deporting qualified individuals who entered the United States as children.²⁰⁷ Under DACA, United States Citizenship and Immigration Services (USCIS) applies prosecutorial discretion regarding the deportability of immigrants who arrived to the United States as children on a case-by-case basis.²⁰⁸ DACA's goal is to protect innocent immigrants who came to the United States as minors, have lived productive lives, and have known no country other than the United States, from deportation. The DACA process does not provide a formal legal status, nor does it create a pathway to permanent residency or citizenship.²⁰⁹ Individuals with approved DACA petitions enjoy a two-year deferral of removal from the United States with the possibility of renewal.²¹⁰ An approved DACA recipient can also become eligible for employment authorization by showing that he or she:

- 1) entered the United States before his or her 16th birthday;
- 2) has continuously resided in the United States from June 15, 2007 to the present;
- 3) was under the age of 31 as of June 15, 2012;
- 4) either entered without inspection or had a lawful immigration status that expired before June 15, 2012;
- 5) is currently in school, graduated from high school, has a general educational development (GED) certification, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- 6) has not been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and does not otherwise pose a threat; and
- 7) was present in the United States on June 15, 2012, and at the time he or she made the request for consideration of deferred action with USCIS.²¹¹

206. *Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T OF HOMELAND SEC. (Sept. 23, 2019), <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> [<https://perma.cc/TG8W-VKL9>].

207. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION. SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/EW6J-T89C>].

208. Memorandum from U.S. Sec'y of Homeland Sec., Janet Napolitano, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

209. U.S. DEP'T OF HOMELAND SEC., *supra* note 207.

210. *Id.*

211. *Id.*

Donald Trump has been inconsistent in his treatment of DACA and has ultimately undermined the program. During his presidential campaign, Candidate Trump impliedly demonized the individuals qualified for DACA—also referred to as Dreamers—by referring to the program as “illegal amnesty.”²¹² He promised to reverse the program on the basis that it was unconstitutional.²¹³ However, as president, Trump promised to leave the program intact, saying that he would show “great heart” to DACA recipients and that they should not be worried about their status in the United States.²¹⁴ Conservatives called for him to keep his campaign promise and eliminate DACA, and President Trump caved to the pressure.²¹⁵ He began dismantling the program by rescinding the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which provided deferred action for certain parents who had arrived to the United States unauthorized and with children.²¹⁶ On September 5, 2017, Attorney General Jeff Sessions announced that the DACA program was being terminated, ostensibly because it “denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens.”²¹⁷ Federal courts have ruled against its rescission.²¹⁸ And now, the federal government is still accepting renewal applications for DACA, but it is no longer accepting first-time applications.²¹⁹ The Supreme Court has agreed to hear the issue on the legality of DACA, and it is believed that the Court will render its opinion in the summer of 2020.²²⁰

212. Grace Donnelly, *Donald Trump, DACA and the Arguments Being Made for and Against Immigration Reform*, FORTUNE (Jan. 25, 2018), <https://fortune.com/2018/01/25/trump-daca-citizenship/> [<https://perma.cc/WKV2-G4SU>].

213. Katie Reilly, *Here's What President Trump Has Said About DACA in the Past*, TIME (Sept. 5, 2017), <https://time.com/4927100/donald-trump-daca-past-statements/> [<https://perma.cc/J3KC-NLJQ>].

214. See *id.* (citing President Trump as saying he is going to create policies to take care of everybody, including DACA recipients).

215. Richard Gonzales, *5 Questions About DACA Answered*, NPR (Sept. 5, 2017), <https://www.npr.org/2017/09/05/548754723/5-things-you-should-know-about-daca> [<https://perma.cc/F2U2-JJGR>] (explaining Trump's decision to end DACA).

216. See Press Release, U.S. Dep't of Homeland Sec., Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful> (statement from Secretary Kelly announcing the end of DAPA) [<https://perma.cc/EWP5-XW3T>].

217. Adam Edelman, *Trump Ends DACA Program, No New Applications Accepted*, NBC (Sep. 5, 2017), <https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686> [<https://perma.cc/7RKQ-TKNY>].

