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**UNITED STATES v. TEXAS AND SUPREME COURT
IMMIGRATION JURISPRUDENCE: A DELINEATION OF
ACCEPTABLE IMMIGRATION POLICY UNILATERALLY
CREATED BY THE EXECUTIVE BRANCH**

DANIEL R. SCHUTRUM-BOWARD*

The United States has become increasingly dependent¹ on immigrants.² Immigrants aid in providing U.S. citizens with a myriad of services, making possible crucial aspects of our lives.³ However, many of these hardworking individuals remain undocumented⁴ and, therefore, live with the constant possibility of being detained by immigration authorities, thrown into deportation proceedings⁵ and, consequently, separated from

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1. See, e.g., Tamar Jacoby, *Without Immigrant Labor, the Economy Would Crumble*, N.Y. TIMES (Apr. 17, 2012), <http://www.nytimes.com/roomfordebate/2011/08/17/could-farms-survive-without-illegal-labor/without-immigrant-labor-the-economy-would-crumble> (“Immigrant workers aren’t a ‘cheap labor’ alternative They are the only labor available to do many unskilled jobs, and if they were eliminated, most would not be replaced. Instead, whole sectors of the economy would shrivel, and with them, many other jobs often filled by more skilled Americans.”).

2. This Comment will use the terms “immigrants” and “aliens.” The latter is a legal term. See generally Lauren Gambino, “*No Human Being Is Illegal*”: *Linguists Argue Against Mislabeling of Immigrants*, GUARDIAN (Dec. 6, 2015), <https://www.theguardian.com/us-news/2015/dec/06/illegal-immigrant-label-offensive-wrong-activists-say> (discussing the labeling of immigrants).

3. CTR. FOR IMMIGRATION STUDIES, IMMIGRATION AND THE AMERICAN WORKER: A REVIEW OF THE ACADEMIC AMERICAN LITERATURE 19 (2013), <http://cis.org/sites/cis.org/files/borjas-economics.pdf> (explaining that immigrants benefit those born in the United States in many ways because they “buy goods and services produced by American firms, increasing the demand for native workers; they can lower the price of services in many industries, such as construction, benefiting American consumers; and immigrant entrepreneurs open up firms, create jobs, and possibly make a large contribution to economic growth”).

4. Jens Manuel Krogstad et al., *5 Facts about Illegal Immigration in the U.S.*, PEW RES. CTR. (Nov. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/> (“There were 11.1 million unauthorized immigrants in the U.S. in 2014, a total unchanged from 2009 and accounting for 3.5% of the nation’s population. The number of unauthorized immigrants peaked in 2007 at 12.2 million, when this group was 4% of the U.S. population.”).

5. See generally Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1 (2014) (discussing the deportation process under the Immigration and Nationality Act and the possibility of erroneous orders of deportation).

family,⁶ severed from economic stability, and repatriated to a potentially dangerous country.⁷ To prevent this devastating outcome, in 2012, the Department of Homeland Security effectuated by executive order Deferred Action for Childhood Arrivals (“DACA”).⁸ DACA is a policy wherein the government agrees to defer prosecution of certain undocumented children and young adults “for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.”⁹ The Executive Branch then issued a memorandum in 2014, which sought to expand eligibility for the DACA program to a larger pool of individuals by creating Deferred Action for Parents of Americans program (“DAPA”).¹⁰ Under DAPA, individuals eligible for the program would be permitted to stay in the United States with their children.¹¹ Twenty-five states brought suit to enjoin the programs, and the U.S. District Court for the Southern District of Texas granted a preliminary injunction.¹² The United States Court of Appeals for the Fifth Circuit affirmed in November 2015,¹³ relying on a Gordian knot of nebulous immigration and administrative jurisprudence.¹⁴ The Supreme Court of the United States, by an equally divided Court, affirmed the injunction.¹⁵

Part I of this Comment gives a brief description of the legal landscape of Supreme Court immigration cases,¹⁶ which recognize that Congress has

6. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (noting the detrimental impact of deportation on families).

7. *See, e.g.*, Sibylla Brodzinsky & Ed Pilkington, *U.S. Government Deporting Central American Migrants to Their Deaths*, *GUARDIAN* (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> (“The U.S. government is deporting undocumented immigrants back to Central America to face imminent threat of violence . . .”).

8. *See* Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot. et al. (June 15, 2012), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (listing specific criteria that applicants must meet in order to receive deferred action); *see infra* Part I.C.

9. Memorandum from Janet Napolitano, *supra* note 8, at 2.

10. The Department of Homeland Security’s Authorization to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 6 (2014) [hereinafter *DAPA Memo*], <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

11. *See, e.g.*, *MIGRATION IN AN ERA OF RESTRICTION AND RECESSION: SENDING AND RECEIVING NATIONS IN A CHANGING GLOBAL ENVIRONMENT* 93–94 (David L. Leal & Nestor P. Rodríguez eds., 2016) (discussing the DAPA and DACA programs’ goal of protecting “well-defined groups of unauthorized immigrants from deportation”).

12. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

13. The memorandum issued in 2014 and the collective DAPA and DACA expansion programs it temporarily implemented, are hereinafter referred to as the “2014 memo” and the “2014 memo programs,” respectively.

14. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

15. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

16. *See infra* Part I.A.

plenary power over immigration,¹⁷ and the Executive Branch's authority to execute immigration law¹⁸ and promulgate administrative rules relating to immigration policy.¹⁹ Part II discusses the way in which the Court's opinions implicitly demonstrate that Congress's plenary power is inextricably tied to both the Executive Branch's wisdom of "nation well-being" and determinations of pressing social concerns surrounding immigration,²⁰ a tie the Obama Administration thoroughly investigated and understood when implementing the 2014 memo programs.²¹ Part II, moreover, argues that the Court should not have affirmed the preliminary injunction against the 2014 memo programs because the plaintiff states did not prove a cognizable injury,²² and the preliminary injunction likely harms the residents of the plaintiff states more than the 2014 memo programs would harm the states.²³

I. JUDICIAL DEFERENCE IN IMMIGRATION: THE COURT'S ENTRUSTMENT OF IMMIGRATION POLICY TO THE POLITICAL BRANCHES

This Part discusses pinnacle Supreme Court immigration cases wherein the Court has delineated the federal political branches' authority to form and execute immigration law²⁴ and Congress's plenary power²⁵ to enact immigration law.²⁶ Subsequently, this Part illustrates the Executive Branch's long-standing authority to exercise discretion in determining when to enforce immigration law.²⁷ Finally, this Part explains the common ways in which the Executive Branch, over several administrations, has supplemented immigration policy.²⁸

17. See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 374 (2004) ("The constitutional core of immigration law—the doctrine of Congress's plenary power over immigration— . . . largely insulates federal immigration law from constitutional attack."). But see Gabriel J. Chin, *Is There a Plenary Power Doctrine?: A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 259 (2000). ("The plenary power cases use strong language in support of the idea that Congress can do what it wants, but they may be largely dicta.").

18. See *infra* Part I.B.

19. See *infra* Part I.C.

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* Part II.A.1.

23. See *infra* Part II.C.

24. See U.S. CONST. art. II, § 3 (declaring that the President of the U.S. "shall take Care that the Laws be faithfully executed"); see also *Printz v. United States*, 521 U.S. 898, 922 (1997) (stating that "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints" (citation omitted) (quoting U.S. CONST. art. II, § 3)).

25. Cox, *supra* note 17, at 4.

26. See *infra* Part I.A.

27. See *infra* Part I.B.

28. See *infra* Part I.C.

A. *The Political Branches Have Power Over Immigration Policy*

The Supreme Court has consistently, with some restrained deviations, held that enactment and enforcement of immigration law are only within the purview of the federal political branches, often concluding that Congress derives a somewhat elusive yet plenary power over the arena through Article I of the Constitution.²⁹ The justifications for the allocation of power over immigration law to the political branches, and the consequent non-reviewability (or limited reviewability)³⁰ of these laws by the federal courts largely are based on the federal political branches' knowledge of and duty to ensure national well-being, which preserves national sovereignty.³¹ Legal considerations implicating national well-being, like national sovereignty, foreign affairs, and national security, are the common thread tying together most of the key decisions by the Court to leave immigration policy to the political branches.³²

The earliest indication of this allocation of power in the political branches can be found in *Chae Chan Ping v. United States*,³³ also called *The Chinese Exclusion Case*, of 1889. The appellant in this case was a Chinese citizen who had been denied reentry into the United States due to an 1888 congressional enactment (which contravened an existing treaty between the United States and China).³⁴ The Court, on the one hand, upheld the exclusion,³⁵ giving deference to the authority and insight of the political branches by claiming, “[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a

29. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (stating that immigration “matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”); see also U.S. CONST. art. I, § 8 (declaring that “Congress shall have [p]ower [t]o . . . establish an uniform [r]ule of [n]aturalization . . . [a]nd [t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers”). But see *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (mentioning that the “[plenary] power is subject to important constitutional limitations”); *INS v. Chadha*, 462 U.S. 919, 940–41 (1983) (noting that the Legislative Branch must elect “a constitutionally permissible means of implementing [its plenary] power”); *Landon v. Plasencia*, 459 U.S. 21, 37 (1982) (holding that a lawful permanent resident facing exclusion is entitled to protection under the Due Process Clause of the Fourteenth Amendment); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (considering due process concerns over immigration law).

