IN SEARCH OF THE NATION OF IMMIGRANTS: BALANCING THE FEDERAL STATE DIVIDE

*M. Isabel Medina**

Issues raising the role of immigration and immigrants and the relationship between the federal government and the states under our constitutional framework have dominated the national dialogue this past year, and promise to continue to challenge us in years to come. They are questions that tested us at the founding of this republic and that continue to challenge us today. Like conversations about religion, conversations about immigrants, refugees, undocumented aliens or noncitizens raise issues of national, cultural and individual identity; they raise a past that does not always reflect a happy history and that many find threatening. The idea of a nation of immigrants evoked by President John F. Kennedy in his book by that name[1] is usually intended to communicate a positive good, but our history as a nation of immigrants is a complicated and troubled one.

As a consequence, conversations become heated, and even professionals lose their way through the verbal thickets, forgetting to look for the facts, neglecting to acknowledge the complexity that is a trait of almost everything about the human condition, and losing the empathy, civic virtue and tolerance that the visual and emotional image evoked by this "nation of immigrants" can convey. It is in the search for accuracy, for facts, for compassion and understanding of the role that immigrants and immigration have played in American society, in our understanding of the Constitution, in our understanding of race and how it operated and operates in American society, and the role that states and the federal government have played historically in the development of constitutional norms that govern immigration today, that I explore the subject. In doing so, I develop three ideas: first, the United States has one of the most generous formal immigration policies in the world today, working primarily to unite families and offering immigrants for the most part the promise of equality with U.S. citizens and a welcome to those who would become members of our society, regardless of their country of birth. Unfortunately, while generous by world standards, our immigration laws themselves create harsh inequities for would-be immigrants and for U.S. citizens or immigrants seeking to reunite with their families or pursue opportunities in the United States.

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* Ferris Family Distinguished Professor of Law, Loyola University New Orleans College of Law. This essay is based on the Fourth Annual Judge Harry J. Wilters Jr. Lecture on Constitutional Law and Professional Ethic delivered at the University of South Alabama on September 20, 2016 in honor of Judge Wilters of the 28th Judicial Circuit for Baldwin County.

[1] JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1959).

Second, and a less comfortable narrative, I explore through facts the role that racial bias has played in the context of immigration. The welcome mat extended to immigrants is often double-edged, and sometimes turns into suspicion, hostility, even hatred and casts those same individuals we welcomed into "aliens" we would push out. Whether cast as a matter of race, national origin, skin color or religion, we have not always treated groups perceived as "alien" or "different" from us, with a generous spirit.

Last, I explore the challenges that issues of immigration pose for the United States in the twenty-first century and how constitutional norms, in particular, norms reflecting federalism concerns may guide our response to those challenges. For the most part, the United States operates as an open society, one in which citizens and residents enjoy substantial freedom to think, dress, act and work in ways that are true to their individual personal, social, and cultural identities. It is legitimate to look to our historical record, taking the lessons it offers us and informing our future. It is also imperative that we remember the core values that have guided American society, however imperfectly, from the start.

Currently, the United States admits approximately one million immigrants annually. An immigrant is a person lawfully admitted for permanent residence to the United States. Once admitted she is on her way to U.S. citizenship through a process we call naturalization. In order to naturalize, she must reside here for five years, demonstrate fluency in English and familiarity with the U.S. constitution and history, be of good moral character, and be willing to swear allegiance to the United States.[2] In 2014, 653,416 immigrants became U.S. citizens. Not everyone who applies is naturalized. In that same year, 66,767 applicants were denied citizenship.[3]

Immigrants are selected primarily on the basis of family relationships. For example, more than half (645,560) of immigrants admitted in 2014 (1,016,518) qualified for that status on the basis of a family relationship.[4] Certain family relationships will allow U.S. citizens and permanent residents to petition for a visa for certain family members. In addition, a smaller number of immigrants are admitted on the basis of employment (approximately 151,596 in 2014) and for humanitarian reasons (approximately 134,242 in 2014) like those fleeing countries where they face persecution because of their race, religion, political opinion, national origin or because of their membership in a particular group.[5]

Generally, the largest category of immigrant admissions is immediate relatives of U.S. citizens: spouses, minor unmarried children and parents of

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[2] *See* Maria Isabel Medina, Migration Law in the United States (2016) [hereinafter Migration Law].

[3] Dep't of Homeland Sec., Yearbook of Immigration Statistics 2015, at 51 tbl.20 (2016) [hereinafter DHS 2015 Statistics], *available at* https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf, *archived at* https://perma.cc/DQ4V-452Q.

[4] *Id.* at 18 tbl.6.

[5] Immigration and Nationality Act, 8 U.S.C. §§1101(a)(42), 1158 (2012).