218. See DACA Litigation Timeline, NAT'L IMMIGRATION LAW CTR., <https://www.nilc.org/issues/daca/daca-litigation-timeline/> [<https://perma.cc/7Z3Y-6YCA>] (describing federal court decisions on DACA); see also Adam Liptak, *Supreme Court Appears Ready to Let Trump End DACA*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/supreme-court-dreamers.html> [<https://perma.cc/JTU5-K3UE>].

219. See Frequently Asked Questions USCIS is Accepting DACA Renewal Applications, NAT'L IMMIGRATION LAW CTR., <https://www.nilc.org/issues/daca/faq-uscis-accepting-daca-renewal-applications/> [<https://perma.cc/C259-3VC6>].

Despite having previously proclaimed support for Dreamers and the DACA program,²²¹ and despite his purported disdain for President Obama's use of executive orders in the immigration context,²²² rescinding DACA is another example of President Trump changing existing policy and the face of immigration in this country—this time by attacking innocent and productive immigrant children who did no wrong when they arrived in this country, and who by and large view themselves as Americans. Yet their innocence is irrelevant to President Trump. Thus, through his arguably heartless and at best hypocritical statements, Trump has furthered his vision of what it is to be a member of American society—and it is not one that includes immigrants.

E. Deportations

As part of his campaign, Donald Trump promised to deport millions of immigrants, furthering the messaging to his base that outsiders are a threat that must be removed.²²³ President Trump has yet to deport a number close to that figure,²²⁴ however, he has attacked immigrants with repeated calls to build a wall,²²⁵ labeling immigrants as threats,²²⁶ and ordering highly-visible raids at places where large numbers of immigrants are employed.²²⁷

Part of President Trump's anti-immigrant policy has included issuing highly-publicized raids to arrest and deport unauthorized immigrants. While headlines across the country publicize these raids, they have not been successful in deporting the millions of undocumented immigrants like President Trump promised.²²⁸ Instead, these raids symbolize to his

221. See *Regents of the Univ. of Ca. v. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *cert. granted* 139 S. Ct. 2773; *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018), *cert. granted* 139 S. Ct. 2779 (2018). See also *Litigation Related to Deferred Action for Childhood Arrivals*, NAT'L IMMIGRATION LAW CTR., <https://www.nilc.org/issues/daca/litigation-related-to-the-daca-program/> [<https://perma.cc/S8T3-6XC2>].

222. See Reilly, *supra* note 213.

223. See Mark, *supra* note 116 (referring to Trump's 2014 attacks on Obama for using executive actions to create immigration policy).

224. See Jennifer Rubin, *Don't Forget That, for a Year, Trump Called for Deporting All Illegal Immigrants*, WASH. POST (Aug. 23, 2016), <https://www.washingtonpost.com/blogs/right-turn/wp/2016/08/23/dont-forget-that-for-a-year-trump-called-for-deporting-all-illegal-immigrants/> [<https://perma.cc/8ZX7-J8V2>] (quoting Donald Trump as saying, "[w]e have at least 11 million people in this country that came in illegally. They will go out.").

225. In fiscal year 2018, the most recent year with complete data, ICE and CBP deported 387,287 unauthorized immigrants. John Gramlich, *How Border Apprehensions, ICE Arrests, and Deportations Have Changed Under Trump*, PEW RESEARCH CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/> [<https://perma.cc/A5YT-HLVC>]. These numbers are still below the number of deportations under the Obama Administration, around 400,000 per year. *Id.*

226. See Keith, *supra* note 1.

227. Such as the call for "extreme vetting" of Muslims entering the United States. See Beydoun *supra* note 56.

228. This includes a 2019 raid by Immigrations and Customs Enforcement in a Mississippi food-processing plant, just days after the mass shooting at the El Paso Wal Mart in August. See *Mississippi Employers in ICE raids Unlikely to be Prosecuted*, PBS NEWS HOUR (Aug. 10, 2019), <https://www.pbs.org/newshour/show/mississippi-employers-in-ice->

base his efforts to address unauthorized immigration—through high-publicity enforcement tools.²²⁹ For example, in the first week of February 2017, hundreds of immigration arrests marked the beginning of the first mass raids under President Trump, and indicated that there were more to come.²³⁰ The emphasis on raids as a tool of enforcement, and perhaps more importantly as a means to pacify the base of the anti-immigrant political right, continues, as evidenced by a raid in 2018 in which ICE officials arrested more than 150 individuals in northern California during a three-day immigration enforcement operation.²³¹ The Trump Administration has also received criticism for conducting dozens of small immigration raids at 7-Eleven stores across the country.²³² Acting ICE Director Thomas Homan said the raids were meant to “send a strong message to U.S. businesses that hire and employ an illegal workforce.”²³³

