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Articles

Bold Executive Action and False Equivalence

Stephen H. Legomsky*

Amidst the legal and political discourse following President Obama's immigration executive actions and the polar opposite thrust of President Trump's executive actions in this field, one hears a familiar refrain—a dire warning to liberals that zealous advocacy of humane immigration policies will come back to haunt us. Liberal executive actions in this field, it is said, set broader legal and political precedents and trigger conservative backlashes that open the door to anti-immigrant and other illiberal executive actions. Seeing no evidence of such a causal link, I disagree. To the contrary, the steady, principled advocacy of humane immigration policies is critical to the realization of positive outcomes and the defeat of harmful ones.

These arguments have come from both directions. From the political right, they are meant to justify bold anti-immigrant executive action. These advocates cite DACA (Deferred Action for Childhood Arrivals)¹ and DAPA (Deferred Action for Parents of

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1. Barack Obama, President of the U.S., Remarks by the President on Immigration at the Rose Garden (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks->

Americans)² as legal or political precedent for broad executive power. Additionally, they try to undermine immigrant advocates by pointing to our support of DACA and DAPA and thus accusing us of doing 180-degree turns now that the shoe is on the other foot. From the political left, the warnings are meant as a caution against overly bold progressive executive action that they fear might lend support to future conservative action.

In 2012, the Obama Administration established a program known as “Deferred Action for Childhood Arrivals” (DACA).³ The program authorized “deferred action,” a long-established vehicle for prosecutorial discretion,⁴ for certain undocumented immigrants who had been brought to the United States as children. They had to apply individually, to have lived continuously in the U.S. since 2007, to meet several additional criteria, and to show they merited the favorable exercise of discretion.⁵ When granted, deferred action temporarily makes the recipient a low priority for deportation and eligible to apply for permission to work during the temporary period for which deferred action is granted.⁶ On September 5, 2017, the Trump

president-immigration; Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

2. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

3. Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 1.

4. For a superb, comprehensive historical account of deferred action and related instruments of prosecutorial discretion, see SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015), especially ch. 4; *see also* Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 *SAN DIEGO L. REV.* 819 (2004).

5. Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 1, at 1.

6. 8 C.F.R. § 274a.12(c)(14) (2014).

Administration rescinded DACA.⁷

In 2014, the Obama Administration established a second program known as “Deferred Action for Parents of Americans” (DAPA).⁸ This program authorized deferred action, again after individualized consideration, for certain parents of United States citizens and lawful permanent residents.⁹ A divided court of appeals panel preliminarily enjoined DAPA,¹⁰ and on June 15, 2017 the Trump Administration rescinded it.¹¹

The idea that pro-immigrant executive action rests on premises that will later support anti-immigrant executive actions has surfaced in at least three contexts: legal precedent, political norms, and public backlash. In each of these contexts the critics argue that, by supporting President Obama’s executive actions or other inclusive immigration policies, we liberals are now hoisted by our own petards. Not all of these critics have made all of these arguments. But each of these arguments has been made by one or more individuals, as the following discussion will show.

I. LEGAL PRECEDENT

The common premise of the arguments addressed in this section is the need for consistency—in particular, the need to avoid double standards. In a thoughtful article on judicial review of the political branches’ immigration policymaking, Professor Margulies considers the division of power between the legislative and executive branches of government.¹² One of his observations

7. Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

8. Memorandum from Jeh Charles Johnson to León Rodríguez, *supra* note 2.

9. *Id.* at 4.

10. *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015), *aff’d per curiam mem. by an equally divided court*, 136 S. Ct. 2271 (2016).

11. Memorandum for the President from John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Stephen Miller, Assistant to the President & Senior Advisor to the President for Policy, on Rescinding Policy Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) 1 (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/2017-HQFO-00935%20Records.pdf>.

12. See Peter Margulies, *Bans, Borders, and Sovereignty: Judicial*

is highly relevant here: “A model that views President Obama as a co-principal of Congress can hardly deny that role to President Trump.”¹³

At that level of generality there is no reason to quibble. As usual, however, the devil is in the details. Reasonable minds can disagree as to whether a given assertion of executive authority really amounts to making the executive a “co-principal of Congress.”¹⁴ More important, bold executive actions are not fungible. They rest on different sources of law, different sets of facts, different policy goals, and different cost-benefit analyses. DACA and DAPA are bold executive actions that relate to immigration; so too are President Trump’s travel ban¹⁵ and his orders rescinding DACA and DAPA.¹⁶ That much they have in common. But the resemblance ends there. The legal issues are as different as night and day, as discussed in more detail below.¹⁷ Whether any one of these actions can fairly be described as elevating the executive branch to the role of “co-principal of Congress,”¹⁸ therefore, or for that matter whether any one of these is legally flawed, tells us nothing about whether the same is true of any of the others.