U.S. citizens (once the U.S. citizen reaches the age of 21). In 2014, immediate relatives alone made up almost half the number of immigrants admitted to the United States: 416,456 out of the total 1,016,518. All other categories of immigrant admissions are subject to a number of quotas. So, for example, the next category of family admissions — unmarried sons and daughters of U.S. citizens (they are in this category because they are no longer minors — they're over the age of twenty-one) is subject to a visa quota of 23,400 annually and a per country quota (usually 20,000 visas annually).[6] Each country of origin is granted the same number of visas as every other country. So, if you are a U.S. citizen with older, unmarried children from most other countries, those children would probably have to wait around seven years for their visa "number" to come up if they filed an application today. An applicant from Mexico, the country with the longest waiting line, filing today would have to wait eleven years for their visa number to come up. That is, they could look at having their visa application approved in eleven years.[7] That is a long time to wait for your son or daughter to join you in the United States.

The majority of immigrant admissions in 2014 were persons born in Asia (430,508) with the leading countries of India (77,908), the People's Republic of China (76,089), the Philippines (49,996) and Vietnam (30,283). The next largest national origin category was born in North America, which includes the Caribbean (324,354), with the largest group coming from Mexico (134,052).[8]

Most immigrants tend to be drawn to existing immigrant communities. California, New York, Florida and Texas have been the primary destination states for legal immigrants since 1971.[9] One of every 5 immigrants resides in Los Angeles or New York City.[10] What about Alabama? The trend for immigration in Alabama reflects a decreasing number of immigrants. In terms of overall population, which in 2014 was 4.849 million, immigrants represent approximately .07 percent of Alabama's population.[11]

Immigrants enjoy basic equality to U.S. citizens as long as they comply with the terms of their admission. They may not be entitled to many benefits that U.S. citizens receive and they remain subject to deportation if they violate the terms of their visas. But like citizens they enjoy the guarantees of

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[6] *See* THOMAS ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 20-22 (7th ed. 2012) (explaining the quota system).

[7] U.S. Dep't of State Visa Bulletin, Vol. X, No. 7 (July 2017), *available at* https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_July2017.pdf, *archived at* https://perma.cc/DDP5-95PG.

[8] DHS Statistics 2015, *supra* note 3, at 12–15 tbl.3.

[9] *Id.* at 16 tbl.4.

[10] *Id.* at 17 tbl.5.

[11] *Id.* at 16 tbl.4; *see also* PEW RES. CTR., OVERALL NUMBER OF U.S. UNAUTHORIZED IMMIGRANTS HOLDS STEADY SINCE 2009, at 39 (2016), *available at* http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/09/31170303/PH_2016.09.20_Unauthorized_FINAL.pdf, *archived at* https://perma.cc/V976-NW5B.

equal protection and due process under the U.S. Constitution.[12] That permanent resident aliens remain subject to deportation has a substantial impact on them and their families. In 2014, the United States removed 414,481 noncitizens and returned 162,814.[13] The Obama administration removed more noncitizens from the U.S. than any other prior administration. U.S. law provides for deportation of permanent resident aliens for a wide variety of criminal offenses – some serious but many trivial. That these individuals may be children, spouses or parents of U.S. citizens may not deter their deportation, even if only for minor or non-violent offenses.

The United States also annually admits many more millions of temporary residents, what we call non-immigrant admissions. This category of admissions is limited in time and purpose and may carry conditions, such as a prohibition on employment, and include tourists, business visitors, students, parolees and temporary workers. We do not impose numerical limits on most nonimmigrant categories, except in the case of some temporary workers. In 2014, we admitted more than 180 million temporary visitors or workers to the United States.[14] That is the largest number of nonimmigrant admissions since at least 2005. The largest category is tourists. Unsurprisingly, perhaps, since they are our two closest neighbors, the two largest countries of origin for temporary admissions are Canada, with roughly 13 million (13,254,972) and Mexico with 20 million (20,002,936).[15]

The United States enforces immigration quotas and border controls. In 2015, the U.S. Customs and Border Patrol apprehended 337,117 noncitizens attempting to enter the U.S. without inspection.[16] This represents a dramatic reduction in the number of apprehensions, which at the beginning of the twenty-first century were as high as 1.6 million annually. By contrast, in 2005, the U.S. apprehended 1,291,142 noncitizens attempting entry without authorization into the U.S.[17] The substantial reduction in apprehensions reflects the strengthening of our border controls. That in turn has reduced the number of unauthorized or undocumented immigrants in the U.S. Currently, there are approximately 11.3 million undocumented or unauthorized noncitizens residing in the U.S. This number has been stable for the last five years and makes up 3.5% of the U.S. population. Most of the unauthorized reside in the same states as the lawful immigrant population. Alabama is one of the states in which the population of unauthorized noncitizens has decreased since 2009. Unauthorized immigrants make up 5.1% of the U.S. labor force, and Nevada (10.4%), California (9%), Texas (8.5%), and New