President Trump has indeed followed his promises to attack the purported threat posed by immigrants. In doing so, he has undertaken executive actions he criticized his predecessor for, has rescinded programs aimed to protect innocent young adults that only know this country as their homeland, and has undertaken highly-visible, but numerically insignificant, raids to give his political supporters the appearance of fulfilling his anti-immigrant campaign promises. Even though President Trump’s measures have not resulted in large-scale deportations, they have essentially put immigrants in a “deportable” state—an ambiguous legal situation in which their vulnerability to exploitation is heightened. The ultimate goal is seemingly not “deportation,” but discretionary “deportability” whenever unauthorized immigrants feel like a problem.²³⁴ For immigrants, it is like living with a sword of uncertainty hanging over their heads.

raids-unlikely-to-be-prosecuted [<https://perma.cc/Z5LJ-J99V>] (detailing ICE raid in several Mississippi food-processing plants where hundreds of suspected undocumented immigrants were detained). In that raid, over 600 individuals were arrested on charges that appear to be related to immigration violations. *Id.*

229. Zolan Kanno-Young & Michael D. Shear, *ICE Signals Mass Immigration Arrests, but not the ‘Millions’ Trump Promised*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/politics/trump-immigration-deportations.html> [<https://perma.cc/A7ZP-M2QM>].

230. See *id.* (discussing President Trump’s promise to conduct immigration raids).

231. Seung Min Kim and Ted Hesson, *Trump Just Getting Started with Immigration Raids*, POLITICO (Feb. 13, 2017), <https://www.politico.com/story/2017/02/trump-immigration-raids-234970> [<https://perma.cc/A2RP-WJPF>].

232. *ICE Announces More Than 150 People Arrested in San Francisco Area*, CBS NEWS (Feb. 28, 2018), <https://www.cbsnews.com/news/ice-arrests-immigration-operation-san-francisco-bay-area/> [<https://perma.cc/AP89-HGXM>].

233. fcis]See James Doubek, *ICE Targets 7-Eleven Stores in Nationwide Immigration Raids*, NPR (Jan. 11, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/11/577271488/ice-targets-7-eleven-stores-in-nationwide-immigration-raids> [<https://perma.cc/B9P9-RK2V>] (describing the 7-Eleven raids and the subsequent response from proponents and detractors).

234. *Id.*

III. LET'S MAKE AMERICA WHITE AGAIN

President Trump's immigration policies point towards a clear goal: to stem ongoing demographic trends that point to a more diverse—and accordingly, brown—America in the near future. His rhetoric and policy-making has denigrated and derided racial minorities while defending white-nationalists.²³⁵ President Trump and his supporters prioritize immigration because they perceive the issue to be about their own survival.²³⁶ For Trump voters, immigration dilutes *their* America, rendering it unrecognizable, and their privileged position in American society is threatened in the process. But—restricting immigration is not just about retaining jobs—it is also about ostensibly preserving “American” culture.²³⁷ For President Trump, immigration is but a proxy for race; an issue where race permeates every conversation, yet he uses the issue of race as code, as a form of dog-whistling.²³⁸ For Trump supporters, it is acceptable to defend America from foreigners, while ignoring that an idealized version of America is a white America, and that the foreigners who scare them are not white.²³⁹ Trump's immigration policies—and their connection to race—are not a dog whistle, but a rebel yell. And Trump's promise to “Make America Great Again” delivers to his supporters on this call.²⁴⁰

As unprecedented as President Trump's actions may seem, he is rehashing old tropes and furthering immigration policies that had previously been found on the fringes of the political discourse. The Federation for American Immigration Reform (FAIR) has long espoused many of the ideas that are now part and parcel of the Trump Administration.²⁴¹ Its founder, John Tanton, is a white nationalist who opposes Latin American immigration and

235. After all, unauthorized immigrants provide the cheap labor that many industries in the United States have come to rely on. See Hannah Denham, *What We Know About the 5 Companies Targeted in the ICE raids in Mississippi*, WASH. POST (Aug. 9, 2019), <https://www.washingtonpost.com/business/2019/08/08/what-we-know-about-five-companies-targeted-mississippi-ice-raids/> [https://perma.cc/J37J-QKMQ].