30. *Harisiades*, 342 U.S. at 589.

31. See *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (emphasizing the federal government’s duty to preserve the national sovereignty of the United States).

32. *Id.*

33. 130 U.S. 581 (1889).

34. *Id.* at 600 (conceding that “the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement”).

35. *Id.* at 603 (noting that “the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy”).

part of those sovereign powers delegated by the Constitution”³⁶ The Court, on the other hand, signaled specifically that the Executive Branch has authority over this area of law, referring to “[t]he act [of 1888] vested in the President power to order [deported] all such aliens as he should judge dangerous to the peace and safety of the United States”³⁷ In reaching this conclusion, the Court correspondingly articulated its institutional incompetence to intervene,³⁸ which set the scene for numerous Supreme Court immigration cases wherein the Court deferred to the political branches.³⁹

The twentieth century did not result in any significant doctrinal shift away from recognizing the authority of the political branches over immigration law. In *United States ex rel. Knauff v. Shaughnessy*,⁴⁰ the Court held that Ms. Knauff, the noncitizen wife of a U.S. citizen, was rightly found excludable by the Attorney General.⁴¹ The Court based this decision in part on classified information, stating that “[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”⁴² The Court, in this instance, indicated that both political branches share authority over immigration policy; however, by referring to the Executive Branch’s authority as “inherent,” the Court, here, may have been interpreting the Constitution as vesting a greater authority in

36. *Id.* at 609. With respect to the authority of the government in this area of law, the Court explained:

The power of exclusion of foreigners . . . , as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Id.

37. *Id.* at 610.

38. *Id.* at 602–03 (“[W]hether our government [may] disregard[] its engagements with another nation is not one for the determination of the courts. . . . This court is not a censor of the morals of other branches of government; it is not invested with any authority to pass judgment upon the motives of their conduct.”).

39. Four years after *The Chinese Exclusion Case*, the Court once again enshrined the ultimate authority of the political branches over immigration law. In *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), the Court upheld the exclusion of a Chinese national based on the determination of an immigration officer (an agent of the Executive Branch) that Ms. Ekiu was nearly insolvent and, hence, would impose a financial burden on the public. *Id.* at 662. The Court noted: “It is an accepted maxim of international law, that every sovereign nation has the power . . . to forbid the entrance of foreigners” *Id.* at 659. Further, the Court reiterated that it is the dominion of the political branches to preserve the country’s wellbeing and sovereignty. *Id.* at 659 (stating that the political branches have the authority “to admit [foreigners] only . . . upon such conditions as it may see fit to prescribe”); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 713–14 (1893) (holding that Congress has the authority “to expel [noncitizens], like the power to exclude [noncitizens] . . . from the country, [which] may be exercised entirely through executive officers”).

40. 338 U.S. 537 (1950).

41. *Id.* at 537.

42. *Id.* at 542.

the Executive Branch, as opposed to the Legislative Branch, from which such policy “stems.”⁴³ Though the Court has never delineated the allocation of power between the political branches exactly, it has, nonetheless, has not meaningfully veered from the conclusion that immigration policy is exclusively within the province of the political branches.⁴⁴

B. The Executive Branch’s Power to Use Enforcement Discretion

While there remains residual confusion over the roles that each political branch plays in the formulation of immigration policy,⁴⁵ it is uncontested that the Executive Branch has the power to decide *how* immigration laws are to be enforced.⁴⁶ Article II of the U.S. Constitution gives the Executive Branch the authority to execute laws created by Congress through Congress’s plenary lawmaking power rooted in Article I of the Constitution.⁴⁷ The Executive Branch, however, is not bound to enforce all laws created by Congress without considering the most effective way to do so.⁴⁸ Indeed, enforcement discretion is an essential tool that the Executive Branch employs within the administrative state and the federal criminal justice system, which allows it to decide how best—and when—to enforce the law.⁴⁹ While the concept of enforcement discretion may seemingly contradict the Executive Branch’s duty to “take Care that the Laws be faithfully execut-

43. *Id.*

44. *See, e.g.,* *Harisiades v. Shaughnessy*, 342 U.S. 580, 587–88 (1952) (reaffirming its prior holdings on the matter in stating “[t]hat aliens remain[ing] vulnerable to expulsion after long residence is . . . a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.”); *see also* *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the *political branches* of the Federal Government. . . . [S]uch decisions are frequently of a character more appropriate to *either the Legislature or the Executive* than to the Judiciary.” (emphasis added)); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (determining that a noncitizen could be removed due to past membership in the Communist Party without violating his or her right to due process, because of the political branches’ broad power over immigration grounded in their duty to preserve national security and foreign relations).

45. *See supra* Part I.A.

46. *See* U.S. CONST. art. II, § 3 (mandating that the Executive Branch “take Care that the Laws be faithfully executed”).

47. *Id.*

48. *See* *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (explaining the importance of exercising enforcement discretion on unauthorized workers as it “embraces immediate human concerns” and spares government resources that are better spent on deporting “alien smugglers or aliens who commit a serious crime”).

49. *See, e.g.,* *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (recognizing that “an [executive] agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch”).

ed,” the duty is not without bounds.⁵⁰ The history of enforcement discretion indicates that the Executive Branch may decide not to enforce the law “on a case-by-case basis,” but is disallowed from doing so wholesale.⁵¹ The Executive Branch, as further elucidated below, has employed enforcement discretion on several occasions within the realm of immigration.⁵²

C. Supplementation of Immigration Legislation by the Executive Branch

The primary statutory source of immigration law is the Immigration and Nationality Act (“INA”),⁵³ which has been amended on several occasions since its creation.⁵⁴ Such acts of Congress, on many past occasions, however, have been supplemented by the Executive Branch when the text of the statute is lacking in detail or cannot be implemented by the agency without promulgating administrative rules.⁵⁵ The agencies within the Executive Branch may supplement existing legislation through rulemaking processes pursuant to the Administrative Procedure Act (“APA”).⁵⁶ The most common form of rulemaking is known as informal rulemaking, or notice-and-comment rulemaking, in which a federal agency publishes notice of the proposed rule in the Federal Register and then responds to material comments it receives from the public.⁵⁷ Alternatively, the APA permits executive agencies to pass interpretive rules, which merely interpret legislation, via executive memoranda in order to inform its officers of the appropriate

50. U.S. CONST. art. II, § 3; *Heckler*, 470 U.S. at 833 (“Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”).

51. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999) (indicating that determinations of the enforcement of immigration law may be tailored to individual circumstances).

52. *See infra* Part I.C.

53. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2012)) [hereinafter INA].

54. The INA has been amended by legislation such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, and the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

55. The executive order is the mechanism through which the Executive Branch can create law. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding executive orders by President Reagan regarding relations with Iran to halt harmful legislation, deferring to the Executive Branch’s authority over national security and foreign affairs).

56. 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5362, 7521 (2012) (originally enacted as Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946)).

57. *Id.* § 553(b) (“General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.”).

way to execute the law.⁵⁸ Interpretive rules, commonly effectuated by executive memorandum, are exempt from notice-and-comment rulemaking.⁵⁹

In 1987, for example, President Ronald Reagan created the Family Fairness program—without first engaging in notice-and-comment rulemaking—by executive memorandum.⁶⁰ In effect, under the guise of “voluntary departure,” the program granted deferred action to undocumented spouses and children of documented immigrants, thereby allowing the lawfully present family member sufficient time to be able to petition on behalf of her undocumented family.⁶¹

This program was renewed by President George H.W. Bush in 1990.⁶² The Bush Administration decided to extend the program via executive memorandum because, without it, immigration officials would be legally required to deport many undocumented immigrants who otherwise would have been eligible for lawful status due to their family members’ recent grant of lawful status.⁶³ This memorandum went on to express that the program intended “to assure uniformity in the granting of voluntary departure and work authorization for the ineligible [undocumented] spouses and children of legalized aliens.”⁶⁴ At the time, the application of the statutory scheme, in effect, had a disproportionate impact on undocumented immigrants (with respect to the guiding principle of family unity, in particular), because it resulted in the deportation of individuals who would have otherwise been able to gain lawful status in the United States had they and their documented family members been given more time to complete the expensive, laborious legalization process.⁶⁵ To be eligible for the Family Fairness program, one must have been “admissible as an immigrant” except for unlawful presence, “not have been convicted of a felony or three misdemeanors” in the United States, and not have assisted in the persecution of any person.⁶⁶ The Family Fairness program also listed three grounds on which

58. *Id.* § 552(a)(1)(d).