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[12] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Landon v. Plasencia, 459 U.S. 21 (1982); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).
[13] DHS Statistics 2015, *supra* note 3, at 103 tbl.39.
[14] *Id.* at 65 tbl.25.
[15] *Id.* at 67–69 tbl.26.
[16] *Id.* at 91 tbl.33.
[17] *Id.*

Jersey (7.9%), have the highest shares of unauthorized immigrants in their labor forces.[18]

To place the numbers overall in perspective: in 2014, 318.9 million persons resided in the U.S. The U.S. Census Bureau estimates had us beginning 2016 with a population of 322,762,018. The number of births for the U.S. in 2014 was 3,988,076 and the 2015 number decreased slightly to 3,977,745. In contrast, immigration to the U.S. annually is a little over one million — a number that our nation would appear to easily accommodate. Most new Americans added to our nation are overwhelmingly born in the U.S. With that understanding of our current framework, let us consider its historical roots.

It is difficult to argue with the proposition that we are a nation of immigrants. Even our indigenous people journeyed to the land. By the time Europeans arrived, there were already a substantial number of settled native tribes. The reaction of tribes to the new arrivals was mixed — some were willing to accommodate the newcomers — some not. Perhaps with good reason: the arrival of Europeans on the North American continent was a calamitous event for North American Indian tribes. Their numbers were decimated — historians have estimated that ninety percent of indigenous people died as a result of European settlements.[19] In the words of Martin Luther King, Jr. in *Why We Can't Wait*:

> Our nation was born in genocide. . . We are perhaps the only nation, which tried as a matter of national policy to wipe out its indigenous population. Moreover, we elevated that tragic experience into a noble crusade. Indeed, even today we have not permitted ourselves to reject or feel remorse for this shameful episode.[20]

The advent of Europeans brought forced migrants to our shores – African slaves and convicts. To do an adequate telling of the impact of slavery on the United States is the subject of another lecture; racism then and still today lives in the shadow of the tragedy of slavery. Many European settlers came fleeing repression in their native land, to some extent we could think of these settlers as modern-day refugees — individuals who are not really exercising choice in deciding to migrate because if they stay in their home countries they will face persecution or an inability to survive. Even voluntary migrants, however, in the colonial, revolutionary and founding eras, faced potential lack of acceptance because of who they were, where they came from, their religion, their beliefs or the color of their skin. This was

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[18] *See* Pew Res. Ctr., *supra* note 11; Pew Res. Ctr., Size of Unauthorized Immigrant Workforce Stable After the Great Recession 5, 24 (2016), *available at* http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/11/02160338/LaborForce2016_FINAL_11.2.16-1.pdf, *archived at* https://perma.cc/YNW6-UAPT.

[19] Roxanne Dunbar-Ortiz, An Indigenous Peoples' History of the United States 40 (2014).

[20] Martin Luther King, Jr., Why We Can't Wait 110 (1964).

true for Catholics, for the Irish, for the Italians, for the Germans, for those from Mexico, for those of the Jewish faith, for those from China and from Japan well into the twentieth century. The United States often welcomed new groups of immigrants and encouraged them to migrate here, but that welcome often did not last, instead turning into hostility and outright targeting of the new groups.

Thus, for example, the United States encouraged and facilitated migration of Chinese workers in the mid-nineteenth century, particularly during the time when we were building the intercontinental railroad. But after its completion in 1869, the demand for Chinese laborers was reduced. Particularly on the West Coast in California, where the majority of Chinese immigrants resided, public opinion during the 1860's and 70's clamored for a bar on Chinese migration. At the state level, California enacted a variety of statutory restrictions on the Chinese immigrants restricting their ability to establish businesses and work, some of which were declared invalid as a violation of the Equal Protection Clause of the Fourteenth Amendment by federal courts.[21]

In response to the protests and concerns over Chinese migration, Congress enacted one of the first immigration statutes, the Chinese Exclusion Act of 1882, limiting Chinese immigration to the U.S., prohibiting them from becoming citizens, and requiring them to carry a certificate at all times identifying their status in the United States.[22] Although it had found state efforts to discriminate against the Chinese invalid, the Court upheld federal statutes that discriminated against the Chinese in even more pernicious ways as valid regulation of immigration.[23] Subsequent federal statutes further limited Chinese migration and made it very easy to deport lawfully admitted Chinese immigrants who could not prove, through white witnesses, their residence in the U.S. for a certain period of time.[24] In these cases, facing federal discrimination rather than state, the Supreme Court took a narrow view of Due Process and Equal Protection reasoning that the Constitution gave almost plenary power to Congress and the President to regulate admission and exclusion of noncitizens to the United States.