In a series of similarly thoughtful writings, Professor Blackman specifically targets DACA supporters and the parties challenging President Trump’s travel ban.¹⁹ Blackman claims that their current legal challenges to President Trump’s executive actions contradict the arguments they previously made in defending the legality of pro-immigrant policies.²⁰ In one article

Review of Immigration Law in the Trump Administration (Roger Williams Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 177, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029655.

13. *Id.* at 6 n.23.

14. *Id.*

15. The current versions are Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,164–71 (Sept. 27, 2017) (nationals of specified countries) and Exec. Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 24, 2017) (refugees).

16. See Memorandum from Elaine C. Duke to James W. McCament, *supra* note 7; Memorandum from John F. Kelly to Stephen Miller, *supra* note 11.

17. See *infra* notes 36–44 and accompanying text.

18. Margulies, *supra* note 12, at 6 n.23.

19. See Josh Blackman, *Commentary*, JOSH BLACKMAN’S BLOG, <http://joshblackman.com/blog/c-v/#commentary> (last visited Mar. 3, 2018).

20. Josh Blackman, *A Ludicrous Ruling That Trump Can’t End DACA*, NAT’L REV. (Jan. 10, 2018, 4:57 PM), <https://www.nationalreview.com/2018/>

Blackman argues that “[i]mmigration advocates who ignore this venerable maxim [that Congress does not ‘hide elephants in mouseholes’] will have scant protection if future presidents exercise discretion that is less congenial to their desired reforms.”²¹ This was a reference to the use of that maxim in the court decision affirming a preliminary injunction of DAPA.²² As I have shown elsewhere, however, the provision in question was no mousehole.²³ Even if it were, a future challenge to an anti-immigrant executive action would rest on the specific provisions of law relevant to that case. Unless the legal issues happened to be identical, a “mousehole” argument in one case would not support Professor Blackman’s dark forecast of “scant protection”²⁴ in another case.

Elsewhere, Professor Blackman mocks the State of Washington for “rel[ying] on the standing argument it once opposed [referring, presumably, to the defendants’ and amicus states’ arguments that Texas lacked standing to challenge DAPA] to seek a nationwide injunction against Trump’s executive order.”²⁵ But the State of Washington hardly relied on any

01/daca-court-ruling-trump-cant-end-daca/.

21. Josh Blackman, *Immigration Inside the Law*, 55 WASHBURN L.J. 31, 37 (2015).

22. *Texas v. United States*, 787 F.3d 733, 760 n.86 (5th Cir. 2015) (citing *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)).

23. Stephen H. Legomsky, *Written Testimony of Stephen H. Legomsky Before the United States House of Representatives Committee on the Judiciary*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON JUDICIARY 16–18 (Feb. 25, 2015), <https://judiciary.house.gov/wp-content/uploads/2016/02/Legomsky-Testimony.pdf> [hereinafter Legomsky Testimony].

24. Blackman, *supra* note 21, at 37.

25. Josh Blackman, *DACA Recipient, Detained by ICE, Asserts 5th Amendment Violation for “Break[ing] the Promise Made to Him” Because of Grant of Lawful Presence*, JOSH BLACKMAN’S BLOG (Feb. 14, 2017),

<http://joshblackman.com/blog/2017/02/14/daca-recipient-detained-by-ice-asserts-5th-amendment-violation-for-breaking-the-promise-made-to-him-because-of-grant-of-lawful-presence/>. The State of Washington is not a party to the case Professor Blackman describes; the plaintiff there is an individual DACA recipient challenging his detention. See *Petition for Writ of Habeas Corpus at 2, Ramirez Medina v. U.S. Dep’t of Homeland Sec.*, No. 3:17-cv-05110 (W.D. Wash. Feb. 13, 2017). I am assuming Professor Blackman is referring to the suit brought by the State of Washington to enjoin President Trump’s travel ban. See *Complaint for Declaratory & Injunctive Relief, Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Jan. 30, 2017).

