

**MICHELLE  
ENGLISH:**

Greetings. I'm Michelle English, and on behalf of the MIT Center for International Studies, welcome you to today's Starr Forum. Before we get started, I'd like to mention that we have many upcoming Starr Forums for this academic year, including on November 21 at 4:30 PM, a talk on digital feminism in the Arab Gulf.

Speaking at this event will be Mona Eltahawy, an award-winning columnist and international public speaker on Arab and Muslim issues and global feminism. She's based in Cairo and New York City, and she is author most recently of the *Seven Necessary Sins for Women and Girls*. Joining this talk is Hala Aldosari, who is a Saudi scholar and activist, whose work focuses on women's rights in Arab societies, violence against women, and the guardianship system in Saudi Arabia. She joined the MIT Center for International Studies as its 2019 Robert E Wilhelm Fellow.

If you haven't already, please sign up to get our email announcements. In typical fashion, today's talk will conclude with a Q & A with the audience. For those asking questions, please line up behind the microphones, and we ask that you be considerate of time and others who want to ask questions. Please also identify yourself and your affiliation before asking your question.

Today's Starr Forum is co-sponsored by the Myron Weiner Seminar Series on International Migration. This series is part of the Inter-University Committee on International Migration, and is housed at the MIT Center for International Studies. Among its members is Justin Steil, who is the discussant of our talk today.

Professor Steil is assistant professor of law and urban planning at MIT. His research examines the intersection of urban policy with property, land use, and civil rights law. His recent scholarship has explored the relationship between space, power, and inequality in the context of immigration federalism, residential segregation, lending discrimination, environmental justice, and mass incarceration. Please join me in welcoming Professor Steil to the podium.

[APPLAUSE]

**JUSTIN STEIL:**

Thank you, and thank you everyone for being here. We are excited-- very excited to have with us today Cristina Rodriguez from Yale Law School. Obviously, immigration is a topic that has

been at the forefront of politics for the past three years, at the very least, and beyond that.

And we're very excited to have Professor Rodriguez here to help us look a little more deeply into the constitutional and institutional structures of immigration policy, immigration enforcement, and the power over who can be in this country, and on what terms. So we're very excited about the talk that's coming.

Cristina Rodriguez is a professor of law at Yale Law School. In recent years, her work has focused on constitutional structures and institutional design, particularly through looking at immigration law and related areas of law as vehicles through which to explore how the allocation of power shapes the management and resolution of legal and political conflict. Prior to joining the faculty at Yale, Professor Rodriguez served as Deputy Assistant Attorney General in the Office of Legal Counsel at the United States Department of Justice during the Obama administration.

And prior to that, she was on the faculty at the New York University School of Law. Professor Rodriguez earned her BA and JD degrees from Yale, and attended Oxford University as a Rhodes Scholar, and clerked for Judge David Tatel of the United States Court of Appeals for the DC circuit, and also for Justice Sandra Day O'Connor of the United States Supreme Court. Thank you so much, Professor Rodriguez, for being here with us today. We're looking forward to it.

[APPLAUSE]

**CRISTINA  
RODRIGUEZ:**

Thank you so much, Justin. I very much appreciate the invitation to be here today, and I also appreciate all of the work that Michelle English did to help organize the visit. So I would like to talk about the ways in which the last two presidential administrations have served us with stunning contrasts in their approach to immigration policy, and their conceptions of the role of immigration in our national life, as an embodiment of the impasse we face over immigration in this country today.

And so I therefore would like to begin with a tale of two presidents. So once upon a time, the Obama administration sought to make its mark on immigration policy. After its multi-year and unsuccessful pursuit of a legislative solution to the country's immigration woes, the president and the highest levels of his administration turned inward. Under pressure from the brash and courageous immigrant youth leading the charge to lay their claim to a place in the American

polity, the task was to figure out what can be done to enable their right to remain in the United States without direct congressional authorization.

The result was a bold two-stage program, providing relief from deportation and work authorization to upwards of 5 million immigrants present in the United States without legal status-- first, in 2012, to the young people brought to the US without legal authorization, and then, in 2014, to the parents of US citizens and lawful permanent residents. The president and his officials framed these moves with a generous understanding of the polity, with the belief that who deserves to be here is broad, sociological, and expansionistic.

To the president's lawyers and supporters, these deferred action programs embody the very basic exercise of prosecutorial discretion, only on a large categorical scale. But critics in both Congress and the commentariat accused the president of usurping the lawmaking function, and marching us further down the road to an imperial presidency-- actions they thought that were of a piece with his end runs around Congress and implementing other statutes, such as the Affordable Care Act and the No Child Left Behind Act.

Opposition emerged first from within law enforcement, as ICE agents sued the president for forcing them to violate their oaths to the Constitution. But in 2014, nearly every Republican governor agreed, and two dozen states, led by Texas, promptly sued the administration to stop the program for parents of citizens and permanent residents for going into effect. Complainants alleged a variety of legal infractions at both a statutory and constitutional level, and the lower courts effectively halted the program from going into effect.

In the surprise ending few were expecting, Donald Trump replaced President Obama. President Trump proceeded to dismantle the Obama immigration legacy with a breathtaking assertion of federal law enforcement power. Built around a narrative that immigration is a symptom of decline, and a source of cultural, physical, and economic danger, Trump, his campaign, and his administration offered a definition of the polity that has been, by turns, highly legalistic and culturally nationalistic, alongside repeated calls to shrink the immigrant population still further.

This administration has paired a law and order vision of immigration status with racial demagoguery to make its claims. One of Trump's very first acts in office was to turn to a power expressly delegated to the president by Congress during the Cold War-- to deny entry to aliens or classes of aliens in the United States, when the President determines it to be in the

public interest.

Citing section 212(f) of the Immigration and Nationality Act-- which I will refer to as the INA for short-- he issued the now-infamous travel ban executive order just a week after his inauguration, suspending the entry of nationals from various Muslim majority countries, and sowing confusion at the airports, and prompting emergency litigation. Enforcement priorities generally in this administration, from its outset to the present day, have framed immigrants as threats to public order, and revealed the administration's intent to use the government's enforcement authority to the maximum extent allowed by law.

Memos issued by Trump's first Secretary of Homeland Security, John Kelly, announced a dramatic expansion of state power through the use of detention, summary removal proceedings, and the commitment to constructing the ultimate symbol of exclusion-- the wall. The president has pursued this latter goal, despite rejection in Congress, by invoking statutory emergency powers.

But perhaps most dramatically of all, President Trump has rescinded-- or attempted to rescind-- President Obama's relief for the Dreamers, citing its dubious legal status and the desire to have Congress resolve the matter once and for all. This time, it was the turn of the Democratic governors and the immigrant rights community to take the president and his administration to court, citing manipulation of the statute, structural constitutional offenses, and violations of constitutional rights to boot.

This very month-- I think in about a week-- the Supreme Court will take up the case, and it could decide not just whether Trump can rescind Obama's policy, but whether DACA, as it is now widely known, was lawful to begin with. So it would be hard to script to greater contrasts than these, but while offering us entirely different visions of the role immigration plays in our national life, there is an important common denominator.

Each president has reinforced the centrality of executive governance in general, and law enforcement, in particular, to the construction of the polity and the meaning of the immigration code. How do we make sense of this power of the modern presidency-- a power to shape our regulatory environment, our world, but in a way that can be so dramatically from one poll to the next, depending on who wins the election-- who's is in charge, even though the underlying legal code remains the same?

It would be easy and not altogether wrong to characterize these two tales of the Obama and

Trump administrations as manifestations of our hyperpolarized politics, and the attendant congressional dysfunction. Congress and the American people are at an impasse precisely because these competing visions of immigration are both very much at home in American politics, and always have been.