The Chinese, the Court noted "remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own

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[21] Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

[22] Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58.

[23] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 602 (1889) (upholding a law prohibiting Chinese laborers who had left the U.S. prior to its passage from returning to the country); Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893) (upholding a provision of the Chinese Exclusion Act of 1892, Pub. L. No. 52-60, 27 Stat. 25, requiring Chinese residents of the U.S. to possess certificates of residence and bear the burden of proving their lawful residency).

[24] *See* Act of July 5, 1884, Pub. L. No. 48-220, 23 Stat. 115; Act of Sept. 13, 1888, Pub. L. No. 50-1015, 25 Stat. 476 (requiring among other things residency to be established by white whiteness); Scott Act of 1888, Pub. L. No. 50-1064, 25 Stat. 504 (declaring certificates of residency already issued null and void); Chinese Exclusion Act of 1892, Pub. L. No. 52-60, 27 Stat. 25 (extending Chinese exclusion for ten years; providing for punishment at hard labor for those Chinese found to be in the U.S. unlawfully).

country. It seemed impossible for them to assimilate. . .."[25] It was understandable to the Court that the California constitutional convention communicated to Congress that "Chinese laborers had a baneful effect on public morals, that their immigration . . . approaching the character of an Oriental invasion and was a menace to our civilization. . .."[26] In short, the drafters of California's constitution had said Chinese citizens should be excluded, and Congress had obliged.

In the context of immigration, race became analogous to national origin, and sometimes religion, and race became the formal framework through which federal immigration policy developed. The first comprehensive federal immigration statute introduced a national origins formula to determine eligibility for migration to the United States. The Emergency Quota Act of 1921 limited the number of aliens of any nationality entering the U.S. to three percent of the foreign-born persons of that nationality who already lived in the U.S. as of the 1910 census.[27] As a practical matter, the act preferred those national origins that were already present in substantial numbers in the United States. Asians were barred from migrating for the most part, so the act favored immigration primarily from European countries. It was not until the 1940's that Congress repealed the Chinese Exclusion Acts and allowed the naturalization of persons of Chinese descent.[28]

It was not until the Civil Rights Era, in 1965, that the United States completely abolished the national origins system.[29] Today, visas are allotted on a per-country basis. Each country or national origin is allotted the same number of visas. This creates another set of problems that we saw at work in our current immigration framework — long waiting lines for immigrants who are eligible for an immigrant visa, as soon as one is available for them. Despite the elimination of the national origins system, however, the problem of bias has persisted: the welcome may be accompanied by harassment, hostility and calls to "return where you come from." Because the expression of racism or bias is often based on physical and linguistic characteristics, it is likely that these incidents of harassment and hostility are often directed at US citizens — persons who are as fully members of U.S. society as those who would target them.[30]

I gave you the example of the Chinese, first invited and then pushed out, but it is not the only example I could give: we could consider American citizens of Japanese descent interned in camps during World War II; Germans, drawn to the U.S. in the 1800's in the millions, but targeted for

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[25] *Chae Chan Ping*, 130 U.S. at 595.

[26] *Id.*

[27] *See* Emergency Quota Act of 1921, Pub. L. No. 67-8, 42 Stat. 5; Immigration Act of 1924, Pub. L. No. 68-190, 43 Stat. 153; *see also* MIGRATION LAW, *supra* note 2, at 30–31.

[28] *See* Act of Dec. 17, 1943, Pub. L. No. 78-344, 57 Stat. 600; MIGRATION LAW, *supra* note 2, at 31–32.

[29] *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; *see also* MIGRATION LAW, *supra* note 2, at 33.

[30] M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment,* 83 IND. L.J. 1557, 1567–69 (2008).

discrimination during the world wars; Irish Catholics in the late 1800's targeted by the Know Nothings, a political party that came into being to oppose Catholic immigration, and urged states to prohibit the vote to immigrants,[31] and Mexicans encouraged to come and work in the United States through the Bracero program,[32] when we needed agricultural and other workers during World War II, but then forcibly removed from the United States in a series of actions memorialized in Woody Guthrie's poem "Plane Wreck at Los Gatos," also known as "Deportees."[33] The poem memorializes a plane crash in 1948 that killed 28 immigrant workers whose identities had been ignored by the federal government and the national press. The plane, chartered by immigration officials to deport twenty-eight bracero workers from Oakland, California, crashed with no survivors. Although the pilot and plane staff were identified by name, none of the workers were identified in the national press and appear to have been buried in a mass grave with a plaque listing numbers and designating them "deportee." Recently, the deportees were finally identified by name and their burial formally acknowledged by name.[34]

This is the ugly side of the nation-of-immigrants story: the story of a struggle to resist racial bias and animus. It is a history that we ignore at our peril.