236. President Trump defended the white-nationalists who rallied in protest of the removal of a Confederate statute in a park in Charlottesville, Virginia in August 2017. See Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames 'Both Sides'*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> [https://perma.cc/8NZ6-S8TL]. In response to the rally and death of a counter-protester, President Trump remarked that “there is blame on both sides.” *Id.*

237. See Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 P.S.: POLITICAL SCI. & POL., no. 3, 2018, at 528, 531 (observing that anti-immigrant sentiment and racism both played a strong role in predicting a Trump vote).

238. Michael Tesler, *Economic Anxiety Isn't Driving Racial Resentment. Racial Resentment is Driving Economic Anxiety*, WASH. POST (Aug. 22, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/22/economic-anxiety-isnt-driving-racial-resentment-racial-resentment-is-driving-economic-anxiety/> [https://perma.cc/S7YM-V8RE].

239. See generally IAN HANEY LOPEZ, *DOG WHISTLE POLITICS* (2019) (describing how the political Right has used coded racial language to advance its electoral fortunes and undermine equality since the 1960s).

240. See Hooghe & Dassonneville, *supra* note 236 (discussing the anti-immigrant and race-based factors in voting for Trump).

241. See Daniel Cox et al., *supra* note 53 (discussing, among other factors, fear of immigration, cultural displacement, and economic hardship as a predictors for voting for Trump).

bemoans the demographic decline of white, Protestant Americans in states like California, drawing comparisons to apartheid rule in South Africa.²⁴² FAIR is on the record opposing the Immigration and Nationality Act of 1965, the 14th Amendment's birthright-citizenship clause, and the provision of services at the state and local level to unauthorized immigrants and their families, among other anti-immigrant measures.²⁴³ Former Kansas Secretary of State Kris Kobach, who works for FAIR's legal arm, helped craft the controversial Arizona Senate Bill 1070, which granted local police officers the authority to question and detain individuals who lacked authorization to reside in the United States. Kobach's policies caused him to briefly be considered by President Trump for the position of "immigration czar."²⁴⁴ FAIR is but one of the many fringe anti-immigrant organizations that have now gained legitimacy and a wide audience as a result of the President's bully pulpit.²⁴⁵

The modern roots of xenophobia in the United States are rooted in the European "Great Replacement" idea—that is, the trope that non-white, non-Christian, non-Western immigrants are replacing native Europeans and irrevocably altering the racial and cultural makeup of Europe.²⁴⁶ In this worldview, the white race is endangered and threatened by more prolific non-Western immigrants.²⁴⁷ This manifests in the United States with Americans fearing that they are being displaced (and replaced) by immigrants who do not assimilate, do not play fair, and receive perks from a liberal-welfare state at the expense of hard-working Americans.²⁴⁸ The belief feeds off of centuries of white privilege, slavery and its aftermath, and segregation.²⁴⁹ As the civil rights movement promised to deliver equality of

242. See Carly Goodman, *The Shadowy Network Shaping Trump's Anti-Immigration Policies*, WASH. POST (Sept. 27, 2018), <https://www.washingtonpost.com/outlook/2018/09/27/shadowy-network-shaping-trumps-anti-immigration-policies/> [https://perma.cc/H6Q4-JR3G] (discussing FAIR's history and its staffer's integration into the Trump Administration).

243. John Tanton, 'WITAN Memo' III, SOUTHERN POVERTY LAW CTR. (Oct. 10, 1986), <https://www.splcenter.org/fighting-hate/intelligence-report/2015/witan-memo-iii> [https://perma.cc/BKT8-QGYL].