standing argument it had once opposed.²⁶ The argument that it opposed in *Texas v. United States* was that Texas had standing by virtue of the administrative costs it would incur in processing driver license applications filed by DAPA recipients.²⁷ That position bears no resemblance to Washington's asserted grounds for standing in its own challenge to President Trump's travel ban—that the ban “is separating Washington families, harming thousands of Washington residents, damaging Washington's economy, hurting Washington-based companies, and undermining Washington's sovereign interest in remaining a welcoming place for immigrants and refugees.”²⁸ Whether or not one finds those interests sufficient for standing, they have nothing to do with the argument that Washington opposed in the Texas litigation.

In the same paragraph, Professor Blackman cites what he similarly believes is an inconsistency in the arguments of immigrant advocates: “The 5th Circuit [in the Texas litigation] found that the conferral of lawful presence made the policy illegal. Now, the [pro-DACA] lawyers are relying on that conclusion to bootstrap a claim that DACA is now a constitutionally protected interest—albeit an illegal one.”²⁹

That characterization misstates the arguments of the challengers' lawyers. Yes, they rely partly on DACA's conferral of lawful presence.³⁰ But if Professor Blackman is suggesting that this reliance contradicts a position that other immigrant advocates took in defending DAPA against Texas's earlier challenge, the inconsistency is not apparent. No DACA supporter of whom I am aware has ever disputed that deferred action gives rise to lawful presence. Nor could they; the memo creating DAPA expressly says it does.³¹ So Professor Blackman's assertion seems to be, rather, that the DACA supporters are relying not just on the creation of lawful presence, but on the Fifth Circuit's conclusion that the conferral of lawful presence makes DAPA illegal.³² But any argument that *illegality* is what gives the plaintiffs' interests

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

27. *Texas*, 787 F.3d at 748–54.

28. Complaint for Declaratory & Injunctive Relief, *supra* note 25, at 1–2.

29. Blackman, *supra* note 25.

30. See Petition for Writ of Habeas Corpus, *supra* note 25, at 11.

31. Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 1, at 2.

32. See Blackman, *supra* note 25.

constitutional protection would surely be a nonsequitur. For that reason alone, it is not surprising that the DACA supporters nowhere offer such a theory. And if Professor Blackman means only to suggest that the DACA supporters are relying on the conferral of lawful presence *despite* the Fifth Circuit's holding, the obvious answer is that the district court in Washington is not bound by the Fifth Circuit's controversial holding, one that we can safely assume the lawyers challenging the legality of the rescission do not share in any event. They would be on firm ground in resisting the Fifth Circuit's conclusion. As I have argued elsewhere, DACA and DAPA are well within the legal authority of the executive branch, the Fifth Circuit's poorly-reasoned 2–1 panel decision notwithstanding.³³ At any rate, the pro-DACA lawyers' argument that DACA confers lawful presence was not their principal argument; their main point was that, apart from lawful presence, DACA creates a "reasonable expectation" which, under current case law, can establish a constitutionally protected interest.³⁴ They additionally assert a constitutionally protected interest in being free from imprisonment.³⁵ For these many reasons, the claimed inconsistencies simply do not exist.

Let us be clear about one fundamental fact: the specific *legal* issues in the litigation challenging DACA and DAPA have almost nothing relevant in common with the legal issues in either the travel ban litigation or the DACA rescission litigation. In the litigation challenging DAPA, the legal issues were whether Texas had standing based on its alleged expenses in processing driver licenses;³⁶ whether DAPA violated the general overall spirit of the Immigration and Nationality Act;³⁷ and whether DAPA contained too little discretion to be exempt from the notice-and-comment requirements of the Administrative Procedure Act.³⁸ In the travel

33. Legomsky Testimony, *supra* note 23, at 2–26.

34. Petition for Writ of Habeas Corpus, *supra* note 25, at 3–4.

35. *Id.* at 14.

36. *Texas v. United States*, 787 F.3d 733, 747–54 (5th Cir. 2015).

37. *Id.* at 754.