Our constitutional norms make it easier for us to resist that animus and bias when it is the result of state legislation, rather than federal, because the power to regulate immigration as part of our foreign affairs has been consistently recognized as national in character. It is in a case challenging the federal statutes targeting Chinese immigration, that the Supreme Court made clear that the Constitution placed the immigration power solidly with Congress and the Executive. The Constitution does not contain an express grant of power to Congress to regulate immigration. Thus, in deciding the question whether Congress had the power to exclude noncitizens from the United States the Court considered the various sources of power under the Constitution on which the power to regulate immigration rest. In *Chae Chan Ping v. United States*, the same case that noted the wide racial differences between Chinese and Americans, the Court recognized that "the power of exclusion of foreigners" was an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the

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[31] *See generally* TYLER G. ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850'S (1992).

[32] Act of Apr. 29, 1943, Pub. L. No. 78-82, 57 Stat. 70; Agricultural Act of 1949, Pub. L. No. 81-792, 63 Stat. 1051 (extending Bracero program); Act of July 12, 1951, Pub. L. No. 82-223, 65 Stat. 119 (providing limited protection to Bracero workers); *see also* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (2010 ed.).

[33] WOODY GUTHRIE, PLANE WRECK AT LOS GATOS (Woody Guthrie Publications & TRO-Ludlow Music 1961).

[34] *See* Diana Marcum, *Names Emerge from Shadows of 1948 Crash*, L.A. TIMES (July 9, 2013), http://www.latimes.com/local/la-me-deportees-guthrie-20130710-dto-htmlstory.html, *archived at* https://perma.cc/7MTE-GNLS.

Constitution, the right to its exercise at any time, when in the judgment of the government, the interests of the country require it."[35]

Thus, federal courts treat the immigration power as resting with Congress and the Executive branches of government; consequently, states generally lack power to regulate directly in this area, unless authorized by Congress. That states lack the power, under our constitutional scheme, to regulate immigration does not mean that states will not attempt to do so.[36] In the past decade, states have aggressively moved to regulate immigrants, in particular, undocumented immigrants. When such laws are inconsistent with or unauthorized by federal law, courts have not hesitated to declare them preempted by federal law,[37] or unconstitutional under either the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment.[38]

One example of modern state regulation of immigrants is Alabama's HB 56, enacted in 2011 and considered by some to be the harshest immigration law passed by a state to deter unauthorized immigrants from residing in the state.[39] Alabama's law targeted unauthorized immigrants and Alabama U.S. citizens alike. It prohibited immigrants not lawfully present in the U.S. from attending public postsecondary educational institutions, and it required public schools to track children's immigration status to discourage or deter them from participating in the public school system.[40] The bill prevented unauthorized immigrants from renting housing in the state or entering into contracts in the state, and made renting an apartment to an unauthorized person in the state a crime punishable by imprisonment for up to one year.[41] The bill also made it a crime for unauthorized aliens to look for work in the state or to work in the state, and punished persons who harbored or transported undocumented immigrants in the state.[42] Federal courts declared most of these provisions invalid as either preempted by federal law or in violation of the Equal Protection Clause of the Fourteenth Amendment.[43]

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[35] Chae Chan Ping v. United States, 130 U.S. 581, 609, 603–610 (1889).

[36] *See* M. Isabel Medina, *Symposium on Federalism at Work: State Criminal Law, Noncitizens and Immigration Related Activity – An Introduction,* 12 Loy. J. Pub. Int. L. 265, 267–69 (2011).

[37] *See* Arizona v. United States, 567 U.S. 387, 400–15 (2012) (holding several provisions of Arizona's S.B. 1070 preempted).

[38] *See, e.g.*, Arce v. Douglas, 793 F.3d 968 (9th Cir. 2015).

[39] Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535; *see generally* Kevin R. Johnson, *Immigration and Civil Rights Is the "New" Birmingham the Same as the "Old" Birmingham,* 21 Wm. & Mary Bill Rts. J. 367 (2012); Benjy Sarlin, *How America's Harshest Immigration Law Failed*, MSNBC (Dec. 16, 2013, 3:30 PM), http://www.msnbc.com/msnbc/undocumented-workers-immigration-alabama, *archived at* https://perma.cc/FWS3-W5HM; David Weigel, *Alabama Tried a Donald Trump-Style Immigration Law. It Failed in a Big Way*, Wash. Post (Aug. 22, 2015), https://www.washingtonpost.com/politics/alabama-tried-a-donald-trump-style-immigration-law-it-failed-in-a-big-way/2015/08/22/2ae239a6-48f2-11e5-846d-02792f854297_story.html?utm_term=.6242257c0fe8, *archived at* https://perma.cc/3F2W-RM8A.

[40] 2011 Ala. Laws 535 §§ 8, 28.

[41] *Id.* § 13.