244. SOUTHERN POVERTY LAW CTR. *Federation for American Immigration Reform*, <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> [https://perma.cc/7TKV-FKH3]. Other anti-immigrant measures include supporting Proposition 187, opposing the establishment of sanctuary cities for immigrants, and publishing anti-immigrant rhetoric online. See *id.*

245. S.B. 1070, 49th Leg., 2d Reg. Session (Ariz. 2010). See also Maggie Haberman & Annie Karni, *A Would-Be Trump Aide's Demands: A Jet on Call, a Future Cabinet Post and More*, N.Y. TIMES (May 20, 2019), <https://www.nytimes.com/2019/05/20/us/politics/kris-kobach-trump.html> [https://perma.cc/3T3U-8PNM]. Kris Kobach listed ten conditions, which included access to a government plane, an office in the West Wing, guaranteed weekends off, and assurance of being made homeland security secretary by November, in order for him to be considered as "immigration czar." *Id.* Rather than take on this position, he currently running for the United States Senate in the 2020 election. KOBACH U.S. SENATE, <https://kriskobach.com> [https://perma.cc/SKD9-Y8YT].

246. See Goodman, *supra* note 241 (discussing the history of and the network surrounding FAIR).

247. John Feffer, *The 'Great Replacement' is a Genocidal Playbook*, THE NATION (Oct. 22, 2019), <https://www.thenation.com/article/archive/white-supremacist-great-replacement/> [https://perma.cc/KY33-NEH5].

248. *Id.*

249. See Courtney Hagle, *How Fox News Pushed the White Supremacist "Great Replacement" Theory*, MEDIA MATTERS (Aug. 5, 2019), <https://www.mediamatters.org/tucker-carlson/how-fox-news-pushed-white-supremacist-great-replacement-theory> [https://perma.cc/RSL9-GUMR] (discussing the "Great Replacement" theory as it appeared in the

opportunity to communities of color, many whites chafed at what they perceived as unfair advantages being lavished on racialized “Others.”²⁵⁰ The downturn in manufacturing and the globalization of the economy further alienated blue-collar Americans who felt they were being denied the American Dream while immigrants and communities of color received federal government handouts.²⁵¹ This resentment was exacerbated by liberal politicians who seemed to ignore the white-working class while catering to big cities, globalization, diversity, and multiculturalism.²⁵²

Donald Trump’s campaign capitalized on these fears of replacement. Steve Bannon, as Trump’s campaign manager, designed a populist-nationalist electoral strategy that tapped into the white-working class’s pent-up frustrations.²⁵³ Former Obama voters, upset with Washington politics, concerned about their economic future, and apprehensive about their fading place in American society, turned to Donald Trump in 2016. Candidate Trump hit the nativist nerve of these anxious voters, and quelled fears of replacement. Donald Trump capitalized on their economic and racial fears and since his election he has served as a conduit to support a racist and xenophobic ideology. Trump voters’ fears and underlying prejudices have provided a populist political opening that has granted openly-racist white supremacists access to the highest office in the United States.

Trump’s speeches center around White America while dismantling the nation’s immigration system to curtail demographic changes deemed pernicious to White Americans.²⁵⁴ He delivers nostalgia for a time past when men and women assumed traditional gender roles; political correctness did not exist; coal, steel, and manufacturing reigned supreme; people of color “knew their place”; and the American dream seemed attainable for the average man.²⁵⁵

August 2019 El Paso mass-shooter’s manifesto, and providing a non-comprehensive list of times when Fox News pushed for the “Great Replacement” theory in its reporting).

250. See Eoin Higgins, *The White Backlash to the Civil Rights Movement*, MEDIUM (May 22, 2014), <https://eoinhiggins.com/the-white-backlash-to-the-civil-rights-movement-1817ff0a9fc> [<https://perma.cc/7UYH-MTKF>] (describing white backlash as a response to racial integration and the dissipation of white privilege).

251. See *id.*

252. See Kat Chow, *Why More White Americans are Opposing Government Welfare Programs*, NPR (June 8, 2018), <https://www.npr.org/sections/codeswitch/2018/06/08/616684259/why-more-white-americans-are-opposing-government-welfare-programs> [<https://perma.cc/8FX5-XDMY>] (describing a study that found that since 2008, more white people in the United States oppose welfare programs in part because of increasing “racial resentment”).

