THE PRESIDENT'S IMMIGRATION POWERS: MIGRATORY LABOR AND RACIAL ANIMUS

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Since the nation's founding, presidents have been motivated by racial animus while using executive powers over migratory labor. Early presidents enforced the Constitution's fugitive slave provision. They explored diplomacy to deport free blacks to Africa. From the 1880s through 1940s, presidents acted on the racial animus of workers by restricting laborers from China and Japan, and later, Europe. Franklin Delano Roosevelt's internment order—based more on anti-Japanese sentiments of Californians and their elected leaders than military necessity—resulted in the coerced labor of Japanese Americans, to the benefit of bigoted farm owners.

Against this backdrop, I examine President Donald Trump's immigration orders that affect employment relationships. Twenty lawsuits have been filed: They challenge the travel ban; rescission of DACA (Deferred Action for Childhood Arrivals), DAPA (Deferred Action for Parents of Americans), and TPS (Temporary Protected Status); covert vetting for citizenship petitions (Controlled Application Review and Resolution Program, or CARRP); and presidential obstruction of MAVNI (Military Accessions Vital to the National Interest), a program for foreigners in the military to gain citizenship.

I quantified results for first-round and subsequent rulings: (1) the Administrative Procedure Act and Due Process Clause were cited, respectively, in 75% and 70% of cases; (2) jurisdiction was found in 96% of the cases; (3) in 77% of the cases involving a request for an injunction, courts granted some form of relief; (4) overall, plaintiffs won all or part of 89% of the rulings.

I conclude that President Trump's approach to migratory labor follows numerous presidents who acted on racial animus prior to 1965, when the Immigration and Nationality Act was enacted. The results suggest that Pres-

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ident Trump has overreached in using executive immigration powers, violating statutory and constitutional requirements. In view of judicial deference to executive actions in immigration matters, the results signify new limits to presidential powers.

> I received, in the last year of my entering into the administration of the general government, a letter from the governor of Virginia . . . on the means on procuring some such asylum to which these people might be occasionally sent. I proposed to him the establishment of Sierra Leone, in which a private company in England had already colonized a number of negroes. . . .[1]
>
> —President Thomas Jefferson

> [I]f the average family in which there are children contained but two children the nation as a whole would decrease in population so rapidly that in two or three generations it would very deservedly be on the point of extinction, so that the people who had acted on this base and selfish doctrine would be giving place to others with braver and more robust ideals. . . . [A] race that [practiced] such doctrine—that is, a race that practiced race suicide—would thereby conclusively show that it was unfit to exist, and that it had better give place to people who had not forgotten the primary laws of their being.[2]
>
> —President Theodore Roosevelt (comparing low birth rate among whites to other races)

> There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life . . .[3]
>
> —President Woodrow Wilson

1. Letter from Thomas Jefferson, President of the U.S., to John Lynd (Jan. 21, 1811), *in* FIRST ANNUAL REPORT, AM. SOC'Y FOR COLONIZING THE FREE PEOPLE OF COLOR OF THE U.S. 13 (Washington, D.C., D. Rapine 1818), https://archive.org/stream/ASPC0001932500#page/n11/mode/2up [https://perma.cc/C8EK-GB5E].

2. Theodore Roosevelt, Speech Before the National Congress of Mothers: On American Motherhood (Mar. 13, 1905), *in* THE WORLD'S FAMOUS ORATIONS (William Jennings Bryan & Francis Whiting Halsey eds., Online ed., Bartleby.com 2003) (1906), https://www.bartleby.com/268/10/29.html [https://perma.cc/NJ8M-ZJMV]. Roosevelt was referring to whites when he urged families to have more children. *See* THOMAS G. DYER, THEODORE ROOSEVELT AND THE IDEA OF RACE 150 (La. State Univ. Press 1992) ("The sheer bulk of Roosevelt's writing and speaking on the entire issue demonstrated that he considered race suicide of great importance to the survival of 'white civilization.'").

3. President Woodrow Wilson, Third Annual Message (Dec. 7, 1915).

> We have people coming into the country, or trying to come in —we're stopping a lot of them. . . . You wouldn't believe how bad these people are. These aren't people, these are animals, and we're taking them out of the country at a level and at a rate that's never happened before.[4]
>
> —President Donald Trump

I. INTRODUCTION

A. Overview

Although presidents have issued 5,884 executive orders,[5] courts have invalidated only a few.[6] A President has plenary powers over immigration, an outgrowth of Article II powers to conduct foreign affairs and to faithfully execute laws. Courts often decline jurisdiction in challenges to immigration actions.[7]

4. Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html [https://perma.cc/NRW4-UA8A].

5. *The American Presidency Project*, UNIV. OF CAL. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/app-categories/written-presidential-orders/presidential/executive-orders [https://perma.cc/XCB4-3G7X] (last visited Dec. 4, 2018). There is a discrepancy between the number of executive orders catalogued in the database and the present count of executive orders, which exceeds 13,000. The American Presidency Project explains "that our collection of executive order texts is complete beginning with the administration of Harry S. Truman through the present. For the period of time prior to 1945 . . . the collection is not complete—although it includes all documents published in official presidential compilations. The archives of the American Presidency Project continue to grow as we obtain and digitize original texts." The earliest executive orders were not numbered. This may also explain the discrepancy. The first executive order in the database, issued by President John Q. Adams, officially announced the death of Thomas Jefferson and John Adams. *See* John Q. Adams, Executive Order [on the death of Thomas Jefferson] (July 11, 1826), THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/200526 [https://perma.cc/J245-8SA9] (last visited Sept. 30, 2019).

6. *E.g.*, Jecker v. Montgomery, 54 U.S. 498, 515 (1851) (holding that presidential order establishing a prize court in a foreign land, where the U.S. Navy captured a ship that was dealing with an enemy, was not upheld because the court was neither established by the Constitution or act of Congress). More recently, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and Korematsu v. United States, 323 U.S. 214 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

7. *But see* Ramos v. Nielsen (*Ramos I*), No. 18-cv-01554-EMC, 2018 WL 3109604, at *1 (N.D. Cal. June 25, 2018) (reviewing challenge to immigration-based executive order).

For nearly 300 years, people have come from around the world to the United States for work. Some as slaves, some as indentured servants—involuntary and voluntary—some as Mexican peons or Chinese coolies,[8] some as free people seeking refuge or asylum, some who unlawfully entered the United States as children or adults, and others with an employment visa. Most have been people of color (and for significant periods of American history, some Europeans have been treated like people of color).[9]

There are good reasons not to refer to these dislocated people as "immigrants." That term refers to a person's voluntary intention to make a permanent residence in the United States.[10] The voluntary element does not apply to slaves, forcibly removed from Africa and resettled in America. The Constitution referred to their journey as a "migration."[11] The permanence element does not apply to Central Americans and Haitians who have Temporary Protected Status (TPS). However, many have resided continuously in the United States since the 1990s, they have been approved to work, and now face deportation from President Trump. Despite the differing circumstances, however, these examples bear many similarities to how we typically understand what it means to be an immigrant. Over time, they have worked, set down roots, married and raised families, and established a permanent and voluntary presence. Whatever their legal status and length of presence in the United States, foreigners have caused recurring economic insecurity for American workers, particularly when immigration has been framed in racial terms. For these reasons, I use the term "migratory labor," which applies to people who have come to work in America under a wide variety of circumstances, and references their role

8. I use this term for Chinese labor with reservations because of its derogatory history. Nonetheless, the word cannot be avoided in recalling the racial discrimination directed at Chinese immigrants and their descendants. *E.g.*, *In re* Chang, 344 P.3d 288, 288 (2015) (granting Hong Yen Chang, a native of China who graduated from Columbia Law School, posthumous admission to the California bar).

9. *E.g.*, MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 128 (2011); James Pula, *American Immigration Policy and the Dillingham Commission*, 37 POLISH AM. STUD. 5, 18-19 (1980) (citing a U.S. Immigration Commission dictionary of races that classified Poles by "their physical inheritance [insofar] as they resemble the 'Eastern' or Slavic race more than that of northwestern Europe") (internal quotation omitted).

10. Dandamudi v. Tisch, 686 F.3d 66, 70 (2d Cir. 2012) (discussing "immigrant" and "nonimmigrant" and how this distinction relates to permanent and temporary residency).

11. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 18 (2007).

once arriving in the United States as opposed to their motivation for immigration.

I use empirical analysis to measure judicial review of President Trump's anti-immigrant orders, proclamations, and policies. These employment-related actions include the travel ban largely affecting Muslims, the "Hire American" executive order revising the H-1B visa, rescissions of President Barack Obama's Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) actions that allowed certain unlawful immigrants to qualify for temporary employment permits, and similar rescissions of TPS (Temporary Protected Status) for a wide range of long-time residents from Central American and other countries. These immigration actions, which either directly or indirectly affect the labor market in the United States, are challenged in twenty different cases, some that consolidate several lawsuits. As of this writing, the Trump Administration has lost most rulings. The emerging trend suggests that the President has overreached with respect to his constitutional authority while precipitating precedents that limit presidential powers.

My study only begins here: I analyze this emerging trend through a long historical lens. President Trump's racially tinged approach compares to actions taken by other presidents. I begin by exploring the Constitution, specifically the provisions which institutionalized slavery. I then examine presidential action relating to migratory labor, beginning with George Washington. Twelve presidents owned slaves, one of whom traded in slaves while in office.[12] Some early presidents believed that neither free black people nor slaves could assimilate in white America and used their office to pursue deportation of black people to Africa.[13] Other presidents used their Article II powers to enforce the fugitive slave provisions of the Constitution.[14]

The Civil War led to the abolition of slavery, but peonage and other forms of debt labor soon took its place. These newer servitudes exploited migrants of color—initially, Chinese and Mexican

12. Gleaves Whitney, *Slaveholding Presidents*, HAUENSTEIN CTR. FOR PRESIDENTIAL STUD. (July 19, 2006), https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1021&context=ask_gleaves [https://perma.cc/QB6Q-J9V8].

13. *See* Henry Noble Sherwood, *The Formation of the American Colonization Society*, 2 J. NEGRO HIST. 209, 217 (1917).

14. WALTER H. MAZYCK, GEORGE WASHINGTON AND THE NEGRO 118-120 (1932).

workers.[15] Additionally, White workers who felt threatened by the otherness of these foreigners[16] organized unions and even a political party.[17] In time, their racial animus traveled to the White House, where presidents gave voice and action to their intolerance.[18] From 1875 through 1952, Congress enacted racially-tinged immigration laws[19] that excluded, restricted, and catalogued foreigners who competed in labor markets with white Americans.[20]

Presidents rarely stood against these laws. Occasionally, presidents were political agents for white workers who advocated immigration restrictions to preserve racial purity, superiority, separation, and exclusion.[21] In one jarring example, an executive order forcibly removed Japanese American citizens from their homes and jobs and led to their incarcerated labor.[22]

My study concludes: (1) President Trump's approach to immigration follows numerous presidents whose treatment of migratory labor was motivated by racial animus; (2) most of President Trump's immigration orders that affect employment fall outside the Constitution's Article II powers over foreign affairs, and many courts have not dismissed lawsuits that challenge these actions; and (3) as courts adjudicate President Trump's immigration orders and policies relating to employment, presidential powers over immigration erode significantly.

B. Organization of This Article

Part II examines President Trump's immigration orders and administrative actions and their effects on migratory labor.[23] Part II.A puts the President's broad immigration powers into context.[24]

15. 1 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 249 (Francis Wharton, ed. 2d. 1887).

16. Heong v. United States, 112 U.S. 536, 566 (1884).

17. SAMUEL GOMPERS & HERMAN GUTSTADT, MEAT VS. RICE: AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM: WHICH SHALL SURVIVE? 14 (1902).

18. *E.g.*, Wilson, *supra* note 3.

19. Page Act of 1875, Pub. L. No. 43–141, 18 Stat. 477 (1875); Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882); Geary Act, ch. 60, § 1, 27 Stat. 25 (1892) (repealed 1943); Immigration Act of 1924, ch. 190, § 11(a) , 43 Stat. 153, 159–160 (1924), Emergency Quota Act of 1921, Pub. L. No. 67–5, ch. 8, 42 Stat. 5 (1921), Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(6)(C) (1952).

20. *Infra* notes 198–203.

21. *Infra* notes 213, 228, and 256–257.

22. *Infra* note 293.

23. *Infra* notes 40–122.

24. *Infra* notes 51–56.

Part II.B[25] examines three areas where this President's actions have affected employment: (1) the President's executive orders, specifically the "travel ban"[26] and a "Hire America" policy that regulates H-1B visas;[27] (2) the administration's work-related immigration policies, including the termination of two deferred enforcement programs—DACA[28] and DAPA[29]—and the rescission of TPS for Central Americans and Haitians;[30] (3) this administration's practices—distinguished from its policies—that implicate the same employment authorization effect.[31] Part II.C analyzes litigation data for the cases in Part II.B.[32] Subpart (1) explains how the sample was created.[33] Subpart (2) provides data and fact findings.[34] Table A shows the laws used by plaintiffs to challenge the President's actions.[35] Table B shows how often (1) courts invoke or deny jurisdiction, (2) plaintiffs win, and (3) courts issue or continue injunctions.[36] I conclude this discussion with four key fact findings.[37]

Parts III through V put these findings in historical context. Part III covers the founding of the republic,[38] Part IV explores the modern era of federal regulation of immigration,[39] and Part V focuses on the contemporary period, running from 1952 through 2016.

Part VI synthesizes the two tracks of my analysis—one trained on President Trump, the other exploring how presidents since Washington enforced policies for migratory labor. My main conclusion is that President Trump's xenophobic approach has many historical precedents but is incompatible with current immigration law.

25. *Infra* notes 57–114.
26. *Infra* notes 57–67.
27. *Infra* notes 68–74.
28. *Infra* notes 75–82.
29. *Infra* notes 83–86.
30. *Infra* notes 87–95.
31. *Infra* notes 98–113.
32. *Infra* notes 115–122.
33. *Infra* notes 115–117.
34. *Infra* pp. 22–25.
35. *Infra* p. 23.
36. *Infra* p. 24.
37. *Infra* pp. 22–25.
38. *Infra* notes 123–170.
39. *Infra* notes 171–306.

II.
PRESIDENT TRUMP'S IMMIGRATION ORDERS AND ACTIONS AFFECTING EMPLOYMENT

The idea that many presidents have harbored racial animus is hard to accept. Reverential myths cloud our perceptions of these honored leaders—George Washington never told a lie, Thomas Jefferson pioneered equality, Theodore Roosevelt was progressive, Woodrow Wilson, an intellectual, was above bigotry, and Franklin Roosevelt, champion of liberalism, reluctantly interned Japanese Americans at the military's insistence. There is some truth to these portrayals but much distortion. Also, it may be uncomfortable to associate these highly regarded presidents with President Trump, especially due to his racist tweets and pronouncements.[40] But all these presidents, in different degrees, succumbed to racial bias in using their powers against migratory laborers. What is more worrisome is that few courts have curbed a President's immigration powers when used for racially invidious purposes. The Constitution is my starting point for understanding this abyss in checks and balances.

A. Presidential Immigration Powers

Executive orders and presidential proclamations are enigmas because they lack explicit statutory authority. But while the Constitution makes no mention of them, the Constitution mandates policies for citizenship,[41] immigration,[42] and race[43]—policies that

40. *E.g.*, Peter Baker, *Trump Fans the Flames of a Racial Fire*, N.Y. TIMES (July 14, 2019), https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-race.html [https://perma.cc/LRW7-X7J6] (comparing Trump's "Go Back Home" tweetstorm against four dark-skinned Congresswomen to his "birther" conspiracy theory attacking Barack Obama, his 2015 campaign attack on Mexican "rapists" coming across the border, his assertion that Haitian immigrants "all have AIDS" and African visitors would never "go back to their huts" and his statement that were "very fine people on both sides" of the Charlottesville white nationalist rally); Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [https://perma.cc/E9MM-RFZM] (reporting President Trump as saying "Why are we having all these people from shithole countries come here?" He reportedly continued, "Why do we need more Haitians? Take them out.").

41. U.S. CONST. art. I, § 2, cl. 2 (explaining eligibility standard for House of Representatives includes requirement of U.S. citizenship for seven years); U.S. CONST. art. I, § 3, cl. 3 (eligibility standard for House of Representatives includes requirement of U.S. citizenship for nine years); U.S. CONST. art. II, § 1, cl. 5 (eligibility standard for House of Representatives includes requirement of a "natural

undeniably favored white people because of how the Three-Fifths Clause gave slave states outsized influence in the national politics. Article II confers unilateral authority on the President on a variety of matters—to serve as commander in chief, grant reprieves and pardons, and fill vacancies in the executive branch—but does not grant any power explicitly related to involuntary migration (slaves), voluntary immigration (colonists who fled religious persecution), or labor.[44] The constitutional hook for the President's authority over foreign affairs is the power to "take Care that the Laws be faithfully executed"[45] and to conduct foreign affairs by appointing[46] and receiving[47] ambassadors.

Facing ambiguity on the limits of his executive powers, President George Washington assumed a power to declare a policy of neutrality in a war between France, England, and other nations.[48]

born citizen, or a citizen of the United States, at the time of the adoption of this Constitution.").

42. U.S. CONST. art. I, § 8 (granting Congress power to "establish a uniform rule of naturalization"). This power grew out of the perceived failings of the Articles of Confederation, which granted to states the power to naturalize citizens—a practice that created differential standards across states, but more deeply, a power with "extraterritorial ramifications" that undermined federal power). Michael T. Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1012 (1976).

43. The Constitution counted three-fifths of all slaves and certain Indians toward each state's population for purposes of apportioning seats in the House of Representatives. U.S. CONST. art. I, § 2, stating:

> Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

This concept, as it applied to slaves, carried over from the Confederation Congress, who used this ratio for national taxation. Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause on the United States Constitution*, 28 WM. & MARY Q. 563, 563 (1971).

44. *See* U.S. CONST. art. II, § 2. Congress has authority under the Constitution to enact laws that regulate commerce among the states. U.S. CONST. art. I, § 8. The constitutionality of this power as it relates to labor and employment was upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (holding that Congress had authority to enact the National Labor Relations Act).

45. *Id.* The interrelationship between the "Take Care" Clause and the President's role as Commander-in-Chief is examined in Brian Finucane, *Presidential War Powers, the Take Care Clause, and Article 2(4) of the U.N. Charter*, 105 CORNELL L. REV. (forthcoming 2020).

46. U.S. CONST. art. II., § 2.

47. *Id.*

48. *See* A Proclamation by President George Washington (Apr. 22, 1793), *in* 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1914, 148–49 (James D. Richardson, ed., 1897).

Ever since, there has been little reason to doubt that a President has plenary powers over foreign affairs, and by implication, regulation of U.S. borders.[49]

The Supreme Court did not review executive policy actions such as administrative adjudications until 1902.[50] Since then, judicial review has continued to expand and now extends to proclamations, a policy tool that functions like an order.[51] Courts consider whether an order or action: (1) serves a function explicitly or inherently part of Article II of the Constitution;[52] (2) executes a power delegated by Congress in a statute;[53] (3) conforms to a Supreme

49. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)). *See also* Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445 (1999); William D. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850 (1999); RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1990); Christopher Deering & Forrest Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 POL. RES. Q. 767, 767–68 (1999). For more on presidential proclamations, *see* Brandon Rottinghaus & Jason Maier, *The Power of Decree: Presidential Use of Executive Proclamations, 1977–2005*, 60 POL. RES. Q. 338, 340 (2007).

50. Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 96 (1902) (reviewing Postmaster General's bar of fraudulent advertising for medical treatments). Subtle distinctions and gray areas marked out by executive actions, such as executive orders, proclamations, signatures on Cabinet-level policy documents and more, are analyzed in William D. Neighbors, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 107 (1964) ("[I]ssuance of executive orders was a haphazard operation both as to form and procedure [until 1935.]").

51. Courts also review presidential proclamations. *E.g.*, Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).

52. *E.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–320 (1936) ("[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.").

53. *E.g.*, Stark v. Wickard, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress."); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding an executive order on grounds that Congress authorized this action); Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) (upholding executive orders that nullified attachments of Iranian funds as part of implementing a hostage release agreement with Iran, citing congressional acquiescence to the President's action).

Court precedent;[54] (4) reflects the intent of constitutional framers in the Federalist Papers;[55] and (5) maintains separation of powers.[56]

B. President Trump's Immigration Orders, Proclamations, and Administrative Actions

1. Executive Orders and Proclamations Relating To Migratory Labor

Travel Ban: Issued by President Trump in the first week of his administration, Executive Order 13,769 banned entry of virtually all persons from seven Muslim countries.[57] Among its effects on migratory labor, the order "affected prospective employment relationships by denying states and private employers the ability to sponsor medical and science interns from the affected countries."[58] After the order was enjoined,[59] a new order was issued—again, with effects on employment relationships.[60] The Supreme Court partially

54. Exec. Order No. 9250, 7 Fed. Reg. 7871 (Oct. 6, 1942).

55. The most expansive defense of a President's power to issue executive orders is Justice Vinson's dissenting opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952) (holding that plant seizure pursuant to Exec. Order 10,340 was unconstitutional exercise of presidential power).

56. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 138 (1951) (ruling that President Truman's Executive Order 9835, creating a Loyalty Review Board and authorizing the Attorney General to designate certain groups as subversive, was unconstitutional). Justice Burton concluded:

> The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot. If applied to this case and compounded with the assumption that the President's Executive Order was drafted for him by his Attorney General, the conclusion would rest upon the premise that the Attorney General has attempted to delegate to himself the power to act arbitrarily.

Id.

57. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (restricting admissions of aliens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen). As a presidential candidate, Donald Trump repeatedly suggested that Muslims posed a threat to the U.S. and proposed a "Muslim ban." *See* Trump v. Hawaii, 138 S. Ct. 2392, 2435–36 (2018) (Sotomayor, J., dissenting).

58. Washington v. Trump (*Washington II*), 847 F.3d 1151, 1159–1160 (9th Cir. 2017) (University of Washington's sponsorship of medical and science interns affected by entry-bar).

59. Washington v. Trump (*Washington I*), No. C17–0141JLR, 2017 WL 462040 at *2 (W.D. Wash. Feb. 15, 2017).

60. Trump v. Int'l Refugee Assistance Project (*Trump I*), 137 S. Ct. 2080, 2088 (2017) (ruling on Exec. Order No. 13,780 ("EO–2"), by narrowing district court's injunction to apply, *inter alia*, to "a worker who accepted an offer of employment from an American company").

denied enforcement of this revised order in *Trump v. International Refugee Assistance Project*.[61]

The President won a decisive ruling for his third attempt at categorically barring entry to millions of foreigners in *Trump v. Hawaii*.[62] Narrower than the two previous iterations, this ban was issued as a proclamation rather than an order.[63] It minimized employment effects by narrowing its scope to people with no prior relationship to the United States.[64]

Following these cases, President Trump issued Executive Order 13,815, labelled EO-4, and a related memorandum that resumed the refugee admission program but with additional "extreme vetting."[65] In apparent disregard of the Supreme Court's ruling, the administration denied entry to people with bona fide prior relationships to the United States, including employees of U.S. entities.[66] Relying on *Trump v. Hawaii*, a district court enjoined

61. *Id.* (denying enforcement to Section 2(c) of the order insofar as it applied to foreign nationals who had a credible claim of a bona fide relationship with a person or entity in the United States, including an employment relationship).

62. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2440 n.5 (2018) (Sotomayor, J., dissenting) ("President Trump is not exercising his discretionary authority to determine the admission or exclusion of a particular foreign national. He promulgated an executive order affecting millions of individuals on a categorical basis."). While the ruling upheld the ban and rejected arguments concerning presidential animus, the Court overruled *Korematsu*. *Id.* at 2423 (referring to Roosevelt's Executive Order 9066 as a "morally repugnant order"). By using this case as an occasion to overrule Korematsu, the majority opinion seemed to imply that moral arguments against President Trump's travel ban did not meet the extreme threshold of repugnance.

63. *Id.* (holding that the President suspended entry under Proclamation No. 9645).

64. *Id.* at 2422–2423. By its express terms, the proclamation improved "screening and vetting protocols and procedures associated with visa adjudications and other immigration processes" for people seeking entry from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. *See* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

65. Exec. Order No. 13,815, § 3(a), 82 Fed. Reg. 50055 (Oct. 27, 2017); Memorandum from Rex W. Tillerson, Sec'y, Dep't of State, Elaine Duke, Acting Sec'y, Dep't of Homeland Sec., and Dan Coats, Dir., Nat'l Intelligence to President Donald Trump on Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities (Oct. 23, 2017). On January 25, 2017, President Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States, without defining this term. Hawaii v. Trump (*Hawaii I*), 241 F. Supp. 3d 1119, 1126 (D. Haw. 2017).

66. Doe v. Trump (*Doe III*), 288 F. Supp. 3d 1045, 1061 (W.D. Wash. 2017). Iraqi militants kidnapped and raped Ms. Doe and warned her to stop working for Americans or face death. *Id.* She was four years into an application and vetting process at the time that Executive Order 13,815 barred her from completing the final stages for the refugee admissions process. *Id.*

the order to the extent that it affected refugees with bona fide relationships to the United States.[67]

"Hire American" and H-1B Visas: On April 18, 2017, the President issued Executive Order 13,788. Titled "Buy American and Hire American,"[68] the order applies to the United States technology workforce.[69] It states a policy to award H-1B visas to the most skilled or highest paid petitioners.[70] The industry has complained that the regulation—which applies to a large migratory labor market[71]—hinders employers who are seeking to hire these workers.[72] A proposed rule related to the order would significantly restrict hiring by limiting H-1B to "the most-skilled or highest-paid petition beneficiaries."[73] Beneath its surface appeal to merit, the policy was based on, and promulgated shortly after, a *60 Minutes* program that blamed Indian workers for taking jobs from Americans.[74]

67. *Id.* at 1086 (ruling that the order and memorandum were subject to the notice and comment requirements of the Administrative Procedure Act for rulemaking, and the Secretary of Homeland Security lacked authority to suspend indefinitely a nondiscretionary statutory duty under the INA).

68. Exec. Order No. 13,788, 82 Fed. Reg. 18837 (Apr. 18, 2017) [hereinafter *Buy American and Hire American*]. The order was issued on April 18, 2017, less than a month after CBS aired a 60 Minutes segment titled "You're Fired." *Sixty Minutes: Are U.S. Jobs Vulnerable to Workers with H-1B Visas?* (CBS television broadcast Mar. 19, 2017).

69. *Buy American and Hire American*, *supra* note 68, at § 1(c).

70. *Buy American and Hire American*, *supra* note 68, at § 5(b).

71. U.S. Dep't of Homeland Security, 2015 Y.B. of Immig. Statistics, 65 (2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf [https://perma.cc/FA45-3E2S] (showing "temporary workers in specialty occupations (H1B)" totaled 537,450 in 2015).

72. *See* David J. Bier, Opinion, *America Is Rejecting More Legal Immigrants Than Ever Before*, N.Y. Times (Nov. 15, 2018) (finding that Department of Homeland Security rejected 11.3 percent of requests to the immigration agency, including petitions for work permits, marking the highest rate of denial on record).

73. *See* Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62406 (proposed Dec. 3, 2018) (to be codified at 8 C.F.R. pt. 214). For analysis of the complex new rule, see Stuart Anderson, *New H-1B Rule Likely Unlawful and More Costly For Employers*, Forbes (Dec. 10, 2018), https://www.forbes.com/sites/stuartanderson/2018/12/10/new-h-1b-rule-likely-unlawful-and-more-costly-for-employers/#46f46f13a2d3 [https://perma.cc/L9TX-XVHT].

74. The White House held a press briefing just a month after the *60 Minutes* segment aired. At the April 17, 2017 briefing an unidentified "Senior Administration Official" cited this TV show as a major talking point:

> So 80 percent receive less than the median wage, and only 10 percent receive the median wage. And so only 5 percent were categorized at the highest wage tier of the four wage tiers that are in place for the H1B guest worker visa. The result of that is that workers are often brought in well below market rates to replace American workers, again, sort of violating the principle of the pro-

2. Policies: Rescission of Deferred and Protected Status and EB-5 Limits

Previous presidents over the past thirty or more years used executive power to provide temporary legal status for migrants whose circumstances were dire but who did not meet asylum or refugee criteria under immigration laws. President Trump rescinded these actions, and several lawsuits have challenged his administration's rescission orders. Additionally, the President has affected the employment of migratory labor by limiting a work-related visa known as EB-5.[75]

DACA: The Trump administration has taken steps to terminate President Barack Obama's DACA policy,[76] including the elimination of work authorization.[77] However, these steps have not taken the administration very far. In *Batalla Vidal v. Nielsen*, a case that involved executive action to deny employment authorization to DACA recipients, the court ruled that these immigrants, and states, have standing.[78] The *Batalla* court also enjoined the rescission of the DACA policy because that policy likely violated the Administrative Procedure Act (APA) and the Fifth Amendment Due Process Clause.[79] In a subsequent ruling on equal protection, the court found that the Secretary of Homeland Security had no racial animus but recognized that the President may have directed the policy

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gram, which is supposed to be a means for bringing in skilled labor, and instead you're bringing in a lot of times workers who are actually less skilled and lower paid than the workers that they're replacing.

And we've all seen high-profile examples of this, and I'm sure that many of you are aware — and President Trump has been a leader in calling attention to this effort.

Press Release, Senior Administration Official, The White House Press Briefing Room (Apr. 17, 2017) (on file with the White House).

75. *See infra* note 96.

76. Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. to James W. McCament, Acting Dir., U.S. Citizenship and Immigration Servs, Thomas D. Homan, Acting Dir., U.S. Immigr. and Customs Enf't, Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Prot., Joseph B. Maher, Acting Gen. Counsel, Ambassador James D. Nealon, Assistant Sec'y, Int'l Engagement, Julie M. Kirchner, Citizenship and Immigr. Servs. Ombudsman (Sept. 5, 2017) (on file with Homeland Security).

77. *Id.* (stating that DHS will "reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum").

78. Batalla Vidal v. Duke (*Vidal I*), 295 F. Supp. 3d 127, 150 (E.D.N.Y. 2017) (reporting the employment aspect of the rescission action).

79. Batalla Vidal v. Nielsen (*Vidal III*), 291 F. Supp. 3d 260 (E.D.N.Y. 2018).

with a "constitutionally suspect" purpose.[80] The rescission policy led to other lawsuits.[81] Those cases are now consolidated for review by the Supreme Court.[82]

DAPA: President Trump's DHS also rescinded the DAPA Program,[83] an Obama-era policy which granted deferral status for three years to parents of DACA eligible children and young adults. After twenty-six states filed a lawsuit to challenge DAPA, a Texas district court enjoined it.[84] The consequence of that injunction was later felt when a magistrate in *J-M-C-B v. Nielsen* dismissed a lawsuit

80. *Id.* at 278 (stating, "whether—and, if so, for how long—any Executive action disproportionately affecting a group the President has slandered may be considered constitutionally suspect").

81. *See* Coyotl v. Kelly, 261 F. Supp. 3d 1328, 1341 (N.D. Ga 2017) (holding jurisdiction-stripping provisions of federal law do not apply); Inland Empire—Immigrant Youth Collective v. Nielsen (*Inland I*), No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018) (enjoining revocation of EAD and DACA status); Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018); Medina v. U.S. Dep't of Homeland Sec. (*Medina I*), No. C17-218-RSM-JPD, 2017 WL 2954719 (W.D. Wash. Mar. 14, 2017) (DACA-recipient's arrest and detention did not preclude jurisdiction); NAACP v. Trump (*NAACP I*), 321 F. Supp. 3d 143 (D.D.C. 2018) (DACA rescission affecting 689,800 enrollees was a major policy decision and therefore reviewable); NAACP v. Trump (*NAACP II*), 298 F. Supp. 3d 209 (D.D.C. 2018); NAACP v. Trump (*NAACP III*), 315 F. Supp. 3d 457, 473 (D.D.C. 2018) (holding DHS rescission of DACA "was both subject to judicial review and arbitrary and capricious"); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents I*), No. C 17-05211 WHA, 2017 WL 4642324 (N.D. Cal. Oct. 17, 2017) (ordering DHS to complete record under ADA for DACA-rescission); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents II*), 875 F.3d 1200 (9th Cir. 2017) (denying government's motion to stay order); *In re* United States, 138 S. Ct. 443 (2017) (granting government's motion to stay order); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents III*), 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (holding court had jurisdiction to enjoin rescission policy); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents IV*), 908 F.3d 476 (9th Cir. 2018) (enjoining DHS from using estopped from using DACA-recipient personal information); CASA de Maryland v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758 (D. Md. 2018) (federal government estopped from using information provided by participants for immigration enforcement).

82. McAleenan v. Vidal, 139 S. Ct. 2773 (2019).

83. *See* Memorandum on Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), U.S. Dep't of Homeland Sec. (June 25, 2017), https://www.dhs.gov/sites/default/files/publications/DAPA Cancellation Memo.pdf [https://perma.cc/XVW6-AL94].

84. *See* Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2771 (2016).

that challenged the Trump administration's rescission of DAPA as moot.[85] A judge adopted the magistrate's findings and order.[86]

TPS: DHS terminated temporary status for 300,000 migrants from Haiti, Sudan, Nicaragua, and El Salvador, but this termination was also soon enjoined by the courts.[87] In *Ramos v. Nielsen*, the district court dismissed the Agency's jurisdiction argument,[88] and enjoined the termination.[89] In a subsequent ruling, the *Ramos* court noted that the "information sought by the Secretary coincides with racial stereotypes—i.e., that non-whites commit crimes and are on the public dole."[90] The court based its injunction partly on a finding of the President's racial animus.[91]

Plaintiffs from El Salvador, Haiti, and Guatemala prevailed in *Centro Presente v. United States Department of Homeland Security*.[92] In

85. J-M-C-B v. Nielsen (*J-M-C-B I*), No. 03:16-CV-02150-AC, 2018 WL 3797566 (D. Or. May 30, 2018). In June 2017, Secretary of Homeland Security John F. Kelly rescinded the 2014 DAPA Memorandum. *See* U.S. Dep't of Homeland Sec., *supra* note 83.

86. J-M-C-B v. Nielsen (*J-M-C-B II*), No. 3:16-cv-02150-AC, 2018 WL 3795221, at *1 (D. Or. Aug. 8, 2018), *appeal filed*, No. 18-35744, 2019 WL 1087494 (Jan. 24, 2019).

87. *See* Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648, 2648 (Jan. 18, 2018); Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2654 (Jan. 18, 2018); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636, 59636 (Dec. 15, 2017); Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47228, 47228 (Oct. 11, 2017). TPS rescission status means, in part, that these individuals cannot secure work authorization in the U.S. *See* Ramos v. Nielsen (*Ramos III*), 336 F. Supp. 3d 1075, 1108–09 (N.D. Cal. 2018).

88. Ramos v. Nielsen (*Ramos I*), No. 18-cv-01554-EMC, 2018 WL 3109604, at *1 (N.D. Cal. June 25, 2018) (citing McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 492 (1991) (jurisdiction-stripping applies to "a single act rather than a group of decisions or a practice or procedure employed in making decisions.")). The Court also allowed plaintiffs to present proof that President Trump's statement could be construed as "evidence of racial bias animus against non-white immigrants, and that he thereafter influenced and tainted DHS's decision-making process with regard to TPS." *Id.* at *2. Moreover, the court found that the "prohibition on racial animus under the Due Process clause's Equal Protection guarantee applies to executive action in the immigrant context." *Id.* (citation omitted).

89. *Ramos III*, 336 F. Supp. 3d at 1107-09 (holding that judicial review was not precluded and granting preliminary injunction).

90. *Id.* at 1105.

91. Ramos v. Nielsen (*Ramos II*), 321 F. Supp. 3d 1083, 1132 (N.D. Cal. 2018).

92. Centro Presente v. U.S. Dep't of Homeland Sec., 332 F. Supp. 3d 393, 414–16 (D. Mass. 2018). The court ruled on three separate but related policy decisions made by the Secretary of Homeland Security: the decision of January 18, 2018 to terminate El Salvador's TPS designation, effective September 9, 2019; the decision of November 20, 2017 to terminate Haiti's TPS designation, effective July

denying the Agency's motion to dismiss, the court found enough evidence of racial animus behind the rescission decisions to apply heightened scrutiny.[93] These actions were found, in the alternative, to lack a rational basis.[94] The court also denied the motion to dismiss President Trump as a defendant.[95]

EB-5 Limits: Congress created the EB-5 visa in 1990, allowing affluent investors to be eligible for lawful permanent residence if they met financial criteria and created a certain number of new jobs in the United States.[96] Until recently, the State Department did not count children of investors against the cap of EB-5 visas. Plaintiffs in *Wang v. Pompeo* have alleged that the Trump administration is unlawfully capping EB-5 visas by counting children and spouses of EB-5 principals against the annual cap.[97] The district court denied the motion for an injunction.[98]

3. Blocking Petitions for Naturalization and Adjustment of Status

In addition to implementing programmatic policies as just discussed—that is, immigration actions that affect large numbers of people defined by a broad characteristic—President Trump's administration has restricted the ability of foreigners to qualify for a specific type of visa or immigration status. My study examines lawsuits that involve these executive branch actions. *Wagafe v. Trump*[99] and *Jafarzadeh v. Nielsen*[100] challenge an allegedly covert immigra-

22, 2019; and the decision of May 4, 2018 to terminate Honduras' TPS designation, effective January 5, 2020. *See Id.* at 402–404.

93. *See Id.* at 415, finding that "the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision."

94. Distinguishing this case from *Trump v. Hawaii*, the court concluded: "In this case, by contrast, there is no justification, explicit or otherwise, for Defendants' switch to focusing on whether the conditions that caused the initial designation had abated rather than a fuller evaluation of whether the country would be able to safely accept returnees." *See Id.* at 416.

95. *Id.* at 418-19.

96. Immigration Act of 1990 ("The 1990 Act"), Pub. L. No. 101-649, § 121, 104 Stat. 4978, 4989–90 (codified as amended at 8 U.S.C. § 1153(b)(5)).

97. Feng Wang v. Pompeo, 354 F. Supp. 3d 13, 17 (D.D.C. 2018).

98. *Id.* at 28.

99. Wagafe v. Trump (*Wagafe I*), No. C17-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017). Wagafe did not specifically allege how he learned of the secret screening program but he waited three and a half years for action on his application for naturalization after he met all the criteria for citizenship. *Id.* at *3. Wagafe alleged that CARRP's vetting process is secret. *Id.* at *1.

100. Jafarzadeh v. Nielsen, 321 F. Supp. 3d 19 (D.D.C. 2018).

tion program called Controlled Application Review and Resolution Program. Generated within the executive branch, CARRP enables immigration officials to deny petitions for citizenship or adjustment of status on national security grounds, even when a petitioner meets all criteria under the Immigration and Nationality Act (INA).[101] CARRP is alleged to be a screening process with no congressional approval[102] that uses overbroad criteria, such as donations to Muslim charities, to indicate who is a national security threat.[103] Plaintiffs also claim that the program usurps Congress's exclusive power to set uniform naturalization laws.[104] In the main case, the *Wagafe* court has certified a class,[105] although litigation has been bogged down over the government's motions to protect evidence from discovery.[106]

In *Kirwa v. U.S. Dep't of Defense*, the plaintiff, along with a class of other immigrants, challenged the Trump administration's decision to block non-citizens in the Army's Selected Reserve program from completing applications for expedited citizenship.[107] In the case at bar, the military refused to issue a form to certify a petitioner's military duty status.[108] Petitioners alleged that this paperwork obstruction exposes them to loss of jobs and deportation.[109] Citing a likely violation of the APA, the district court in *Kirwa v. U.S. Dep't of Defense* granted injunctive relief.[110] The court

101. *Wagafe I*, 2017 WL 2671254, at *1 (Plaintiffs alleging that USCIS officers are directed to deny or delay an application as long as possible if a CARRP criteria is met).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at *16.

106. Wagafe v. Trump (*Wagafe II*), No. C17-94 RAJ, 2018 WL 1737939 (W.D. Wash. Apr. 11, 2017).

107. Kirwa v. U.S. Dep't of Def. (*Kirwa III*), 285 F. Supp. 3d 257, 263-64 (D.D.C. 2018) (involving MAVNI program [Military Accessions Vital to the National Interest], started in 2008, and in effect through early 2017, that allowed more than 10,000 military enlistees to become naturalized citizens via an expedited process). The Defense Department has added a "slow-walk" step for processing an application by inserting an open-ended step for "Background Investigation and Suitability Vetting." *Id.*

108. *Id.* at 264–65. The court certified a class and issued a restraining order. *Id.* at 263.

109. Kirwa v. U.S. Dep't of Def. (*Kirwa I*), 285 F. Supp. 3d 21, 43 (D.D.C. 2018) ("[E]very day of delay leaves plaintiffs in limbo and in fear of removal. . . . Plaintiffs live in constant fear that they will lose their work or student visas, or be discharged, deported, and subject to harsh punishment in their country of origin for joining a foreign military.").