59. *Id.* § 553(b)(3)(A) (stating that “[e]xcept when notice or hearing is required by statute, this subsection does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

60. Memorandum from Gene McNary, Comm’r, Immigration & Naturalization Serv., to Reg’l Comm’rs (Feb. 2, 1990), reprinted in 67 INTERPRETER RELEASES 164, 165 (1990). This memorandum states that the “family fairness” program serves as “guidelines,” therefore, it would not need to go through notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A).

61. *Id.*

62. *Id.* (stating that “[v]oluntary departure will be granted for a one-year period”).

63. *Id.* (noting that the former INS was “likely to face the issue of family fairness for several more years, because of the length of time needed for newly legalized aliens to acquire lawful permanent resident status and then to wait for a visa preference number to become available for family members”).

64. *Id.*

65. *Id.*

66. *Id.* at 164–65.

the Executive Branch could not extend voluntary departure and two items of documentary evidence to be submitted.⁶⁷

The Obama Administration, as previously mentioned, proposed programs similar to the Family Fairness Program in 2012 and 2014⁶⁸; however, it decided to include more detail and explanation of its legal basis for its executive action.⁶⁹ In 2012, the Department of Homeland Security (“DHS”) created DACA, allowing undocumented individuals who entered the United States without authorization and met enumerated qualifications to gain lawful presence.⁷⁰ In 2014, DHS issued an executive memorandum that expanded the timeframe of DACA and directed DHS officials to implement the DAPA and Lawful Permanent Residents program.⁷¹ The DAPA program would have granted lawful presence to targeted individuals and some public benefits, such as eligibility for work authorization and driver’s licenses.⁷²

The 2014 memo programs, echoing their predecessor, the Family Fairness program, stressed the need for sensible application of U.S. immigration laws by prioritizing the deportation of individuals who pose a threat to the country—as opposed to a potentially haphazard, priority-blind application—thereby pragmatically and expeditiously spending government resources.⁷³ The 2014 memo, furthermore, explained that “[d]eferred action is a long-standing administrative mechanism,” allowing the Secretary of DHS to defer the deportation of undocumented immigrants for a fixed period of time and cited the Family Fairness program of the Reagan and Bush Senior Administrations for support.⁷⁴ In line with the Family Fairness program, the 2014 memo programs were intended to add administrative convenience, “promote the humane enforcement of the law[,] and ensure family unity.”⁷⁵

67. *Id.* at 165.

68. *See supra* notes 9–14 and accompanying text.

69. Much of the Executive Branch’s explanation of and legal authority for the granting of deferred action (particularly DACA) can be found in an opinion released by the Executive Branch’s Office of Legal Counsel. *See* DAPA Memo, *supra* note 10 (explaining the legality of DAPA on the grounds that “agency’s enforcement decisions [are] consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering”).

70. *See* Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs. et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf (reiterating the functionality of DACA from the original 2012 memo).

71. *Id.* at 3.

72. *Id.* at 3–4.

73. *Id.*

74. *Id.* at 2.

75. *Id.*

The 2014 memo further explained that deferred action was a method through which the Secretary of DHS could defer the deportation of undocumented immigrants on various grounds, including humanitarianism.⁷⁶ Beneficiaries of the 2014 memo programs would not receive any legal status in the United States, “much less citizenship,” but rather mere permission to lawfully remain in the country for a predetermined period of time.⁷⁷ According to the memo, such deferred action is legal so long as each applicant for the programs is evaluated on a case-by-case basis.⁷⁸ Moreover, the 2014 memo explained that deferred action was used historically to allow “minor children of certain legalized immigrants, widows of U.S. citizens, [and] victims of trafficking and domestic violence,” to lawfully remain in the United States.⁷⁹ The first aforementioned example is illustrated by the DACA program put in place in 2012, and its subsequent expansion by the 2014 memo.⁸⁰

The rationale for the expansion of deferred action in the 2014 memo was that the majority of the individuals who would be eligible for the 2014 memo programs were “hard-working people who ha[d] become integrated members of American society.”⁸¹ Such individuals, the 2014 memo further justified, were unlikely to “represent threats to national security, public safety, and border security,” and would be “encourage[d] . . . to come out of the shadows, submit to background checks, pay fees, apply for work authorization . . . , and be counted.”⁸²

The 2014 memo set out explicit requirements under which U.S. Customs and Immigration Services (“USCIS”) was to implement the DAPA program, which were to be comparable to DACA.⁸³ In order to be eligible for DAPA one must: have a child who is a U.S. citizen or lawful permanent resident; have continuously resided in the United States since before January 1, 2010; be physically present in the United States on the date of the memorandum’s issuance and at the time of applying for a 2014 memo program with USCIS; have no lawful status on the date of the memorandum; not be “an enforcement priority”; and demonstrate no other factors that make the grant of deferred action inappropriate.⁸⁴ The 2014 memo pro-

76. *Id.*

77. *Id.*

78. *Id.* The implicit statutory authority for the granting of deferred action can be found in several federal statutes. *Id.* at 3 n.2 (detailing several sections of the INA that permit deferred action for self-petitioners under the Violence Against Women Act, as well as for victims of human trafficking and other qualifying crimes perpetrated in the United States).

79. *Id.* at 2.

80. *Id.* at 3.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 4.

grams were challenged with legal action shortly after their implementation.⁸⁵

D. United States v. Texas: The Clash of the Administrative Procedures Act, States, and the Executive Branch

In response to the 2014 memo, Texas and twenty-five other states filed for a preliminary injunction in the U.S. District Court for the Southern District of Texas.⁸⁶ The plaintiff states argued that the 2014 memo programs constituted a substantive change in immigration law and, therefore, needed to be promulgated by notice-and-comment rulemaking.⁸⁷ Finding in favor of the plaintiffs, the district court determined the 2014 memo programs gave “lawful presence” to their recipients, which DHS did not have statutory authority to do, and was not an interpretive rule exempt from notice-and-comment rulemaking.⁸⁸ Additionally, the court found that the memo programs conferred practical benefits on the recipients, including work authorization and state-subsidized driver’s licenses, which resulted in economic injury to the states that gave rise to Article III standing.⁸⁹ Consequently, the district court granted the preliminary injunction.⁹⁰

The U.S. government then appealed to the U.S. Court of Appeals for the Fifth Circuit, arguing that the states lacked standing to bring the claim, principally due to the absence of an Article III injury.⁹¹ The court, nevertheless, found that the 2014 memo would have required Texas to provide the program recipients with driver’s licenses, which would constitute a legitimate economic injury, satisfying the injury requirement of Article III.⁹² The court explained: “Deferred action . . . would affirmatively confer ‘lawful presence’ and associated benefits [including driver’s licenses and work authorization] on a class of unlawfully present aliens.”⁹³

The states again argued the 2014 memo programs violated the procedural requirements of the APA and the programs should have been subject to notice-and-comment rulemaking.⁹⁴ The court agreed, noting that the 2014 memo programs would not, in fact, constitute a decision not to act (or

85. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

86. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

87. *Id.* at 604. The other plaintiff states on appeal include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, and Tennessee. *Id.* at 604 n.1.

88. *Id.* at 661.

89. *Id.* at 611, 616–17, 670.

90. *Id.* at 677.

91. *Texas*, 809 F.3d 134.

92. *Id.* at 152–53.

93. *Id.* at 166.

94. *Id.* at 149.