253. The Hillary Clinton 2016 presidential campaign was a case-in-point, and a good example of an ongoing trend in American liberal politics. See generally, SASHA POLAKOW-SURANSKY, *GO BACK TO WHERE YOU CAME FROM: THE BACKLASH AGAINST IMMIGRATION AND THE FATE OF WESTERN DEMOCRACY* 2017.

254. See Ronald Brownstein, *Donald Trump’s Fragile Hold on America*, THE ATLANTIC (Nov. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/11/trump-bannon-election/508688/> [<https://perma.cc/N5XE-FLVK>] (quoting Steve Bannon as saying, “[t]he globalists gutted the American working class and created a middle class Asia . . . [t]he issue now is about Americans looking to not get [messed] over. If we deliver, we’ll get 60 percent of the white vote, and 40 percent of the black and Hispanic vote and we’ll govern for 50 years.”).

255. See Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further his Immigration Obsession*, THE NEW YORKER (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates->

However, under President Trump, seeking that dream has become untenable for immigrants. Obtaining asylum, getting visas, attaining permanent residency, and becoming a naturalized citizen have become more difficult in the United States.²⁵⁶ The Trump Administration has not only sought to modify immigration policies, but it is also actively undermining immigration-related federal agencies by removing staff, refusing to fill vacancies, expanding vetting procedures, delaying decisions, and raising the burden of proof for immigration cases.²⁵⁷ Legal immigration is increasingly a lengthier, costlier, and more frustrating process for prospective immigrants and their petitioners.²⁵⁸ President Trump has become the proverbial “wrecking ball” in the United States immigration system, and has consequentially bolstered his image as a “disruptor” in Washington.²⁵⁹

In addition, the widely-publicized mistreatment of refugees and their children not only seeks to discourage people from coming to the United States to claim asylum, but it also undermines the reputation of the United States as a welcoming nation and beacon of hope for the oppressed.²⁶⁰ President Trump’s America is a bullying neighbor that has removed the welcome mat from the front door for prospective immigrants. He desires to reduce immigration—legal or otherwise—to miniscule levels.²⁶¹ His theory of American citizenship is one that allows white immigrants—preferably those from northern European countries—in, while keeping people of color out.²⁶² This policy echoes the words of his policy adviser Stephen Miller: “Continue to worship at the alter [sic] of multiculturalism and we may come to

donald-trump-to-further-his-immigration-obsession [https://perma.cc/8VYN-W9QT] (discussing top White House aide Stephen Miller’s influence in shaping President Trump’s immigration policy).

256. See Emrys Westacott, *Why Trump’s ‘Make America Great Again’ Nostalgia is a Dangerous Political Tool*, MEDIUM (July 25, 2016), <https://timeline.com/false-nostalgia-donald-trump-e935ef77018c> [https://perma.cc/K59L-GMLF] (discussing the nostalgia espoused by conservative political beliefs and Donald Trump’s rhetoric in particular).

257. In addition to his barriers to entry for asylum, President Trump has promulgated policies that expand the meaning of “public charge” when considering visa and green card applications. See Gavrielle Jacobovitz, *The Trump Administration Just Made it Harder to Apply for Green Cards and Visas*, HUFFINGTON POST (Aug. 12, 2019), https://www.huffpost.com/entry/public-charge-department-of-homeland-security-final-rule_n_5d449198e4b0ca604e31fb51 [https://perma.cc/GDS8-HNA2]. This rule is thought to have a “chilling effect” on millions of immigrants attempting to come to the United States. *Id.*; see also León Rodríguez, *The Trump Administration is Making Legal Immigration Harder, Too*, WASH. POST (July 29, 2019), <https://www.washingtonpost.com/outlook/2019/07/29/trump-administration-is-making-legal-immigration-harder-too/> [https://perma.cc/Q56S-4TU9] (discussing how delays at U.S. Citizenship and Immigration Services are making it more difficult to seek legal entry to the United States).