In the absence of a Congress able or willing to act, presidents seize the advantage and use the system to advance their electoral prospects and their visions for immigration policy. But in work that I've pursued with my longtime co-author, Adam Cox of NYU, for over a decade, we have shown that the power of the presidency over immigration law has been deep and longstanding, and has arisen from a variety of sources.

Sometimes, and often, it's a product of crisis, but more generally, it's because of the underlying structure of the law, and what we call the enforcement logic behind it. In our forthcoming book, that's coming out in 2020, *The President Immigration Law*, we contend that the history of immigration policy suggests, both descriptively and normatively, that we should understand the separation of powers in immigration law and the numerous other domains as a tale of two principles-- the president and Congress, each of which operates with its own visions and competences to manage the crucial task of setting the metes and bounds of our society.

This is a challenge to the conventional notion that it's Congress that is primarily in charge of making these choices, and the president acts as its faithful agent. The Trump administration does nothing, if not reinforce the descriptive dimensions of this account, but it has challenged some of the basic assumptions of a theory-- at least for us-- that would embrace executive policymaking through enforcement-- these assumptions posit a productive, mutually checking, giving take between political officials and bureaucrats, and the demands of the regulatory world.

In the Obama years, and for much of the post-world War II period, these assumptions may have been debatable, but they were often valid and held, regardless of the political party in charge of the administration. Today, commentators across the political spectrum wonder, however, if they are eroding beyond repair. The story of the Trump era, when told as history, could end up being a tale about the resilience of institutions and norms that have long disciplined the behavior of our government in the face of rotten leadership and public disillusionment.

Or perhaps, historians will come to see our time as a tipping point, when those norms and

institutions, long in decline, finally gave way to a politics and system of governance driven by personality and raw power. Or perhaps, we will come to see it as the beginning of a new era of immigration policymaking that better serves our national interest. Only time will tell.

And scholars have, in fact, been having a heated debate about these questions-- about whether the current administration represents an unfortunate era from which the country and the system will recover, or whether we're witnessing a truly existential threat to our constitutional order. As we live through this moment, my own inclination has been not to overstate the power of an abusive demagogue or to distort our theories of executive or administrative power in his image-- not least because the causes of any constitutional and political decline are almost certainly myriad, and not exclusively located in the presidency.

I ultimately believe that the cause for concern lies less with the expansion of presidential power, and more with the health of our democracy, the political culture, and struggling institutions that make legislative compromise and popular consensus difficult. But today, instead of trying to address these incredibly weighty and difficult problems, I would like to use the particular and glaring case of immigration law to explore the dynamics that underlie them, to consider whether we can remain optimistic about our system.

And in order to do this, I want to first tell a little bit of the historical story that explains this two-principles understanding of immigration policymaking that I have identified. So courts have long justified strong federal power over immigration alongside a deference to executive judgment by observing that who controls the entry into the country and who controls who remains and on what terms implicates the nation's foreign policy.

The law and politics of America's first century were fluid and uncertain, and it was actually state and local governments that played the primary role as regulators of immigration through their taxation powers, and inspection powers, and in some cases-- including within the state of Massachusetts-- the creation of their own deportation regimes. But in this world of proto-immigration policy, at the federal level, it was presidents who played the primary role in regulating the movement of people.

In 1842, for example, President Tyler-- not necessarily well-known-- one of our presidents-- declared in his first message to Congress that we hold out to the peoples of other countries an invitation to come and settle among us as members of our rapidly-growing family. He was reacting to the gathering nativism that produced the Know Nothing Party of the 1850s, and a

slew of anti-immigrant laws around the country-- including, again, here in Massachusetts.

He then set

Out to negotiate the nation's first commercial treaty with China, which enabled commerce and migration between the two countries. It was only in the late 19th century, in response to escalating resentment of Chinese on the west coast and pressure from states like Massachusetts and New York, that Congress finally asserted itself powerfully. In 1875, the Page Act targeted criminals and prostitutes for exclusion, but was widely understood as an effort to curb Chinese migration.

This effort matured into outright Chinese exclusion in 1882, and Congress thus launched the American experiment with systematic immigration restriction. The story of the 20th century is of Congress's ever-greater occupation of this field. The treaty tradition did, to some extent, and in dramatic fashion, survive this shift in the balance of power.

During World War II, for example, presidents Roosevelt and Truman negotiated, and then implemented, a bilateral treaty with Mexico to launch the largest guest worker program in US history in response to labor shortages in the southwest. Both presidents behaved as if they had inherent power to take action, and the program took shape according to executive enforcement priorities, including through the sorts of mass deportations and roundups pictured in this slide, which is fairly typical of law enforcement activity at the border during this period.

The program thrived in the face of tensions with Congress, until 1964, when the glare of the Civil Rights movement and documentary television made it untenable to maintain a labor program that was marked by exploitation, depressed domestic wages, and racial subordination and strife. This, though-- the use of presidential power to formulate treaties that would lead to the migration of large numbers of people-- was anomalous.

And yet, the decline of treaty making and immigration hardly sidelined the president. In many ways, the president is only more powerful today than he was at-- during the war time period. The elaboration over the 20th century of a legislative code, counterintuitively, has empowered the president in two ways that remain essential today, and that we see at work in the policies of the Trump administration and those of his predecessor-- first, through expressly delegated powers, and secondly, as the result of the power to enforce the law-- the core executive power.

The Trump administration's forays into immigration policy have shined a light on some very startling delegations in the US code-- authorities that have been used by past presidents in limited and discreet ways, but the Trump administration has used in dramatic fashion. The president's declaration this past February of a national emergency at the border was grounded in statutory authorities that effectively empowered him to circumvent Congress's very clear rejection of his border wall by rejecting funding for the wall.

Of course, many legal details remain to be sorted out, and aspects of the president's actions may ultimately be invalidated, but at the heart of it was a set of statutory authorities giving the president broad power. Equally vivid and controversial was President Trump's entry ban that I invoked at the outset-- an act ultimately upheld by the Supreme Court in 2018 after a fraught run through the lower courts, on the ground that Congress had given the power to the president to do precisely what he had done.

In issuing his entry ban order, Trump relied on this INA section 212(f) to suspend the entry of a class of aliens that he thought were detrimental to the interests of the United States. When Congress adopted this provision in 1952, it did understand the breadth of what it was doing. Representative Emanuel Celler-- a Democrat from New York, and one of the architects of this major immigration legislation-- argued that the provision did too little to constrain the reasons presidents could invoke to suspend immigration.

He thought it, quote, "allowed the president willy-nilly, on good grounds-- or if I may be facetious, on coffee grounds-- to suspend totally any immigration to the country." It was an unchecked sweeping form of power. The president's most recent invocation of this power-- President Trump's most recent use of it-- comes closer than ever before to proving Emanuel Celler correct-- that it authorizes the president to swallow the immigration code whole.

Section 212(f) is the basis for the administration's most recent, and arguably most breathtaking assertion of the power to exclude immigrants-- another presidential proclamation that, in this case, would require applicants for permanent admission to prove that they will have health insurance, or can afford health insurance, before they will be allowed in. What had been treated as a national security power is now being used to drastically curtail all manner of legal migration.

An estimate by the Migration Policy Institute projects that the proclamation could exclude 375,000 people per year. That's roughly 2/3 of those who would otherwise be eligible to enter,

under the law as it exists. We're talking about spouses, children, parents of citizens, and lawful permanent residents. But whatever we think about the advisability of these kinds of delegation-- and this administration is teaching us that Congress needs to rein some of them in-- presidents past have not actually needed such sweeping grants of power to remake the immigration system.

Historically, presidents have also been able to exploit smaller interstitial bureaucratic devices, small grants of authority, to push their immigration and ideological agendas. I want to give just one example to give you a flavor of how presidents have been able to use what seem like small powers in the code in service of a broader vision, in part because of their power over not just foreign policy, but also the concept of who and what it means to be American.