“deferred action”) by DHS, but rather a deliberate action to give undocumented immigrants “lawful presence.”⁹⁵ Moreover, the states, to the satisfaction of the Fifth Circuit Court of Appeals, showed that there was sufficient evidence that DHS would not exercise case-by-case prosecutorial discretion in implementing the 2014 memo programs, but instead would categorically grant lawful status, thus violating administrative agencies’ duties to exercise prosecutorial discretion on a case-by-case basis.⁹⁶ The court explained that “[a]lthough prosecutorial discretion is broad, it is not ‘unfettered.’ Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change.”⁹⁷

The court consequently found that the preliminary injunction against the enactment of the 2014 memo programs was properly granted; he states had shown that they would likely succeed on the merits of their claim that the programs were required to undergo notice-and-comment, as the memorandum was a legislative rule and not merely a “policy statement,” or interpretive rule.⁹⁸ In extensive detail, the court additionally explained that the 2014 memo programs contravened the Immigration and Nationality Act, laying out the extent to which DAPA would surpass the statutory authority granted to DHS by Congress under the INA; the court, for example, pointed out there was no explicit statutory authorization or historical practice that reveal’s DHS’s authority to implement DAPA.⁹⁹ The court further found that the implementation of the 2014 memo programs within DHS would violate the APA because, in practice, the programs would not allow USCIS officers to exercise enforcement discretion as required by the APA, and that the government’s claim to the contrary was simply pretext.¹⁰⁰ The officers were required to evaluate applications using a boilerplate form to determine whether to deny DACA applications, thereby stripping away any alleged discretion.¹⁰¹ Finally, the court concluded that Texas would suffer significant costs by an increase in the issuance of partially state-subsidized driver’s licenses to recipients of the 2014 memo programs.¹⁰² Therefore, the 2014 memo programs would cause Texas a redressable injury giving Texas Article III standing to challenge the program.¹⁰³ The government appealed

95. *Id.* at 168.

96. *Id.* at 171–73.

97. *Id.* at 167 (footnote omitted) (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

98. *Id.* at 171–73.

99. *Id.* at 185. *But see* Nelson, *supra* note 60, at 1200–04 (detailing the Family Fairness program, a practice similar to and preceding DAPA).

100. *Texas*, 809 F.3d at 172.

101. *Id.* at 174 (claiming that “there was evidence that the DACA application process *itself* did not allow for discretion, regardless of the rates of approval and denial”).

102. *Id.* at 155.

103. *Id.* at 163.

to the Supreme Court, and the Fifth Circuit ruling was summarily affirmed by an equally divided Court.¹⁰⁴

II. ANALYSIS

This Part first explains that Congress often depends on the Executive Branch in forming immigration policy, and the *United States v. Texas* courts should have given greater deference to the Executive Branch's decision to implement the 2014 memo programs.¹⁰⁵ Further, the Executive Branch has recognized, over several administrations, the pressing need for effectuating deferred action programs similar to the 2014 memo programs to shield certain undocumented immigrants from deportation.¹⁰⁶ Therefore, the judiciary should have permitted to the implementation of the 2014 memo programs. In ruling to the contrary, the Court dodged crucial aspects of contemporary immigration jurisprudence by focusing on administrative minutia¹⁰⁷ and phantom injuries.¹⁰⁸

A. *Immigration Legislation Is Often Informed—and Shaped—by the Executive Branch*

As seen in Part I, the Court has historically exercised judicial restraint when considering cases involving immigration law, frequently deferring to the political branches.¹⁰⁹ Some legal scholars, however, have argued, “[t]he jurisprudential . . . focus on the distribution of power between courts and the political branches, though important, has obscured a second separation-of-powers issue: the question of how immigration authority is distributed between the political branches themselves.”¹¹⁰ This Part argues that contrary to the assertion that “[t]he Supreme Court has long glossed over separation-of-powers questions in immigration law,”¹¹¹ the plenary power of Congress to enact immigration law is tied to and informed by the Executive Branch's knowledge of national independence and well-being.¹¹² Consequently, in certain instances, the Executive Branch's findings and decisions inform immigration policy and its execution, justifying deference to the Executive Branch over matters of immigration law.

104. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

105. *See infra* Part II.A.

106. *See infra* Part II.B.

107. *See supra* Part I.C.

108. *See infra* Part II.C.

109. *See supra* Part I.

110. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009).

111. *Id.*

112. *See supra* Part I.A.

The Court, as an initial matter, certainly does not often distinguish between the roles played by the Legislative and Executive Branches.¹¹³ For example, in *United States ex rel. Knauff v. Shaughnessy*, the Court stated, the “[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government, . . . only upon such terms as the United States shall prescribe.”¹¹⁴ The Court continued by emphasizing that the admission of noncitizens “must be exercised in accordance with the procedure which the United States provides,” again not specifying which branch of government holds superior authority over the matter.¹¹⁵ Similarly, in *Hirsiades v. Shaughnessy*,¹¹⁶ the Court held that “any policy toward aliens is . . . so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”¹¹⁷ Additionally, in *Mathews v. Diaz et al.*,¹¹⁸ the Court noted that “[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”¹¹⁹

Despite the conflation of the two political branches’ authority over immigration law, the Court has often clarified that Congress’s authority over immigration policy to a certain degree relies on—from its conception to its execution—the Executive Branch; this leads the Court to often treat the Executive Branch’s decisions on immigration policy as authoritative.¹²⁰ The Court, in making such findings, gives deference to the Executive Branch’s enforcement techniques¹²¹ and its actions in the furtherance of a well-founded objective.¹²²

113. *See supra* Part I.A.

114. 338 U.S. 537, 542 (1950).

115. *Id.*

116. 342 U.S. 580 (1952).

117. *Id.* at 588–89.

118. 426 U.S. 67 (1976).

119. *Id.* at 81. However, the Court continued, stating that because decisions of immigration policy may implicate foreign relations, and because of “changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.” *Id.* Here the Court referred to the political branches in tandem; however, the last sentence, due to its use of “or,” shows that the Executive Branch can act independently of Congress in deciding immigration policy. *See id.*

120. Cox & Rodríguez, *supra* note 110, at 461 (“Over time, the Court’s continued inattention to the scope of the President’s power over immigration policy has given rise to doctrinal confusion. In some cases, the Court has gone so far as to suggest that the President has inherent authority to regulate entry into the country.”).

121. *See infra* Part II.A.1.

122. *See infra* Part II.A.2.

1. *The Court Defers to Executive Branch Enforcement Techniques*

In *Nishimura Ekiu v. United States*,¹²³ the Court, explained that “the final determination of [whether to deport an alien] may be entrusted by Congress to executive officers.”¹²⁴ The decision reaffirmed the notion that it is within Congress’s purview to create immigration policy and delegate the execution of that policy to the Executive Branch. The Court continued:

It is not within the province of the judiciary to order that foreigners . . . shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.¹²⁵

Although the Court maintains the notion that the Executive Branch acts in accordance with the powers expressly delegated by Congress, it also emphasizes that immigration officials have authority to exercise discretion regarding how immigration policy should be enforced.¹²⁶ *Nishimura Ekiu*, therefore, indicates the Executive Branch did have authority to use its discretion to grant deferred action, and work authorization,¹²⁷ pursuant to the 2014 memo programs.¹²⁸

In *Fong Yue Ting v. United States*,¹²⁹ further illuminating the dichotomy between the political branches, the Court similarly indicated the Executive Branch’s power to use its discretion in the realm of immigration law enforcement. When considering the legality of the order of deportation in question, the Court stated: “The power of Congress . . . to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers . . .”¹³⁰ In other words, the Executive Branch is not required to effectuate the immigration

123. 142 U.S. 651 (1892).

124. *Id.* at 660.

125. *Id.*

126. *Id.*; see *supra* Part I.B. Note that Section 287 of the INA does not require that immigration officers enforce immigration law, but rather merely states that they “shall have power” to enforce it, therefore leaving open the option not to use said power. INA, Pub. L. No. 82-414, § 287(a), 66 Stat. 163, 233–34 (1952) (codified as amended at 8 U.S.C. § 1357(a) (2012)). Under this interpretation, the Executive Branch, consequently, has the legal authority to direct immigration officers to defer the use of that power.

127. *United States v. Texas*, 809 F.3d 134, 197 (5th Cir. 2015) (King, J., dissenting) (“The ability to apply for work authorization . . . has been tied to deferred action by a federal regulation since the early 1980s. The most current such regulation . . . states that ‘[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority,’ may apply for work authorization ‘if the alien establishes an economic necessity for employment.’” (alteration in original)).

128. See *supra* Part I.C.

129. 149 U.S. 698 (1893).