[42] *Id.* §§ 11, 13.

[43] United States v. Alabama, 691 F.3d 1269, 1282–83, 1285–91, 1292–96 (11th Cir. 2012) (state law provisions on alien registration, employment, adding new immigration crimes analo-

Ultimately, the state agreed to a settlement that included payment of $350,000 in attorney fees to the groups that challenged the law successfully.[44] It is unsurprising, then, that the state's immigrant population has decreased in recent years.

States may choose to target immigrants, as Alabama did, or they may choose to protect immigrants and reject federal efforts to co-opt them into overly burdensome regulatory schemes. For example, California and other states provided their young, undocumented residents with the benefits of in-state tuition and drivers' licenses[45] long before the Obama administration adopted the provisions of the Deferred Action for Childhood Arrivals (DACA) in 2012, which allowed certain young people who entered the U.S. without authorization as children relief from removal and authorization to work in the U.S.[46] Many U.S. cities, including New York City, San Francisco, and Los Angeles, rejected federal policies aimed at co-opting state and local law enforcement departments into enforcing federal immigration laws.[47] While federal law may reign supreme in regulation of immigration, the Court has interpreted federalism principles to limit the power of the federal government to coerce state governments to legislate federal statutory policy and enforce federal regulatory schemes.[48]

While well-settled constitutional principles are likely to continue to restrict the power of states to regulate immigration, and in particular, to target immigrants whether here lawfully or unlawfully, the larger question and the question that will continue to pose a moral and ethical challenge to American society is that of our national policy. While those same constitutional principles provide Congress and the Executive greater latitude with regards to immigrants, as we saw in the past treatment of the Chinese and Mexicans, more modern cases have made clear that Equal Protection and Due Process limit the power of Congress and the Executive when regulating immigrants. For example, in *Landon v. Plasencia*, the Court made it clear that the government could not refuse admission to a returning permanent resident alien

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gous to federal crimes preempted); Hispanic Interest Coal. of Ala. v. Governor of Alabama, 691 F.3d 1236, 1245–49 (11th Cir. 2012) (state law requiring enrolling public school students to verify citizenship and immigration status subject to heightened scrutiny and violated Equal Protection); Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F.Supp.2d 1165, 1179–84 (M.D. Ala. 2011) (state law prohibiting business transactions including housing rentals between aliens not lawfully present in the U.S. and the state or its political subdivisions preempted), *vacated as moot*, No. 11–16114–CC, 2013 WL 2372302 (11th Cir. May 17, 2013).

[44] Daniel Vock, *With Little Choice, Alabama Backs Down on Immigration Law*, Pew Charitable Tr.: Stateline Blog (Oct. 13, 2013) http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/10/30/with-little-choice-alabama-backs-down-on-immigration-law, *available at* https://perma.cc/FP3J-9TQ8.

[45] *See generally* Martinez v. Regents of the Univ. of Cal., 241 P.3d 8855 (Cal. 2010); Josh Keller, *California Supreme Court Upholds Law Giving In-State Tuition to Illegal Immigrants,* Chron. Higher Educ. (Nov. 15, 2010), http://www.chronicle.com/article/California-Supreme-Court/125398/, *archived at* https://perma.cc/SLW9-VZCU.

[46] *See* Migration Law, *supra* note 2, at 108.

[47] *See* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy,* 2 U.C. Irvine L. Rev. 247, 249 (2012).

[48] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

without providing her with due process.[49] And in *Tuan Anh Nguyen v. Immigration and Naturalization Service*, the Court applied the standard of scrutiny that generally applies to statutes that discriminate facially on the basis of gender in an immigration context: intermediate scrutiny, thus, signaling that the Court, while deferential to the national government in the immigration context, will not simply abdicate its reviewing function.[50] Thus, the well-settled principle that the U.S. may not discriminate on the basis of race, national origin, religion or ethnicity is likely to prevail even in the context of immigration. Only in cases where the government can establish that it has a compelling interest that necessitates the use of race, national origin, religion or ethnicity as a classification may the government discriminate on this basis.

Immigration authorities engaged in this kind of discrimination through the adoption of the National Security Entry Exit Registration System (NSEERS) in the wake of the September 11th attacks.[51] NSEERS required nonimmigrants from twenty-five countries (twenty-four predominantly Arab or Muslim nations in addition to North Korea) to register and report periodically to immigration authorities.[52] Critics assailed the program on constitutional grounds, but the government abandoned the program in December 2003; reporting requirements for individuals placed in the NSEERS upon arrival were minimized but not totally eliminated.[53] Challenges to the NSEERS and to the administration's policy of targeting Arab Muslim men for surveillance and detention continue to be litigated in the federal courts; pleading rules and issues of immunity may mean that the courts never rule on the actual merits of the claim.[54]