And that is the role of the president in the formulation of America's refugee policy. So at the same time that Congress created this vast suspension power in 212(f), it also created the so-called parole power, which permits the attorney general-- now, the Secretary of Homeland Security-- to temporarily, and for emergency reasons, in the public interest, allow any citizen into the United States.

Congress was clear at the time that this was only meant to be in individual cases for discrete purposes-- for example, for someone who needed medical assistance, who was otherwise being detained, or if someone needed to serve as a witness in a trial or stand for prosecution. It was designed as a case management tool to make it possible to enforce the law without wreaking havoc. But whereas the suspension power lay dormant until the 1980s, the parole power became central to presidential administration not long after the INA was passed in 1952.

Presidents from Eisenhower to Clinton used the power to admit large numbers of non-citizens they deemed worthy, despite Congress's failure to create adequate routes for refugee admissions. President Eisenhower was the first to hit on the capacious use of the parole power in the wake of the Soviet Union's crushing of the uprising in Hungary in 1956. Even as countries around the world-- including Canada, Australia, countries in Latin America, Israel-- took in thousands of Hungarians fleeing the Soviet tanks, Congress did nothing.

The Eisenhower administration therefore reimagined the parole power to compensate for legislative shortfalls, and allowed approximately 38,000 Hungarians to enter. In doing so, Eisenhower had set a precedent. By 1965, Congress openly criticized Eisenhower's parole

policies, but left the text of the statute alone. And so President Lyndon Johnson took advantage of Congress's formal evasion of responsibility in dealing with a foreign policy dilemma of his presidency-- immigration from Cuba.

In October 1965, Fidel Castro abruptly announced that his critics and opponents were free to leave Cuba. Just days later, LBJ hailed the signing ceremony for the 1965 Immigration Act at the base of the Statue of Liberty, signing the law that abolished once and for all the exclusions based on national origins that had kept southern Europeans and Eastern Europeans mostly out of the country, as well as Asian exclusion.

He linked the act to the then flowering American creed that immigrants and citizens alike were to be judged based on what they are, and not because of the lands from which they sprung. But even as he capped this major legislative achievement-- one through years of tough bargaining, interest group politics, and inter-branch compromise-- he also asserted a robust unilateral power. He directed various departments of his administration to immediately make all arrangements to permit those in Cuba who sought freedom to make an orderly entry into the United States.

The Cuban airlift lasted for eight years, and resulted in the admission of more than 200,000 new immigrants, the vast majority of whom eventually became citizens. Their entries served the objectives of Johnson, and then Nixon, and the US foreign policy establishment, and it revealed communism's bankruptcy to them, because the Cuban people were voting with their feet. This story of the parole power takes twists and turns to the 1970s, '80s, and '90s, and it suggests two important observations about presidential power and immigration.

First, it would be tempting to see this policymaking as reflecting the exercise of a de facto emergency power, but I think it's equally emblematic of what we might call-- and this is not that interesting a phrase, but it's nonetheless quite important-- bureaucratic dynamism, and the desire to lay a claim to an area of regulation with vivid human drama, and where changing circumstances are especially salient. And second, the executive's policymaking leadership and independence have ultimately proven resistant to congressional control.

From Truman to Trump, members of Congress have made noises about reining the president in, but it has proven difficult for Congress to stifle this presidential tradition of independence. This has been for reasons that are familiar to constitutional theory about the relative competences of the branches-- the president has more energy, is more vigorous, can act

more quickly-- but also because of the direct interrelationship that allows the president to exert his vision over foreign policy.

Congress has typically ended up responding to the president's assertion of authority by enacting legislation that reflects and largely accepts the way in which the executive has already remade immigration policy. The history of the parole power encapsulates this dynamism, creativity, and instability of executive governance. These features of presidential power over immigration law that arise from delegated powers have been important historically, but, I would argue, they are the secondary source of presidential power over immigration law.

The most important source is one that begins developing in importance in the 1970s, and is central to our immigration law and politics today, and that is the power to enforce the law. The second power stems from the president's duty to take care of that the law be faithfully executed, and it's this power that accounts for the bulk of the president's influence today, and for the core dynamics of our system.

My longtime co-author and I call this form of presidential authority *de facto* delegation, a concept that tells us much about the president's role in the immigration regime as it does about the capabilities of our government. The charge of the immigration debate in recent decades stems from a single arresting statistic. Roughly half of all non-citizens living in the United States-- approximately 11 million immigrants-- are formally deportable.

The staggering size of this population-- which began to build in the 1970s, and accelerated up through the late '90s and early 2000s-- is the result of the collision between two forces-- one bureaucratic, the other sociological. The first is the explosive growth of the deportation state, with its sweeping grounds and capacities for removal. And the second is the accretion of illegal immigration in the 1970s and '80s, and its dramatic acceleration in the 90s through the 2000s.

For a variety of reasons, these phenomena have resulted in a settled population of millions of immigrants without status. We call this the shadow system of immigration, and it has made Congress's intricate detailed code of immigration rules increasingly of secondary importance. The law, on its face, a world without unauthorized immigrants, is belied by a deep and persistent reality on the ground.

Add to this equation the way that Congress has swelled the population of potentially deportable lawful immigrants by expanding the grounds for removal, and the point is even more salient. The consequence of this mismatch between the law on the books and law on the

ground is that executive enforcement judgments have a sizable effect on immigration policy. It's the executive's choice about whom to prosecute and whom to remove that determines the composition of our population.

So having identified what we think is a key feature of our system today, the question becomes how to think about it. And so we consider two possible accounts of the regime. On one view, this enormous shadow population reflects an unfortunate policy failure-- a failure of the government. Congress built the immigration regime over the course of the 20th century hoping for perfect compliance, and the rise of illegal immigration stands is a rebuke to that vision.

On the second view, the formal law notwithstanding, Congress either wanted or foresaw large-scale immigration outside the law, and now tacitly accepts it, depending on executive underenforcement of the law to manage it-- including by allowing most ordinary workers to remain in the United States, which has been roughly characteristic of enforcement policy, at least since the 1980s.

If the first account is accurate, then we might think that the executive has an obligation to use its enforcement power to secure full compliance. You can call this the Trump approach. But if the second account is accurate-- and I think it's closer to the truth-- than a perfect world is not a world of perfect compliance. Instead, Congress understands that the executive is going to under-enforce the law, and shape and manage migration as a result.

This is the light in which we should see the Obama relief policies-- as a series of judgments about who among this population ought to be allowed to remain in the United States and earn a livelihood on the books. The system is a vehicle through which value judgments about illegal immigration have been expressed. Judgments are reflected in this statement on the border wall-- *somos trabajadores*-- which means we or all workers-- which is embodied in the enforcement policies of the Obama era-- that they should be allowed to remain.

Through the criteria elaborated by the Obama administration, especially for DACA and DAPA, these policies have prioritized the insulation of young people brought to the United States who would otherwise be productive members of our society, were it not for their legal status. And these are the criteria of the various initiatives that are now well-known, and mostly focus on what we might describe as sympathetic non-citizens-- though that characterization is also critiqued and challenged.

This kind of underenforcement of the law characterizes many regulatory arenas, and provides

officials of the executive with tools to advance their ideologies or policy agendas. We see this especially in areas like drug policy, civil rights enforcement, the enforcement of the security laws-- securities laws. But what made the Obama immigration initiatives dramatic was not that the president imposed his values and priorities on the de facto screening regime.

It was the forms through which he did it-- by inviting millions of people to apply for deferral from removal, and enabling those millions of people to work with authorization in the United States in light of regulations that had been on the books since the Reagan era. These policies clearly were meant to deliver on the inclusive sociological immigration vision I invoked at the outset.

But they delivered because they advanced a series of important administrative law interests as well-- interest in controlling the law enforcement bureaucracy, which to that point, had resisted efforts to channel its discretion through informal guidelines. Its culture is and was one of enforcement, and resisted efforts to rein it in. And these policies made the executive's enforcement judgments, which were inherently opaque, a bit more predictable and a bit more transparent.