130. *Id.* at 713–14 (emphasis added).

laws created by Congress, but rather retains power, independent from the Legislative Branch, over the implementation of immigration policy.¹³¹

In fact, the Court further claimed in *Fong Yue Ting*, “[i]t is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by . . . acts of Congress, to submit the decision of questions . . . to the final determination of executive officers.”¹³² In doing so, the Court once again invoked the common practice of legislative reliance on and judicial deference to the Executive Branch and its officers in deciding the best ways to enforce immigration policy. In actuality, Congress cedes some of its “plenary power” to the Executive Branch to determine whether to shield certain undocumented individuals from deportation.¹³³ The 2014 memo programs would have left such determinations to immigration officers: applicants for the programs would have submitted evidence of their eligibility for the programs, then the officers would decide, using their discretion, whether the applicant qualified for deferred action.¹³⁴

Even when the Court decides to more directly intervene in the realm of immigration policy, it still tends to defer to the Executive Branch’s implementation of it.¹³⁵ In the 1960s, for example, the Executive Branch concluded that homosexuality fell under the statutory ground of inadmissibility based on “psychopathic personality.” The Court faced a challenge to this interpretation in *Boutilier v. Immigration and Naturalization Service*,¹³⁶ and concluded that the interpretation of the statute was reasonable.¹³⁷ The Executive Branch did not have an explicit congressional mandate to make that

131. See *supra* Part I.B.

132. *Fong Yue Ting*, 149 U.S. at 714.

133. See *supra* Part I.C.

134. *Texas v. United States*, 86 F. Supp. 3d 591, 604 n.1 (S.D. Tex. 2015); *contra* Memorandum from Jeh Johnson, *supra* note 70, at 4 (explicitly mandating that immigration officers use their discretion when reviewing applications for the 2014 memo programs, stating that applicants must “present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate”); see also *supra* Part I.C.

135. See, e.g., Shruti Rana, *Chevron Without The Courts?: The Supreme Court’s Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 313 (2012) (describing a common variety of administrative deference, *Chevron* deference, which is given to executive agencies when interpreting acts of Congress).

136. 387 U.S. 118 (1967).

137. *Id.* at 119. The INA of 1952 prohibited entry into the U.S. of “[a]llies afflicted with psychopathic personality, epilepsy, or a mental defect,” without explicitly mentioning homosexuality as fitting within this list; however, the INA was amended by Congress in 1965 to include “sexual deviation” as a ground for denying entry. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1952), *amended* by INA, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965) (prior to 1990 amendment) (current version at 8 U.S.C. § 1182(a)(1)(A)(iii)–(iv) (2012)). This provision was withdrawn from the INA two and a half decades later, upon the passing of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

determination,¹³⁸ but the Court seemingly decided to defer to the Executive Branch's commitment to enforce immigration law in a way that benefits the interest of the public.¹³⁹ In *Zadvydas v. Davis*,¹⁴⁰ similarly, the Court recognized the "greater immigration-related expertise of the Executive Branch" and that "principles of judicial review in this area recognize primary Executive Branch responsibility."¹⁴¹ Therefore, the Court noted, "require[s] courts to listen with care" to the determinations of the Executive Branch, including decisions to defer enforcement.¹⁴² Due to this precedent showing the Court's past deference to the Executive Branch's authority over the enforcement of immigration policy, the *United States v. Texas* courts should have similarly deferred to the Executive Branch's implementation of the 2014 memo programs and denied the request for preliminary injunction.¹⁴³

2. *The Court Defers to the Executive Branch's Well-Founded Objectives*

The Court has demonstrated that Congress's Article I authority to enact immigration policy is often influenced by the Executive Branch's well-founded objectives to preserve national independence and foreign relations.¹⁴⁴ In *The Chinese Exclusion Case*, for example, the Court explained that it was well settled that "the government of the United States, through the action of the legislative department, can exclude aliens from its territory."¹⁴⁵ The Court, however, expounded on that settled assertion by adding that Executive Branch's "[j]urisdiction over its own [U.S.] territory . . . is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power."¹⁴⁶ The Court, in this instance, suggested that immigration policymaking is contingent on the Executive Branch's compulsory objective to maintain the independence of the

138. *Boutilier*, 387 U.S. at 121–22 (showing the Court's search of a report by "a subcommittee of the Senate Committee on the Judiciary" for traces of legislative intent that would be support the Executive Branch's determination"); *see also supra* note 137 and accompanying text.

139. *Boutilier*, 387 U.S. at 119–23 (affirming the decision of the Special Inquiry Officer who found a homosexual man inadmissible due to his being a "person afflicted with psychopathic personality," in spite of the absence of a legal mandate to do so).

140. 533 U.S. 678 (2001).

141. *Id.* at 700.

142. *Id.*

143. *See supra* Part I.D.

144. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (listing executive duties with which immigration policy is interwoven such as "the conduct of foreign relations, the war power, and the maintenance of a republican form of government").

145. 130 U.S. 581, 603–04 (1889).

146. *Id.*

United States in relation to foreign powers.¹⁴⁷ This illustrates that, in the Court's view, Congress's immigration laws ought to be in accordance with the Executive Branch's policy related to maintaining national independence.¹⁴⁸ This view prioritizes the Executive Branch's duty to preserve independence over Congress's supposedly "plenary power" of Congress over immigration.

The 2014 memo programs, pursuant to the Executive Branch's policy objective to preserve national independence, sought to retain an invaluable workforce willing to work for low wages, which has the potential benefit of incentivizing U.S. businesses to remain in the United States and not outsource to foreign countries.¹⁴⁹ The programs would also likely reduce the federal deficit because would-be recipients of deferred action under the programs—who already pay a significant amount in federal taxes—would be able to participate in the economy without fearing ICE arrests; the increase in economic activity would, therefore, likely facilitate the payment of even more taxes, strengthening U.S. financial security.¹⁵⁰ The *United States v. Texas* courts should have recognized this crucial executive prerogative on which the 2014 memo programs were predicated and allowed the programs to go forward.¹⁵¹

In *The Chinese Exclusion Case*, the Court explored Congress's consideration of executive officials' expertise to find a well-founded objective underlying the Executive Branch's actions.¹⁵² In determining the legality of the Chinese Exclusion Act, signed by President Arthur in 1882, the Court based its decision in part on a communication made by "Mr. Everett, then Secretary of State under President Fillmore, [who wrote]: 'This government could never give up the right of excluding foreigners whose presence it might deem a source of danger to the United States.'"¹⁵³ The Court, therefore, exercised deference by looking past the legislative intent behind the

147. See Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 961 n.290 (2011) (discussing the Executive Branch's power over U.S. law).

148. *The Chinese Exclusion Case*, 130 U.S. at 609 (emphasizing the Executive Branch's duty to preserve the national sovereignty of the United States).

149. Press Release, The White House, Presidential Memorandum—Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century (Nov. 24, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/21/presidential-memorandum-modernizing-and-streamlining-us-immigrant-visa-s> [hereinafter Press Release, Modernizing and Streamlining].

150. LISA CHRISTENSEN GEE ET AL., INST. ON TAXATION AND ECON. POLICY, UNDOCUMENTED IMMIGRANTS' STATE & LOCAL TAX CONTRIBUTIONS 1 (2016), <http://www.itep.org/pdf/immigration2016.pdf> ("Undocumented immigrants contribute significantly to state and local taxes, collectively paying an estimated \$11.64 billion a year." (emphasis omitted)).

151. See *supra* Part I.C.

152. 130 U.S. at 607–10.

153. *Id.* at 607 (quoting Communication from Edward Everett, Sec'y State to A. Dudley Mann, Special Agent, Dep't of State in Eur. (Dec. 1852)).

creation of the Act to the Executive Branch's goal of conducting sensible foreign affairs and preserving national security.¹⁵⁴

In the same vein, the 2014 memo programs were premised on the Executive Branch's well-founded objective of including foreigners whose *absence* it seemingly deemed "a source of danger to the United States," for the expulsion of such people detrimentally impacts the U.S. economy, federal deficit,¹⁵⁵ and U.S. citizens whose families are undocumented.¹⁵⁶ In light of the Court's deference to agents of the Executive Branch in *The Chinese Exclusion Case*,¹⁵⁷ the courts should have given substantially more deference to the U.S. government in *United States v. Texas* and decided not to enjoin the 2014 memo programs.¹⁵⁸

In *United States ex rel. Knauff v. Shaughnessy*, the Court described the Executive Branch as having the inherent objective of excluding certain aliens in the interest of foreign affairs and the best interests of the United States.¹⁵⁹ The Court explained that "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. *It is implementing an inherent executive power.*"¹⁶⁰ In effect, this assertion by the Court implies that Congress's ability to form immigration policy is reliant on the Executive Branch's inherent power to ensure that the U.S. immigration system works in the national interest. The Court, moreover, clarified that in "the instant case[,] the Attorney General, exercising the discretion entrusted to him by Congress and the President, concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States."¹⁶¹

The 2014 memo programs aligned with the executive objective of furthering the public interest, for the goal of the programs was partly to keep in the country a low-wage workforce¹⁶² on which many U.S. citizens de-

154. The Court considered statements Congress relied on when creating the Act made, *inter alios*, by Mr. Marcy, Secretary of State under President Pierce; Mr. Fish, Secretary of State under President Grant; Mr. Evarts, Secretary of State under President Hayes; and Mr. Frelinghuysen, Secretary of State under President Arthur. *Id.* at 607–10.