110. *Id.* at 38–42.

found that changes in certifying honorable service were arbitrary and capricious,[111] guidelines were impermissibly retroactive,[112] and petitioners suffered irreparable harm.[113] The court ordered a preliminary injunction and certified a class.[114]

C. Data Analysis

1. The Sample

For this study I read the 5,884 executive orders issued by every President from Washington to Trump that were catalogued in The American Presidency Project.[115] To analyze the judicial review of President Trump's orders and related actions, I read the executive orders issued by Trump which were catalogued in The American Presidency Project. Because this source reflected some delay in posting executive actions, I supplemented my search by using Westlaw's electronic database. I used a variety of keyword searches, such as "immigration" and "Trump"—or, in place of the President, "Department of Homeland Security." This generated instances that did not involve a presidential order but were still catalogued in The American Presidency Project: specifically, the lawsuits over MAVNI and CARRP.[116]

For a case to be included in the tally, it had to involve an immigration policy of President Trump or his administration. I excluded ordinary cases where a person challenged a removal order. The case also had to touch on some aspect of employment, whether it be a rescission policy that ends EADs, a ban that denies entry to people with jobs or work-related visas, or administrative rules for employment visas.

For these qualifying cases, I recorded the: (1) law or laws at issue; (2) plaintiffs' residency status, as stated in the case; (3) type of federal court (district, appeals, or Supreme Court); (4) whether the holding hinged on procedural issues, substantive issues, or both; (5) ruling on jurisdiction (finding jurisdiction, finding no jurisdiction, or not applicable); (6) injunction (denied, granted in part, granted in whole, or not applicable); and (7) winner (plaintiff entirely, plaintiff in part, or United States entirely). To capture

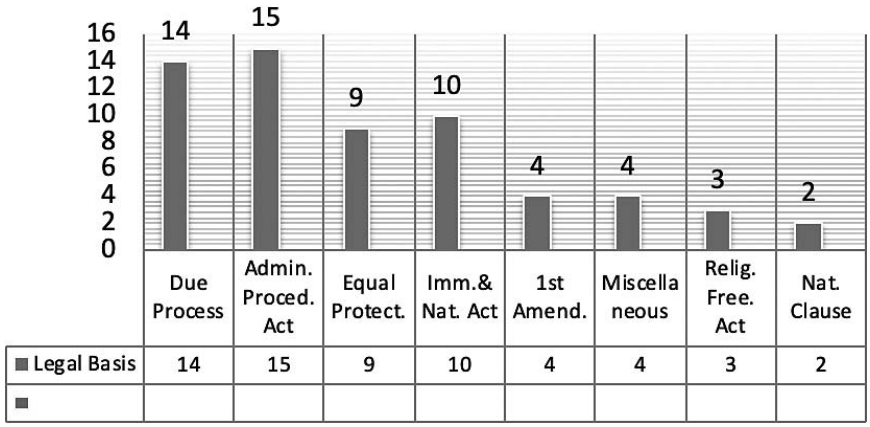
111. *Id.* at 39.
112. *Id.* at 40.
113. *Id.* at 44.
114. *Id.*
115. *See* UNIV. OF CAL. SANTA BARBARA, *supra* note 5.
116. My initial focus was limited to executive orders but expanded to also include: (a) presidential letters; (b) annual addresses to congress; diplomatic communications; cabinet minutes; and executive branch directives.

multiple rounds of litigation, I repeated this pattern for "Court II" through "Court V." The executive orders, proclamations, and agency actions in this sample generated more than one ruling by the same district court—for example, a judge's adoption of a magistrate's findings, or a motion to alter an injunction. I did not code cases, however, that involved technical or procedural issues such as motions for reconsideration, *en banc* hearings and protective orders for information. In other words, these narrow procedural motions did not constitute a new round of litigation but simply an extension of one round. I therefore excluded these rulings to avoid skewing data for more substantive issues. My sample contains 40 court rulings that conform to these specific criteria.[117]

117. *Vidal I*, 295 F. Supp. 3d 127, 150 (E.D.N.Y. 2017); Batalla Vidal v. Nielsen (*Vidal II*), 279 F. Supp. 3d 401 (E.D.N.Y. 2018); Batalla Vidal v. Nielsen (*Vidal III*), 291 F. Supp. 3d 260 (E.D.N.Y. 2018); Centro Presente v. U.S. Dep't of Homeland Sec., 332 F. Supp. 3d 393 (D. Mass. 2018); Coyotl v. Kelly, 261 F. Supp. 3d 1328 (N.D. Ga. 2017); Doe v. Trump (*Doe I*), 328 F. Supp. 3d 1185 (W.D. Wash. 2018); Doe v. Trump (*Doe II*), No. 18-35015, 2018 WL 1774089 (9th Cir. Mar. 29, 2018); *Doe III*, 288 F. Supp. 3d 1045 (W.D. Wash. 2017); Feng Wang. v. Pompeo, 354 F. Supp. 3d 13 (D.D.C. 2018); *Hawaii I*, 241 F. Supp. 3d 1119 (D. Haw. 2017); Hawaii v. Trump (*Hawaii II*), 245 F. Supp. 3d 1227 (D. Haw. 2017); Hawaii v. Trump (*Hawaii III*), 859 F.3d 741 (9th Cir. 2017); *Inland I*, No. EDCV 17–2048 PSG (SHKx), 2017 WL 5900061 (C.D. Cal. Nov. 20, 2017); Inland Empire-Immigrant Youth Collective v. Nielsen (*Inland II*), No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018); *In re* United States, 138 S. Ct. 443 (2017); Jafarzadeh v. Nielsen, 321 F. Supp. 3d 19 (D.D.C. 2018); *J-M-C-B I*, No. 03:16-CV-02150-AC, 2018 WL 3797566 (D. Or. May 30, 2018); *J-M-C-B II*, No. 3:16-cv-02150-AC, 2018 WL 3795221 (D. Or. Aug. 8, 2018); *Kirwa I*, 285 F. Supp. 3d 21 (D.D.C. 2018); Kirwa v. U.S. Dep't of Def (*Kirwa II*), 315 F. Supp. 3d 266 (D.D.C. 2018); *Kirwa III*, 285 F. Supp. 3d 257 (D.D.C. 2018); *Medina I*, No. C17-218-RSM-JPD, 2017 WL 2954719 (W.D. Wash. Mar. 14, 2017); Medina v. U.S. Dep't of Homeland Sec. (*Medina II*), No. C17-0218RSM, 2017 WL 5176720 (W.D. Wash. Nov. 8, 2017); *NAACP I*, 321 F. Supp. 3d 143 (D.D.C. 2018); *NAACP II*, 298 F. Supp. 3d 209 (D.D.C. 2018); *NAACP III*, 315 F. Supp. 3d 457 (D.D.C. 2018); *Ramos I*, No. 18-cv-01554-EMC, 2018 WL 3109604 (N.D. Cal. June 25, 2018); *Ramos II*, 321 F. Supp. 3d 1083 (N.D. Cal. 2018); *Ramos III*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018); Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018); *Regents I*, No. C 17-05211 WHA, 2017 WL 4642324 (N.D. Cal. Oct. 17, 2017); *Regents II*, 875 F.3d 1200 (9th Cir. 2017); *Regents III*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Regents IV*, 908 F.3d 476 (9th Cir. 2018); *Wagafe I*, No. C17-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017); *Wagafe II*, No. C17-94 RAJ, 2018 WL 1737939 (W.D. Wash. Apr. 11, 2018); *Washington I*, No. C17–0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 15, 2017); *Washington II*, 847 F.3d 1151 (9th Cir. 2017); Washington v. Trump (*Washington III*), 858 F.3d 1168 (9th Cir. 2017); *Trump I*, 137 S. Ct. 2080, 2088 (2017).

2. Data and Fact Findings

There were 20 first-round rulings, 11 second-round rulings, 5 third-round rulings, 1 fourth-round ruling, and 1 fifth-round ruling (38 rulings in total).

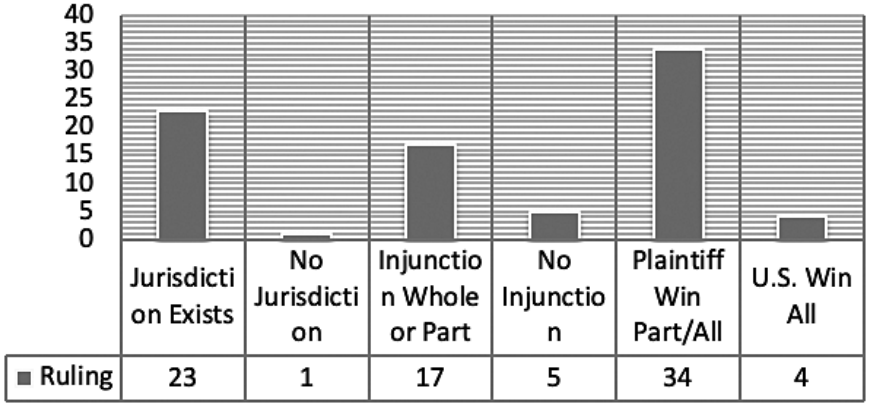


Fact Finding 1 (Table A): The APA and the Fifth Amendment's Due Process Clause were the most common laws that plaintiffs used to challenge President Trump's orders and policies. In the 20 first-round rulings, the APA was cited in 15 cases (75%), while the Due Process Clause was cited in 14 cases (70%). These statistics have several implications: the orders and policies (1) were drafted and implemented hastily or without regard to the legal interests of plaintiffs,[118] (2) harmed or potentially harmed employment interests so much as to implicate a constitutional right,[119] and (3) overlapped or conflicted to such a degree with a statute that notice and comment or other APA requirements were triggered.[120]

118. *Hawaii I*, 241 F. Supp. 3d at 1126 ("The first Executive Order [No. 13,769] was issued without a notice and comment period and without interagency review.").

119. *Regents IV*, 908 F.3d at 509 ("DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits. . . ." (quoting Texas v. United States, 809 F.3d 134, 181 (5th Cir. 2015))), *cert. granted*, 139 S. Ct. 2779 (2019).

120. *Inland II*, 2018 WL 1061408, at *3 ("No additional notice or explanation was provided, and [DACA-recipient] was not provided a chance to respond.").



Fact Finding 2 (Table B): Courts ruled that they had jurisdiction in 23 of the 24 cases (95.9%) where the Trump administration raised this procedural defense. This finding is important and unexpected because some immigration cases find that a statute strips courts of jurisdiction.[121] One might think that the administration's jurisdiction arguments would be able to rely on robust defenses such ripeness, standing, political questions, and justiciability because of how quickly the lawsuits were filed. However, the administration's jurisdiction arguments fell flat. What the data indicate is that the courts were able to find jurisdiction because of these broadly-written policies and had such widespread effects that they presented a significant likelihood of one, if not several, legal violations, caused injuries which were more real than speculative, and used presidential powers in unprecedented ways that raised separation-of-powers or other constitutional issues.

Fact Finding 3 (Table B): In 17 out of 22 injunction rulings (77.2%), courts granted motions to enjoin or to maintain injunctions.[122] This finding means that the orders and policies: (1) were drastic as to their immediate effects and scale of injury; (2) had no notice-and-comment or other buffer for courts to consider in the context of exhaustion of administrative process; or (3) had potentially irreversible consequences, such as deportation.

Fact Finding 4 (Table B): In 34 out of 38 cases (89.4%), plaintiffs won all or part of the ruling. This success rate is noteworthy because courts rarely interfere with presidential immigration orders and actions.

121. *See, e.g.*, Jilin Pharmaceutical USA, Inc. v. Chertoff, 447 F.3d 196 (3d Cir. 2006).

122. *Id.* at 196.

President Trump's orders and policies, coupled with his racially inflammatory tweets and campaign rallies, seem unprecedented—but what does this prove, if anything? How do his executive orders and actions relate to immigration statutes? Are presidents willing instruments of Congress, reluctant enforcers of immigration laws, or defiant obstacles to congressional will? I take up these questions in Part III. I start with original language in the Constitution to provide historical context.

III.
CONSTITUTIONAL REGULATION OF SLAVE MIGRATION AND IMPORTATION: PRESIDENTIAL ACTIONS

Strangers and immigrants were never welcomed in the American colonies. Communities enacted laws to exclude sojourners.[123] In this forbidding landscape, slavery was accommodated in states that opposed it,[124] and brutally enforced elsewhere.[125] Among varieties of coerced labor,[126] slavery was the most severe, with no hope of freedom.[127] African slavery amounted to involuntary migration,[128] founded on race.[129]

123. William Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 104 (1996) (localities took care of their own poor, not newly arrived strangers). Community exclusion was evident well into the twentieth century; Note, *Depression Migrants and the States*, 53 HARV. L. REV. 1031 (1940) (38 states required a year of residence to qualify a person for legal settlement).

124. *E.g.*, Prigg v. Pennsylvania, 41 U.S. 539 (1842) (holding that state law that gradually abolished right to abduct runaway slaves was unconstitutional as applied to a man who was hired to seize a woman who escaped slavery in Maryland).

125. *E.g.*, Jordan v. State, 22 Ga. 545 (Ga. 1857) (affirming murder conviction of a slave owner who whipped a thirteen-year-old slave girl so severely that she was cut to the bone on her thigh). Georgia law allowed the legislature to mitigate penalties for owners who killed slaves who put down an insurrection or caused death accidentally while administering "moderate correction." *Id.* at 557.

126. Quigley, *supra* note 123 (analyzing four types of involuntary servitude that were less severe than slavery).

127. Jarman v. Patterson, 23 Ky. 644, 645–46 (Ky. 1828) ("Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (negotium), a thing, as he stood in the civil code of the Roman Empire.").

128. Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIOGRAPHY 311, 340 n.40 (1989) (examining Virginia statutes showing degrees of involuntary servitude by place of origin); *see also* Scott v. Sandford, 60 U.S. 393, 407–08 (1857) (defending imposition of slavery on "that unfortunate race" because "[t]he opinion thus entertained and acted

By the time the Constitution was drafted, slave importation peaked in the American colonies. The high mark was reached in 1740 through 1760, with migration of 430,000 Africans.[130] This background informed the drafters' inclusion of rules for American nativity and slavery. The founders embraced or tolerated racial superiority.[131] This was essential to their creation of interdependent chattel rights and political advantages to slave ownership.

The qualification standard for U.S. presidents offers a starting point for understanding this office's powers. Only "a natural born Citizen" is eligible.[132] John Jay, who proposed this idea, feared foreign subversion.[133] Alexander Hamilton said as much in *Federalist No. 68*.[134] This requirement still stands, and the result is that 19.8 million naturalized citizens are disqualified from being President.[135] Within this large population, most appear to be Asian or

upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States").

129. George M. Frederickson, *Toward a Social Interpretation of the Development of American Racism*, *in* 1 KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 407–08 (Daniel M. Fox et al. eds., 1971) ("[S]ocietal racism—the treatment of blacks as if they were inherently inferior for reasons of race—dates from the late seventeenth and early eighteenth century. . . . the catalyst was fear.")

130. Philip D. Curtin, *The Slave Trade and the Atlantic Basin: Intercontinental Perspectives*, *in* 1 KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 74, 93 (Daniel M. Fox et al. eds., 1971). The "total number of immigration from Africa [was] about 430,000." *Id.* at 92.

131. Charles H. Wesley, *Negro Suffrage in the Period of Constitution-Making, 1787–1865*, 32 J. NEGRO HIST. 143, 144–147 (1947).

132. U.S. CONST. art. II, § 5.

133. Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 888 n.37. (1988). Letter from John Jay to George Washington (July 25, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 61 (Max Farrand ed., 1911) ("[W]hether it would not be wise & seasonable to provide a . . . strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american [sic] army shall not be given to, nor devolve on, any but a natural born Citizen.").

134. A foreign-born author, Alexander Hamilton, warned of foreign interference with domestic affairs by "deadly adversaries of republican government" who sought "to gain an improper ascendant in our councils" by "a creature of their own to the chief magistracy of the Union." THE FEDERALIST NO. 68 (Alexander Hamilton).

135. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *Naturalization Rate Among U.S. Immigrants Up Since 2005, with India Among the Biggest Gainers*, PEW RES. CTR (Jan. 18, 2018). Talented public figures, ranging from Alexander Hamilton, Henry Kissinger, and Arnold Schwarzenegger to Madeleine Albright and Ariana Huf-

Hispanic, indicating that the Constitution has disparate impact by race in regard to the nation's highest office.[136] This rule gave room to a "birther" theory that falsely suggested that the first black President was illegitimately elected.[137]

The Constitution also perpetuated racial bias by giving outsized political power to slaveholders through the Three-Fifths Compromise.[138] Although slaves had no right to vote, slaveholding states counted black captives as three-fifths of a person, resulting in twenty representatives and presidential electors.[139] Additionally, the Three-Fifths Compromise gave an advantage to states that allowed the importation and sale of captive migrants in their ports and markets for use as laborers. This provision created a perverse incentive for states to enhance their political influence over the presidency.[140]

Article II, Section 9 of the Constitution reinforced the connection between human trafficking and the presidential election, stating: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."[141] Written to last twenty-one years, the provision allowed slave states to grow a breeding stock of enslaved Africans. Once 1808 was reached and slave importation was constitutionally subject to termination, a native-born generation of slaves would reach sexual maturity. Not only did this provision favor slave traders and owners, it also added to the electorate in slave states for presidents. In the meantime, ports of slave-owning states could be used for the "importation" of Africans and others—essentially, a human trafficking policy that was constitutionally sheltered.

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fington, have been constitutionally barred from office. Richard Skinner, *The Constitution's "Natural-Born" Defect*, Vox (Apr. 15, 2019, 4:40 PM), https://www.vox.com/mischiefs-of-faction/2019/4/15/18308338/natural-born-citizen-us-president [https://perma.cc/3AQE-A2JM].

136. *See* Jeffrey S. Passel, Pew Res. Ctr, Growing Share of Immigrants Choosing Naturalization: Part IV (2007) (finding in 2005 that, among naturalized citizens, 4.0 million came from South and East Asia, 1.6 million came from Mexico, and 2.8 million from Latin America (exclusive of Mexico), compared to 2.8 million from Europe and Canada. Another 0.7 million came from the Middle East, and 0.4 million from "other."). These data are not reported by race but imply that most naturalized citizens are not white.

137. *See infra* note 170.

138. *See supra* note 43.

139. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952).

140. *Id.*

141. U.S. Const. art. I, § 9.

The prerequisites for President, combined with state requirements of citizenship and suffrage, disqualified free blacks, women, and a significant group of white men from the presidency.[142] Three years after the Constitution was drafted, the Naturalization Act of 1790 restricted citizenship to "a free white person."[143] Though not in express terms, the law denied naturalization to slaves when it added that "no person, heretofore proscribed by any state, shall be admitted as a citizen."[144] The law limited the right of becoming citizens "to aliens being free white persons."[145]

Together, the Constitution and the Naturalization Act of 1790 severely limited political participation on grounds of nativity and race. This combination created conditions that resulted in twelve of the first eighteen presidents being slave owners.[146] Ownership of human chattel was not a passive experience. George Washington, for example, sold an unruly slave prior to his time in office.[147] Following the Revolutionary War, he pressed British authorities to return slaves that the British took from Americans.[148]

Presidents not only owned slaves, but, at times, they also used diplomacy to affect the migration of blacks. George Washington—an ambivalent slaveholder while in office[149]—used his Article II powers on behalf of Georgia to pursue a fugitive slave accord with

142. Wesley, *supra* note 130, at 147.

143. *See* An Act to Establish a Uniform Rule of Naturalization Act, ch. 3, 1 Stat. 103-104 (1790) (repealed 1795).

144. *Id.*

145. *Id.*

146. *See* Whitney, *supra* note 12 (reporting that eight presidents owned slaves while President (indicated with asterisks here). The estimated slave owning totals are: George Washington* (between 250–350); Thomas Jefferson* (about 200); James Madison* (more than 100); James Monroe* (about 75); Andrew Jackson* (fewer than 200); Martin Van Buren (one); William Henry Harrison (eleven); John Tyler* (about 70); James Polk* (about 25); Zachary Taylor* (fewer than 150); Andrew Johnson (probably eight); and Ulysses S. Grant (probably five)).

147. Letter from George Washington Bearing on the Negro to Captain John Thompson (July 2, 1766), *in* 2 J. NEGRO HIST. 411, 411–412 (1917) ("Sir: With this letter comes a Negro (Tom), which I beg the favour of you to sell, in any of the Islands you may go to, for whatever he will fetch and bring me in return for him . . . . That this fellow is both a rogue and a runaway . . . .").

148. *Id.* at 414 ("Whether this conduct is, consonant to, or how far it may be deemed an infraction of the treaty, is not for me to decide. I cannot, however, conceal from you, that my private opinion is, that the measure is totally different from the letter and spirit of the treaty . . . .").

149. Kenneth Morgan, *George Washington and the Problem of Slavery*, 34 J. AM. STUD. 279 (2000) (the President owned 317 slaves in 1790, though he treated them with paternalism and disliked splitting their families).