So this story, and the focus on the Obama era, reveals a robust regime of executive governance, which embodies two important capacities of the executive that also serve to justify presidential unilateralism, as I've described it. Perhaps the most important is the executive's ability to temper the over-extension of the legislature. This is a classic reason for prosecutorial discretion.

The executive can adapt to change much more readily than Congress-- not just in the ordinary sense of adapting to changed circumstances, but in the deeper sense of adapting to the way the law actually works in practice, which Congress cannot predict from the outset. There's also a political justification for the system-- that the presidency and the executive serve as sites for politics and political engagement-- a zone of significant policymaking, where groups, interests, or members of the polity can press their claims.

An enforcer that conceptualizes itself as a policymaker is more likely to be open to this sort of democratic dynamic. Now, none of this is to say that the president, today or historically, operates with better motives than Congress. Historically, the president has been more open to immigration and less likely to indulge atavistic thinking than Congress. But clearly, that's not where we are today.

My position is not meant to gloss over the ideological or material motives that presidents have had, when promoting expansionist policies. The Cold War manipulation of the parole power to serve foreign policy interests is a good example of those. And nothing in this theory is mutually exclusive with the idea that Congress ought to address underlying problems in the law itself.

There are too many sympathetic people intertwined in the lives of others for our current regime to continue and remain legitimate. Shrinking the domain of enforcement, shrinking the number of people who are subject to law enforcement is the work of Congress-- though, as a result, I think, at least for now, remains mostly a pipe dream, because of the difficulty of enacting legislation.

So these theories were all good and well for 2016. Now, it's 2019, and we've lived through two years of a very different president than any of presidents past-- in my view-- with strong, illiberal impulses, and either ignorance of or disdain for formal and informal constraints on his power. So what do we make of this model of executive governance, when we have an executive branch that does not value some of the assumptions built into the model?

The two-principles model is one that can survive ordinary swings in administrations between Democratic and Republican, in part because institutional interests will always constrain the president. The day-to-day reconciliations required of a large bureaucracy, like the Department of Homeland Security, could mean, even in the Trump context, that the actual record of enforcement will not differ that much from Obama's over the long haul.

The difference may turn out to be one of rhetoric and climate, not outcomes. Indeed, President Obama was tagged as deporter-in-chief by advocates for proceeding with removals at a rapid pace. His administration also refused to use parole to address the arrival of tens of thousands of mostly women and children at the southern border in 2014, who were fleeing severe gang violence and cartel violence in Central America-- the same people who are in the news today.

Instead, he turned to detention and deterrence, an approach that has morphed into forms of extreme cruelty through family separation and bureaucratic indifference to conditions in the hands of the Trump administration. This continuity between the two administrations highlights the underlying enforcement logic of our system, and one that can only be displaced by radical intervention-- that pipe dream that I was talking about.

For now, the question remains how we can continue to value political control of law enforcement in an era when the risks of abuse of such control are all too apparent. In the case of immigration enforcement, the current administration seeks to remove the shackles of political control to empower a bureaucracy, that is itself ideological, to serve the president's political ends, which dovetail with aggressive use of the coercive power of the state.

The risks associated with this version of presidential power are less the articulation of dangerous legal theories than a surge in core executive powers. So what do we do about it? I want to end on a note that explores ways in which this surge might be constrained alongside a system that, nonetheless, maintains a robust role for the president in managing immigration policy.

The answers I would give, in brief, consist of reasons, rights, and politics. In responding to the myriad shifts in immigration policy that have emerged from this administration, the lower federal courts have taken on a surprising role-- surprising to me, at least. They've been decidedly political-- not in a partisan sense, but in the sense that they seem to be self-conscious participants in managing and molding reality on the ground.

They're relying on administrative law doctrines that scrutinize executive branch decisions to ensure that they are not the product of arbitrary and capricious decision making. The courts have weighed in to judge the rationality of government action. And even the Supreme Court has gotten in on the act. Just last term, the Supreme Court itself showed its willingness to scrutinize the government's motives in the decision that essentially blocked the Trump administration's effort to add a question about citizenship to the imminent 2020 census.

In litigation, the Department of Commerce claimed that it sought to add the question in order to help the Department of Justice enforce the Voting Rights Act. The court, led by Chief Justice Roberts, found that explanation wholly incredible, contrived. The real reason though the court doesn't say this in its brief-- in its opinion was almost certainly to suppress the count of Latinos in order to dilute their political power in the next reapportionment, which is based on the census.

Now, ordinarily, courts except agencies' reasons for pursuing a course of action, but the Chief Justice, in his opinion, used vivid language to signal its departure from this norm. He says, our review is deferential, but we are not required to exhibit a naivete from which ordinary citizens are free. There's a disconnect between the decision made and explanation given.

Accepting contrived reasons would defeat the purpose of the enterprise. Judicial review must be more than an empty ritual. This is not typical language. This requirement of reasons and the giving it reasons does have limits-- the willingness of courts to intervene notwithstanding. Even robust reason given requirements in executive hands give-- leave ample power to the executive to shape the regime according to its own preferences.

And the extreme bad faith that the Supreme Court called out on the part of the Department of Commerce in the census case is pretty difficult to prove. There was a lot of extraordinary evidence, in that case. The court's openness to second guessing motives will be put to the test later this month, in the case challenging the Trump administration's effort to unwind the DACA program.

The lower courts have not permitted it, finding that the administration did not give a credible reason for its decision to change its mind. And yet, it's also important to realize that a victory for DACA recipients in the suit before the court would present risks. The worry is that embracing the challenge to Trump's DHS will end up hamstringing executive governance with excessive procedure, empowering judges to express incredulity in context-- a context in which agencies should be making the final decision.

At stake is how easy it is going to be to unwind the policies of the Trump administration, when it is replaced by somebody else. At least in the case of immigration law, the question then becomes whether constraints on executive power, external to the decision making process, are available and effective. So we might, therefore, look to the second thing I mentioned, and that is to writes-- another classic restraint on government power.

Rights, both statutory and constitutional, offer a direct vehicle for identifying, and then limiting what might be abusive about governmental power. Now, at the statutory level, the INA is not exactly known for extending many rights to non-citizens, especially since reforms in 1996 pushed the statute in a restrictive direction. But the statute imposes substantive constraints on the executive in various ways.

As part of its border enforcement agenda, for example, the Trump administration has attempted to define much of our asylum law out of existence-- not only by limiting the definition of refugee, but also by closing off opportunities for asylum applicants. These efforts are mired in multi-issue, multi-party litigation in the courts right now. The Supreme Court has also shown itself willing to treat the US government's claims of power-- near absolute authority over

immigrants-- with skepticism.

Two years ago, for example, in a case called *United States versus Maslenjak*, the court rejected the government's interpretation of its authority to denaturalize citizens, concluding that the government's position-- which was any misstatement in the naturalization process was grounds for revoking citizenship-- was way too aggressive a reading of the statute. Citizenship and naturalization, in the court's view, were contexts in which the right had become treated as virtually sacred. And therefore, it read the government's power narrowly.

Now, with respect to constitutional rights, the Supreme Court's decision in 2018, in *Trump versus Hawaii*, casts a long, dark shadow. There, the court essentially upheld President Trump's entry ban, and showed the court's intention to protect the prerogative of the office of the president. In my view, the decision marked a worrisome departure from the past, rather than continuity with it.

Before it, the court had never upheld an immigration policy that openly discriminated on the basis of race or religion during a period of constitutional history when the same policy would have been illegal in the domestic setting. But that is, I think, precisely what the court did in *Trump versus Hawaii*. And yet, this opinion notwithstanding, channels do remain open for a jurisprudence that restrains the executive in defense of non-citizens rights.