38. *Id.* at 762–67. Texas also argued that, in issuing DAPA, President Obama had breached his constitutional duty to "take [c]are that the laws be faithfully executed." *Id.* at 746 (citing U.S. CONST. art. II, § 3). That argument, however, was superfluous. The only laws that Texas claimed the President had failed to execute faithfully were the immigration laws. *Id.* Either the President's actions were consistent with the immigration laws, in

ban litigation, the issues required interpretation of a statutory provision empowering the President to ban classes of noncitizens; interpretation of another statutory provision barring specified forms of nationality discrimination; a fact question as to whether the travel ban had been motivated largely by animus toward Muslims; and a question as to whether—if such animus were found—the action would violate the constitutional prohibition on the establishment of religion.³⁹ Finally, in the challenge to President Trump’s rescission of DACA, the issues were whether the rescission order was unconstitutionally motivated by anti-Mexican animus;⁴⁰ whether it would violate due process for the Administration to divert to enforcement purposes the information voluntarily provided by the DACA applicants;⁴¹ whether the rescission was “arbitrary and capricious”;⁴² and whether the rescission order required use of the notice-and-comment provisions of the Administrative Procedure Act and an impact analysis under the Regulatory Flexibility Act.⁴³ The legal arguments made by immigrant advocates in the litigation challenging DAPA thus had little or no connection to those made in either the travel ban or the DACA rescission litigation.⁴⁴

The only commonality we are left with is that all these challenges were to bold executive actions that affect large numbers of people. At that level of generality, the similarity is

which case there were no laws that he had failed to execute faithfully, or his actions were inconsistent with the immigration laws, in which case that statutory violation alone would render the policy unlawful. Either way, therefore, the constitutional claim is simply a restatement of the statutory argument.

39. See *Hawaii v. Trump*, 878 F.3d 662, 673–75, 683–97, 702 (9th Cir. 2017), *cert. granted*, No. 17-965, 2018 WL 324357 (U.S. Jan. 19, 2018); *Hawaii v. Trump*, 871 F.3d 646, 650–51, 655–57 (9th Cir. 2017).

40. Complaint for Declaratory & Injunctive Relief at 2–3, 52, *New York v. Trump*, No. 1:17-cv-05228 (E.D.N.Y. Sept. 6, 2017).

41. *Id.* at 3, 52–53.

42. *Id.* at 53.

43. *Id.* at 54–55.

44. One qualification is necessary. As just noted, both the DAPA challenge and the challenge to the rescission of DACA presented notice-and-comment issues. But those issues were not the same. In the former, the question was whether DAPA contained enough discretion to bring it within the statutory exemption for “general statements of policy.” 5 U.S.C. § 553(b)(3)(A) (2016). Whether the rescission left room for administrative discretion was not an issue in the latter case.

unhelpful. The critics' claims of inconsistency—and thus the suggestions that defense of a bold pro-immigrant initiative will later support an equally bold anti-immigrant initiative—rest simplistically on a false equivalence.

A separate line of argument goes beyond immigration. Upholding DACA and DAPA, some fear, would provide legal clearance for future (now present) conservative Presidents to refuse to enforce a whole battery of laws they personally dislike. The parade of horrors has included refusals to enforce the laws on health care, taxes, the environment, voting rights, and employment discrimination.⁴⁵

These fears seem misplaced. I have no doubt that conservative Presidents could be tempted to do some or all of those things. President Trump is the best evidence that the fear of a conservative President dismantling important regulatory protections is real. But DACA and DAPA are not the culprits that could supply the legal ammunition for such actions. To suggest otherwise would require at least two logical leaps.

First, neither DACA nor DAPA entails *non-enforcement* of the immigration laws. The resources Congress has appropriated for immigration enforcement, while massive,⁴⁶ are still not enough to go after more than a very small fraction, roughly 4%, of the current undocumented population.⁴⁷ DACA and DAPA reflect nothing more than determinations that the populations these programs address are exceptionally low removal priorities and that, given the policy decision not to pursue their removal, there are strong reasons to grant them deferred action and temporary work permits.⁴⁸ No one has suggested that the Obama

45. See, e.g., Ruth Marcus, *A slippery slope on immigration*, WASH. POST (Nov. 18, 2014), https://www.washingtonpost.com/opinions/ruth-marcus-a-slippery-slope-on-immigration/2014/11/18/501a11b0-6f5b-11e4-893f-86bd390a3340_story.html?utm_term=.3dff1db8f6de (citing the similar concerns of Professor David Martin, see *infra* note 57); *Frustration over stalled immigration action doesn't mean Obama can act unilaterally*, WASH. POST (Aug. 5, 2014), https://www.washingtonpost.com/opinions/frustration-over-stalled-immigration-action-doesnt-mean-obama-can-act-unilaterally/2014/08/05/9c7bc1c6-1c1c-11e4-ae54-0cfe1f974f8a_story.html?tid=a_inl&utm_term=.4f9dddc98d33.