Spain in 1791.[150] As slaves crossed the border to the Spanish possession of Florida, state officials complained to Washington that they had '"never been able to reclaim them.'"[151]

Early presidents used quasi-immigration powers. Thomas Jefferson signed a law in 1807 to prohibit importation of slaves.[152] Nonetheless, he bought slaves while he was President.[153] President James Madison owned slaves.[154] However, he admonished Congress to bar further importation of slaves.[155] When Madison ratified the Treaty of Ghent, ending hostilities with Britain in 1815, he pledged to promote the "entire abolition" of slavery.[156] The United States believed this referred to slaves taken by the British; but the British disagreed, prompting other presidents pressed to return this human property.[157] President James Monroe, who partly operated his plantations with slaves,[158] negotiated to repatriate enslaved workers.[159]

150. MAZYCK, *supra* note 14, at 118–20. For a broader view of how America's early political leaders viewed slavery, an essential resource is MATTHEW T. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY (1934).

151. MAZYCK, *supra* note 14, at 118.

152. Act of Mar. 2, 1807, Pub. L. No. 9–22, 2 Stat. 426 (1807).

153. Howard Temperley, *Jefferson and Slavery: A Study in Moral Perplexity*, *in* REASON AND REPUBLICANISM: THOMAS JEFFERSON'S LEGACY OF LIBERTY 91 (Gary L. McDowell & Sharon L. Noble eds., 1997). Jefferson bought ten slaves while in office. FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 21, 26 (1974).

154. JEFF BROADWATER, JAMES MADISON: A SON OF VIRGINIA AND A FOUNDER OF THE NATION 188 (2012) (Madison instructed his overseer to treat his slaves with "humanity and kindness").

155. In a message from the President of the United States, delivered to the House of Representatives by Edward Coles, President Madison stated:

> Among the commercial abuses under the American flag . . . it appears that American citizens are influential in carrying on a traffic in enslaved Africans, equally in violation of the laws of humanity, and in defiance of the laws of their own country.

H. JOURNAL, 11th Cong., 2d. Sess. 435 (1810).

156. Peace and Amity (Treaty of Ghent), U.K.-U.S., art. X, Dec. 24, 1814, 8 Stat. 218.

157. Arnett G. Lindsay, *Diplomatic Relations between the United States and Great Britain Bearing on the Return of Negro Slaves, 1783–1828*, 5 J. NEGRO HIST. 391, 411–14 (1920).

158. Gerard W. Gawalt, *James Monroe, Presidential Planter*, 101 VA MAG. HIST. & BIOGRAPHY 251, 264 (1993).

159. S. EXEC. DOC. NO. 18-371 (1824) ("I[, James Monroe,] transmit to the Senate, for their constitutional advice with regard to its ratification, a convention for the suppression of the African slave trade, signed at London . . . by the Minister of the United states . . . .").

In these discussions, the United States justified slavery without shame.[160] The British and United States submitted the question to arbitration before the Emperor of Russia in 1822 but that process broke down.[161] Finally, under the slave-owning acumen of President Jackson, the United States government offered to settle the dispute for money.[162] Jackson's commercial success, prior to becoming President, included slave trading.[163] He bought and sold slaves while President.[164]

What is clear is that presidents had a vested interest in their diplomacy to secure repayment for slaves taken by the British in the War of 1812. Even John Quincy Adams, an abolitionist President, found himself in the awkward position of paying appropriations to incarcerate slaves who were seized on the open seas.[165]

Slaveholding also created fear of revolts. After a slave insurrection in Haiti, President Washington's government advanced $726,000 to French whites in St. Domingue, enabling them to purchase arms and supplies to suppress black independence.[166] Later, President Martin Van Buren and former President John Quincy Adams were involved in a diplomatic row over a slave insurrection on a Spanish ship that arrived in a New York port.[167]

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160. H.R. Doc. No. 16-342 (1821). Monroe's message appeared to endorse the pro-slavery view of a Spanish minister, stating:

> Sir: the introduction of negro slaves into America was one of the earliest measures adopted by the august ancestors of the King . . . for the improvement and prosperity of those vast dominions, very shortly after their discovery. The total inaptitude of the Indians to various useful but painful labors, the result of their ignorance of all the conveniences of life, and the imperfect progress in civil society, made it necessary to have recourse to strong and active laborers for breaking up and cultivating the earth.

Id. (words of Don Luis de Onis to Secretary of State).

161. Peace and Amity (Treaty of Ghent), U.K.-U.S., art. X, Dec. 24, 1814, 8 Stat. 218.

162. *Id.*

163. John Spencer Bassett, The Life of Andrew Jackson 66 (1911). Jackson had armed encounters with government agents who insisted on seeing proof that he had title to certain slaves. *Id.*

164. Mark R. Cheathem, *Andrew Jackson, Slavery, and Historians*, 9 Hist. Compass 326, 331 (2011).

165. S. Doc. No. 20-340 (1827) (presenting a detailed statement of appropriated expenditures to enforce the Act of March 3, 1819).

166. Donald R. Hickey, *America's Response to the Slave Revolt in Haiti, 1791–1806*, 2 J. Early Republic 361, 364–65 (1982).

167. Iyunolu Folayan Osagie, The Amistad Revolt: Memory, Slavery, and the Politics of Identity in the United States and Sierre Leone xii (2003); *see also* United States v. Libellants of the Schooner Amistad, 40 U.S. 518 (1841) (hold-

The Constitution's effect in producing slaveholding presidents also tied them to a deportation issue: whether the United States should forcibly remove slaves to Africa. To that end, various deportation groups were active, including the American Colonization Society, formed in 1817.[168] Two presidents were involved in diplomatic efforts to colonize American slaves to Africa.[169]

In sum, the Constitution has shaped the presidency along racial lines. This effect is subtle today but has been exploited in an elaborate "birther" conspiracy about the nation's first black President.[170] Today, twenty million naturalized citizens—mostly nonwhite—are ineligible to be President because they were born outside the United States. The original Constitution set the course for a presidency that for much of the next 230 years was institutionally inclined to translate the racial animus of white Americans, particularly workers, into immigration restrictions. In this context,

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ing that President Adams used his powers as Commander-in-Chief to carry out legislation to block slave trading); S. DOC. NO. 20-340.

168. Henry Noble Sherwood, *The Formation of the American Colonization Society*, 2 J. NEGRO HIST. 209, 217 (1917).

169. *See* Letter from Thomas Jefferson, *supra* note 1. President Monroe, who was actively engaged with the American Colonization Society, dispatched two emissaries to England and then on to Africa to explore resettlement of American slaves. Early Lee Fox, The American Colonization Society 1817-1840, 52-53 (1919) (unpublished Ph.D. Dissertation, Johns Hopkins University) (on file with the Library of Congress).

170. *See Birther Bills: Alive and Dead in State Legislatures*, DAILY KOS (Apr. 19, 2011), https://www.dailykos.com/stories/2011/4/19/968301/- [https://perma.cc/GTS9-UC2H] (reporting that "birther" bills were introduced in at least fourteen states legislatures: Arizona, Missouri, Nebraska, Oklahoma, Texas, Connecticut, Georgia, Indiana, Maine, New Hampshire, Arkansas, Tennessee, and Montana). *See also* Richard Ruelas, *How Arizona Became Ground Zero for 'Birthers'*, REPUBLIC (Oct. 20, 2016), https://www.azcentral.com/story/news/local/arizona-best-reads/2016/10/16/how-arizona-became-ground-zero-birthers/91924322/ [https://perma.cc/A6WM-FNLD]; Jan Moller, *Gov. Jindal Will Sign 'Birther' Bill If It Reaches His Desk*, TIMES PICAYUNE (Apr. 19, 2011), https://www.nola.com/news/politics/article_9e226450-b3d1-5912-a59a-1c0fc7a659f4.html [https://perma.cc/RM2P-CKBH]; Tim Murphy, *Oklahoma Birther Bill One Step Closer to Becoming Law*, MOTHER JONES (Apr. 8, 2011), https://www.motherjones.com/politics/2011/04/oklahoma-birther-bill-one-step-closer-becoming-law/ [https://perma.cc/B4NF-AYUS]; Elizabeth Crisp, *Missouri House Approves "Birther" Bill*, ST. LOUIS POST-DISP. (March 28, 2012), https://www.stltoday.com/news/local/govt-and-politics/missouri-house-approves-birther-bill/article_cd2808da-7920-11e1-8076-001a4bcf6878.html [https://perma.cc/HJ7J-7A42]; Melissa Jeltsen, *NH Birther Bill Backer: "I Don't Know" Where Obama Was Born*, TALKING POINTS MEMO (March 11, 2011), https://talkingpointsmemo.com/dc/nh-birther-bill-backer-i-don-t-know-where-obama-was-born [https://perma.cc/Q6JE-AXXW].

President Trump's racially themed immigration messages should not surprise. He is a byproduct of a flawed Constitution.

IV.
CHINESE, JAPANESE, OTHER ASIANS, AND EUROPEANS: THE PRESIDENT'S ROLE IN EXCLUSIONARY ACTIONS

The modern era of federal immigration began in 1862 with a law to regulate Chinese workers,[171] a significant source of migratory labor. American policy through 1952 was a multi-layered accretion of restrictions mostly aimed at protecting white workers from competition with foreign labor. Alongside this development, presidents amplified xenophobic rants of labor leaders and politicians. In this section, I explore how immigration shifted from state to federal control and analyze the statutory exclusion of Chinese laborers and executive enforcement of these racial restrictions. I conclude by analyzing how presidents implemented these restrictions.

A. Transition of Immigration Controls from States to the Federal Government

Under Article II, Section 2 of the Constitution, the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties."[172] The exercise of this power from 1862 to 1943 led to the exclusion of the Chinese and Japanese, and eventually most other nationality groups except those from the United Kingdom and northern Europe.

Before the 1860s, states exercised immigration powers because the federal government had few immigration laws. The Constitution referred to slave "migration" and "importation," but the Supreme Court interpreted this language as a form of commerce.[173] States enacted immigration laws, called "passenger

171. M. Foster Farley, *The Chinese Coolie Trade 1845-1875*, 3 J. ASIAN & AFR. STUD. 257, 257 (1968) (citing Edgar Holden, Coolie Trade, 29 HARPER'S MAG. 2, 2 (June 1864)) (the term "coolie" referred to the lowest class of laborers from eastern countries).

172. U.S. CONST. art. II, § 2.

173. *Id.* at art. I, § 9. The text in Article II, Section 9 shows the Framers' conflicted understanding of slavery in the context of migratory labor, alternately referring to "Migration or Importation." Groves v. Slaughter, 40 U.S. 449, 505 (1841) (noting that "[t]he transportation of slaves from a foreign country, before the abolition of that traffic, was subject to this commercial power"). *See also* New York v. Compagnie Generale Transatlantique, 107 U.S. 59, 89 (1883) ("The two words

laws," to bar entry of convicts,[174] which were intended for "the better settlement and relief of the poor,"[175] but were really concerned with how migrants found work in order to avoid becoming public charges.

States also attempted to discourage immigration by making the steerage industry bear the cost of bringing unemployed aliens. For example, beginning in 1824, New York required shipmasters arriving from foreign ports to list names, ages, and occupations of every passenger,[176] a policy that linked immigration and work. The states then used this reporting requirement to levy a per capita fee for the support of foreign paupers but were ultimately thwarted by the Supreme Court.[177]

Federal immigration laws began with Abraham Lincoln. He dispatched Anson Burlingame to negotiate a treaty with China[178] (known as the Burlingame Treaty), which achieved a new level of amity and provided for free immigration between the two countries.[179]

'migration' and 'importation' refer to the different conditions of this race as regards freedom and slavery. When the free black man came here he migrated; when the slave came he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import.").

174. *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 112–13 (1837) (Virginia, South Carolina, Georgia, New Hampshire, Massachusetts, and New York enacted "passenger laws" that regulated immigration between 1788 and 1791).

175. *Id.* at 103 n.4. So-called passenger laws were enacted in the U.S. starting in 1819 to prevent overloading of immigrant ships and to provide for more humane conditions. *See* Hans-Jürgen Grabbe, *European Immigration to the United States in the Early National Period, 1783–1820*, 133 PROC. AM. PHIL. SOC'Y 190, 204 (1989).

176. *Miln*, 36 U.S. at 142 (sustaining the law as a constitutional exercise of the state's police powers).

177. Passenger Cases, 48 U.S. (7 How.) 283, 452 (1849). Justice Wayne believed that only Congress had constitutional power to regulate commerce with foreign nations, and found the state laws in conflict with that enumerated power.

178. David L. Anderson, *Aaron Burlingame: American Architect of the Cooperative Policy in China, 1861–1871*, 1 DIPLOMATIC HIST. 239 (1977).

179. *See generally* A Treaty of Peace, Amity and Commerce, Between the United States and China, Dec. 21, 1858, 12 Stat. 1023, *amended by* Additional Articles to the Treaty Between the United States and China, U.S.-China, Oct. 19, 1868, 16 Stat. 739. Article XVIII allowed hiring of Chinese persons to assist in the teaching of languages of the Empire. *Id.* Article V (as amended) stated that the United States and Emperor of China recognize "the mutual advantage of the free migration and emigration of their citizens and subjects respectively . . . for the purposes of curiosity, of trade, or as permanent residents." *Id.*

Soon, however, the unrestricted migration of Chinese laborers spurred worker protests.[180] Completion of the transcontinental railroad threw these laborers into competition with Americans.[181] White laborers chafed for an immigration ban.[182] Their pleas hardened into bigotry.[183] Unions also protested Chinese laborers.[184] Eventually, American workers formed a political party.[185] They succeeded in passing laws to exclude "Orientals."[186]

180. *See generally* MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION (1909); ELMER C. SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1939); LUCILLE EAVES, A HISTORY OF CALIFORNIA LABOR LEGISLATION (1910); Terry E. Boswell, *A Split Labor Market Analysis of Discrimination Against Chinese Immigrants, 1850–1882*, 51 AM. SOC. REV. 352, 356 (1986) ("[W]hite workers and white small business owners formed a political alliance in the Democratic Party to secure national anti-Chinese state action").

181. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 17 (2007); *see also* Boswell, *supra* note 180, at 365–66 (detailing the labor force participation of Chinese Workers for railroads).

182. *See* Heong v. United States, 112 U.S. 536, 566 (1884) (describing the reaction of white workers to the influx of Chinese laborers: "Successful competition with them was, therefore, impossible, for our laborers are not content, and never should be, with a bare livelihood for their work").

183. For a stark example, see GOMPERS & GUTSTADT, *supra* note 17, at 14 ("For many years it has been impossible to get white persons to do the menial labor performed by Chinese and Japanese—It is Mongolian's labor and not fit for whites." In the agricultural districts a species of help has been created, known as the blanket man. White laborers seldom find permanent employment; the Mongolian is preferred. During harvest time the white man is forced to wander from ranch to ranch and find employment here and there for short periods of time, with the privilege of sleeping in the barn or haystacks. He is looked upon as a vagabond, unfit to associate with his employer or to eat from the same table with him. The negro slave of the South was housed and fed, but the white trash of California is placed beneath the Mongolian.").

184. SIDNEY ROGER DANIELS, THE POLITICS OF PREJUDICE 16–18 (1962). This attitude carried on for more than fifty years, marked by labor leader Samuel Gompers' ugly endorsement of the Chinese Exclusion Act. Herbert Hill, *Anti-Oriental Agitation and the Rise of Working Class*, 10 SOC'Y 43, 51 (1973) (quoting labor leaders Samuel Gompers and Herman Gutstadt that the "Yellow Man found it natural to lie, cheat and murder").

185. A comprehensive treatment appears in PHILIP S. FONER, THE WORKINGMEN'S PARTY OF THE UNITED STATES 25–36 (1984).

186. *See In re* Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880) (involving a California statute that criminalized employment of Chinese labor by a corporation). The law was declared unconstitutional:

> [T]the law is void, as not being a reasonable, bona fide, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans, or Americans; that the corporations

Before this prejudice could metastasize across the nation, presidents were already airing racially tinged immigration grievances before Congress.[187] Diplomacy also changed from the time of Lincoln, with less regard for outcast groups. Jews and Mormons experienced the change from presidential tolerance to indifference.[188]

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have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon. . . .

Id. at 493; *see also* Baker v. Portland, 2 F. Cas. 472, 474 (C.C.D. Or. 1879) (striking down Oregon law that prohibited the employment of Chinese laborers on public works projects) ("True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.").

187. *See* Ulysses S. Grant, First Annual Message (Dec. 6, 1869) (transcript available at the National Archives) ("In this connection I advise such legislation as will forever preclude the enslavement of the Chinese upon our soil under the name of coolies, and also prevent American vessels from engaging in the transportation of coolies to any country tolerating the system."); *see also* President Ulysses S. Grant, Sixth Annual Message (Dec. 7, 1874) (transcript available at the National Archives) ("[T]he great proportion of the Chinese immigrants who come to our shores do not come voluntarily, . . . but come under contracts with headmen, who own them almost absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes. . . ."); President Chester A. Arthur, Third Annual Address (Dec. 4, 1883) (transcript available at the National Archives) ("Question has arisen touching the deportation to the United States from the British Islands . . . of persons unable there to gain a living and equally a burden on the community here. Such of these persons as fall under the pauper class as defined by law have been sent back in accordance with the provisions of our statutes.").

188. Initially, presidential diplomacy advocated for the interests of Jews. President Martin Van Buren's Secretary of State, John Forsyth, instructed a U.S. diplomat:

> In 1840, at the time of mistreatment of Jews at Damascus, our "charge d'affaires at Constantinople was instructed to interpose his good offices on behalf of the oppressed and persecuted race of the Jews in the Ottoman dominions, among whose kindred are found some of the most worthy and patriotic of our own citizens."

1 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 15. The Digest also reports: "The joining by a consul of the United States, in a Mohammedan country, with consuls from other powers in a protest against the conviction and execution of a Jew for blasphemy, meets with the approval of the Government of the United States." *Id.*

The retreat from benevolence coincided with anti-Chinese sentiments. President Rutherford B. Hayes's Secretary of State, William Evarts, instructed an American diplomat that if "a citizen of the United States has been broken up in his business at St. Petersburg simply for the reason that he is a Jew" then the Russian government should be told that "the religion professed by one of its citizens has no relation whatever to that citizen's right to the protection of the United States." *Id.* at 434, § 206. Secretary Evarts instructed another diplomat: "The increase of Mor-

These diplomatic embers signaled a broader presidential shift from protecting minorities to tolerating abuses against them.

B. The Chinese Laborer: Exclusion and Restrictions

The long period of restricting Chinese workers began with the Coolie Act,[189] an 1862 law that gave presidents power to inspect and seize passenger ships in U.S. ports.[190] Later, the Page Act of 1875 barred immigration of women from China, Japan and other Asian nations for the purpose of prostitution.[191] As anti-immigrant fever rose across the country, President Rutherford Hayes named James Burrell Angell to renegotiate the Burlingame Treaty.[192] The resulting Angell Treaty ended unrestricted Chinese labor migration to the United States and made China responsible for curbing emigration to the United States.[193] However, while Hayes agreed to some changes to the immigration system, he blocked harsher measures. In 1879, he vetoed the Fifteen Passenger Bill because it conflicted with U.S. treaty obligations.[194] This did not dissuade Congress,

mon emigration to the United States from Austria is an evil to which the Austrian Government may be properly turned, asking such measures of repressing emigration as may be practicable." *Id.* at 519.

189. Act of Feb. 19, 1862 (Act of 1862), ch. 27, 12 Stat. 340 (regulating transportation of "inhabitants or subjects of China, known as 'coolies'"), *repealed by* Pub. L. No. 93-461, 88 Stat. 1387 (1974). At the same time, peonage occurred in the New Mexico territory. *E.g.*, Jaremillo v. Romero, 1 N.M. 190, 192–93 (N.M. 1857) (suit alleging that a household servant, apparently a Mexican national, abandoned her service to a New Mexico territorial citizen without paying off her labor servitude).

190. Act of 1862 at ch. 7 § 6.

191. Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477, § 1 (1875).

192. H.R. Res. 282, 112th Cong. (2011) (expressing "the regret of the House of Representatives for the passage of discriminatory laws against the Chinese in the United States, including the Chinese Exclusion Act," and including specifically: "Whereas in 1878, the House of Representatives passed a resolution requesting that President Rutherford B. Hayes renegotiate the Burlingame Treaty so Congress could limit Chinese immigration to the United States").

193. Treaty Regulating Immigration from China, China-U.S., May 9, 1881, 22 Stat. 826. The preamble to the treaty referred to the "increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration"—and apparent reference to "ill treatment" of the Chinese and the U.S. government's commitment to "devise measures for their protection." *Id.* at art. III. The treaty also provided discretion to the United States to "regulate, limit, or suspend such coming or residence" of Chinese laborers. *Id.* at art. I.

194. Rutherford B. Hayes, Veto Message Regarding Immigration Legislation to the House of Representatives (Mar. 1, 1879) (transcript available at the Miller Center at the University of Virginia) (the bill set a maximum of fifteen Chinese passengers to be brought into the U.S. on a ship).

which presented the Chinese Exclusion Act of 1882 to President Chester Arthur.[195] President Arthur vetoed the bill because it barred Chinese immigration for twenty years.[196]

From 1882 through 1907, the federal government injected itself into the regulation of ports (previously the domain of states) to further control immigration into the country. I highlight these general developments before discussing how these policies and procedures were applied to migratory labor.