Even on its own terms, *Trump versus Hawaii* rejects the strongest version of the plenary power-- the claim that the Department of Justice often makes, that there are no constitutional restraints on the exercise of immigration powers. And *Trump versus Hawaii* should not be assumed to apply to other kinds of immigrants rights cases. The entry ban was profoundly affected by the fact that it involved questions of national security at the precipice of entry.

And so it remains possible that the court can treat other sorts of rights claims by non-citizens differently. That said, the current state of doctrinal uncertainty surrounding detention, removal, and border policing-- all of the manifestations of the enforcement logic-- does mean that reliance on the Constitution to restrain abuses of the president's power remains a work in progress-- one that requires construction and recovery of some older traditions-- one, that my account of de facto delegation and the shadow regime should remain urgent.

And then finally, if we can't rely on reasons and rights-- and there are reasons to believe that those are not the most-- the strongest bulwarks against presidential power-- we're left with politics. Perhaps more important than whether any statutory or constitutional rights claims

carry the day in court is the potential for this legal discourse to transform political discourse. And often, I think, this is why let against bring their cases.

And this brings me to my final point. The claims about constitutional structure-- about presidential power, congressional power, state versus local versus federal power-- are often political in nature. They are fundamentally political in nature, and they're driven by underlying ideologies and preferences about the scope and responsibilities of government.

As a result, politics is the ultimate response to any concern that the executive has abused its power, and it should provide us with the most meaningful and lasting form of restraint. The problem, of course, is there are reasons to be skeptical about the strength of our political institutions. Congress is the greatest and truest power to curb executive abuses, but its capacity and willingness to do so, especially during unified government, is questionable at best.

Now, the fact that both houses of Congress voted to overturn Trump's emergency declaration to build the border wall was a sign that even this Congress has aligned. But of course, in that case, the president was able to overcome the congressional vote with his own veto. Because I think it's important to conclude events like this on a note of optimism, I do want to express a hope for public and political deliberation on the underlying substantive issues that animate the debate over immigration policy, and the president's role in it.

The current administration's enforcement policies embody a vision of immigration that many of us think is morally bankrupt, but that has always had a place in American politics, as you can see from this graph charting-- this chart laying out the trajectory of American public opinion on immigration, and the thin line that supports expanding immigration across time. For now, restrictionists have captured the executive branch, which, in some dispiriting sense, is actually acting responsibly to this tradition in American history.

I do, however, think we would be wrong to conclude that we are living in a thoroughgoing nativist moment. Survey data suggests that we, as a country, have receded from the restrictionist highs of the 1990s. Though, again, there has never been great appetite for the expansion of immigration. Those are the yellow columns there. And public opinion on the value of immigration has grown increasingly polarized, which is why the survival of an inclusive vision requires this-- a May Day protest-- marches by immigrant workers and their allies to challenge the criminalization of unauthorized status.

And this-- the public revulsion at the entry ban and the sudden exclusions of people from Muslim-majority countries-- and of course, the courageous activism of the Dreamers, with whom I began, whose youth has ensured their healthy disrespect for authority, including for our last two presidents. These gatherings of people to stake a public claim on the debate over immigration have succeeded in discrete moments to stop draconian immigration legislation, turn a sympathetic ear in the White House into concrete action, and force a restrictionist administration onto its heels.

Mobilization of this sort is not easy, or even desirable to sustain, which is why we still need our lawyers and our constitutional arguments. For that, I personally am grateful. I hope that the long history of presidential immigration law gives us some faith in the creativity and responsiveness of government to grapple with the status quo. And this confidence in the complex system I have described could, I hope, in the end, free us up to deliberate about the kind of nation we ultimately wish to be so that we may bring law and our understanding of our constitutional commitments closer to a shared vision. And with that, I'm happy to continue the conversation with Justin.

[APPLAUSE]

**JUSTIN STEIL:** Thank you.

**CRISTINA** Thank you.

**RODRIGUEZ:**

**JUSTIN STEIL:** There are so many questions I want to ask. I had a number prepared in advance, but I think I might go off script, based on what you've said. So you alluded to this juxtaposition between the decision and the travel ban case-- the Muslim case-- and the subsequent decision in the census citizenship case. And so we're obviously living in a moment that's characterized by this extreme intertwining. Not that this is new. It's been a reality in the United States since the country's founding, of race, and immigration, and a rise of populist movements here and globally.

And so it seems that, if the Constitution's protections against-- equal protections against discrimination are to have any power in the immigration context, at this moment, it's going to require, to some extent, looking into the motives and justifications for policies. And we saw very different decisions there, where the court in the travel ban case said, we don't see

evidence of religious bias, even though it seems self-evident.

And in the citizenship case, they said this does seem [INAUDIBLE]. Can talk a little bit about how you think-- why you think those two decisions came out differently in that aspect?

**CRISTINA  
RODRIGUEZ:**

Yeah. I think that the-- in some ways, the census litigation helps to put the travel ban case into some perspective. And I don't want to sugarcoat that case, because I think I and a lot of other people were startled at the position the court took. The court could have said, there's not enough evidence here to show discriminatory intent, most of the statements that are being pointed to were made during the campaign about wanting a complete shut down of Muslim immigration, and everything to that effect.

But it didn't take that course, and instead, said that, as long as there was a facially plausible reason for the exclusion, that was enough, independent of whether there were discriminatory motives as well. So that was an extreme position. But I think the court's willingness is-- specifically Chief Justice Roberts is really who we're talking about here-- to say in the census case that, when it's obvious to everyone involved that the administration's coming up with contrived reasons to justify something that clearly has some kind of nefarious motive behind it-- it's not going to allow it-- is encouraging.

And it allows us to see the travel ban case for its particular context, which is national security judgments made about people before they have ever entered the United States at all. Those are people who have the least claim on the Constitution. They certainly are connected to US citizens, and permanent residents, and institutions in the country who do have an interest in their migration, but those who are seeking the actual entry remain outside of the United States.

And the reason given by the administration is that there was inadequate information sharing from those countries of origin to enable adequate security screening. And so those facts, in typical common law style, would allow a subsequent court to say, this is a very specific holding. And I think the census decision might reinforce that, because it is a case where the court is willing to look behind motives.

Now, it's not that the court actually said, what we think is going on here is the attempt to discriminate against Latinos and suppress their count, but that was part of the lead-up to the case and the inability of the administration to come up with an even plausible sounding reason to cover what are the likely motives. Was this bridge too far for the court?

I think that the DACA litigation, which is being heard in a week or two, will be another data point in this question for how to fit this all together. And I think really, someone like Roberts is just trying to, in a pragmatic sense, manage this really complex policy and political environment without allowing everything the administration dreams up, but also without getting too involved in decisions that are typically for the executive branch.

**JUSTIN STEIL:** So do you think you can actually introduce everyone a little bit to the issues in the upcoming DACA case, and how they relate to your argument--

**CRISTINA** Yes.

**RODRIGUEZ:**

**JUSTIN STEIL:** --about presidential power?

**CRISTINA** So when the Trump administration came into office, one of the many things that it did to try to unspool President Obama's immigration policies was to rescind DACA. DACA is the policy that allows people who were brought to the United States as minors to basically be insulated from removal, and to work with papers in the United States.

**RODRIGUEZ:**

And it's something that had been renewed a couple of times in the Obama years, and it was unclear whether Trump was going to try to rescind it. But then his Department of Homeland Security decides to rescind it. And when an administrative agency changes its mind about something under standard doctrine, it has to give a good reason.

Most people who are observing this thought that the Trump administration would be able to undo it easily, because the policy was not a rule. It wasn't something that was authorized by law, per se. It was a discretionary policy, and was framed as such. But the lower courts, in hearing the challenges to the attempt to rescind the policy, found that there wasn't a good reason.

The main reason the administration first gave was that DACA was itself illegal, and so it couldn't continue an illegal policy. But all the courts to hear the case said, DACA's not illegal. It's perfectly within the president's power to have done, so you have to give us a better reason. And that has made its way all the way up to the Supreme Court.