46. See *infra* notes 58–62 and accompanying text.

47. See Legomsky Testimony, *supra* note 23, at 3.

48. See *id.* at 29 (summarizing the policy rationales for DAPA and DACA).

Administration failed to fully use the immigration enforcement resources that Congress provided.

Still, some might protest, even if upholding DACA and DAPA would not authorize complete non-enforcement of other laws, it would at least authorize partial non-enforcement. But even that is not true, for several reasons. First and foremost, every statutory system is different. In particular, they differ with respect to the degree of discretion that Congress has delegated to the relevant government agency. As just discussed, the litigation over the validity of DAPA turned on whether it violated the immigration laws (and the notice-and-comment provisions of the Administrative Procedure Act).⁴⁹ A judicial precedent holding that DACA and DAPA are consistent with the immigration laws would tell us nothing about whether some other, hypothetical executive action is authorized by the environmental laws, or the civil rights laws, or the tax laws.

In addition, the executive branch has only whatever enforcement resources Congress has given it. Unlike the case with DACA and DAPA, a future Administration would be on thinner legal ice if it refused to use even the resources it had. Among other things, such actions would invite serious questions as to whether the Administration is complying with the terms of the relevant appropriations Act.⁵⁰ As with the feared immigration-related actions, these hypothetically extreme executive actions in other far-flung areas of the law would require their own independent legal support. DACA and DAPA are distinguishable in too many ways.

II. POLITICAL NORMS

Legal issues aside, Professor Eric Posner worried that DAPA may modify political norms that control what the president can do Obama's defenders thus argued that Republicans shouldn't complain about his deferred-action plan because presidents George H.W. Bush and Ronald Reagan also deferred action against undocumented immigrants. Critics of Obama's action worry that it establishes a broader political norm that

49. 5 U.S.C. § 553.

50. See Legomsky Testimony, *supra* note 23, at 3–4.

enables the president to achieve, through non-enforcement, ends unrelated to immigration.⁵¹

Professor Posner then offered examples of regulatory constraints that a conservative future President might be tempted to neutralize through non-enforcement—financial regulation, Obamacare, climate regulation, and antitrust regulation.⁵² Written before the election of Donald Trump, Professor Posner’s warning might seem prescient at first glance.

He is quite right that supporters of DACA and DAPA have drawn political support from the eerily similar “Family Fairness” policies of Presidents Reagan and Bush.⁵³ But that sole example of one President citing a predecessor’s prosecutorial discretion in support of his own policy is overstated. The fact that Presidents Reagan and Bush had adopted analogous policies several decades earlier was only one of the many arguments in support of DACA and DAPA.⁵⁴ As a member of the Obama Administration integrally involved in the rollout and implementation of DACA, I can attest firsthand that this point was not a *sine qua non* for the President’s decision. Immigrant advocacy organizations can claim the lion’s share of the credit for that. The reference to the Reagan/Bush policy was merely a makeweight; there is no doubt that the policy would have been issued even without analogous programs in the 1980s. Moreover, there was no DACA and no DAPA when Presidents Reagan and Bush announced their programs.⁵⁵ They did not need precedential political norms to do so. Neither did President Obama.

But suppose it were otherwise. Suppose the political norms that underlay the Family Fairness policy of Presidents Reagan and Bush had been critical to President Obama’s political capacity to create DACA and DAPA. All of those policies protected classes of undocumented immigrants from imminent deportation. How any

51. Eric A. Posner, *Obama’s Immigration Order Is a Gift to Future Republican Presidents*, NEW REPUBLIC (Nov. 23, 2014), <https://newrepublic.com/article/120382/obamas-immigration-executive-order-gift-republican-presidents>.

52. *Id.*

53. Legomsky Testimony, *supra* note 23, at 23, 25.

54. *See id.* at 2–29.