258. See Price, *supra* note 19 (discussing the Trump Administration’s pause on hiring immigration judges, and slowness in procuring support staff); see also Rodríguez *supra* note 256 (discussing delays at USCIS).

259. See Rodríguez, *supra* note 256 (discussing how Trump’s policies lengthen processing times and impose other burdens, such as appearing for an in-person interview, that increase costs for applicants).

260. See Thomas Hicks Jr. & Curtis Ellis, *Donald Trump: The Great Disrupter*, THE HILL (Oct. 17, 2018), <https://thehill.com/opinion/white-house/411535-donald-trump-the-great-disruptor> [https://perma.cc/BN6N-56EA].

261. See Lazarus, *supra* note 57.

262. See Catherine Rampell, *Trump’s Anti-Immigrant Agenda Isn’t About Rule of Law or Economics At All*, WASH. POST (Jan. 30, 2020), https://www.washingtonpost.com/opinions/trumps-anti-immigrant-agenda-isnt-about-rule-of-law-or-economics-at-all/2020/01/30/7a6b966a-43a8-11ea-b5fc-eefa848cde99_story.html [https://perma.cc/BKJ2-D3KM] (discussing Trump’s “public charge” rule as an effort to restrict immigration).

see that we are participating in the sacrifice of the one culture which binds us all.”²⁶³ For the Trump Administration, America is no longer a nation of immigrants; it is a nation *threatened* by immigrants.

CONCLUSION

These case studies show that the Trump Administration has sought to make immigration into the United States more difficult by blocking potential immigrants from entering the United States, deporting unauthorized immigrants, scaring them away, or making their lives so difficult that they would self-deport. If anything can define Donald Trump’s immigration policies, it is their emphasis on cruel attrition tactics. The bans and the raids come and go, but what remains in their aftermath is a generalized fear among immigrant communities. Immigrants feel less welcome, less wanted, and like they have no rights or legal recourse in the United States. With no other alternative but to remain in the shadows of society, immigrant communities live in fear of deportation, or of being forced to make the dreaded choice to return to countries that they left long ago. The Muslim Bans, the separation of families at the border, the rescission of DACA, and the random raids and deportation of immigrants with no criminal history create uncertainty in the United States for immigrants.

Trump’s attrition tactics are cruel and un-American, despite having an overall negligible impact on the actual number of immigrants in the country. In addition to spreading fear among immigrants, his policies most importantly show his core base of voters that he is tough on immigration. The Trump Administration and its most ardent xenophobes have provided the changes that their voters yearn for—one raid at a time. For President Trump and his voters, in this fictional dreamscape, America’s shifting demographics will grind to a halt—and return to a primarily-white populace in the not-so-distant future. For the xenophobes in his administration, Trump is the first—and perhaps last—chance that they have to push their racist agenda. For Trump, who is neither an ideologue nor an intellectual, his racist and white-supremacist immigration agenda has become his political brand, his ticket to the top, and his best hope for a second term. Surrounded as he is by immigrants and the children of

263. See Jamelle Bouie, *Trump’s America is a ‘White Man’s Country’*, N.Y. TIMES (July 15, 2019), <https://www.nytimes.com/2019/07/15/opinion/trump-aoc-omar-pelosi.html> [<https://perma.cc/2RUX-GL4N>] . Donald Trump, in a meeting about immigration policy, once decried immigrants from Haiti, El Salvador, and African nations coming the United States, and referred to these nations as “s***hole countries.” See Josh Dawsey, *Trump Derides Protections for Immigrants from ‘S[***]hole’ Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/25LH-VHZ4>] .

immigrants—including in his own family²⁶⁴—Trump is not the best role model for white xenophobes, but he will do for now.