The administration has tried at least one more time, if not two more times, since the first rescission to do it again and to do it better. But it has not been able to satisfy the courts, and

that's what's before the Supreme Court. And the case itself is not going to be that interesting to a general public, in the sense that it will turn on the meaning of the arbitrary and capricious standard and what process an administration has to go through.

But at the end of the day, it could have an effect on how easy it is for one administration to change its predecessor's policies. And both Democrats and Republicans have relied on this power. A new administration comes into effect-- there are all kinds of tools that has to shift the policy environment, even when Congress doesn't act.

And a lot of the Democratic candidates are putting out, in addition to their legislative platforms, their platforms for changes in administrative policy. And so this case will affect how easily, in lots of areas, future presidents can change predecessor's policies. And the court could actually decide whether DACA was legal or illegal. If it decides that it DACA was illegal, then the dreamers are out of luck, other than through seeking legislation. And future presidents wouldn't be able to do what President Obama did, if they were so inclined.

**JUSTIN STEIL:** And so building on that and coming back to your argument, especially about the role of presidential power in part coming from prosecutorial discretion-- which is well-accepted, but I think can be confusing sometimes-- that if the Constitution says the president has a responsibility to take care to faithfully execute the laws, how does that then become the president cannot-- can choose not to execute the laws?

**CRISTINA RODRIGUEZ:** Yeah. This argument was most clearly stated in the litigation that ICE agents brought against DACA. And in their litigation, they said, how can it be that I can witness a legal violation or see someone before me who's removable, and then decide not to enforce the law? That's a violation of my oath to the Constitution to enforce the law.

The basic idea that justified DACA, and that I think makes it legal, is that, even though the president has a duty to take care of the laws faithfully executed, there are limited resources. And in a world with limited resources, it's not possible to enforce the law in every instance in which it's violated. And this is very familiar in the criminal law.

Half this room is probably a violation of some criminal law, and yet the law's under-enforced, because it's not possible to enforce against every violation of the law. And so for example, during the Obama years, the Department of Homeland Security would routinely say-- and I don't know how true this was, but I think there's an element of truth to it-- that we only have

money to deport 400,000 people per year.

So even though there are many millions of people who are deportable inside the United States, there simply aren't the resources. And that then leads to a justification of setting priorities. Even the strongest critics of DACA did not, in the end, in the litigation in the lower courts, say that the president and his administration can't set priorities to decide to go after the most serious offenders, or illegal-- unauthorized immigrants who have committed serious crimes.

Because that kind of prioritization is part of the way that law enforcement works. My co-author and I have a more complicated theory of why under-enforcement is justified, that's grounded in the view that Congress doesn't actually intend for the law to be enforced 100%. It has drawn, in this setting and in others an overbroad law.

Essentially, it can't make up its mind. There are too many compromises that legislators are trying to make, and so they come up with a law. They probably don't want it enforced against everyone who's actually in violation of it, and so they delegate that to the executive to choose. And through that delegation, the executive is justified in setting priorities.

The Dreamers should not be deported-- people who have committed serious crimes should be deported. And there's a vast middle between those two poles. There's actually support for this idea in some of the Supreme Court's case law that scrutinizes and elaborates the nature of federal immigration authority. So it's not an outlandish idea that Congress would want its laws completely enforced, but it does require accepting that the laws on its face is not what the law is in reality.

**JUSTIN STEIL:** So this idea that Congress maybe passes overbroad laws, not intending them to be enforced makes me think about what the potentially unintended consequences of that might be. And there's some scholarship in political science, including professor in political science here [INAUDIBLE], that talks a lot about how policies and programs create their own politics.

We usually think of politics create the law, but then often, those programs-- such as Medicare, Medicaid, and the distinctions between them, or Social Security-- create constituencies. And so I was thinking about that, as you were talking about how many of the issues that you were discussing come back to 1996, and the cluster of laws passed by Congress under the Clinton administration-- the IIRIRA-- the Illegal Immigration Relief and Immigrant Responsibility Act.

**CRISTINA** Very good, yes. It's hard to get that acronym [INAUDIBLE]

**RODRIGUEZ:**

**JUSTIN STEIL:** And PWRORA, the Personal Responsibility and Work Opportunity Reconciliation Act; and AEDPA, the Antiterrorism and Effective Death Penalty Act created a cluster of issues in criminal justice, in welfare-- social welfare policy, and especially in immigration. And so I'm wondering-- it made me think that, in a sense, those legislative enactments, even though they don't have real programs like Social Security associated with them, have created their own politics. And so I'm wondering what lessons you would take from the politics of that moment and the consequences of those laws for the president.

**CRISTINA** That's a hard question. The lessons I would take specifically from the immigration legislation is  
**RODRIGUEZ:** that overbroad grounds of removal, or grounds of rule that might seem intuitive on their surface, can have reverberations that are not desired or expected. One of the things that has been eliminated in the law of deportation, and that I think would be useful to restore-- especially in light of this-- the political logic underlying these tough-on-crime type provisions, which once enacted, are very hard to undo-- is that there used to be statutes of limitations on grounds of deportation.

And that's a provision in the law that its effect is only valid for five years after the commission of the offense. And once that's done, you can no longer prosecute the person. You see in the criminal law-- also lots of civil offenses. The justification for that is that-- it's manifold, but it includes that, once enough time has passed, there's an injustice that might arise from prosecuting somebody for offense that's far in the past.

Evidence gets old and stale, and so it's likely-- or it's difficult to have a fair trial or a fair proceeding. Those used to exist and be attached to grounds of removal, and they reflected the theory that, even if someone commits an offense, after a certain number of years, removing them for an offense that's so far in the past-- a shoplifting offense, even an assault or something like that-- has social consequences that multiplied across the number of people who would be affected are too serious.

And reintroducing that into this concept could help ameliorate some of the unintended effects of those laws. But I think the lesson to take from 1996 is that the enforcement logic not only has an effect on political constituencies that matter to both parties. It also has an effect on employers, and it results in this relentless, insatiable desire for resources by law enforcement

bureaucracies to enforce the law.

The budgets of the federal immigration enforcement bureaucracies have increased in a secular fashion over the last 30 years. And I think their budgets are greater than all other federal law enforcement budgets combined. And so I don't think-- apart from the people who supply the tools that they use, and may be some of the agents themselves-- that that's an especially desirable dynamic that Congress has found itself in.

**JUSTIN STEIL:** Yeah. And so shifting a little bit a-- but to build on that, how do we get out of that dynamic? One of the things you talk about is that we have this now shadow structure, shadow citizens, shadow system of people who may be documented or undocumented, but don't have the same legal rights as citizens. But it seems a particularly difficult moment. What openings do you see to change that conversation?

**CRISTINA RODRIGUEZ:** I don't have a lot of optimism on that front, but I will say-- so in the epilogue to the book that Adam and I have written, we've tried to articulate what our vision is for the right structure of immigration policy. That depends on the political will to enact it, and of course, it's radically different than the one that we have today.

And the way we frame that as not just a pipe dream, but as a possibility, is to say there are few facts about the world that have-- put us in a different kind of political environment than we were in the early 2000s, when reforms stalled-- even when you had a Republican president supporting it in, George W Bush. And that is that the dynamics that were driving illegal immigration from 1970s up to the early 2000s no longer exist.

So there is not pressure from Mexico anymore in the same way, for a variety of reasons. With the great recession and the collapse of the housing market, that's had an effect on the demand. But more importantly, the Mexican population has aged. The country has developed considerably in the last 20 to 30 years. And so net migration from Mexico is zero.

That doesn't mean there aren't still people crossing illegally in search of economic opportunity, but it means that more people are going back. And that dynamic is not feeding the politics of immigration anymore. And so that could present an opportunity, if that resonated with people, to say, we need a system that cleans up the mess of the last 40 years, which includes millions of people without legal authorization.