Beginning with the Immigration Act of 1882, Congress gave the President broad immigration powers to levy a head tax;[197] exclude "idiots, insane persons, paupers" and other undesirable people and appoint a superintendent of immigration;[198] conduct admission and deportation inquiries by executive branch officers and boards of inquiry;[199] hold administrative hearings "separate and apart from the public";[200] issue registration certificates to new arrivals;[201] exclude "defective persons";[202] deport alien prostitutes;[203] create the Bureau of Immigration;[204] consolidate administrative control of naturalization in the new Agency;[205] provide exclusive federal jurisdiction over naturalization;[206] and enlarge the President's discretion to protect American workers from

195. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882). While commonly referred to as the Chinese Exclusion Act of 1882, contemporaries called it the Chinese Restriction Act. *See* Beth Lew-Williams, *Before Restriction Became Exclusion: America's Experiment in Diplomatic Immigration Control*, 83 PAC. HIST. REV. 24, 26 (2014).

196. Chester A. Arthur, Veto of the Chinese Exclusion Act to the Senate (Apr. 4, 1882) (transcript available at the Miller Center at the University of Virginia).

197. *See* Immigration Act of 1882, Pub. L. No. 47-376, § 1, 22 Stat. 214, 214 (1882) (creating duty of 50 cents per each foreigner entering on a ship).

198. *See* Immigration Act of 1891, Pub. L. No. 51-551, § 1, 26 Stat. 1084, 1085 (1891). The law also expanded excluded groups to all contract laborers, people with contagious diseases, idiots, convicts, and polygamists. *See id.* The law also provided for a presidential power to appoint a superintendent of immigration. *See id.* at § 7.

199. Act of Mar. 3, 1902, 32 Stat. 1213, §25, 57 Cong. Ch. 1012 (1903).

200. *Id.*

201. Immigration Act of 1906, Pub. L. No. 59-338, § 1, 34 Stat. 596, 596 (1906).

202. Act of Feb. 27, 1907, Pub. L. 59-96, § 2, 34 Stat. 898, 898-900 (1907) (excluding "idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous," as well as paupers and beggars).

203. *Id.* at § 3.

204. Immigration Act of 1906 § 1.

205. *Id.*

206. *Id.*

detrimental labor conditions.[207] Courts upheld these broad delegations of power to presidents and immigration officials, including laws that mixed executive and judicial power by allowing Article II immigration judges to adjudicate petitions to avoid removal.[208]

Congress strengthened the executive branch's authority over immigrants. Acting under an amendment to the Chinese Exclusion Act of 1882,[209] President Arthur's customs officials in San Francisco prevented all Chinese from landing, even Chinese workers who had a right to be in the United States.[210] Upon taking office in 1885, President Grover Cleveland denounced Chinese workers as a "servile class to compete with American labor."[211] Congress further restricted Chinese workers in the Alien Contract Labor Law, which

207. *Id.* (President may refuse entry to the United States if holder of a passport is a detriment to "labor conditions").

208. *E.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (holding that no other tribunal, unless expressly authorized, can review an immigration officer's fact findings); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) ("[P]ower of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive."); Lem Moon Sing v. United States, 158 U.S. 538, 545 (1895) ("[P]ower of congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers."); Wong Wing v. United States, 163 U.S. 228, 234–35 (1896) ("[I]t is within the constitutional power of congress to deport both of [Chinese laborers] . . . and to commit the enforcement of the law to executive officers."); United States v. Gue Lim, 176 U.S. 459, 464 (1900) ("This court has already sustained the power of Congress to provide for excluding or expelling Chinese . . . ; also the power to intrust the final determination of the facts upon which the individual is to be expelled, to an executive officer."); Li Sing v. United States, 180 U.S. 486 (1901) (Congress "can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials"); Lee Lung v. Patterson, 186 U.S. 168, 176 (1902) ("[J]urisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right"); Kaoru Yamataya v. Fisher, 189 U.S. 86 (1903) ("[T]he power to exclude or expel aliens belonged to the political department of the government, . . . and no other tribunal . . . was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.").

209. Act of July 5, 1884, ch. 220, 23 Stat. 115 (July 5, 1884).

210. Problems involved certain laborers who had left for China before return certificates were issued, as well as with Chinese merchants arriving from ports outside of China—and the local customs officer who strictly construed the certificate law, while playing to anti-immigration supporters. LUCY SALYER, CHEW HEONG V. UNITED STATES, FEDERAL TRIALS AND GREAT DEBATES 3 (2006).

211. "The laws should be rigidly enforced which prohibit the immigration of a servile class to compete with American labor, with no intention of acquiring citizenship, and bringing with them and retaining habits and customs repugnant to our civilization." Grover Cleveland, First Inaugural Address (Mar. 4, 1885) (transcript available at the Miller Center at the University of Virginia).

prohibited recruitment organizations and trafficking gangs from paying passage for foreigners to work in the United States.[212]

Over the next three years, hostility toward migratory workers exploded. President Benjamin Harrison, when accepting his party's presidential nomination in 1888, denounced foreign labor.[213] A month later, Congress passed the Scott Act.[214] This draconian law provided for removal of any Chinese laborer who could not produce a certificate of legal residency.[215] When the law went into effect, approximately 30,000 Chinese laborers were overseas.[216] Just days after the Scott Act became law, a worker with proper paperwork before the law was returned to the United States from China; however, the customs officer refused to accept his papers. The resulting Supreme Court case, *Chae Chan Ping v. United States*, was a landmark decision.[217] It recognized Congress' absolute power to regulate immigration, including reneging on a treaty by denying admission to aliens.[218] The Court repeated the mob animus against Chinese people, describing them as "vast hordes of people crowding in upon us,"[219] and "a different race . . . dangerous to [America's] peace and security."[220]

212. Alien Contract Labor Law (Foran Act), ch. 164, 23 Stat. 332 (1885). The law prohibited any entity or person from prepaying for passage of a foreigner to work in the U.S. *Id.* at § 1. It made exceptions for skilled workers to immigrate. *Id.* at § 5. For additional background, see Samuel P. Orth, *The Alien Contract Labor Law*, 22 AM. POL. SCI. Q. 49, 54–55 (1907).

213. Letter from Benjamin Harrison Accepting the Presidential Nomination (Sept. 11, 1888) (on file with The American Presidency Project) (tying tariffs to immigration restrictions: "Legislation prohibiting the importation of laborers under contract to serve here will, however, afford very inadequate relief to our working people if the system of protective duties is broken down").

214. Scott Act, Pub. L. No. 50-1064, 22 Stat. 54 (1888).

215. *Id.* at § 12.

216. *See* Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005) (approximately 30,000 Chinese laborers were temporarily overseas when the law changed).

217. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding federal authority to enact a law that contradicted the Burlingame Treaty of 1868, which allowed for Chinese laborers to enter the U.S.).

218. *Id.* at 609 ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

219. *Id.* at 606.

220. *Id.*

The Geary Act of 1892 imposed even harsher restrictions.[221] Chinese residents were required to carry a permit in the United States[222] and non-compliance was punishable by deportation or one year in prison with hard labor.[223] Even Chinese residents who had never traveled outside the United States could be deported.[224] In the absence of a permit, a Chinese laborer who sought to prove lawful residency could only use a "credible white witness."[225] When Chinese laborers were detained without a court hearing, the Supreme Court, despite three impassioned dissents, upheld the law in *Fong Yue Ting v. United States*.[226] The Geary Act also introduced a major institutional change: courts were bypassed entirely in immigration matters, and the executive branch was vested with unreviewable authority to deport aliens.[227]

221. Geary Act, ch. 60, § 1, 27 Stat. 25 (1892) (repealed 1943); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding Section 6, a provision that required Chinese aliens to obtain certificates of residency). Thus, the law significantly expanded the regulation of Chinese laborers beyond international travel to include mere residency. The law was enforceable by arrest and deportation if a Chinese alien had no certificate or violated any other law. The Court denied Fong Yue Ting's appeal for a writ of habeas corpus.

222. Geary Act § 6.

223. *Id.* at § 4. (describing the "punishment for illegal residence").

224. Wong Wing v. United States, 163 U.S. 228, 235 (1896).

225. Geary Act § 6.

226. *Fong Yue Ting*, 149 U.S. 698 (upholding section 6 of the Geary Act, thus denying Fong Yue Ting's appeal for a writ of habeas corpus). Justice Brewer's dissenting opinion laid bare the basic unfairness of the Geary Act:

> Again, a person found without such certificate may be taken before a United States judge. What judge? A judge in the district in which the party resides or is found? There is no limitation in this respect. A Chinese laborer in San Francisco may be arrested by a deputy United States marshal, and taken before a judge in Oregon; and, when so taken before that judge, it is made his duty to deport such laborer, unless he proves his innocence of any violation of the law, and that, too, by at least one credible white witness. And how shall he obtain that (white) witness? No provision is made in the statute therefor.

Id. at 741–42 (Brewer, J., dissenting).

227. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) (upholding the Geary Act against a Chinese merchant who was denied re-entry even though by treaty he was allowed to enter the U.S. to conduct business). The Court stated:

> The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, *and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention*, is settled by our previous adjudications.

Id. (emphasis added). *But see Wong Wing*, 163 U.S. at 228 (striking down Section 6 as unconstitutional, as applied to Chinese laborers who were sentenced to hard labor without having a judicial hearing).

During his inaugural address in 1897, President William McKinley cast foreigners as a public menace, and demanded that "our gates must be promptly and tightly closed."[228] He issued the first executive order pertaining to immigration and labor conditions, barring Chinese workers from Hawaii.[229] Meanwhile, his administration's insulting treatment of a Chinese minister, as well as other frictions, soured whatever good will remained with China.[230]

C. Japanese, All Asians, and Europeans: Broader Racial Exclusion

The strained treaty relationship with China carried over to the Presidency of Theodore Roosevelt. Brought to office after an anarchist murdered McKinley, Roosevelt's first address to Congress depicted the attack—which was carried out by the son of Polish immigrants[231]—as an assault on the working man. This played into Roosevelt's plea for Congress to broaden immigration restrictions beyond China.[232]

In the Immigration Act of 1903, Congress specifically introduced race in a questionnaire to be completed at a disembarkation

228. President William McKinley, First Inaugural Address (March 4, 1897) (transcript available at the Miller Center at the University of Virginia).

229. 2 MESSAGES AND PAPERS OF WILLIAM MCKINLEY (Sept. 2, 1899), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1902 (George Raywood Devitt ed., 1904), http://www.gutenberg.org/files/14446/14446-8.txt [https://perma.cc/NL4Y-UYZS] ("Of the Chinese Exclusion Laws in the Hawaiian Islands under the clause in said Resolution restricting the emigration of Chinese to the Islands").

230. The Gresham-Yang Treaty of 1894 superseded the Scott Act, transferring control of Chinese registration and exclusion on a treaty basis. *See* Act of Mar. 17, 1894, 28 Stat. 1210, Treaty Series 51. Under McKinley, the treaty unraveled. Soon after he took office, the Chinese minister notified the State Department that Americans were abusing his countrymen. He cited a particularly insulting incident in New York City. George E. Paulsen, *The Abrogation of the Gresham-Yang Treaty*, 40 PAC. HIST. REV. 457, 461–62 (1971). As Chinese ministerial carriages passed through the streets, a mob pelted them with stones and dirt. Police did nothing to avert the attack. As this was the second occurrence, Wu Ting-fan complained to the Secretary of State. In reply, McKinley's government could muster no more warmth than to say that "Federal authorities are powerless under our complicated system of government." *Id.* at 462.

231. Leon Czolgosz was born in Detroit, Michigan according to the Buffalo, New York booking of the assassin. *See* LINDSAY RECKSON, WILLIAM VANDER WEYDE, LEON F. CZOLGOSZ, MCKINLEY ASSASSIN 1, 4 (2016).

232. *Id.* at 4 ("I earnestly recommend to the Congress that in the exercise of its wise discretion it should take into consideration the coming to this country of anarchists or persons professing principles hostile to all government and justifying the murder of those placed in authority.").

port.[233] The Naturalization Act of 1906 required aliens to "speak the English language" for admission.[234] The Immigration Act of 1907[235] combined anti-immigrant sentiment with the rising popularity of eugenics by excluding people with physical and psychological disabilities.[236] During this period, academic studies reinforced prejudicial treatment of foreigners.[237] The 1907 act also created an immigration commission,[238] which later advocated for nationality quotas while voicing racial intolerance.[239]

Despite the anti-immigrant sentiment which drove the exclusion of Chinese immigrants from the country, the resulting labor shortages were filled with immigrants from a different country: Japan.[240] A contract labor system brought 30,000 émigrés from Japan

233. Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213 (regulating the immigration of aliens into the United States).

234. Naturalization Act of 1906, ch. 3592, 34 Stat. 596, *repealed by* Nationality Act of 1940, ch. 876, 54 Stat. 1137.

235. Act of Feb. 20, 1907, Pub. L. 59-96, § 2, 34 Stat. 898, 898-900 (1907) (excluding for admission "idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous" as well as paupers, beggars, and persons with tuberculosis).

236. *Id.* at § 2.

237. *E.g.*, Henry W. Farnam, *The State and the Poor*, 3 POL. SCI. Q. 282, 293 (1888) ("[T]he foreign-born may be said to make a somewhat heavier drain, in proportion to their numbers, upon the commonwealth, than the native-born population. Yet the native-born mothers are found to have on an average 3.52 children apiece, while the foreign-born have 4.91. Thus, the very element which sends the largest contingent into the jails and workhouses is also most active in recruiting the coming generation."); Frank Fetter, *Social Progress and Race Degeneration*, 28 FORUM 228, 237 (1899) ("[T]he benefits of social progress are being neutralized by race degeneration"); JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA 212–13 (1906) ("The line between inferior and superior . . . races appears to be the line between the temperate and tropical zones . . . . The children of all the temperate zones are eligible to the highest American civilization and it only needs that they be 'caught' enough.").

238. Immigration Act of 1906, Pub. L. No. 59-338, § 39, 34 Stat. 596, 909 (1906).

239. *Infra* note 254.

240. Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 POL. SCI. Q. 604, 606 (1922) (explaining that the Chinese exclusion law spurred California farmers to seek "Negroes, Mexicans, Filipinos, Hindus, Porto-Ricans and Japanese"). By one account, the labor shortage caused farmers to idle 568,943 acres. *Id.* Banks holding mortgages were harmed by "farm lands that could not be made productive because Chinese labor had been driven out." *Id.* The new supply of labor was created in large part because of a burdensome tax policy that Japan initiated to end its feudalistic agriculture system. *See* Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B. C. THIRD WORLD L. J. 37, 44 (1998); *see also* DANIELS, *supra* note 184; Clayton D. Laurie, *"The Chinese Must Go": The United States Army and the Anti-Chinese*

to Hawaiian plantations[241] to substitute the lost Chinese laborers.[242] From Hawaii, workers migrated to Washington and California, with the result that more than 90,000 Japanese were in the continental United States by 1907.[243] Conflicting conditions—the importation of Japanese laborers and the fearful reactions on them—led Roosevelt to adopt conflicting positions across foreign and domestic policy.

Seeking to avoid conflict with Japan, Roosevelt pressured the San Francisco Board of Education to stop segregating Asian children.[244] In an address to Congress and the nation, he warned Americans to avoid anti-Japanese outbursts.[245] At times, however,

Riots in Washington Territory, 1885–1886, 81 PAC. NW. Q. 22, 24 (1990); ROBERT B. RHODE, BOOMS AND BUSTS ON BITTER CREEK: A HISTORY OF ROCK SPRINGS, WYOMING 44–63 (1987).

241. DANIELS, *supra* note 185, at 5. The early stages of this migration appear in *In re Gip Ah Chan*, 6 Haw. 25, 29 (Haw. 1870).

242. DANIELS, *supra* note 185; *see also* Christopher Hu, *Transplanting Servitude: The Strange History of Hawaii's U.S. Inspired Contract Labor Law*, 49 STAN. J. INT'L L. 274, 285 n.85 (2013) ("Between 1882 and 1892, the composition of the workforce shifted further: The Japanese replaced the Chinese as the most numerous ethnic group on the plantations.").

243. U.S. IMMIGRATION, S. DOC NO. 61-747, at 624 (3d Sess. 1910).

244. After local citizens formed a Japanese and Korean Exclusion League, the San Francisco school board passed a policy on October 11, 1906 to segregate Asian students. This put Roosevelt in the middle of a bitter dispute, local and international in scope. *See* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 206–08 (1998). Roosevelt instructed his emissary, Victor Metcalf:

> I had a talk with the Japanese Ambassador before I left for Panama; . . . and then told him that in my judgment the only way to prevent constant friction between the United States and Japan was to keep the movement of the citizens of each country into the other restricted as far as possible to students, travelers, business men, and the like; that inasmuch as no American laboring men were trying to get into Japan what was necessary was to prevent all immigration of Japanese laboring men—that is, of the Coolie class—into the United States. . . .

Letter from President Theodore Roosevelt, to Victor Metcalf, Sec'y of Commerce and Labor (1906) (on file with the Theodore Roosevelt Center at Dickinson State University), https://history.hanover.edu/courses/excerpts/260gentlemen.html [https://perma.cc/S9LY-6YMB].

245. In his annual message, Roosevelt told Congress: "I ask fair treatment for the Japanese as I would ask fair treatment for Germans or Englishmen, Frenchmen, Russians, or Italians. I ask it as due to humanity and civilization. I ask it as due to ourselves because we must act uprightly toward all men." He added: "I am prompted to say this by the attitude of hostility here and there assumed toward the Japanese in this country." President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906) (transcript available at the Miller Center at the University of Virginia).

Roosevelt's letters revealed prejudice against Japanese people.[246] Roosevelt temporarily quelled domestic tensions by reaching a "Gentleman's Agreement" in 1907 with Japan to limit entry of their laborers.[247] But Executive Order 589, a later order which categorically banned the entry of Japanese laborers from outside the continental United States, demonstrated Roosevelt's sympathy to anti-Japanese sentiment.[248]

Anti-European sentiment was also growing at this time.[249] President William Howard Taft spoke against "outbursts of race feeling

246. Referring to Japanese immigration Roosevelt confided: "This whole Japanese business is very puzzling. I suppose because there are such deep racial differences that it is very hard for any of us of European descent to understand or be understood by them." DYER, *supra* note 2, at 135 ("This whole Japanese business . . . is very puzzling. . . . I suppose because there are such deep racial differences that it is very hard for any of us of European descent to understand or be understood by them."); *see also* Letter from President Theodore Roosevelt, to Senator Philander Knox (1909) (on file with the Library of Congress) ("In Hawaii the trouble is primarily due to the shortsighted greed of the sugar planters and of the great employers generally, who showed themselves incapable of thinking of the future of their children and anxious only to make fortunes from estates tilled by coolie labor. Accordingly, they imported, masses of Chinese laborers and, then masses of Japanese laborers . . . . To permit the Japanese to come in large numbers into this country would be to cause a race problem and invite and insure a race contest. It is necessary to keep them out.").

247. For specific attribution of President Roosevelt's role in the Gentlemen's Agreement, see ROGER DANIELS, NOT LIKE US: IMMIGRANTS AND MINORITIES IN AMERICA 1890–1924, 74–75 (Chicago 1997); MARION T. BENNETT, AMERICAN IMMIGRATION POLICIES: A HISTORY 25 (1963).

248. S. DOC. NO. 63–173 at 530 (1913) ("I hereby order that such citizens of Japan or Korea, to-wit: Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States."). The order cited "An Act to regulate the immigration of aliens into the United States," approved Feb. 20, 1907. *Id.*

249. The skin-color of immigrants from Southern Italy caused some Americans to question their "membership in the white race." MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 128 (2011). Between 1886 and 1910, at least 29 Italian men were lynched in the South. *Id.* Slavic immigrants were the subject of damning stereotypes, compared at times to Chinese and Jews for being overly thrifty. Karel D. Bicha, *Hunkies: Stereotyping the Slavic Immigrants, 1890–1920*, 2 J. AM. ETHNIC HIST. 16, 23 (1982). Rather than restrict Europeans by a formula, the literacy test emerged as a policy favorite for immigration opponents: "They argued that such a test would cut in half the influx from southern and eastern Europe, without seriously interfering with the older immigration from the more literate areas of Europe." John Higham, *American Immigration Policy in Historical Perspective*, 21 L. & CONTEMP. PROBS. 213, 221 (1956).

among our people against foreigners of whatever nationality."[250] And while Taft vetoed a bill for an immigration literacy test, his correspondence with Congress regarding the literacy test indicated that "undesirable" immigrants from "southern Italy, among the Poles, the Mexicans and the Greeks" should not be admitted.[251]

World War I nearly halted immigration to the United States.[252] Public outcry grew, nevertheless, for more restrictions. The Dillingham Commission, established by Congress in 1907 as the Immigration Commission,[253] concluded after four years of intensive data gathering that many Eastern and Southern Europeans were inferior workers compared to their Northern counterparts.[254] President Woodrow Wilson agreed. As a scholar, Wilson had published a book that singled out the "sturdy stocks of North Europe" for contributing to America's early success while disparaging "multitudes of men of the lowest class from the south of Italy and men of the meaner sort out of Hungary and Poland."[255] As a politician, he described America's breeding stock as the best of God's creation.[256] Southern European nations "were disburdening themselves of the more sordid and hapless elements of their population."[257]

250. William Howard Taft, Inaugural Address (March 4, 1909) (transcript available at Yale Law School Library) (requesting federal legislation to preempt local laws that interfered with treaty obligations).