55. DACA and DAPA were announced in 2012 and 2014, respectively. *See supra* notes 1 and 2.

of those policies establish or even solidify political norms that would legitimize *anti*-immigrant executive actions is not apparent. To the best of my knowledge, no one in the Trump Administration cited DACA and DAPA as precedents that support President Trump's authority to impose a travel ban, or to rescind DACA, or to dismantle any non-immigration-related regulatory regimes. Nor could they.

And that is my main objection—the effortlessness with which the various naysayers have assumed causation. Those who assert these claims are making a causal assumption that they should have some obligation to demonstrate rather than just assert. I will add one rhetorical question: Does anyone really believe that, if only President Obama had not established DACA and DAPA, President Trump would have zealously enforced the Affordable Care Act and the environmental laws?

III. PUBLIC BACKLASH

A third sort of “be careful what you wish for” argument encompasses executive actions like DACA and DAPA but takes a more generic form. The notion is that liberal immigration policies serve only to spur a public political backlash that in turn will create an opening for future repressive legislation or executive action.⁵⁶

Along those lines, at least one highly-respected scholar has argued that immigrant advocates need to support strong law enforcement measures as a prerequisite to achieving humanitarian reforms.⁵⁷ But there are reasons that immigrant

56. See, e.g., James F. Hollifield, Valerie F. Hunt & Daniel J. Tichenor, *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 WASH. U.J.L. & POL'Y 7, 14 (2008) (“If too many foreigners reside on the national territory, it may become difficult for a state to identify its population vis-à-vis other states. The national community may feel threatened, and there may be a social or political backlash against immigration.”); Jake Lichter, *Mode IV and the Future of a Liberalized Global Immigration Policy*, 27 GEO. IMMIGR. L.J. 187, 193 (2012) (“[L]ower wages [from foreign competition] will come at a benefit to producers, but the possible backlash created on a domestic level among citizens may be severe. If immigration were to be truly liberalized it could become impossible for governments to protect against the problems associated with social dumping.”).

57. David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. &

advocates have not prioritized, or even shown affirmative support for, still more enforcement. One reason is that excessive law enforcement can produce cruel outcomes.⁵⁸

The other reason is the already-bloated immigration enforcement budget. The numbers are staggering: The Border Patrol budget is now more than fourteen times what it was in 1990.⁵⁹ The ICE interior enforcement operations budget has tripled since 2004.⁶⁰ From 1986 to 1996, the interval between the passage of two major immigration enforcement laws,⁶¹ the number of Border Patrol agents doubled; that number doubled again from 1996 to the attacks of September 11 in 2001, and it doubled yet again in the decade following the 9/11 attacks.⁶² We now spend more money on immigration enforcement than is spent by “all other principal federal criminal law enforcement agencies combined.”⁶³

Yet, even with these continual exponential increases in

POLS. 411, 412–26 (2015).

58. See Vivian Yee & Caitlin Dickerson, *10-Year-Old Immigrant Is Detained After Agents Stop Her on Way to Surgery*, N.Y. TIMES (Oct. 25, 2017), https://www.nytimes.com/2017/10/25/us/girl-cerebral-palsy-detained-immigration.html?_r=0 (recounting the highly publicized case of Rosa Maria Hernandez).

59. *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL, Jan. 25, 2017, at 2, <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> (Border Patrol budget increased from \$263 million in 1990 to \$3.8 billion in 2016).

60. MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 19 (2013) (total ICE interior operations budget increased from \$959.7 million in 2004 to \$2.75 billion in 2013).

61. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1101 (1986)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

62. MARC R. ROSENBLUM, CONG. RESEARCH SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 13 (2013).

63. Press Release, Migration Policy Inst., U.S. Spends More on Immigration Enforcement than on FBI, DEA, Secret Service & All Other Federal Criminal Law Enforcement Agencies Combined (Jan. 7, 2013), <https://www.migrationpolicy.org/news/us-spends-more-immigration-enforcement-fbi-dea-secret-service-all-other-federal-criminal-law> (In 2012, “approximately 24 percent higher than collective spending for the FBI, Drug Enforcement Administration, Secret Service, U.S. Marshals Service and Bureau of Alcohol, Tobacco, Firearms and Explosives.”).