More recently, the first two weeks of the Trump administration have generated an unparalleled challenge to the United States' comprehensive approach to immigration since 1965. President Trump's departures from existing immigration policy are remarkable primarily because they came about in a void — nothing had happened in the United States to support the claim that our existing immigration system, our vetting of refugees and immigrants had failed or needed substantial improvements. No event had prompted a need for abandoning a system in place for decades. Notwithstanding, much that candidate Donald Trump had promised on the campaign trail has be-

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[49] Landon v. Plasencia, 459 U.S. 21, 32–33 (1982); *see also* Kerry v. Din, 135 S.Ct. 2128 (2015) (majority of court recognizing a protected liberty interest in a U.S. citizen spouse's right to have non-citizen spouse considered for a visa to reside in U.S.).

[50] Tuan Ang Nguyen v. I.N.S., 533 U.S. 53, 60 (2001); *see also* Zadvydas v. Davis, 533 U.S. 678, 699 (2001) (federal habeas corpus statute empowered federal courts to review federal agencies' decisions regarding the appropriate length of immigration detention)

[51] Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584-01 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

[52] *Id.*

[53] *See* Migration Law, *supra* note 2, at 14, 66–67.

[54] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (establishing pleading standards in rejecting Muslim Pakastani man's claim that FBI Director discriminated against him on the basis of his religion or national origin by approving policy subjecting Arab Muslim men to more restrictive confinement).

come executive policy. By executive order, the new president declared his commitment to completing the wall between the United States and Mexico, and pledged his commitment to detaining and deporting even more resident noncitizens than had the Obama administration;[55] targeted sanctuary cities and jurisdictions, threatening them with loss of federal grants;[56] suspended admission of noncitizens from seven Muslim countries, suspended Syrian refugees indefinitely, suspended the entire U.S.'s refugee admissions system for four months, and prioritized claims for refugee status based on religious persecution for members of minority religions, once refugee admissions resumed.[57] The ban on immigrants and persons granted temporary admission to the U.S. from the seven Muslim countries set off an almost immediate roar of disapproval and dismay; its almost immediate implementation without notice set off protests across the United States and witnessed bands of attorney offering their services at airports that served international flights.[58] It was almost immediately challenged in the courts and a number of courts have enjoined parts of the order.[59]

Comprehensive analysis of the legal challenges raised by many of the provisions of the three executive orders issued thus far by the White House is beyond the scope of this essay, which primarily reflects the status quo as it was before the Trump presidency. Plainly, however, the President's actions have given rise to legal challenges that will test the boundaries of constitutional norms in the years to come. Those challenges include a claim that the President's Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States," violates the Establishment Clause of the

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[55] Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) ("Border Security and Immigration Enforcement Improvements"); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) ("Enhancing Public Safety in the Interior of the United States").

[56] Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

[57] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("Protecting the Nation from Foreign Terrorist Entry into the United States"); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (enjoined by Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *aff'd*, 847 F.3d 1151 (9th Cir. 2017)).

[58] Daphne Rustow and Ainara Tiefenthäler, *Protests at J.F.K. Against Immigration Ban*, N.Y. Times (Jan. 28, 2017), https://www.nytimes.com/video/us/politics/100000004899878/protests-at-jfk-against-immigration-ban.html, *archived at* https://perma.cc/29QA-M6WE; Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. Times (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html, *archived at* https://perma.cc/5PWE-6VJ4.

[59] *See, e.g.*, Darweesh v. Trump, No. 17 Civ. 480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); Int'l Refugee Assistance Project v. Trump, No. TDC–17–0361, 2017 WL 1018235 (D. Md. Mar. 16, 2017); Hawai'i v. Trump, No. 1:17-cv-00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017); County of Santa Clara v. Trump, No. 17–cv–00574–WHO, 17–cv–00485–WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017); Sarsour v. Trump, No. 1:17cv00120(AJT/IDD), 2017 WL 1113305 (E.D. Va. Mar. 24, 2017); *see also* Michael D. Shear, Nicholas Kulish and Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide,* N.Y. Times (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html, *archived at* https://perma.cc/4QU3-TE2X. Many of these cases were ultimately consolidated and heard by the Supreme Court, which has stayed injunctions on the travel ban for those from six Muslim-majority without a bona fide relationship to a U.S. citizen. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2089 (2017).

First Amendment because it discriminates on the basis of religion by prioritizing refugee claims on the basis of religion (as opposed to all other refugee claims including those based on persecution on the basis of political opinion) and by prioritizing refugee claims on the basis of particular religions.[60] The ban on admissions to persons from seven Muslim majority countries also faces challenge under the Fifth Amendment Due Process Clause as invidious discrimination on the basis of national origin and religion.