155. *Id.* at 607.

156. *See infra* Part II.C.

157. *The Chinese Exclusion Case*, 130 U.S. at 603–04.

158. *See supra* Part I.D.

159. 338 U.S. 537, 539, 542 (1950) (stating the question presented as whether "the United States [may] exclude without hearing, solely upon a finding by the Attorney General that her admission would be prejudicial to the interests of the United States, the alien wife of a citizen who had served honorably in the armed forces of the United States during World War II?").

160. *Id.* at 542 (emphasis added).

161. *Id.* at 544.

162. Press Release, Modernizing and Streamlining, *supra* note 149 ("Such action would not only continue our proud tradition of welcoming immigrants to this country, but also reduce Federal deficits, increase productivity, and raise wages for all Americans. Immigration reform is an economic, national security, and moral imperative.").

pend.¹⁶³ The programs also aimed to strengthen the financial stability of the U.S. government through the abundance of tax revenue that comes from undocumented immigrants.¹⁶⁴ Finally, unity between U.S. citizens and residents and their undocumented family members was an additional compelling objective in the public interest that the 2014 memo programs sought to pursue.¹⁶⁵ In light of the holding in *Shaughnessy*, therefore, the *United States v. Texas* courts should have upheld the 2014 memo programs because they grant immigration officials the authority to act in the public interest.

3. *The 2014 Memo Programs' Well-Founded Objective to Allow the Immigrant Community to Exit from the Shadows*

As briefly delineated above, the Executive Branch has articulated, in the face of fervent opposition,¹⁶⁶ a pressing need to grant deferred action to undocumented immigrants who do not pose a risk to the United States.¹⁶⁷ This Section illustrates in more detail the well-founded objective referred to above, showing that the Executive Branch's objective was well-researched and grounded in compelling reasoning, including humanitarian, economic, and national security grounds,¹⁶⁸ therefore deserving deference by the courts.¹⁶⁹

In 2014, the White House released a memorandum in which it explained, "despite the overwhelming contributions of immigrants to our Nation's prosperity, our immigration system is broken and has not kept pace with changing times."¹⁷⁰ Regarding these "overwhelming contributions" to the United States by immigrants, the memorandum continued, "[i]mmigrants represent the majority of our PhDs in math, computer sci-

163. Jacoby, *supra* note 1.

164. GEE ET AL., *supra* note 150, at 1.

165. *See infra* Part II.C.

166. *See Immigration Action Gets Mixed Response, but Legal Pathway Still Popular*, PEW RES. CTR. (Dec. 11, 2014), <http://www.people-press.org/2014/12/11/immigration-action-gets-mixed-response-but-legal-pathway-still-popular/> ("About as many disapprove (50%) as approve (46%) of Obama's action, which could make up to 4 million people . . . newly eligible for deportation relief. Roughly eight-in-ten Republicans (82%) disapprove of the executive action and about seven-in-ten Democrats (71%) approve of it, with very strong attitudes on both sides."); *supra* Part I.D. (Texas, along with twenty-five other states, filed for a preliminary injunction against the enactment of the DAPA memorandum in the Southern District of Texas).

167. *See supra* Parts I.C., II.A.2.

168. Press Release, Modernizing and Streamlining, *supra* note 149 ("Such action would not only continue our proud tradition of welcoming immigrants to this country, but also reduce Federal deficits, increase productivity, and raise wages for all Americans. Immigration reform is an economic, national security, and moral imperative.").

169. *See supra* Part I.D.

170. Press Release, Modernizing and Streamlining, *supra* note 149.

ence, and engineering. . . . Immigrants are also more than twice as likely as native-born Americans to start a business in the United States.”¹⁷¹

In forming the well-founded objective underlying the 2014 memo programs, the Executive Branch vested time and resources into intimately understanding the varying interests, motives, and ideologies of people on both sides of the immigration reform debate by meeting with an array of experts and interested parties.¹⁷² For example, in April of 2011, the President met with “a broad group of business, law enforcement, faith, and former and current elected leaders from across the political spectrum” to engage in a discussion on how the immigration system can be changed “to meet our 21st century economic and security needs.”¹⁷³

In 2011, similarly, President Obama met with the Congressional Hispanic Caucus where he detailed “how the Administration continues to improve our legal immigration system, secure our borders, and enhance our immigration enforcement.”¹⁷⁴ The President also noted that his Administration’s aim was to improve enforcement practices by focusing on criminal, undocumented immigrants to avoid wasting resources prosecuting immigrants able to stay in the country, leaving those resources available for legitimate national security objectives.¹⁷⁵

The impetus behind the President’s initiative to implement the 2014 memo programs is likely connected to the continued increase in immigration to the United States, as well as an increase in the audibility of the immigrant community and its advocates.¹⁷⁶

171. *Id.*

172. Press Release, The White House, Readout of the President’s Meeting with Stakeholders on Fixing the Broken Immigration System (Apr. 19, 2011), <https://www.whitehouse.gov/the-press-office/2011/04/19/readout-presidents-meeting-stakeholders-fixing-broken-immigration-system>.

173. *Id.*

174. Press Release, The White House, Readout of the President’s Meeting with the Congressional Hispanic Caucus on Fixing the Broken Immigration System (May 3, 2011), <https://www.whitehouse.gov/the-press-office/2011/05/03/readout-presidents-meeting-congressional-hispanic-caucus-fixing-broken-i>.

175. *Id.* (“[The President] noted that his Administration will continue to work toward improving our enforcement practices so that we are not using our limited resources on those potentially eligible for an adjustment of status, but rather tightening our efforts so that the Department of Homeland Security . . . focused on [detaining] criminals . . .”).

176. The immigrant community in the United States is undoubtedly large—and continues to increase. In 1850, there were roughly 2.2 million immigrants in the United States; in 1890, the immigrant community rose to about 14.8 percent of the U.S population; by 2014, there were 42.4 million immigrants residing in the United States, making up 13.3 percent of our nation’s population. Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Apr. 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#CurrentandHistoricalNumbersandShares>. As the Executive Branch transitions from one administration to another, the programs of the prior may be nixed, but this pressing impetus for comprehensive immigration reform will continue.

While in the past it was difficult to gauge the exact number of immigrants in any given community, immigrants and advocates have found creative ways to bring their lives and human rights closer to the forefront of the immigration debate. Social and news media, for example, are used as a medium through which immigrants make their presence and value known, evidenced, for example, by a “virtual iMarch” on Washington in May 2013.¹⁷⁷ This event not only “show[ed] the muscle behind pro-immigration forces,” but also “represented the culmination of years of savvy and relentless efforts by Latino activists to mobilize supporters through social media, and draw undocumented immigrants out of the shadows to maximize political leverage.”¹⁷⁸

Further, undocumented immigrants, in the face of a turbulent view of people like themselves, have taken a leap of faith by allowing their stories to be published in some of the most prominent news outlets, putting a human face and story to the group often referred to as only “undocumented immigrants,” or perhaps more pejorative terms.¹⁷⁹ For example, José Antonio Vargas, who immigrated from the Philippines and is now working in the United States as a successful journalist, shared his experience as an immigrant.¹⁸⁰ Mr. Vargas, in the *New York Times Magazine*, used his fearless voice to show otherwise unaware Americans the reality of being an undocumented immigrant, writing that immigrants are “not always who you think we are. Some pick your strawberries or care for your children. Some are in high school or college. And some, it turns out, write news articles you might read.”¹⁸¹ Mr. Vargas continued by elucidating an often cruel impact immigration law enforcement can have on a person, explaining, “I grew up here. This is my home. Yet even though I think of myself as an American and consider America my country, my country doesn’t think of me as one of its own.”¹⁸² Similarly, Tony Choi, a social media manager for an organization named Soze, shared his story of coming to the United States nearly

177. Lois Romano, *Latinos Push Reform on Social Media*, POLITICO (May 27, 2013), <http://www.politico.com/story/2013/05/latinos-reform-social-media-091901>.