251. 49 CONG. REC. 3156 (1913) (statement of President Taft) ("For the reasons stated in Secretary Nagel's letter to me, I cannot approve that test."). Secretary Nagel's believed a literacy test would be discriminatory: It would be "based upon a fallacy in undertaking to apply a test which is not calculated to reach the true and to find relief from a danger that really does not exist." *See* JAMES LANGLAND, THE DAILY NEWS ALMANAC AND REG. ALMANAC 239 (1914).

252. USCIS HISTORY OFFICE AND LIBRARY, OVERVIEW OF INS HISTORY 6 (2012).

253. Edith Abbott, *Federal Immigration Policies, 1864–1924*, 2 U.J. BUS. 133, 151 (1924) (immigration commission presented 41 volumes of data in 1911, along with numerous proposals to restrict immigration).

254. ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. DOC. NO. 61–747 at 644–54 (1911); *see also* REPORTS OF THE IMMIGRATION COMMISSION, STATISTICAL REVIEW OF IMMIGRATION, S. DOC. NO. 61–756 (1920). The Dillingham Commission issued a 42-volume report with statistical overviews and other analyses of topics related to immigrant occupations. *See* James S. Pula, *American Immigration Policy and the Dillingham Commission*, 37 POLISH AM. STUD. 5, 8 (1980).

255. WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE 212–13 (1902).

256. Hans Vought, *Division and Reunion: Woodrow Wilson, Immigration, and the Myth of American Unity*, 13 J. AM. ETHNIC HIST. 24, 28–29 (1994). In a speech to the Har Sinai Temple on Thanksgiving in 1910, Wilson quoted '"the old New England divine William Stoughton on the subject of God sifting the nations of the world to plant the choicest seed in America, and he went on to say, 'And so, apparently God is sifting the nations yet to plant seed in America.'" *Id.* at 40.

257. *Id.* at 29.

However, there were instances where Wilson thought that Congress went too far in closing America's gates. He vetoed legislation in 1916 which would require a literacy test per the Dillingham Commission's recommendation, believing it contradicted American values and history.[258] Congress, acting against a backdrop of racial and ethnic animus directed at Central and Southern Europeans, overrode his veto in the Immigration Act of 1917.[259] The new law also applied to a global swath of immigrants from the "Asiatic Barred Zone."[260] The law's unwelcoming message discouraged immigration.[261]

The 1920s capped decades of escalating immigration restrictions.[262] Americans were fed a steady diet of fear mongering that permissive immigration was diluting their breeding stock.[263] Eugenics served as a pseudo-scientific basis for these fears.[264] Anti-immi-

258. EXEC. OFFICE OF THE PRESIDENT, VETO MESSAGE (Jan. 28, 1915), https://www.presidency.ucsb.edu/documents/veto-message-0. [https://perma.cc/3469-PESK].

259. Immigration Act of 1917, 39 Stat. 874 (1917) (current version at 8 U.S.C. § 12 (1952)). An example of an argument made for the law appears in JEREMIAH W. JENKS & W. JETT LAUCK, THE IMMIGRATION PROBLEM 24–25 (1911) (complaining that before 1883 ninety-five percent of immigrants came from England, Ireland, Scotland, Wales, Belgium, Denmark, France Germany, Norway, Sweden, the Netherlands, and Switzerland; however, from 1883 to 1904, 81 percent came from Austria-Hungary, Bulgaria, Greece, Italy, Montenegro, Poland, Portugal, Rumania, Russia, Serbia, Spain, Syria and Turkey).

260. Entry was denied to all immigrants from India, Burma, Siam, the Malay States, Arabia, Afghanistan, part of Russia, and most of the Polynesian Islands. Immigration Act of 1917 § 3 (phrased in terms of map coordinates defining the "Continent of Asia").

261. *See* Henry Pratt Fairchild, *The Literacy Test and Its Making*, 31 Q. J. ECON. 447, 451 (1917) ("The whole aim of the laws is to keep out the undesirables").

262. Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 255 (Claudia Goldin & Gary D. Libecap eds. 1994).

263. Madison Grant, a lawyer and leading eugenicist in the early 1900s, promoted the view that the nation's "blood" was over 93% Nordic in 1790 but was diminishing since that time in quantity and quality as a superior breeding stock. Madison Grant, *The Racial Transformation of America*, 219 N. AM. REV. 343, 351 (1924). He was especially concerned about the lower intelligence of immigrants from Eastern and Southwestern Europe. *Id.* at 352. *See generally* MADISON GRANT, THE PASSING OF THE GREAT RACE (1916).

264. Eugenic selection for immigration policy can be found in *Restriction of Immigration: Hearing on H.R. 5, H.R. 101, and H.R. 561 Before the H. Comm. on Immigration and Naturalization*, 68th Cong. 1 (1925) (statement of Harry H. Laughlin) ("There was an American race and an American culture of 1860, and this race and culture is being modified to some degree by the changed racial character of the immigration of the last two generations. (U)nlimited immigration of races and types which have contributed very small percentages to making of the original

gration groups, unsated without the literacy test, began to push for retrogressive quotas—limits that used census figures of nationality groups in the United States to calculate tiny percentages of allowable new immigration for that nationality.[265]

In 1921, Congress acted on public hysteria against non-white immigrants[266] and enacted these retrogressive quotas in the Emergency Quota Act.[267] President Warren Harding signed the bill into law.[268] Congress then made these temporary measures permanent in the Immigration Act of 1924 and further capped immigration from three percent of the nationality group's presence in the 1910 census to two percent of that group's presence in 1890.[269] While the 1924 law focused primarily on Europeans who had recently immigrated,[270] Congress held special hearings for additional restrictions on the Japanese.[271] And in a demonstration of how much

American people would supplant our fundamental race complex, and with the new race would come other cultures, languages, and traditions for the country.").

265. The concept behind this is set forth in detail in *Hearings Before the Comm. on Immigration and Naturalization*, 66th Cong. 5–71 (1919) (statement of Rev. Sidney L. Gulick, Secretary, Exec. Comm. of the Nat'l Comm. for Constructive Immigration Legislation) ("We ought to admit no more than we can Americanize." *Id.* at 6. He therefore proposed that new entrants be limited 3% to 10% "of those who have become American citizens of that particular group.").

266. *See* LOTHROP STODDARD, THE RISING TIDE OF COLOR AGAINST WHITE WORLD SUPREMACY (1920) (portraying a world dominated by rapidly multiplying yellow, brown, and black people that threatened to end the white race's domination of civilization). Stoddard concluded: "People as they are wholly or mostly by whites, they have become parts of the race-heritage, which should be defended to the last extremity no matter if the costs involved are greater than the mere economic value." *Id.* at 226.

267. Emergency Quota Act of 1921, Pub. L. No. 67-5, ch. 8, 42 Stat. 5 (1921).The law used the 1910 census as a baseline for nationality quotas. Based on those numbers, the total number of immigrants admitted could not exceed 3% of the number of residents from that same country living in the U.S. *Id.* at § 5; *see* Proclamation No. 1872, 46 Stat. 2984 (Mar. 22, 1929).

268. Warren G. Harding, Second Annual Message (Dec. 8, 1922) ("Before enlarging the immigration quotas we had better provide registration for aliens, those now here or continually pressing for admission, and establish our examination boards abroad, to make sure of desirables only."); *see also Smuggled Aliens Concern Harding*, N.Y. TIMES, June 16, 1923, at 1.

269. Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159–160 (1924) (the two percent limit set to the 1890 census).

270. *Id.*

271. *A Bill to Limit the Immigration of Aliens into the United States, and for Other Purposes: Hearings on S. 2576 Before the S. Comm. on Immigration*, 68th Cong. 76 (1924) ("California is now suddenly awakening to the situation thus developing. For years it enjoyed and greatly benefited by the advantages of cheap, docile, efficient Asiatic labor. No small part of her prosperity has been made possible by Chinese and Japanese labor on railroads, roads, and ranches. California is now

Congress wished to be involved in curtailing the flow of immigrants into the country, both the 1921 and 1924 bills gave specific and detailed instructions to the executive branch for enforcement.[272]

The quota laws of the 1920s aligned Congress and the co-ordinate branches in hostility toward Asians.[273] President Calvin Coolidge joined other presidents who failed to take a moral stand against the implementation of those racial policies.[274] The Supreme Court offered no resistance. *Takao Ozawa v. United States* exposed the hypocrisy behind the idea that a literacy test was intended to admit foreigners who could assimilate.[275] Ozawa was highly literate and fully assimilated,[276] and yet his petition for naturalization was denied for one reason: he was not white.[277] Nevertheless, the Court upheld the decision to refuse his petition. *United States v. Bhagat Singh Thind* yielded a similar result for a Hindu from Punjab who sought citizenship though naturalization.[278] The Court endorsed the legislative policy that "a white person, within the meaning of this section . . . is entitled to naturalization; otherwise not."[279] Justice Sutherland's opinion in *Bhagat Singh* typified main-

discovering that Japanese labor is no longer cheap or servile."); *see also id.* at 5 (testimony of V.S. McClatchy) (March 11, 1924) ("Of all the races ineligible to citizenship under our law, the Japanese are the least assimilable and the most dangerous to this country." He continued: "They do not come to this country with any desire or any intent to lose their racial or national identity. They come here specifically and professedly for the purpose of colonizing and establishing here permanently the proud Yamato race. They never cease to be Japanese.").

272. Emergency Quota Act of 1921, Pub. L. No. 67-5, ch. 8, § 7, 42 Stat. 5 (1921) (requiring the Secretary of Labor to publish each month the number of arriving immigrants by nationality and publishing monthly reports).

273. *See* Ozawa v. United States, 260 U.S. 178 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923); *In re* Hidemitsu Toyota v. United States, 45 U.S. 563 (1925); Exec. Order No. 4359-A, 22 C.F.R. 79, 141 (1925). In Section 139, Coolidge's executive order expressly stated that a policy to enforce the Ozawa and Thind rulings that would exclude naturalization to Japanese and Hindus.

274. *See* President Calvin Coolidge, First Annual Address (Dec. 6, 1923) (on file with the American Presidency Project).

275. *Ozawa*, 260 U.S. at 178.

276. *Id.* at 189 (Ozawa lived in the U.S. for 20 years, graduated from the high school in Berkeley, California, attended the University of California for three years, educated his children in the U.S., attended American churches, and spoke English in his home).

277. *Id.* at 198. Justice Sutherland's opinion ruled that Japanese were ineligible for citizenship because they were not "free white persons" within the meaning of the Naturalization Act of 1906: "The appellant . . . is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side." *Id.*

278. *Bhagat Singh Thind*, 261 U.S. at 204.

279. *Id.* at 207.

stream thought of policy leaders, including American presidents: "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today."[280] Lower courts decided immigration cases under similarly crude racial theories.[281] As a result of the 1924 act, whose quotas went into effect in 1927,[282] 85 percent of quotas were allocated to people from Northern and Western European nations.[283] President Herbert Hoover set annual quotas by nationality in Proclamation No. 1872, preferring immigrants from the United Kingdom while excluding almost all people from nonwhite nations.[284]

The galloping pace of legislation finally slowed to a trickle,[285] so much so that from 1931 to 1936, the United States had net emi-

280. *Id.* at 209.

281. *E.g.*, *In re* Ahmed Hassan, 48 F. Supp. 843, 845–46 (E.D. Mich. 1942) ("Of course, when an individual applying for citizenship has a skin of a different color than is usual for the members of the group from which he claims to come, a strong burden of proof then rests upon him to show by the usual methods of proving genealogy that he is in fact a member of that group. After the individual has been traced into his group, the second question which the court must answer is whether the members of the group as a whole are white persons as Congress understood the term in 1790 when it first enacted the statute. In deciding this latter question, the test is . . . what groups of peoples then living in 1790 with characteristics then existing were intended by Congress to be classified as 'white persons.' Applying these principles the court finds that petitioner is an Arab and that Arabs are not white persons within the meaning of the act.").

282. Immigration Act of 1924, Pub. L. No. 68–139, 43 Stat. 153 (1924).

283. *See* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 67 n.1 (1999).

284. Proclamation No. 1872, 46 Stat. 2984 (Mar. 22, 1929) (setting annual quota limits of 100 for Afghanistan, Albania, Andorra, Arabian peninsula, Armenia, Australia, Bhutan, Bulgaria, Cameroon (British), Cameroon (French), China, Danzig, Egypt, Ethiopia, Iceland, India, Iraq, Japan, Liberia, Liechtenstein, Luxemburg, Monaco, Morocco (French and Spanish Zones and Tangier), Muscat (Oman), Nauru, Nepal, New Zealand, New Guinea, Palestine, Persia, Ruanda and Urundi, Samoa, San Marino, Siam, South Africa, South West Africa, Tanganyika, Togoland, Togoland (French mandate), and Yap and other Pacific Islands. Other nations were allotted: Austria 1,413; Belgium 1,304; Czechoslovakia 2,874; Denmark 1,181; Estonia 116; Finland 569; France 3,086; Germany 25,957; Great Britain and Northern Ireland 65,721; Greece 307; Hungary 869; Irish Free State 17,853; Italy 5,802; Lithuania 386; Netherlands 3,153; Norway 2,377; Poland 6,524; Portugal 1440; Rumania 295; Russia 2,784; Spain 252; Sweden 3,314; Switzerland 1,707; Syria and Lebanon 123; Turkey 226; and Yugoslavia 845).

285. Pub. L. No. 89-236, 79 Stat. 911 (1934) (allowing foreign-born children of American mothers and alien fathers to apply for naturalization and simplified the naturalization process for foreign-born husbands of American women); The Nationality Act of 1940, Pub. L. No. 76–853, 54 Stat. 1137 (1940) (specifying stan-

gration.[286] However, sentiment about immigrants began to manifest internally, especially against immigrants from Japan. In multiple states, laws were passed to prohibit the "Japanese race" from owning land.[287] When Japan attacked Pearl Harbor, ostensible concerns about national security and the threat posed by Japanese nationals and Japanese Americans became actionable.[288] Three weeks after the attack on Pearl Harbor, a leader of the Los Angeles Chamber of Commerce pressed the Army to round up American citizens of Japanese descent, an idea that Lt. Gen. DeWitt—the commander who eventually carried out Roosevelt's infamous evacuation order—dismissed as morally repugnant and counter-productive.[289] But by early 1942, when DeWitt reported on

dards for naturalization with regard to race, ethnicity and oral English competency); The Magnuson Act of 1943, Pub. L. No. 78–199, 57 Stat. 600 (1943) (repealing the Chinese Exclusion Act of 1882).

286. *See* David Fellman, *The Alien's Right to Work*, 22 MINN. L. REV. 137, 137 n.3 (1938) (from 1931–1936 immigration totaled 256,538 compared to emigration of 359,680, a difference of 103,142); Goldin, *supra* note 262, at 239 (reporting that the Emergency Quota Act of 1921 reduced immigration from Southern and Eastern Europe, which averaged 730,000 per year before World War I (1905–1914), to 20,000 persons per year).

287. *See* People v. Morrison, 13 P.2d 803, 804 (Cal. App. 1932) (upholding criminal conspiracy conviction of an American citizen and Japanese alien for violating Alien Land Law's prohibition of ownership by aliens), *rev'd by* 218 Cal. 287 (1933), *rev'd by* 291 U.S. 82, 95 (1934) ("admixture of oriental blood might be too slight for his race to be apparent to the eye," resulting in violation of due process for lack of clear knowledge of criminal intent); *see also* Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 87 n.141, 142 (1947) (in addition to California, Arkansas and Wyoming statutes prohibited land ownership by persons of Japanese descent and by ineligible aliens; and Indiana, Minnesota, Pennsylvania, and South Carolina imposed acreage-ownership restrictions for non-citizens).

288. National security was the ostensible justification for Executive Order 9066. Exec. Order No. 9066, 7 Fed. Reg. 1406 (Feb. 19, 1942). While this rationale had practical appeal, the internment order deflected blame for failure to fortify American defenses: "The truth—that defense arrangements on Hawaii, . . . and elsewhere, were needlessly woeful—was conveniently forgotten." *Id.*; *see also* Max Everest-Phillips, *The Pre-War Fear of Japanese Espionage: Its Impact and Legacy*, 42 J. CONTEMP. HIST. 243, 249 (2007).

289. J.L. DEWITT, FINAL REPORT: EVACUATION OF THE JAPANESE FROM THE WEST COAST 115–116 (1943) (by December 13, 1941, the Justice Department had interned 595 Japanese aliens). DeWitt stated:

> I thought that thing out to my satisfaction. . . . If we go ahead and arrest the 93,000 Japanese, native born and foreign born, we are going to have an awful job on our hands and are very liable to alienate the loyal Japanese from disloyal. . . . I'm very doubtful that it would be common sense procedure to try and intern or to intern 117,000 Japanese in this theater . . . .
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> . . .

his meeting with the California governor, many Californians were vehemently opposed to anyone of Japanese descent remaining in their midst.[290]

Bigotry against the Japanese, however, did not displace bigotry against other groups of immigrants and people of color. Despite the articulated national security risks posed by those of Japanese descent, California state leaders proposed to relocate Japanese Americans only as far as a remote part of the state "to avoid having to replace the Japanese with Mexican and Negro laborers who might otherwise have to be brought into California in considerable numbers."[291] In other words, prominent Californians envisioned forcibly relocating Japanese Americans and their immigrant parents and grandparents while keeping them close enough to provide labor.

This chronology shows that immigration policies were deeply racialized by the time of President Franklin Roosevelt's Presidency. His infamous Japanese internment policy, embodied in Executive Order 9066,[292] authorized the Secretary of War "to prescribe mili-

> . . . I don't think it's a sensible thing to do . . . . I'd rather go along the way we are now . . . rather than attempt any such wholesale internment . . . . An American citizen, after all, is an American citizen. And while they all may not be loyal, I think we can weed the disloyal out of the loyal and lock them up if necessary.

Id. at 116–17.

290. *Id.* at 125 ("I had a conference yesterday with the Governor . . . with a view to removal of the Japanese from where they are now living to other portions of the state. And the Governor thinks it can be satisfactorily handled without having a resettlement somewhere in the central part of the United States and removing them entirely from the state of California. As you know the people out here are very much disturbed over these aliens, the Japanese being among them, and want to get them out of the several communities.").

291. *Id.* at 125 ("[L]oss of employment and income due to anti-Japanese agitation by and among Caucasian Americans, continued personal attacks by Filipinos and other racial groups, denial of relief funds to desperately needy cases, cancellation of licenses for markets, produce houses, stores, etc., by California State authorities, discharges from jobs by the wholesale, [and] unnecessarily harsh restrictions on travel including discriminatory regulations against all Nisei preventing them from engaging in commercial fishing.") (quoting a Navy report).

Id. at 126.

292. While laying out plans for Roosevelt's Executive Order 9066, Secretary of War Henry Stimson made a diary entry on February 27, 1942, expressing grave concern that the President's evacuation order would amount to exclusion by a "racial characteristic" that "will make a tremendous hole in our constitutional system." GODFREY HODGSON, THE COLONEL: THE LIFE AND WARS OF HENRY STIMSON, 1867–1950, at 259 (1990) ("The second generation Japanese can only be evacuated either as part of a total evacuation, giving access to areas only by permits, or by frankly trying to put them out on the ground that their racial characteristics are

tary areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded."[293] However, the order was motivated by racial animus, widely embraced in California, and communicated to a President who was willing to act on popular prejudice. Senior military and political officials who effectuated the policy realized that the substance of Executive Order 9066 amounted to a violation of the Constitution[294] and sought to avoid any legal landmines by omitting any reference to race or nationality group and using neutral sounding words depicting an internal threat to national security.[295]

The order forced Japanese American owners to leave businesses, employees to leave jobs, students to leave schools, and residents to abandon their homes.[296] It also played to concerns that "brown men" were undercutting white workers for farming jobs.[297]

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such that we cannot understand or trust even citizen Japanese. The latter is the fact but I'm afraid it will make an awful hole in our constitutional system.").