And it's pretty clear, Steven Miller's dreams notwithstanding, that it's not possible to remove 11

million people, nor is that even desirable for most people. And so that would provide support for a legalization program, and then a reimagined immigration system that dealt with changes in the demand for economic migration-- and then addressed the kinds of crises that we are grappling with today, which is people fleeing violence from Central America, which was a different set of concerns and implicates a different body of law than those that drove the debate in the '90s and in the 2000s.

I don't have a high level of confidence that that reframing or that change in circumstances will actually make a difference, but one thing you learn from studying the history of major immigration legislation is that, often, it takes many, many years of hitting your head against the wall and the same organizations, the same representatives in Congress, the same senators trying to do the same thing to actually achieve legislative transformation.

In 1986, there was such a transformation, and Ronald Reagan happened to be supportive of it. So the presidency matters, with respect to how easily this is going to happen. But more than that, the politics underlying it-- the political support for it needs to be there, and it's not right now.

**JUSTIN STEIL:** And what do you think the implications are that the administration has proposed moving towards a more skills-based or points-based system. What do you think the implications of that are? How does that relate to the shifting reality?

**CRISTINA RODRIGUEZ:** I think it's possible that many people who supported a skills-based approach do it not just because it might be good policy, but as a way of reframing the debate-- that we're not building a system that is about admitting people who are poor or less educated than the average American, and that would therefore be a drain on the United States.

Instead, where we're admitting people with skills that the United States needs, and characteristics that makes them assimilable. I personally don't like that framing, because I think you can do two things at once. You can have a system that prioritizes families, and recognizes our interrelationship with Mexico, and our asylum obligations, along with a system of employment-based immigration that does try to recruit people who would be effective in different industries.

But I do think there is a kind of-- there might be a zero-sum quality to the debate. It's hard to advance both those objectives. And so when you turn to a skills-based approach, has a tendency of crowding out other kinds of legitimate, morally justified and required forms of

migration. Maybe it would work to make the law a bit better. It's certainly possible.

Once you open up the legislative process in a case, in the case of immigration-- as with other areas, where there are so many dimensions to it-- you do open up the opportunity to fix things here and there that might not be the primary objectives of the sponsors of the bill-- that people are saying we need more engineers, and things of that sort-- but that, nonetheless, get into the mix.

And so for that reason, I would be willing to open up that conversation as a form of creating opportunity. But I'm also not a political strategist. I don't really belong on the Hill, so I can't say for certain if that would work.

**JUSTIN STEIL:** And one last question, before we turn it over to everyone else-- which you talked a lot about the conflict or tension between presidential power over immigration, congressional power over immigration. You've also written, and I'm very interested in the federalism issues here. And obviously, in recent decades, we've seen that, to enforce immigration laws, the federal government has leaned heavily on state and local governments, and empowering them through programs like 287(g).

We've also seen the sanctuary city movement gaining a lot more momentum in recent years, since Trump's election. How do you see this sanctuary city fight, which is across the courts, all over the country? What do you see is the direction of that?

**CRISTINA RODRIGUEZ:** I think that the direction of it is moving in the-- in favor of those localities that don't want to participate. Just last week, the Trump administration lost another case, where it was trying to impose conditions on law enforcement grants on jurisdictions that didn't want to participate in the enforcement of the immigration laws. And one of the things that, as a professor of constitutional law, is especially gratifying or amusing about all of this is that the doctrines that states and localities are relying on are doctrines that were developed in the '90s by a conservative movement that was trying to curb the expansion of federal power because of its interest in decreasing regulation of the economy.

More generally, just to be blunt about it, those doctrines gave rise to a principle that states and localities can't be forced to enforce federal immigration law, and that's what the Trump administration is trying to do. And so now, it's New York, and Massachusetts, and California that are using federalism to beat back the federal government. And I suspect that, if this gets up to the Supreme Court-- and it may well-- that that will hold, because of the importance of

federalism to justices across the spectrum, and because what the government is trying to do is use other governments machinery to enforce its own objectives.

Now, without getting too much into detail, there are lots of ways the federal government can do that without conditioning these grants. Part of what's going on, especially when Sessions, the first attorney general, initiated these lawsuits against states like California's political part of the larger strategy of the federal government trying to sideline or denigrate California. And it's part of this partisan political battle that's happening.

So for that reason, it still matters in the politics of immigration, because it's creating contrasts between two world views. It just so happens that the inclusive view is now supported by conservative doctrines that protect federal and-- or state and local authority, and it's finding its home in blue jurisdictions, rather than red ones.

**JUSTIN STEIL:** Thank you so much. I really enjoyed this. And now, some questions from the audience.

[APPLAUSE]

**AUDIENCE:** Hi. My name is Ron [INAUDIBLE]. I'm an MIT alumnus. A lot of people have come to the States as-- excuse me-- as tourists or on-- as work visas or students legally. What proportion of the 11 million is that category?

**CRISTINA RODRIGUEZ:** That's a great question, because a significant percentage of unauthorized immigrants did not cross the border illegally or without inspection-- which is the technical legal term-- but instead, arrived lawfully. I don't know the current percentage, but it's somewhere around 40%. So it's a substantial bunch of that population.

And so the image of the illegal immigrant as someone who's clandestinely crossed the border-- the southern border, in particular-- is not wholly accurate. Though it still is a significant portion of the population. And from a legal point of view, that distinction matters, because people who entered with visas and then overstay and become unauthorized actually get a more generous treatment in the law.

They have a path, if they have some other connection through a job or a family member, to becoming lawful, where somebody who crossed the border without inspection does not. And so within the population itself, there are disparities in the effects of the law, as it's currently written.

**AUDIENCE:** Hi. I'm Brian Shaw. I'm a member of the public. So you'd mentioned how increased enforcement budgets have affected the actual legal outcome, even though the law itself has changed-- has not changed. Technology seems to have a similar effect, where things like facial recognition make enforcement actions possible and cheaper in ways that just were not possible or cost-effective, when the law itself was written. Can you maybe speak to how that's shifting [INAUDIBLE]?

**CRISTINA RODRIGUEZ:** Yeah. So I don't know much about the use of facial recognition in immigration enforcement, per se, but I do know that changes in technology have been extremely important to the way the enforcement power actually works, and to the amplification of it. So I alluded before to a program called Secure Communities, which is one that allows the federal government to use the data-- the fingerprint data that the FBI gets from state and local governments that document criminal arrests, and compare it to data about who's deportable, or has an ordered deportation, or is otherwise removable from the United States, in order to identify people, when they're in state and local custody-- or have recently been state or local custody-- for deportation.

That has been made possible by technology. The way that enforcement used to work was that the federal government would rely on state governments to say, hey, we have someone in custody who's committed this offense and might be deportable. And so there were a lot of quasi-formal agreements with state and local officials and quasi-formal collaboration.

With this change of technology that allows interoperable data systems to be created, the government doesn't need those collaborations anymore. And so they can identify, and therefore, deport tens of thousands more people than it would have been able to do before 2008, when this technology came online. There's a lot of debate in border security circles about using things like facial recognition technology as a way of tracking people.

And one of the elements of tracking that customs officials have not been very good relates to the prior question, which is that biometric data is taken when people enter the United States, but no one monitors who's left the United States. And so it's almost impossible to know if someone who entered lawfully has remained over the duration of the visa.

I honestly don't know if there are technological solutions to that problem, but if there is a solution to that problem, it's probably going to come from technology and changes of this sort

that make it easier for law enforcement officials to identify people-- including people who haven't committed that offense, or been arrested, or run afoul of the law, but are otherwise surveilled in other ways.