178. *Id.* Similarly, Welcome.us, a nonprofit organization that dedicates itself to celebrating a diverse America, formed an online campaign wherein stories of immigrant celebrities and common folk are shared to encourage the United States to stand in solidarity with arriving immigrants. See generally *Our Stories Make up the American Story*, IMMIGRANT HERITAGE MONTH, <http://welcome.us/stories/> (detailing stories of an array of immigrants in the United States) (last visited May 17, 2017).

179. See Gambino, *supra* note 2 (using the term “undocumented immigrants” and impugning the use of terms like “illegal”).

180. José A. Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES MAG. (June 22, 2011), http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?_r=0; José A. Vargas, *Not Legal Not Leaving*, TIME (June 25, 2012), <http://content.time.com/time/subscriber/article/0,33009,2117243-1,00.html>.

181. *Id.*

182. *Id.*

two decades ago from South Korea due to economic turmoil.¹⁸³ Mr. Choi is an undocumented immigrant who received deferred action under DACA 2012.¹⁸⁴ He said that living with the constant fear that his status could be revoked, and that he could be removed to a country of which he only has vague memories.¹⁸⁵

The Executive Branch's well-founded objective of effectuating the 2014 memo programs to give certain undocumented individuals permission to remain in the United States was likely fueled by the publication of the stories of people like Mr. Vargas and Mr. Choi.¹⁸⁶ For example, President Obama issued statements in which he expressed the U.S. interest in: retaining immigrants who are well-educated¹⁸⁷ (like Mr. Vargas and Mr. Choi), keeping hard workers (like Mr. Vargas and Mr. Choi) who may be willing to take an unpopular, tough job, and perhaps most crucially, keeping families together.¹⁸⁸ The Executive Branch potentially found these well-founded objectives to outweigh any foreseeable economic harm on the plaintiff states.

B. United States v. Texas Missed the Mark: Familial and Financial Injuries to Residents of Plaintiff States Outweigh the (Self-Inflicted) Alleged Economic Injury to the States Themselves

1. The States' Alleged Injury

The Fifth Circuit's decision in *United States v. Texas*, as previously noted, hinged to a large degree on the economic injury and administrative inconvenience that the plaintiff states would suffer if the 2014 memo programs were to go into effect.¹⁸⁹ Texas, nevertheless, did not sufficiently prove its alleged injury was fairly traceable to the 2014 memo programs. Texas's contention "that documentation confirming lawful presence pursu-

183. Saleah Blancaflor, *'I Am an Immigrant': Campaign Brings Faces, Voices to Immigrant Heritage Month*, NBC NEWS (June 1, 2016), <http://www.nbcnews.com/news/asian-america/i-am-immigrant-video-campaign-brings-faces-voices-immigrant-heritage-n581661>.

184. *Id.*

185. *Id.*

186. See Press Release, Modernizing and Streamlining, *supra* note 149.

187. Barack Obama, President of the United States, National Address on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (asking, "Are we a nation that educates the world's best and brightest in our universities, only to send them home to create businesses in countries that compete against us? Or are we a nation that encourages them to stay and create jobs here . . . create industries right here in America?").

188. *Id.* ("They work hard, often in tough, low-paying jobs. They support their families. . . . Many of their kids are American-born or spent most of their lives here, and their hopes, dreams, and patriotism are just like ours. As my predecessor, President Bush, once put it: 'They are a part of American life.'").

189. See *supra* Part I.C.

ant to DAPA would allow otherwise ineligible aliens to become eligible for state-subsidized driver's licenses" is not supported by its transportation code.¹⁹⁰ Texas, therefore, would only have to change its license-subsidization policy, which can be changed without legislative action as it is not grounded in any statutory authority, in order to avoid issuing licenses to recipients of the 2014 memo programs.¹⁹¹ Texas's alleged injury, in other words, was purely "self-inflicted."¹⁹²

Moreover, the alleged "injury" the programs posed was not actual or imminent but, in fact, already existed and was implicitly condoned by Texas. Individuals who have status through DACA,¹⁹³ the Violence Against Women Act, and the U Visa program,¹⁹⁴ for example, are eligible, under Texas transportation code, to obtain driver's licenses. The code provides that people who are "authorized [to] stay in the United States, as indicated by the documentation presented under Section 521.142(a)," including any "documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license."¹⁹⁵ If Texas genuinely took issue with granting driver's licenses to these classes of immigrants, it would have already changed its license-subsidization policy to preclude individuals under other visa programs from getting licenses.

Texas could contend that the sheer number of recipients of deferred action under the 2014 memo programs, compared to the lesser number of the aforementioned recipients, was the factor causing the injury. This injury, however, was caused by Texas's own policy regarding the issuance of state driver's licenses, not because the Department of Homeland Security decided to use its power of prosecutorial discretion.¹⁹⁶ Interestingly, Texas broadcasts its driver's license policy, openly marketing itself as a state in which recipients of deferred action can get a driver's license,¹⁹⁷ therefore

190. *Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015).

191. TEX. TRANSP. CODE ANN. § 521.1425(d) (West 2010) ("The department may not deny a driver's license to an applicant who provides documentation described by Section 521.142(a) based on the duration of the person's authorized stay in the United States, as indicated by the documentation presented under Section 521.142(a).").

192. *Texas*, 809 F.3d at 157 ("Relying primarily on *Pennsylvania v. New Jersey*, the United States maintains that Texas's injury is self-inflicted because the state voluntarily chose to base its driver's license policies on federal immigration law." (citation omitted) (citing 426 U.S. 660 (1976) (per curiam)).

193. Note that DACA 2012 was not at issue in *United States v. Texas*. Instead, the plaintiff states challenged the expansion of DACA through the 2014 memorandum.

194. See generally Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115 (2015) (detailing the many forms of deferred action).

195. TRANSP. §§ 521.142, .1425(d).

196. See *supra* Part I.A.

197. TEXAS DEP'T. OF PUB. SAFETY, VERIFYING LAWFUL PRESENCE, 4 <https://www.dps.texas.gov/DriverLicense/documents/verifyingLawfulPresence.pdf> (manifesting

bolstering the argument that its economic injury is “self-inflicted.”¹⁹⁸ The number of the aforementioned recipients within Texas, therefore, could amount to a large portion of Texas’s immigrants.¹⁹⁹

The plaintiffs, furthermore, did not adequately argue that the 2014 memo constituted final agency action, requiring notice-and-comment rule-making pursuant to the APA.²⁰⁰ The 2014 memo, in fact, was mere agency guidance because it explicitly required immigration officers use discretion in adjudicating applications for the 2014 memo programs, which lacks finality in that it does not impose a hard-and-fast rule to which immigration officers must adhere.²⁰¹ As the 2014 memo was just guidance, the court should have applied *Chevron* deference,²⁰² the requirements of which the 2014 memo would have satisfied for it was, at the very least, “minim[ally]” reasonable and was “not patently inconsistent with the [INA’s] statutory scheme.”²⁰³

The court found that the United State’s argument that the injunction “obstruct[ed] a core Executive prerogative and offend[ed] separation-of-powers and federalism principles” implicated vague and less substantial interests in comparison with the states’ alleged harms.²⁰⁴ Despite this finding by the court, the injuries alleged by the plaintiff states are dwarfed by the drastic injuries the preliminary injunction likely has on people residing in the United States, including familial and financial harms.²⁰⁵

2. *Familial and Financial Injuries to Residents of Plaintiff States*

The well-being of people residing in the United States is profoundly harmed by the injunction on the 2014 memo programs. In fact, in 2015, the Center for American Progress released a detailed report specifying the economic benefits—to residents of many of the plaintiff states—that the 2014

Texas’s will to give “[p]erson[s] granted deferred action” driver’s licenses if they present certain documentation of their grant of deferred action.” (emphasis omitted)).

198. Texas, 809 F.3d at 157 (“Relying primarily on *Pennsylvania v. New Jersey*, the United States maintains that Texas’s injury is self-inflicted because the state voluntarily chose to base its driver’s license policies on federal immigration law.” (citation omitted) (citing 426 U.S. 660 (1976) (per curiam))).

199. *But see* Krogstad et al., *supra* note 4 (illustrating the truism that unauthorized immigration statistics are mere estimates).

200. *See supra* Part I.D.

201. Texas, 809 F.3d at 174.

202. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (finding that courts should defer to agency interpretations of statutes unless said interpretations are unreasonable).