A recent report by the Harvard Immigration and Refugee Clinical Program on the impact of the President's Executive Orders on Asylum Seekers concludes that they will result in massive expansion in the detention of asylum seekers above that experienced under the Obama administration; discrimination against asylum seekers on the basis of religion and national origin; expedited removal of asylum seekers, in all likelihood without access to counsel and without the possibility of appeal; increased use of criminal prosecution of asylum-seekers; and increased return of asylum-seekers to their country of origin and persecution.[61] The President has already indicated, however, that some of the original initiatives, particularly those dealing with refugees, have been abandoned and will be replaced with less problematic policies.[62] Although immigration enforcement during this early period appeared intensive,[63] President Trump also has indicated a willingness to consider legal status to undocumented immigrants who have not committed serious crimes, something that advocates and prior presidents have encouraged Congress to consider, unsuccessfully as yet.[64]

The global experience tells us that immigration pressures will increase in the twenty-first century. The United Nations High Commissioner for Ref-

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[60] U.S. Const. amend. I.

[61] *See* Amy Volz et al., Harv. Immigration and Refugee Clinical Program, The Impact of President Trump's Executive Orders on Asylum Seekers (2017), *available at* https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf, *archived at* https://perma.cc/559D-98VJ.

[62] *See* Dan Levine, *U.S. Appeals Court Will Not Put Trump Travel Ban Case on Hold,* Reuters (Feb. 28, 2017, 2:18 PM), http://www.reuters.com/article/us-usa-immigration-court-idUSKBN16627W, *archived at* https://perma.cc/XY7U-27EJ; Laura Meckler, *Donald Trump's New Travel Ban Would Likely Exempt Existing Visa Holders,* Wall St. J. (Feb. 28, 2017), https://www.wsj.com/articles/draft-of-donald-trumps-new-order-would-exempt-existing-visa-holders-from-travel-ban-1488316331, *archived at* https://perma.cc/8MD8-QHG5.

[63] Michael D. Shear and Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions,* N.Y. Times (Feb. 21, 2017), https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html, *archived at* https://perma.cc/MVJ2-N7LU; Lisa Rein, Abigail Hauslohner and Sandhya Somashekhar, *Federal Agents Conduct Immigration Enforcement Raids In At Least Six States,* Wash. Post (Feb. 11, 2017), https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.e5420d5d9d49, *archived at* https://perma.cc/54CQ-XQ46; Press Release, Dep't of Homeland Sec., Statement from Secretary Kelly on Recent ICE Enforcement Actions, (Feb. 13, 2017), *available at* https://www.dhs.gov/news/2017/02/13/statement-secretary-kelly-recent-ice-enforcement-actions, *archived at* https://perma.cc/SM28-49RS.

[64] Julie Hirschfeld Davis, Micheal D. Shear and Peter Baker, *Trump, in Optimistic Address, Asks Congress to End 'Trivial Fights'*, N.Y. Times (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/us/politics/trump-address-congress.html, *archived at* https://perma.cc/E5G6-CKW6.

ugees currently estimates the number of persons that have been forced to relocate due to persecution or conflicts at 65.6 million.[65] The U.S. Supreme Court's traditional posture of deference to the political branches on immigration issues, including refugees, means that it may be largely up to the Congress and the Executive how the United States responds to migration pressures, as well as to how we treat those who we've previously admitted or allowed to reside within our shores. Those political branches, when they work as intended, reflect the will of the majority population. What is the will of a majority population, however, when a President is elected without the majority popular vote? Discerning the will of a majority of the population in a large, pluralistic society like the United States may be impossible — even if it were capable of definition, majority will may be fickle.

States, in turn, reflect the will of their majority populations. The role of the states in addressing migration issues, moreover, is still unsettled — states and cities may provide centers of sanctuary, to the extent our federal order and our federal government allow. Some principles appear well-settled: the President will need Congressional authorization to condition federal grants to states and municipalities on their agreeing to federal immigration imperatives. Even if Congress obliges, moreover, federalism principles may limit federal conditions on spending grants.[66] States may lead challenges to federal immigration policy, but the extent to which those challenges will be an effective mechanism towards change remains unsettled.[67] Ultimately, we are that population, and in that sense, it remains up to us how our country, our state, and our municipality respond today and in the future. The initial response by individuals and states suggests that resolution of these issues will engage directly American society to test our national commitment to those values that define our national polity – that we are an open society, welcoming of outsiders, committed to our membership in a world order that values equality, justice and respect.

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[65] *Statistical Yearbook Figures at a Glance*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, http://www.unhcr.org/en-us/figures-at-a-glance.html, *archived at* https://perma.cc/K3F7-ZE6V (last visited July 24, 2017).

[66] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–86 (2012).

[67] *See, e.g.*, United States v. Texas, 136 S. Ct. 2271 (2016); Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (leaving the issue of standing unaddressed).