Does the Trump Administration represent a political outlier, a last gasp for xenophobic white nationalism, or a significant backlash sparked by our nation nearing some sort of demographic tipping point? It is hard to tell how popular Trump's anti-immigrant ideas and actions still are among his 2016 supporters. Some have soured on Trump,²⁶⁵ while others unconditionally support the President. His policies reflect that he believes he received a mandate from American voters to implement radical, harsh, and cruel immigration policies—despite having lost the popular vote and having won the presidency by a slim margin in a handful of key states.²⁶⁶ President Trump has been unapologetic about his anti-immigration stance since taking office. He is planning to continue to promulgate anti-immigration policies and he is betting his re-election on their popularity among key demographic sectors that gave him the electoral edge in 2016.²⁶⁷ President Trump can now boast about his anti-immigration record to his base, and continue the scare tactics he employed in his 2016 campaign concerning saving “American” culture,²⁶⁸ and make a general appeal to the public that without him, America would be flooded by foreigners of color.²⁶⁹

Meanwhile, Trump's wrecking ball is causing long-lasting damage to an immigration system that has been in place for decades; one based on the humanitarian premise of reuniting families. Trump not only wants to do away with family reunification as an immigration priority by replacing it with a merit-based priorities, he also wants to reduce immigration to historic lows. The 2020 presidential election—where Trump is campaigning

264. Stephen Miller, *America: The Forgotten Campus Culture*, THE CHRONICLE (Nov. 19, 2006), <https://www.dukechronicle.com/article/2006/11/america-forgotten-campus-culture> [https://perma.cc/LVN7-3F3X].

265. Ironically, Trump's family has benefitted from the current immigration system. His mother, as well as two of his wives, were immigrants, and Trump has employed hundreds of immigrants (some of them undocumented) in his properties. See Chris Frates, *Donald Trump's Immigrant Wives*, CNN (Aug. 24, 2015), <https://www.cnn.com/2015/08/24/politics/donald-trump-immigrant-wives/index.html> [https://perma.cc/YCN5-T77P]; see also Joshua Partlow & David A. Fahrenthold, *How Two Housekeepers Took on the President—and Revealed That His Company Employed Undocumented Immigrants*, WASH. POST (Dec. 4, 2019), https://www.washingtonpost.com/politics/how-two-undocumented-housekeepers-took-on-the-president—and-revealed-trumps-long-term-reliance-on-illegal-immigrants/2019/12/04/3dff5b5c-0a15-11ea-bd9d-c628fd48b3a0_story.html [https://perma.cc/ZD4P-PBR7].

266. See Evan Siegfried, *Trump's Biggest Risk in 2020 Isn't Losing Young People. It's Losing Their Grandparents*, NBC (June 17, 2019), <https://www.nbcnews.com/think/opinion/trump-s-biggest-risk-2020-isn-t-losing-young-people-nca1018216> [https://perma.cc/6PFQ-CJ2Q] (discussing how people over the age 65 have declined in their support of Donald Trump since his 2016 election, and may move towards voting for Democrats in upcoming elections).

267. See Jesse Ferguson, *Donald Trump and the Republicans Have No Mandate*, TIME (Dec. 21, 2016), <https://time.com/4608547/donald-trump-republicans-no-mandate/> [https://perma.cc/7TPS-VCRV] (discussing Donald Trump's slim-election margins, and that because of this he does not have a mandate for the policies that he campaigned on).

268. See *Could Donald Trump's Immigration Approach Help American Workers—and His Re-Election Chances?*, THE ECONOMIST (Feb. 14, 2020), <https://www.economist.com/podcasts/2020/02/14/could-donald-trumps-immigration-approach-help-american-workers-and-his-re-election-chances> [https://perma.cc/J8HL-MFAV].

269. Read: White Middle-America

on anti-immigration policies²⁷⁰—will tell us if white nationalism still has traction in United States politics or if it deserves to be consigned to the trash heap of history.²⁷¹

270. Eric Lutz, *Trump's 2020 Strategy: Target Grandpa With Anti-Immigrant Ads*, VANITY FAIR, (Apr. 16, 2019), <https://www.vanityfair.com/news/2019/04/trump-2020-strategy-target-grandpa-with-anti-immigrant-facebook-ads> [<https://perma.cc/J6RW-J6PN>].

271. See *Making America Great Again: Immigration*, DONALD J. TRUMP FOR PRESIDENT, <https://www.promiseskept.com/achievement/overview/immigration/> [<https://perma.cc/U5YQ-Y3NB>] (describing how “President Trump has enforced immigration laws to protect American communities and American jobs,” and listing many of the policies discussed in this paper. See discussion, *supra*).