enforcement resources, immigrant advocates overwhelmingly advocated zealously for the comprehensive immigration reform (CIR) bill that the Senate passed in 2013—a bill that would have more than doubled the size of the Border Patrol yet again,⁶⁴ added much more border fence,⁶⁵ and required other border fortification measures.⁶⁶ It would have made the automated employment verification system known as E-Verify mandatory for all employers,⁶⁷ and it would have adopted a wide range of other interior enforcement measures.⁶⁸ Immigrant advocates were not intransigent about any of those provisions. They accepted these massive enforcement measures as a tradeoff for legalization and increases in legal immigration. It is true that we liberals have generally resisted calls for turning state and local police into junior immigration agents, as well as calls to punish so-called sanctuary cities, but out of important concerns that in fact are shared by many law enforcement professionals.⁶⁹

Just as DACA and DAPA created neither legal nor political norms that somehow legitimize anti-immigrant executive actions like the travel ban, then, I see no evidence that DACA and DAPA are responsible for a public political backlash against immigrants. Nor is there evidence of a more specific causal link between either DACA or DAPA and President Trump's travel ban or any of his anti-regulatory executive actions.

64. MARC R. ROSENBLUM & RUTH ELLEN WASEM, CONG. RESEARCH SERV., R43097, *COMPREHENSIVE IMMIGRATION REFORM IN THE 113TH CONGRESS: MAJOR PROVISIONS IN SENATE-PASSED S. 744*, at 8 (2013) (the bill would have required 38,405 trained full-time active duty U.S. Border Patrol agents deployed, stationed, and maintained along the Southern border); *see also* LISA SEGHETTI, CONG. RESEARCH SERV., R42138, *BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 13* (2014) (as of January 2013, there were 18,462 stationed along the Southwestern border).

65. *Border Security, Economic Opportunity, and Immigration Modernization Act*, S. 744, 113th Cong. § 5 (as passed by Senate, June 27, 2013).

66. *See, e.g., id.* §§ 1101–1102(c).

67. *Id.* § 3101.

68. *Id.* §§ 3104–3306, 3701–21.

69. Jasmine C. Lee et al., *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> (“Many local law enforcement officials favor the [sanctuary] policies, saying they do not want the job of enforcing federal immigration laws. They say they rely on immigrants in their communities to come forward to report crimes.”).

It is easy to *hypothesize* that the Obama executive actions have made possible a range of extreme conservative non-enforcement actions, either by setting dangerous legal precedents or by altering existing political norms. But coming up with actual evidence of any but-for causal connection is harder. If it exists, I have yet to see it.

CONCLUSION

The gist of these various criticisms has been that those of us who have defended either the legality or the wisdom of DACA and DAPA, or who have advocated for other progressive immigration policies, have painted ourselves into a corner. The notion is that we have unwittingly laid the legal and political groundwork for a broad executive power to do cruel things to immigrants. In some of these criticisms there is even the subtle inference that we immigrant advocates have exposed ourselves as hypocrites—and short-sighted hypocrites at that—when we now question the wisdom and the legality of President Trump’s executive actions on immigration.

Of course, if it is hypocrisy to make one argument for the purpose of defending DACA and DAPA and later resist an analogous argument for broad executive power, then it is just as hypocritical to challenge the legality of DACA and DAPA and then later assert that same argument the moment it helps support anti-immigrant executive actions. What is sauce for the goose is sauce for the gander. But I want to get beyond the name-calling, not just because name-calling is unhelpful, but because, as this article demonstrates, neither side is being inconsistent, much less hypocritical. Both the legal and the policy analyses of the various challenged actions are simply different.

To be clear, I do not suggest that no pro-immigrant policy could possibly spawn an anti-immigrant backlash. My suggestion is more modest. I see no evidence that the kinds of positions that critics have recently been faulting liberals for advocating—support for DACA and DAPA, opposition to the travel ban and to the DACA rescission and to the severe reduction in refugee admissions at a time when the needs of the world’s refugees have never been greater—have contributed in any way to any of the extreme anti-immigrant measures recently adopted or proposed. To the contrary, I predict that public opinion will ultimately—and

it might take time—force the reversal of at least some of these policies.

So I say that we immigrant advocates should follow our own instincts, rather than be guided by what our critics tell us our strategies should be. And that means we should continue to fight tooth and nail for immigrants and refugees and for all the values that *we ourselves* believe in.