293. Exec. Order No. 9066, 7 Fed. Reg. 1406 (February 19, 1942). The order used "excluded" a second time, in reference to people who were judged to pose a military threat, stating:

> The Secretary of War is hereby authorized to provide for residents of any such area who are *excluded* therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgement of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order (emphasis added).

Id.

294. *See* HODGSON, *supra* note 294.

295. Exec. Order No. 9066, *supra* note 293.

296. *See* MINE OKUBO, CITIZEN 13660 (1946) (offering a personal account of the evacuation experience. The order resulted in the internment of "all persons of Japanese ancestry" from the West Coast area, formally known as the Western Command area of the United States). It affected 112,353 residents who lived in the Western Defense Command states of Arizona, California, Oregon, and Washington—essentially, 89% of the 126,947 U.S. residents of Japanese ancestry in the 1940 census. Thomas N. Tyson & Richard K. Fleischman, *Accounting for Interned Japanese-American Civilians During World War II*, 33 ACCT. HISTORIANS J. 167, 168 (2006). Two-thirds were Americans by birth. *Id.*; *see also* Lauren Cohen et al., *Resident Networks and Corporate Connections: Evidence from World War II Internment Camps*, 72 J. FIN 207, 222 (2017) (reporting a map of the internment camps, and chart of arrival dates and camp census figures).

297. *See* Korematsu v. United States, 323 U.S. 214, 239 n.12 (1944) ("Special interest groups were extremely active in applying pressure for mass evacuation (citation omitted). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over . . . . They undersell the white man in the markets . . . . They work their women and children while the white farmer has to

Paradoxically, once in internment camps, Japanese Americans worked on farms as imprisoned laborers.[298]

Korematsu v. United States upheld Executive Order 9066 as a valid exercise of presidential power.[299] The majority opinion reasoned that Congress had enacted legislation in aid of the order, and therefore both branches had constitutionally exercised their war powers.[300] Although the Court was not unanimous in its ruling, there was little recognition of the racial motivations behind the order. Justice Jackson believed the order used an "urgent need" to violate individual liberty.[301] Only Justice Frank Murphy's dissent characterized the order as racially biased.[302] The order was re-

pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either.") (alteration in the original) (internal citations omitted); *see also* Eric L. Muller, *Apologies or Apologists—Remembering the Japanese American Internment in Wyoming*, 1 WYO. L. REV. 473, 477 (2001) (reporting a letter written in April 1942 by Wyoming Governor Nels Smith in reply to a constituent: "I could very clearly visualize the West Coast Japanese percolating into our State, a few at a time, gradually taking over jobs which by right should be done by our own citizens . . . ."); James McDonald, Note, *Democratic Failure and Emergencies: Myth or Reality?*, 93 VA. L. REV. 1785, 1819 (2007) (Idaho Attorney General Bert Miller called for putting "all Japanese . . . in concentration camps [ ] for the remainder of the war, and [argued] that no attempt should be made to provide work for them. We want to keep this a white man's country").

298. Karl Lillquist, *Farming the Desert: Agriculture in the World War II—Era Japanese-American Relocation Centers*, 84 AGRICULTURAL HIST. 74, 85 (2010) ("loyal evacuees from Tule Lake enhanced Minidoka's agricultural programs upon their arrival"); *see also* Tyson & Fleischman, *supra* note 296, at 196 (reporting that evacuees had their wages in camps capped after being forcibly removed).

299. *Korematsu*, 328 U.S. at 218. The order was rescinded, effective on January 2, 1945 by a military proclamation. *See U.S. Approves End to Internment of Japanese Americans*, HIST., https://www.history.com/this-day-in-history/u-s-approves-end-to-internment-of-japanese-americans [https://perma.cc/6C8Q-72ZP] (last visited Dec. 13, 2019)

(Major General Henry C. Pratt issued Public Proclamation No. 21, declaring that Japanese American "evacuees" from the West Coast could return to their homes). This was likely the result of *Ex parte* Endo, 323 U.S. 283 (1944), where the Supreme Court ruled that the War Relocation Authority had acted beyond its power and could not detain citizens against whom no charges had been made. More recently, President Gerald Ford also rescinded the order. *See* Proclamation 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

300. *Korematsu*, 328 U.S. at 217–18.

301. *Id.* at 243 (Jackson, J., dissenting) (beginning with a core principle; "[n]ow, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable").

302. *Id.* at 236-37 (Murphy, J., dissenting) (stating that the order was founded "mainly upon questionable racial and sociological grounds, and on grounds of

scinded, effective on January 2, 1945 by a military proclamation.[303] Nonetheless, Japanese Americans experienced ongoing discrimination in the education system and labor markets.[304]

Although it is difficult to pinpoint a paradigm shift between hostility and openness to migratory labor, legislation in the 1940s indicated that there was a changing perspective on the subject of foreign labor. Legislation to repeal laws that excluded Chinese workers marked a thaw in the long era of immigration restrictions: while a bill was pending before Congress in 1943, President Roosevelt implored lawmakers to "correct a historic mistake."[305] The Magnuson Act—formally, the 1943 Chinese Exclusion Repeal—was passed by Congress on December 17, 1943.[306] The new law only highlighted the failure of many presidents to resist a biased approached to immigration. From the Page Act of 1875 through the repeal of Chinese exclusion laws in 1943, presidents offered little resistance to these harsh laws. During these presidencies, the pulse of xenophobia intensified. Justifications varied: immigrants were genetically inferior; their "amalgamation" with native whites threatened America's racial purity; they were clannish and isolated by their peculiar customs; they spoke in foreign tongues—but the

disloyalty"). Justice Murphy also assailed the war-time justification for the order, recounting that "misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation this legalization of racism." *Id.* at 239.

303. The order was not officially rescinded until President Ford issued Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976).

304. State officials in Arkansas barred Japanese internees from enrolling at state universities and colleges and opposed efforts to integrate these displaced people in the state's labor force. *See* Russell E. Bearden, *One State's Reaction to Wartime Internment*, 38 J. WEST 14, 14–16 (1999). Nonetheless, Japanese Americans experienced ongoing discrimination. Aimee Chin, *Long-Run Labor Market Effects of Japanese American Internment during World War II on Working-Age Male Internees*, 23 J. LAB. ECON. 491, 505 (July 2005). The study concludes that interruption of careers and performance of menial labor in camps stunted human capital development for these workers. *Id.* at 515–20. Twenty-five years after male internees were incarcerated their annual earnings were 9%–13% lower than a control group of Japanese Americans in Hawaii. *Id.* at 505. Adolescent internees also suffered from the loss of human capital attributable to three years of exclusion from the labor force. Their wages lagged behind white, native-born Americans until 1960, and for adults, these adverse effects were measurable through 1970. Molly Malloy Cooper, Japanese American Wages, 1940–1990 (2003) (unpublished PhD dissertation, Ohio State University) (on file with Ohio State University).

305. President Franklin D. Roosevelt, Message to Congress on Repeal of the Chinese Exclusion Laws (Oct. 11, 1943) (on file with the American Presidency Project).

306. Pub. L. No. 78-199, 57 Stat. 600, 600-01 (1943).

one persistent theme behind restriction and exclusion was the perceived threat posed by immigrants to Americans' wages and working conditions.

V.
REPLACING RACIAL EXCLUSION WITH DIVERSITY: IMMIGRATION AND NATIONALITY ACT OF 1965 AND BEYOND

Following World War II, America's emergence as a global power changed the nation's perspective on immigration. The transformation was gradual and culminated with passage of the Immigration and Nationality Act (INA) in 1965. This Part shows how presidents of both parties led this sea change. Before the INA, Harry Truman and Dwight Eisenhower used executive orders to challenge immigration quotas that served as race filters. From the passage of the INA until 2016, presidents used their immigration powers in new and forceful ways to increase the racial and ethnic diversity of immigrants. Often, their actions and policies created temporary legal access to jobs. As Part II.B demonstrates, however, President Trump's policies and actions have essentially negated the common approaches taken by Democratic and Republican presidents who have taken actions under the 1965 INA.

A. Executive Orders and Congressional Overhaul Before The INA

President Harry Truman appeared to recognize that the post-World War II period, which had recast America as a global superpower, also required analysis of new immigration values and policies. In 1951, Executive Order 10,129 created a Commission on Migratory Labor, and linked immigration policy to labor market conditions by directing the Commission to investigate the "social, economic, health, and educational conditions of migratory workers."[307] The Commission's report was a call to the public's conscience and sense of pragmatism.[308] A year later, Congress created

307. Exec. Order No. 10,236, 16 Fed. Reg. 3,607 (Apr. 27, 1951) (directing Commission to investigate the "social, economic, health, and educational conditions among migratory workers, both alien and domestic, in the United States . . . .").

308. PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 2 (1951) ("There is nothing wrong or immoral in employing foreign workers in American agriculture when there are mutual advantages in doing so."). The report estimated that one million migratory laborers from Mexico resided in the U.S. without legal status. *Id.*

the H-2 visa for temporary workers.[309] Truman's Executive Order 10,392 created a new commission, the Commission on Immigration and Naturalization, with a broader mandate to overhaul the nation's racial approach to immigration.[310] In 1953, the Commission issued *Whom Shall We Welcome*, a report that advocated for more open immigration.[311] Eisenhower expressed similar values. He actively urged Congress to end racial quotas and open America's gates to certain refugees.[312] On the matter of race he lamented, "The immigration laws presently require aliens to specify race and ethnic classification in visa applications. These provisions are unnecessary and should be repealed."[313] However, nothing came of this plea. President Lyndon Johnson went one step further and proposed a bill to Congress that did away with the several discriminatory bars on Asian immigration and created visa preferences for workers who could fill certain in-demand positions.[314]

In this period, Congress enacted immigration reforms, most notable the McCarran-Walter Act of 1952. The law straddles the di-

309. The Immigration and Nationality Act of 1952, 8 U.S.C. § 1251 (1952). For historical perspective, see ANDORRA BRUNO, CONG. RESEARCH SERV., R44306, THE H-2B VISA AND THE STATUTORY CAP: IN BRIEF 1 (2018), https://fas.org/sgp/crs/homesec/R44306.pdf [https://perma.cc/ZQ2Q-A7LX]. *See also* Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N. J. INT'L L. & COM. REG. 521 (2002).

310. Exec. Order No. 10,392, 17 Fed. Reg. 8,061 (Sept. 4, 1952) (establishing the President's Commission on Immigration and Naturalization).

311. PRESIDENTIAL COMM'N ON IMMIGRATION & NATURALIZATION, WHOM SHALL WE WELCOME xii–xiv (1953) ("1. America was founded on the principle that all men are created equal, that differences of race, color, religion, or national origin should not be used to deny equal treatment or equal opportunity. 2. America has historically been the haven for the oppressed of other lands. 3. American national unity has been achieved without national uniformity. 4. Americans have believed in fair treatment for all. 5. America's philosophy has always been one of faith in our future and belief in progress. 6. American foreign policy seeks peace and freedom, mutual understanding, and a high standard of living for ourselves and our world neighbors.").

312. President Dwight D. Eisenhower, Special Message to the Congress on Immigration Matters (Feb. 8, 1956) (on file with the American Presidency Project) (urging modification of the 1924 and 1952 immigration laws and suggesting higher quota limits).

313. *Id.* ("The inequitable provisions relating to Asian spouses and adopted children should be repealed.").

314. President Lyndon B. Johnson, Special Message to the Congress on Immigration, (Jan. 13, 1965) (on file with the American Presidency Project) (proposing a bill that would allocate visas unfilled by countries to be filled where they are needed, thereby eliminating the discriminatory "Asia-Pacific Triangle," broadening admission to include non-quota visas to parents of citizens, and allowing a visa preference for workers with lesser skills who can fill specific needs in short supply).

vide between America's racially restricted immigration policies and the current model that is premised on diversity of nationality. Bigotry motivated the law.[315] Breaking with past presidents who signed or acquiesced to biased immigration laws, President Truman vetoed the bill, using powerful language.[316] Nevertheless, Congress enacted the law over his continuing disapproval.[317]

Despite its racial motivations, the McCarran-Walter Act made significant advances over past laws. The act replaced a patchwork of immigration statutes, executive orders, and related actions with a comprehensive codification.[318] More significantly, the law adopted the literal terms of the Fourteenth Amendment's birthright citizenship section, eliminating race as a potential disqualification.[319] It also repealed numerous immigration laws—many premised on racial bias—from the 1880s through 1930s.[320] The law also enacted a key mechanism of immigration law which survives to today: congres-

315. Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(6)(C). The bill's sponsor said:

> However, we have in the United States today hard-core, indigestible blocs which have not become integrated into the American way of life, but which, on the contrary are its deadly enemies. Today, as never before, untold millions are storming our gates for admission and those gates are cracking under the strain.

99 CONG. REC. 1518 (1953) (statement of Sen. McCarran).

316. President Harry Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952) (on file with the American Presidency Project) ("I have long urged that racial or national barriers to naturalization be abolished.").

317. Truman expounded on his reasons for vetoing the bill:

> Today, we are "protecting" ourselves as we were in 1924, against being flooded by immigrants from Eastern Europe. . . . We do not need to be protected against immigrants from these countries–on the contrary we want to stretch out a helping hand, to save those who have managed to flee into Western Europe, to succor those who are brave enough to escape from barbarism, to welcome and restore them against the day when their countries will, as we hope, be free again . . . . These are only a few examples of the absurdity, the cruelty of carrying over into this year of 1952 the isolationist limitations of our 1924 law. In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.

318. Marion T. Bennett, *The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 128 (1966).

319. 8 U.S.C. § 301(a)(1) ("The following shall be nationals and citizens of the United States at birth: (1) a person born in the United States, and subject to the jurisdiction thereof . . . .").

320. *Id.* at § 403.

sional delegation to the President of the power to suspend immigration for nationality groups.[321]

B. Executive Orders and Actions in the Age of Diversity: 1965 Through 2016

The INA set a new course.[322] The law abolished a 90-year reign of biased immigration laws, by phasing out national origin quotas,[323] and creating visa preference categories for skills and family relationships with citizens or U.S. residents.[324] By abolishing racial and national barriers, the INA altered America's demographic mix.[325] In the place of quotas and other measures based on race, the law created visa preference categories for skills and family relationships with U.S. citizens or residents.[326]

Societal animus against immigrants did not vanish with passage of the INA, but presidents began using the law's discretionary powers furtively to promote immigration. Gerald Ford, in a Cabinet meeting, apparently allowed Vietnamese immigrants to enter the U.S. This action, taken in 1975 and recorded in White House min-

321. Section 212(f), authorizing the President to "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." *Id.* at § 212(f). Only President Trump invoked this power in broad terms. This happened in Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). Other presidents narrowly applied this power. KATE MANUEL, CONG. RESEARCH SERV., CRS 7-57-5700, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 6-10 (2016).

322. Immigration and Nationality Act of 1965, Pub. L. No. 89–236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). For background, see David M. Reimers, *An Unintended Reform: The 1965 Immigration Act and Third World Immigration to the United States*, 3 J. AM. ETHNIC HIST. 9 (1983).

323. *See* 111 CONG. REC. 24,501 (1965) (statement of Sen. Clark) ("[N]ational origins quotas and the Asian-Pacific [sic] triangle provisions are irrational, arrogantly intolerant, and immoral."); 111 CONG. REC. 21,768 (1965) (statement of Rep. Addabbo) ("[N]ational origins system is discriminatory, and it gives a bad image to our friends overseas."); 111 CONG. REC. 21,792 (1965) (statement of Rep. Brademas) ("[The Bill] will repeal the Asia-Pacific triangle which has too long been an insult to those of oriental ancestry.").

324. Harry N. Rosenfield, *The Prospects for Immigration Amendments*, 21 L. & CONTEMP. PROBS. 401, 413–16 (1956).

325. Twenty years after the law was enacted, new immigrants were disproportionately concentrated in cities—particularly in New York, Los Angeles, Chicago, San Francisco, and Miami, where 46% of this new population settled. Roger Waldinger, *Immigration and Urban Change*, 1989 ANN. REV. SOC. 211, 212 (1989). By the late 1970s, petitions from Asians for naturalization outpaced all other groups. *See* Dorothee Schneider, *Naturalization and United States Citizenship in Two Periods of Mass Migration: 1894–1930, 1965–2000*, 21 J. AM. ETHNIC HIST. 50, 67–68 (2001).

326. *Infra* note 324.

utes, remained classified until 1990.[327] Jimmy Carter resettled new migrants from Cuba and Haiti to a federal fort in Puerto Rico in Executive Order 12,244.[328] Although published, the order seemed intentionally misleading: phrased as a sanitation rule, it relocated Haitians and Cubans to locations where their asylum claims would likely be processed far from potential protesters and media reporting.

More generally, Republican and Democratic presidents used executive powers under the INA in subtle but similar ways to promote pluralistic immigration.[329] The tool of choice was typically deferred action.[330] At times, presidents implemented deportation deferral policies.[331] Sometimes presidents implemented these policies through an administrative agency.[332] Deferral typically applied

327. *See* The White House, Notes of the Cabinet Meeting (Apr. 29, 1975) (on file with the Gerald R. Ford Presidential Library) ("The President reiterated that a total of 43–45000 South Vietnamese will have been evacuated.").

328. Exec. Order 12,246, 45 Fed. Reg. 68,367 (Oct. 15, 1980). In oblique terms, the order designated Fort Allen in Puerto Rico as a place for the immediate relocation and temporary housing of Haitian and Cuban nationals. *Id.* It also provided for the immediate relocation of Haitian and Cuban nationals in Florida to the island and suspended federal water safety and environmental laws for this purpose. *Id.*

329. The subtlety reflected each President's willingness to achieve foreign policy and related immigration objectives by working within the framework of various immigration statutes. A detailed analysis appears in RUTH ELLEN WASEM, CONG. RESEARCH SERV., 97-810 EPW, CENTRAL AMERICAN ASYLUM SEEKERS: IMPACT OF 1996 IMMIGRATION LAW (1997).

330. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999) (To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action . . . .") (quoting 6 C. GORDON, S. MAILMAN, & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03 [2][h] (Matthew Bender, Rev. Ed. 1998)).

331. Memorandum from 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), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/KYK6-WG8K].

332. *E.g.*, 160 CONG. REC. H8636 (daily ed. Dec. 4, 2014) ("The Implementation of the Family Fairness Policy—Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the Spouses and Children of Legalized Aliens (section 245a and section 210)" Decision Memo to Gene McNary, Comm'r, Immigr. Nat'y Serv. (Feb. 8, 1990)); Memorandum from Sec'y of Homeland Sec. Jeh Johnson to Leon Rodriguez on Policies for Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20,

to migrants who failed to qualify for legal status—for example, as refugees or asylees—and were therefore deportable.

At times, Congress provided a direct mechanism for presidents to defer immigration action—for example, the Extended Voluntary Departure program (EVD).[333] In effect until 1990, EVD allowed the executive branch to authorize the temporary presence of people of a designated nationality.[334] Because the power was discretionary, its use was opaque[335] and ambiguous.[336] This status created doubts for EVD recipients about their legal authorization to work, which placed these recipients in a weakened bargaining position.[337] Nonetheless, EVD actions allowed presidents to address acute humanita-

2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/7XZ3-H4XG].

333. *E.g.*, Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (adjusting the status of Cuban refugees to lawful permanent residents); Act of Oct. 23, 1977, Pub. L. No. 95-145, 91 Stat. 1223 (applying to aliens from Cambodia, Laos, and Vietnam). *See generally* 8 U.S.C. § 1103(a) (authorizing Attorney General to establish such regulations and perform such other acts as he deems necessary to carry out his authority).

334. *See* Hotel & Rest. Emps. Union, Local 25 v. Smith, 846 F.2d 1499, 1501 (mem.) (D.C. Cir. 1988) ("In contrast with asylum, which is a statutory exemption from deportation for individual aliens, Extended Voluntary Departure (EVD) is a discretionary suspension of deportation proceedings applicable to particular groups of aliens."); *see also* Lynda J. Oswald, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 158 n.40 (1986); RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3 (2010) (reporting that President Carter granted EVD status to Nicaraguans (July 1979 to September 1980), Iranians (April 1979 to December 1979), and Ugandans (June 1978 to September 1986); President Reagan granted EVD status to Poles (July 1984 to March 1989); and presidents, on a case-by-case basis involving petitions, have granted EVD status for individuals from Lebanon, Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Rumania, and Vietnam, allowing them to remain in the U.S. Important to note, a grant of EVD status allowed people to work lawfully in the U.S.).

335. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–52 (2010). The INS had secretly used "Operating Instructions" in non-public communications to apply criteria—often humanitarian—to defer deportations. *Id.*

336. *See* Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1008 (2006) ("'liminal legality' is characterized by its ambiguity, as it is neither an undocumented status nor a documented one, but may have the characteristics of both").