**AUDIENCE:** Thanks.

**CRISTINA** And that's kind of-- sounds kind of chilling, if true.

**RODRIGUEZ:**

**AUDIENCE:** Hi. My name is [INAUDIBLE]. I'm an associate at the Harvard Physics Department, and an immigrant, lawfully. And I found the whole discussion about US immigration interesting and confusing a lot. So I'll focus on specific things regarding the border crossing.

Recently, the Democratic presidential debate, they talk about decriminalizing, and what would be the effect of that. So that's a question, if you can clarify what's the legal perspective. And the other one is about asylum seekers-- that from one side, the Trump administration reduced the quota significantly. And is there a legal way to boost it back up, with international commitments, et cetera, and still managed to fight or discriminate because there is a misuse, to some extent, of asylum applications? So how do you balance that legally?

**CRISTINA** So on the first question-- so let me answer the second question first, actually, because it's a bit more complicated. I've written quite a bit about this refugee selection system. The short answer to your question is that the president has the power to determine how many refugees the United States accepts from overseas.

**RODRIGUEZ:**

And there's no legal recourse, if he decides to zero it out. I think the last ceiling that he set was at 30,000. Typically, over the last several decades, it's hovered at 70,000. I think it's ever gone much over 100,000 per year. No matter what, those are all numbers that are embarrassing, as compared to other countries that accept far more people per capita.

So per capita for the United States, it's a very small number. But the Trump administration has tried to get it to zero. In 1980, the Congress gave the president that very power in part as a way of trying to control what presidents had been doing, which is just to admit whomever they wanted without oversight by Congress using the parole power I described.

And so the only legal recourse would be for Congress to step in and say, these numbers have to go up. The only possibility is that there's a requirement in the law the president consult with congressional committees, when it's setting these numbers. I don't think that creates any

procedural rights that one could vindicate in court, but Congress could say, this consultation is woefully inadequate, and we demand more.

And then that could put political pressure on the administration. The conflict that you're describing between wanting to admit people with genuine humanitarian concerns and concern about fraud is one that pervades discourse about asylum and refugee protection all over the world, and is even more prevalent in Europe, I think, than it is in the United States.

And I think, on the one hand, it's an overstated problem. But on the other, the refugee selection system itself-- and then our asylum laws, which require the United States to give protection to people who would be returned to persecution otherwise-- do have a very narrow definition of who deserves protection. And so you have to have a legal system, if you're going to abide by that law, that can determine whether someone's within the definition or not.

On top of that, claims to refugee status or claims for asylum depend on accepting credibility-- the credibility of witnesses and their self-testimony. Many people don't have copious documentation of what they have experienced. It's the relaying of personal experience that forms the foundation of many asylum claims coupled with some external evidence about country conditions.

And so it is a process that requires evidence and skepticism of the evidence that's provided. But because I think that the number of people who are actually committing fraud is not-- it can be ferreted out by the system itself. It's not a concern that should lead to a decision to just decrease the numbers of refugee admissions to low rates.

Especially in the overseas system, the UNHCR-- the UN High Commissioner of Refugees-- is assisting in the process of vetting. And so the vetting is robust enough. And our immigration judges, though they have their flaws, are probably good enough at ferreting out these problems that it's not a large number of people who are getting in undetected. And now, I've forgotten the first question.

**JUSTIN STEIL:** Would it be helpful also to clarify the distinction between refugees and asylees and that there's is no cap on asylum application?

**CRISTINA RODRIGUEZ:** Yeah. So the refugee cap relates to people who are overseas and who the United States decides to admit. And since 1980, the president has the power to set those numbers on an annual basis, and then people apply and the various departments decide whom to admit.

Asylum is something you apply for, if you're present in the United States. And you can apply for it if you're here, or you can raise it as a defense in a removal proceeding.

**JUSTIN STEIL:** Or if you're at the border, you can apply for it, because you're in the United States.

**CRISTINA RODRIGUEZ:** Right. You can apply for it at the border, which is what many Central Americans are doing now, is they reach the border and seeking to apply for asylum. As I suggested, there's an obligation on the United States-- that comes from international law, but is actually incorporated into our domestic law-- to not remove people to persecution. And so that's the basic obligation.

That obligation does not entail allowing someone to stay in the United States indefinitely. We also have an asylum system that grants the right to remain, and then apply for permanent residency after a year to people who meet the definition of refugee, but that is discretionary. Our only obligation under international or domestic law is to not return people to persecution. And so once that threat has disappeared or ameliorated, people who have been given protection could, in theory, be returned. What was the first question?

**JUSTIN STEIL:** The first question was about-- the discussion about decriminalizing crossing the border.

**CRISTINA RODRIGUEZ:** Oh, right. Thank you. The basic import of that is most immigration offenses are civil offenses, and so they can result in deportation, and then the detention that precedes them. But they don't result in conviction of a crime. There are a few immigration crimes, including entering the United States without inspection, and then re-entering the United States after you've been ordered removed-- each of which comes with prison sentences attached to them.

The way that that has been relevant to presidential power over immigration law in the recent past is those laws have been used to rapidly process people who arrive at the border and are apprehended, and to create strong disincentives for them either attempting to return, or to create disincentives for people who might seek to return. Because the effect of having one of those criminal fences is not just that you would be subject to imprisonment-- and there's also a fine associated with them-- but that then also has an effect on whether you could, in the future, return lawfully.

And it allows for quick processing of people, essentially with plea bargains, at the border without hearings to manage the problem of illegal immigration at the border. It was used during the Bush years, in particular, to try to streamline that process. So among the reasons why many of the Democratic candidates would get rid of those laws is not just because they're

punitive and attach prison sentences to enter without inspection-- which they believe is wrong-- but also because they empower the Department of Justice to use the threat of those laws to coerce people into giving up their-- what might be claims to remaining inside the United States.

**JUSTIN STEIL:** Last question.

**AUDIENCE:** Thank you. I'm Betty Davis. I'm a staff retiree-- MIT. And my question might be outside your purview, in which case, you could just reject it, because I'm talking about people with temporary visas. But I worked at another university here in the city with international students for a lot of years, and the United States has been a very popular destination for international students-- particularly at graduate level, but also undergraduate.

And I just wonder if the more restrictive immigration policies of this president-- of this administration have had an effect on the those international student populations at various universities in the United States. I heard something on NPR just a couple days ago that foreign students were tending to apply to Canada, instead of the United States. That's my question.

**CRISTINA RODRIGUEZ:** I think the short answer is that the administration's policies are having an effect. I couldn't quantify it for you or say how many people are diverting to Canada, or the UK, or Australia for study, but that is a source of concern. One of the things that the Obama DHS tried to do with its administrative power was to make it possible for students who came on student visas to remain in the United States and get jobs by expanding what's known as the Optional Practical Training program is what OPT stands for.

Sometimes I know the acronyms better than the actual names of the programs. And the goal was to extend the time during which people who'd studied here could work in jobs that were related to their course of study-- on the theory both that that was beneficial to them as students, but also to the United States to have people who'd-- universities who invested in to actually start participating in some way in the economy.

And that could then lead to positions that would make them eligible for other kinds of visas. I don't know what this administration has done to that, but I suspect it has at least scaled it back to where it was before-- if not tried to dismantle that program as part of this larger initiative.

I have a colleague who has been tracking all of the different administrative actions this administration has taken. And if you know anything about the Department of Homeland Security, you know its vast, and there are myriad immigration programs that we don't actually

talk about in public debates. And this is an example of that, so it's good to surface this.

And so there are many, many ways in which, in the lives of individuals, in the lives of institutions of higher learning, in the lives of employers, or the bottom line of employers, that who's staffing DHS can make a huge difference. And that has become one of the tasks of a new administration is to identify where that is, and then to undo whatever that the predecessor has done. So I suspect that's what's happening these days.

**JUSTIN STEIL:** Please join me in thanking Professor Rodriguez. Thank you so much.

**CRISTINA** Thank you for coming.

**RODRIGUEZ:**

[APPLAUSE]