203. Texas, 809 F.3d at 218 (first quoting *Tex. Office of the Pub. Util. Counsel v. FCC*, 183 F.3d 393, 420 (5th Cir. 1999); and then quoting *Am. Airlines, Inc. v. Dep’t of Transp.*, 202 F3d 788, 813 (5th Cir. 2000)).

204. *Id.* at 186.

205. *See supra* Part II.A.3.

memo programs would produce.²⁰⁶ The report showed that these programs would have enabled 5.2 million individuals to legally work and, therefore, be “economically productive.”²⁰⁷ In other words, the 2014 memo programs would have likely bolstered the economies of the states in which would-be applicants for the programs reside, benefitting U.S. citizens living in those states.²⁰⁸ This, more specifically, would have resulted in greater tax revenue and economic activity, among other benefits to the states and their residents.²⁰⁹

Family unity, but for the injunction, would have been preserved, which is of great importance as it is one of the guiding principles of immigration law (as seen, for example, by the INA’s structure, centering to a large degree around familial relationships).²¹⁰ The 2014 memo programs, moreover, could have shielded countless undocumented immigrants from separation from their immediate relatives; DAPA alone would have likely allowed nearly 3.6 million undocumented parents to remain in the country with their children.²¹¹ These potential DAPA recipients have deep roots in the United States, with twenty-five percent having lived in the United States for at least twenty years and sixty-nine percent for ten years or more.²¹² The court, furthermore, ignored its precedential mandate to “listen with care”²¹³ to the expertise of the Executive Branch regarding the importance of family unity in the realm of immigration law, which has been a tradition over several presidential administrations.²¹⁴ The courts’ failure to consider family unity as a crucial component of the 2014 memo programs resulted in a disregard for the Supreme Court’s contemporary perspective on the importance of family.²¹⁵

The Court’s view on family has changed in recent years, shifting in a direction that gives rise to the argument that lawful permanent residents and their immigrant family members should both receive greater constitutional

206. Silva Mathema, *Assessing the Economic Impacts of Granting Deferred Action Through DACA and DAPA*, CTR. FOR AM. PROGRESS (Apr. 2, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/04/02/110045/assessing-the-economic-impacts-of-granting-deferred-action-through-daca-and-dapa/>.

207. *Id.*

208. *Id.*

209. *Id.*; see also Press Release, Modernizing and Streamlining, *supra* note 149.

210. INA, Pub. L. No. 82-414, § 203, 66 Stat. 163, 178–79 (1952) (codified as amended at 8 U.S.C. § 1153 (2012)) (setting out the various preference categories based on the petitioner’s familial relationship to the beneficiary of the application for lawful immigration status).

211. RANDY CAPPS ET AL., MIGRATION POLICY INST., DEFERRED ACTION FOR UNAUTHORIZED IMMIGRANT PARENTS: ANALYSIS OF DAPA’S POTENTIAL EFFECTS ON FAMILIES AND CHILDREN (2016), <http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families>.

212. *Id.*

213. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001); see *supra* Part II.A.

214. See *supra* Part I.B.

215. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

protection.²¹⁶ For example, although the Court has long held that marriage is a fundamental right,²¹⁷ in *Obergefell v. Hodges*,²¹⁸ the Court painted a more accurate, ample, and humane vision of family and its crucial role within U.S. society. In that case, the Court rested its decision that same-sex couples had a constitutional right to marriage on several grounds to protect every U.S. citizen's right to marriage.²¹⁹ Many of these grounds apply to the U.S. interest in maintaining family unity when one relative is a U.S. citizen or lawful permanent resident.²²⁰ The *Obergefell* Court, for example, noted that families of same-sex couples are "relegated to a more difficult and uncertain family life"²²¹ due to bans on same-sex marriage; this parallels the way in which U.S. citizen children of undocumented parents must endure the constant uncertainty of whether their parents will be able to stay with them in the United States.²²² Additionally, the Court, quoting Alexis de Tocqueville, explained, "[w]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs."²²³ When family of deportees retire from the turmoil of public life to a void in their home, they may find the image of disarray and distress; that image can likewise follow them into public affairs.

The *Texas* court, therefore, should have focused its analysis on the large-scale societal benefits that could have emerged from the 2014 memo programs—and the equally large harms that could befall the United States if would-be applicants for the 2014 memo programs are deported—instead of

216. See *Texas v. United States*, 809 F.3d 134, 179–80 (5th Cir. 2015) (noting the INA allows alien relatives of lawful permanent residents ("LPRs") or citizens to apply for lawful status). However, the reality of immigration to the United States is such that many immigrants enter the United States without authorization for various reasons, including the need to flee their hostile country of origin, and therefore face bars on their ability to be granted lawful status even if they apply through their LPR or citizen relative. INA, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182–88 (1952) (codified as amended at 8 U.S.C. § 1182 (2012)).

217. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (noting that marriage "is the foundation of the family and of society" and is thus "the most important relation in life").

218. 135 S. Ct. 2584 (2015).

219. See, e.g., *id.* at 2608 ("No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.").

220. INA § 203, 66 Stat. at 178–79 (codified as amended at 8 U.S.C. § 1153).

221. *Obergefell*, 135 S. Ct. at 2590.

222. See generally Emily Durey, *What Happens to a Child After a Parent Is Deported?*, ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/politics/archive/2015/09/what-happens-to-a-child-after-a-parent-is-deported/432870/>.

223. *Obergefell*, 135 S. Ct. at 2601 (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 309 (H. Reeve trans., rev. ed. 1990) (1840)).

dwelling on the relatively less significant and, in Texas's case, self-inflicted financial cost and administrative inconvenience to the plaintiffs.²²⁴

III. CONCLUSION

United States v. Texas presented the courts with a complex question intertwined with immigration and administrative law,²²⁵ as well as jurisprudence replete with confusing conflation of the political branch's respective powers over the immigration system.²²⁶ Upon review, the Fifth Circuit Court of Appeals affirmed the preliminary injunction, holding that Texas had Article III standing due to the cost of issuing driver's licenses to recipients of deferred action under the 2014 memo programs, and that the enforcement of the 2014 memos violated the notice-and-comment rulemaking requirements of the APA. The courts, however, misunderstood the power of the Executive Branch to unilaterally make immigration policy in order to benefit individuals directly impacted by that policy as well as U.S. citizens.²²⁷ Engaging in a flawed analysis, the courts additionally focused on issues of the case that were plainly peripheral to compelling concerns that the Executive Branch sought to assuage.²²⁸ In enjoining the 2014 memo programs, the courts did not appropriately defer to the Executive Branch's wisdom and authority in determining who can stay and lawfully work in the United States.²²⁹ This does not mean, however, that the Executive Branch possesses unchecked authority to unilaterally affect immigration policy; the Executive Branch must only be permitted by the courts to do so when it has demonstrated impartiality²³⁰ and a thorough comprehension of the U.S. economy and American values.²³¹ As is likely, when similar cases involving the scope of the Executive Branch's power over immigration policy arise in the future, the courts ought to recognize the historical deference granted to the political branches without losing sight of the enduring need for questions of immigration law to be decided on the basis of unbiased beliefs and in accordance with law. The courts, most importantly, must en-

224. *See supra* Part II.A.1.

225. *See supra* Part I.D.

226. *See supra* Part I.A.

227. *See supra* Part II.A.3.

228. *See supra* Part II.B.2.

229. *See supra* Part II.A.

230. *See generally* Adam Ozimek, *Racism, Xenophobia, and Immigration*, FORBES (July 31, 2016), <http://www.forbes.com/sites/modeledbehavior/2016/07/31/racism-xenophobia-and-immigration/#183bb613142a> (providing an explanation (laced with references to President Trump) of, *inter alia*, the ways in which racism and xenophobia "contribute significantly to the level of public opposition to immigration").

231. *See generally* Neil Irwin, *What Donald Trump Doesn't Understand About the Trade Deficit*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/upshot/what-donald-trump-doesnt-understand-about-the-trade-deficit.html>; *see supra* Part II.B.2.

sure that the Executive Branch “take Care that the Laws be faithfully executed,” in a manner faithful to facts and the interest of U.S. citizens.²³²

232. See U.S. CONST. art. II, § 3; see also *State of Washington v. Trump*, No. 17-35105, slip op. at 26, 28–29 (9th Cir. filed Feb. 9, 2017), <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf>. The court stated:

[T]he Government submitted no evidence to rebut the States’ argument . . . [T]he public has a powerful interest in national security and in the ability of an elected president to enact policies. . . . [T]he public also has an interest in . . . avoiding separation of families, and in freedom from discrimination. . . . [T]hese competing public interests do not justify a stay.

Id.