337. *Hotel & Rest. Emps. Union*, 846 F.2d at 1262 (Union attempting to organize hotel workers argued that this status "subjects Salvadoran aliens to employer pressure to remain silent or else be reported for deportation, and that their resulting unwillingness to press their grievances against their employers hinders the union's activities").

rian needs when nationality groups could not qualify as refugees or asylees.[338]

The Immigration Act of 1990 gave presidents a new tool to protect migrants: Temporary Protected Status (TPS).[339] While TPS was not expressly created to be a substitute for EVD, it has had a similar effect: it allows presidents to grant migrants a haven when they fail to qualify for refugee status but flee dangerous political situations or natural disasters.[340]

TPS was enacted for migrants from El Salvador, granting one year of lawful residency.[341] Presidents extended TPS status for Salvadorans from 1990 through 2016, when the Obama administration granted an 18-month extension.[342] These extensions typically provided renewal of employment authorization.[343]

Presidents have significantly broadened TPS to other nationalities without congressional action and have also unilaterally reduced the number of designated countries. Various attorneys general, in consultation with the State Department, have used TPS for migrants from eleven countries.[344] Like Salvadorans, these foreign na-

338. 8 U.S.C. § 1158; 8 U.S.C. § 1231; 8 U.S.C. § 1101(a)(42). Presidents in the current period have issued specialized orders and actions to respond to humanitarian migrants who are not eligible for asylum or refugee status. *See* WASEM & ESTER, *supra* note 334, at 2. A few cases involve an aspect of employment. A notable case is *Hotel and Restaurant Employees Union*. A union claiming to represent Salvadoran hospitality-industry workers who resided illegally in the U.S. sued the Attorney General to suspend all deportation proceedings and to be granted "Extended Voluntary Departure" ("EVD") status. *Hotel & Rest. Emps. Union*, 846 F.2d at 1262; *see also* Gurbisz v. U.S. Immigr. Nat'y Serv., 675 F. Supp. 436 (N.D. Ill. 1987) (bakery employee from Poland petitioned for EVD); Carrillo v. Mohrman, 832 F. Supp. 1412 (D. Idaho 1989) (petition for EVD by seasonal agricultural workers from Mexico).

339. Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990). Acting under 8 U.S.C. § 1254a the President may grant TPS to aliens who flee violence, natural disasters, or other calamities but do not qualify as refugees. Todd Howland et al., *Safe Haven for Salvadorans in the Context of Contemporary International Law A Case Study in Equivocation*, 29 SAN DIEGO L. REV. 671, 672 (1992).

340. 8 U.S.C. § 1254a. For an excellent overview of TPS, see MATTHEW ROONEY & LAURA COLLINS, GEORGE W. BUSH INST., DEPORTING SALVADORANS MAY LEAD TO ECONOMIC DECLINE (2018).

341. LISA SEGHETTI, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3 (2015).

342. *See* Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645 (July 8, 2016); Extension of the Designation of El Salvador for Temporary Protected Status, 78 Fed. Reg. 32,418-01 (May 30, 2013).

343. Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. at 44645.

344. SEGHETTI, *supra* note 341, at 3, tbl. 1 (El Salvador TPS, 204,000; Guinea TPS, 2,000; Haiti, 50,000; Honduras TPS, 61,000; Liberia TPS, 4,000; Nepal TPS,

tionals have been allowed to apply for work authorization.[345] President Obama and President Trump used their discretionary power, however, to terminate TPS for certain foreign nationals.[346]

Another discretionary power, called Deferred Enforced Departure (DED), remains in force. DED quietly emerged as a temporary, discretionary administrative tool in 1990.[347] It emanates from the President's power to conduct foreign relations but has no statutory basis.[348] DED has been used five times.[349] The sole

10,000–25,000; Nicaragua TPS, 2,800; Sierra Leone TPS, 2,000; Somalia TPS, 270; South Sudan TPS, 300–500; Sudan TPS, 600; and Syria TPS, 5,000). As of March 2018, the U.S. Department of Justice listed the following as TPS countries: Angola, Bosnia-Hercegovina, Burundi, El Salvador, Guinea, Guinea-Bissau, Haiti, Honduras, Kosovo, Province of, Kuwait, Lebanon, Liberia, Montserrat, Nepal, Nicaragua, Rwanda, Sierra Leone, Somalia, South Sudan, Sudan, Syria, and Yemen. TEMPORARY PROTECTED STATUS, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/temporary-protected-status [https://perma.cc/DRE3-BCDV] (last visited Oct. 24, 2019).

345. TEMPORARY PROTECTED STATUS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/humanitarian/temporary-protected-status [https://perma.cc/D56M-MWU9] (last visited Oct. 24, 2019).

346. During President Barack Obama's term, USCIS terminated TPS status for nationals from nations ravaged by Ebola—Guinea, Sierra Leone, and Liberia. Six Month Extension of TPS Benefits Before Termination of Guinea's Designation of TPS, 81 Fed. Reg. 66064 (Sept. 26, 2016); Six Month Extension of TPS Benefits Before Termination of Sierra Leone's Designation of TPS, 81 Fed. Reg. 66054 (Sept. 26, 2016); Six Month Extension of TPS Benefits Before Termination of Designation of Liberia's TPS, 81 Fed. Reg. 66059 (Sept. 26, 2016). President Trump's USCIS has massively expanded TPS terminations. *See* Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654 (Jan. 18, 2018) (El Salvadorans); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648 (Jan. 18, 2018) (Haitians); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636 (Dec. 15, 2017) (Nicaraguans); Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47228 (Oct. 11, 2017) (Sudanese).

347. For the date of origin, see 38.2 DEFERRED ENFORCED DEPARTURE, U.S. CITIZENSHIP & IMMIGRATION SERVICES, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html [https://perma.cc/3LN3-AXK7] (last visited Oct. 24, 2019).

348. *Id.* (explaining that DED is a temporary, discretionary, administrative stay of removal. It applies to people from designated countries, and thereby differs from individual deportation decisions); s*ee* Benjamin M. Haldeman, Note, *Discretionary Relief and Generalized Violence in Central America: The Viability of Non-Traditional Applications of Temporary Protected Status and Deferred Enforced Departure*, 15 CONN. PUB. INT. L.J. 185, 188 n.5 (2016) (citing USCIS, "Adjudicator's Field Manual," § 38.2(a) (2014)).

349. 38.2 DEFERRED ENFORCED DEPARTURE, U.S. CITIZENSHIP & IMMIGRATION SERVICES, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html [https://perma.cc/3LN3-AXK7] (last visited Oct. 24, 2019).

remaining group, Liberians, will lose DED status on March 30, 2020.[350]

Apart from using their powers over TPS, EVD, and DED, presidents have also delegated deferral authority to subordinate officials, though these actions have no official denomination. President Ronald Reagan's administration broadened the use of deferred action in 1981 by enabling beneficiaries to apply for work authorization.[351] In 1987, Reagan's Attorney General signed an order to defer deportation of 200,000 Nicaraguans.[352] The action also directed the Immigration and Naturalization Service (INS) to expedite work authorization applications.[353] In an action that may have been a blueprint for DACA, Reagan's INS Director announced a discretionary policy to allow minor children to remain after a statute legalized the presence of their parents but not them.[354] George H.W. Bush's INS Commissioner, Gene McNary, expanded this family unification policy by deferring deportation for unlawfully present spouses and children of legal aliens.[355] Later, the INS authorized

350. As of 2018, only one nationality group, Liberians, has DED status (expiring March 31, 2019). *Id.* DED court cases are rare. *But see* Shuaibu v. Gonzales, 425 F.3d 1142 (8th Cir. 2005) (upholding grant of deferred enforcement departure for a Liberian).

351. Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole; Revision of Border Crossing Card Procedures, 46 Fed. Reg. 25080, 25081 (May 5, 1981). This regulation remains in effect. 8 C.F.R. § 274a.12(c)(14) (2018); *see also id.* at § 274a.12(a)(11) (allowing work authorization for persons "whose enforced departure from the United States has been deferred").

352. President Reagan shielded 200,000 Nicaraguans from deportation in July 1987. *See Immigration Rules Are Eased for Nicaraguan Exiles in the U.S.*, N.Y.TIMES (July 8, 1987), https://timesmachine.nytimes.com/timesmachine/1987/07/09/869787.html?action=click&contentCollection=Archives&module=LedeAsset&region=ArchiveBody&pgtype=article&pageNumber=8 [https://perma.cc/P7GC-ND3N].

353. Immigration and Reform Control Act of 1986 (Simpson-Mazolli Act), Pub. L. No. 99-603, 100 Stat. 3445 (1986) (codified at 8 U.S.C. § 1324). The law requires employers to review documents that establish an employee's eligibility for employment. *Id.* at § 1324a(b).

354. In October 1987, President Reagan legalized the presence of children who unlawfully immigrated with their families. He acted after a problem emerged with "split-eligibility" for families under the 1986 Immigration Reform and Control Act. *See* AMERICAN IMMIGRATION COUNCIL, REAGAN-BUSH FAMILY FAIRNESS: A CHRONOLOGICAL HISTORY 2 (2014). In 1989, this executive action was codified. *See* Helen Dewar, *Senate Votes Protection for Aliens' Kin*, WASH. POST, July 13, 1989, at A4.

355. Memorandum from Gene McNary, Comm'r, Immigr. Nat'y Serv., to Immigr. Nat'y Serv. Reg'l Comm'rs, Family Fairness: Guidelines for Voluntary Departure Under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990), *reprinted in* 67 No. 6 Interpreter Releases 153 app. I, at

employment of these deferral recipients.[356] Bill Clinton used deferred enforcement through his Attorney General to permit Central Americans to remain in the U.S.[357] Similarly, his administration issued a press release in 1997, referring to DED for Haitians.[358]

While modern presidents have relied on opacity to advance the INA's global immigration aims, they also resorted to highly visible executive orders to assert their political values. President Bush used his executive powers in 1989 to legalize the presence of Chinese nationals after the Tiananmen Square crackdown.[359] President Obama, following a longstanding practice,[360] used the Department of Homeland Security to announce deferred enforcement in a policy known as Deferred Action for Childhood Arrivals (DACA).[361] His Secretary of Homeland Security announced another deferral policy, Deferred Action for Parents of Americans (DAPA), for parents of U.S. citizens or legal permanent residents who have resided

164–65 (Feb. 5, 1990) (stating that deportation would be deferred for ineligible aliens who had not been convicted of a felony or three misdemeanors).

356. 160 CONG. REC. H8636 (daily ed. Dec. 4, 2014) (citing Decision Memo to Gene McNary, Comm'r, Immigr. Nat'y Serv., The Implementation of the Family Fairness Policy—Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the Spouses and Children of Legalized Aliens (section 245a and section 210) (Feb. 8, 1990)).

357. In 1993, President Clinton's administration extended by 18 months the DED reprieve granted by President Bush's administration to 200,000 Salvadoran refugees. *See* Elston Carr, *Salvadorans Welcome Extension*, L.A. TIMES (May 30, 1993), http://articles.latimes.com/1993-05-30/news/ci-41689_1_salvadoran-refugees [https://perma.cc/FVM9-MFRX]; *see also* WASEM & ESTER, *supra* note 336, at 6.

358. Press Release, Office of the Press Secretary of the White House, Deferred Enforced Departure (DED) for Haitians (Dec. 23, 1997), https://clintonwhitehouse6.archives.gov/1997/12/1997-12-23-fact-sheet-on-deferred-enforced-departure-for-haitians.html. [https://perma.cc/29NT-CM8E] (DED granted to serve the foreign policy interest in stabilizing a democratic government in Haiti). The statement also recounted that President Bush granted DED three times (for nationals from China, Kuwait, and Salvadorans who had previously registered for TPS). *Id.*

359. President George H.W. Bush shielded Chinese nationals after the Tiananmen Square crackdown. *See* Exec. Order No. 12,711, 55 Fed. Reg. 13897 (Apr. 13, 1990) (giving temporary protection to 80,000 Chinese nationals). Section 3(c) addressed employment, stating that "authorization for employment of such PRC nationals through January 1, 1994." *Id.* at 13898.

360. Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 64 (2012) ("Prosecutorial Discretion Actions Like DACA Have Been Part of the Immigration System for at Least Thirty-Five Years"); *see* The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 5 (2014) (deferred action used by immigration officials "over the years to temporarily prevent the removal of undocumented aliens").

361. *See supra* note 331.

in the country for at least the last five years and who lack a criminal record.[362] DHS also promulgated two rules for H-1B visas: one authorized a process for spouses of H-1B visas to be employed,[363] and the other extended by two years an employment training period for foreign students with advanced STEM degrees granted by U.S. universities.[364]

Beginning with Truman and continuing through Obama, presidents of both parties consistently used executive powers to reverse America's history of immigration laws and presidential actions that favored white citizens and insulated labor markets from competition. While Congress has added legislation since the 1980s to address immigration, they have let thorny issues fester. On the one hand, they enacted a law in 1997 to create a path to permanent residency for more than 450,000 asylees from Nicaragua, Russia, and other nations.[365] On the other hand, that action was unusual.

362. Secretary of Homeland Security Jeh Johnson announced the Deferred Action for Parents of Americans (DAPA) policy, which granted deferred action of removal to certain parents of U.S. citizens and lawful permanent residents. *See* Memorandum from Jeh Johnson, Sec'y of Homeland Sec. to Leon Rodriguez on Policies for Apprehension, Detention, and Removal of Undocumented Immigrants, *supra* note 332. DAPA was established in 2014 and would have applied to parents of U.S. citizens and lawful permanent residents (Green Card holders). *Id.* Criteria for deferred action included:

> [1] have, on [November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident; [2] have continuously resided in the United States since before January 1, 2010; [3] are physically present in the United States on [November 20, 2014], and at the time of making a request for consideration of deferred action with USCIS; [4] have no lawful status on [November 20, 2014]; [5] are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and [6] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Id. at 4. DAPA includes eligibility for recipients "to apply for work authorization for the period of deferred action." *Id.* DAPA was enjoined as a violation of the Administrative Procedure Act. *See* Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2771 (2016).

363. *See* Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214.2, 274a) (the "H-4 Rule"), upheld in Save Jobs USA v. U.S. Dep't of Homeland Sec., 105 F. Supp. 3d 108 (D.D.C. 2015).

364. *See* DHS's 2016 regulation extending the OPT Program by an additional twenty-four months for eligible STEM students (2016 OPT Program Rule), 81 Fed. Reg. 13040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214, 274a); *see also* Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 892 F.3d 332 (D.C. Cir. 2018) (reversing district court's dismissal of union's claim for opposing DHS's motion to dismiss).

365. Nicaraguan Adjustment and Central Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997). From 1999–2017, USCIS received 211,044 NACARA petitions

Even when a bipartisan majority in the Senate tried to comprehensively address major immigration and border security issues,[366] the House of Representatives refused to consider legislation.[367] For most of the time since the 1980s, presidents used their powers to fill the void created by congressional inaction. They used their opaque powers to avoid deporting migrants who had temporary or unlawful status.

By 2016, the synergistic pattern of congressional inertness and discreet presidential actions burst into open conflict. Apart from Donald Trump's intolerance,[368] his diagnosis that the immigration system is broken raises several questions: How long can status quo arrangements last for temporary and deferred-enforcement migrants? Forever? Many beneficiaries have been in the United States for two decades without legal status. On the other hand, can racial animus justify termination of reprieves from deportation? Is his approach unique or consistent with historical uses of presidential power? And ultimately, what are the limits of presidential power over immigration? I address these matters in my conclusions.

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and granted 184,169 of these requests. *See* ASYLUM DIV., U.S. CITIZENSHIP & IMMIGR. SERVS., NACARA CUMULATIVE REPORT, 6-21-99 THROUGH 08-31-17 (2017). NACARA granted amnesty to asylees from Nicaragua, Cuba, Guatemala, El Salvador, and Russia. *See* Eli Coffino, *A Long Road to Residency: The Legal History of Salvadoran and Guatemalan Immigration to the United States with a Focus on NACARA*, 14 CARDOZO J. INT'L & COMP. L. 177, 191 (2006).

366. In May 2006, the Senate passed the Comprehensive Immigration Reform Act of 2006 by a 62–36 margin. The bill included provisions to improve border security with fencing, vehicle barriers, surveillance technology and more personnel. It also created a new temporary worker visa category and provided a path to legal status for certain immigrants who were unlawfully in the U.S. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 2 (2006).

367. *Id.* The Senate bill was never taken up by the House. Instead, the House in December 2005 passed a separate bill with greater focus on border security and enforcement, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. *See* H.R. 4437, 109th Cong. § 1 (2005). That bill proposed tougher measures employment eligibility verification; immigration fraud; and immigration enforcement authority at state and local levels but had no provision for a guest worker program or legalization of immigrants. Instead of taking up the Senate bill in the summer of 2006, the House of Representatives held "field hearings" on immigration. Carle Hulse, *House Adds Hearings on Immigration*, N.Y. TIMES (June 21, 2006), https://www.nytimes.com/2006/06/21/washington/21immig.html [https://perma.cc/W8ZM-7W3K].

368. *See, e.g.*, Baker, *supra* note 40.

VI.
CONCLUSION

The history of presidential immigration powers divides into two periods. The longest time, running from George Washington to Franklin Roosevelt, was largely marked by restrictions and exclusions arising from racial animus directed at migratory laborers. The most recent time began with Truman and ended with Obama. Early presidents enforced the Constitution's fugitive slave provision. They explored diplomacy to deport free black peoples to Africa. From the 1880s through 1940s, presidents acted with Congress to restrict laborers from China, then Japan, and eventually all of Asia, and severely limit the flow of poor "nonwhite" European immigrants. Immigrants were blamed for lowering standards for American workers. Roosevelt's order caused American citizens to lose their jobs and instead work while incarcerated. Truman and Eisenhower explicitly challenged the racial bias in this long history and used their limited powers to move the nation toward a more pluralistic approach to immigration—one that would befit the ideals of American democracy. They set the tone for a comprehensive overhaul of immigration policies.

Passage of the 1965 Immigration and Nationality Act marked a watershed. Thereafter, the nation undertook ambitious policies to promote immigration from all parts of the world. Presidents of both parties, except Richard Nixon, embraced this sweeping legislation. They used executive orders and other administrative powers to permit entry to hundreds of thousands of people displaced by war, political upheaval, and natural disasters. They used prosecutorial discretion to extend the stay of these temporary migrants and created a legal mechanism for their lawful employment. After an amnesty law was passed in 1986, presidents of both parties used their powers to create temporary legal status for children, and eventually, for parents. Family unification was more important to presidents such as Ronald Reagan, George H.W. Bush, and Barack Obama than using their powers to deport large numbers of family members.

Against this backdrop, I examine President Donald Trump's immigration orders that affect employment relationships. His presidency is premised on the theme of "America First." This is not new: My research shows that it parallels the substance and tone of presidents from the 1880s through the 1940s. Trump offers a clear alternative to the pluralistic vision and structure of the 1965 Immigration and Nationality Act. For now, however, that law re-

mains in effect—and this explains, in brief, why courts variously restrain his anachronistic immigration actions.

What do my findings and historical analysis mean for the foreseeable future? First, when President Trump uses presidential powers for immigration, he often conflates national security with job security for Americans. In doing so, he loses sight of the Immigration and Nationality Act of 1965. He also misunderstands that immigration law embeds significant employment regulations, including registration obligations and work privileges for undocumented individuals in the DACA program and recipients of TPS status. At a minimum, he is obligated by the Administrative Procedure Act to provide a formal notice and comment process for some of these actions. This study's finding that plaintiffs relied heavily on the APA and the Fifth Amendment's Due Process Clause signifies that President Trump appears to have expanded presidential immigration powers in ways that implicate individual rights under the Constitution and other U.S. laws, such as the Immigration and Nationality Act.

Second, President Trump is eroding executive powers over immigration. He is careless in using executive orders to change immigration policies that are codified as law. As a result, he has undermined common jurisdiction defenses that presidents usually assert with success. His haste to implement orders has affected individuals and their employers, including people who are authorized to work under the INA. His actions have caused harm with little or no process. Some courts have sharply rebuked the President's callow, impatient, and damaging actions by ordering injunctions. A few have explicitly suggested that he acted with racial or religious animus. To the extent that these cases become precedents, future courts might apply strict scrutiny to presidential immigration actions, as they do for legislative enactments. This would amount to a major concession of executive power.

Third, courts have closely scrutinized his immigration policies that affect employment. They have enjoined most of his actions. This pattern is unprecedented, though it is observable mostly at the district and appellate court levels. The open question is whether the Supreme Court will allow these lower court rulings to stand or will modify them—perhaps to the point of entirely reversing them. Certainly, the Court can apply deferential precedents from the age of racial animus. On the other hand, a conservative majority on the Court overruled *Korematsu* in *Trump v. Hawaii*. The majority did not need to take this strong measure to decide the case, but it signaled some inclination to limit bias in a President's use of Article II pow-

ers. Whether the Supreme Court, Congress, or voters have the most influence on presidential immigration powers is an unsettled question, but America is at a crossroads.