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Rethinking Removability

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Abstract

Removability, in the context of immigration law, refers to the government's legal authority to seek deportation for violations of the federal immigration statute. Removability matters now more than ever before, both for individuals facing possible deportation as well as for the many governmental institutions charged with assessing removability. Using four areas of emerging law—claims to U.S. citizenship, the categorical approach to determining the immigration consequences of crime, the application of the exclusionary rule in removal proceedings, and the exercise of administrative discretion—this Article places removability at the center of its analysis and presents a framework for better understanding removability. Under what this Article calls a narrative of "complex removability," removability is both legally and factually complex, as well as subject to change, notwithstanding the temptation in legal and popular discourse to treat removability as simple and settled.

This Article identifies several common themes that characterize complex removability today. First, obstacles to obtaining substantive, discretionary relief have caused removability to become more complex. Second, challenges to removability tend to be limited across the legal system due to barriers associated with immigration detention, such as the absence of counsel and the pressures of time. Third, complex removability leads to a deeper appreciation of the fluidity and uncertainty associated with immigration status. Fourth, complex removability is not static, but is produced through dynamic interactions between the government and the individual. Fifth, this Article explores the relationship between tensions in the horizontal separation of powers and complex removability. This Article concludes by suggesting several areas in which taking complex removability seriously might bear upon immigration policy, practice, and discourse.

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INTRODUCTION

What part of 'illegal' don't you understand?[1]

This Article begins with the suggestion that there is quite a bit about "illegal" in the immigration context that we do not yet understand. One cannot understand what illegality in immigration means without

1. The phrase "What part of 'illegal' don't you understand?" developed in the mid- to late-2000s as a prominent rallying cry of the anti-immigrant movement, but its origins are unclear. The phrase appears to have first been used in print in 2003 to criticize politicians for being too soft on immigration enforcement. *See* Jon Dougherty, *What Part of 'Illegal' Don't They Understand?*, WND (Aug. 22, 2003, 1:00 AM), http://www.wnd.com/2003/08/20411. By 2007, the phrase had permeated the national discourse and seemed to require no further explanation. *See* Lawrence Downes, *What Part of 'Illegal' Don't You Understand?*, N.Y. TIMES (Oct. 28, 2007), http://www.nytimes.com/2007/10/28/opinion/28sun4.html.

acknowledging the relevance and complexity of the concept of *removability*.[2] Setting aside debates over the use of the term "illegal,"[3] the immigration laws generally do not employ the phrase "illegal alien" or even "undocumented" to define the categories of noncitizens who might face deportation.[4] Instead, "removability" is the technical term that the immigration laws use to refer to the threshold question of whether the government has legal authority to attempt to deport someone.[5] In order to remove an individual, adequate proof must exist that the individual is a noncitizen who violated specific provisions of the immigration laws.[6] Removability is conceptually both broader and narrower than illegality or unauthorized presence. It is broader in the sense that lacking authorization

2. *See* 8 U.S.C. § 1229a(e)(2) (2012) (defining removability).

3. *See* Flores v. U.S. Citizenship & Immigration Servs., 718 F.3d 548, 551 n.1 (6th Cir. 2013) ("We recognize that using the term 'alien' to refer to other human beings is offensive and demeaning. We do not condone the use of the term and urge Congress to eliminate it from the U.S. Code."); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 452–53 (7th ed. 2012) (discussing use of phrases "illegal aliens," "undocumented aliens," and "unauthorized migrants"); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1440–42 (1995) (analyzing the meaning of, and critiquing use of, the term "illegal alien"). For an example of a news media debate on use of the term "illegal immigrant," see Charles Garcia, *Why "Illegal Immigrant" is a Slur*, CNN (July 6, 2012, 12:14 PM), http://www.cnn.com/2012/07/05/opinion/garcia-illegal-immigrants (arguing that the term "illegal" to describe people "dehumanize[s] the individual and generate[s] animosity toward them") and Ruben Navarrette, *"Illegal Immigrant" Is the Uncomfortable Truth*, CNN (July 6, 2012, 11:20 AM), http://www.cnn.com/2012/07/06/opinion/navarrette-illegal-immigrant (arguing, in response to Garcia, that the phrase "illegal" is the most accurate term to describe persons who lack valid immigration status).

4. The term "illegal alien" appears in only six provisions of the Immigration and Nationality Act (INA), but the Act does not use the term to define the categories of persons subject to deportation. *See* 8 U.S.C. § 1365 (providing reimbursement to states for the costs of incarcerating "illegal aliens" with felony convictions); *id.* § 1252c(a) (authorizing state and local law enforcement officials to arrest and detain "illegal aliens," defined as individuals "illegally present" in the United States with prior felony convictions who voluntarily or involuntarily left the country after such conviction); *id.* § 1366 (requiring the Attorney General to submit a report containing data related to incarceration and conviction rates for "illegal aliens"); *id.* § 1621(d) (permitting states to render "illegal aliens" eligible for public benefits); *id.* § 1330 (providing for the Secretary of Treasury to fund certain activities related to apprehension of "illegal aliens"); *id.* § 1356(r) (describing fund related to detention of "illegal aliens"). The INA uses the term "alien" to refer to persons who are not U.S. citizens or otherwise "owe[] permanent allegiance to the United States." *Id.* § 1101(3), (22); *see also Flores*, 718 F.3d at 551 n.1.

5. As explained in greater detail in Section I.A, removability exists where the government proves that an individual violated any of the provisions in two subsections of the federal immigration statute: the grounds of inadmissibility at 8 U.S.C. § 1182(a), or the grounds of deportability at *id.* § 1227(a). Where statutory distinctions between inadmissibility, deportability, and removability are relevant, this Article seeks to use the correct term. This Article otherwise uses the term "removability" to refer to both inadmissibility and deportability grounds, as well as to the general concept of establishing the government's legal authority to pursue removal proceedings against an individual.

6. *See id.* § 1229a(e)(2) (defining removability); *see also* Section I.A.

to be present in the United States is only one of several ways in which a person might become removable.[7] Removability is narrower in the sense that individuals with lawful status may also face charges of removability, for instance, due to prior convictions or other post-entry conduct.[8] Furthermore, millions of individuals might consider themselves "undocumented" even though the government is not trying to remove them; accordingly, the government has not yet adjudicated their removability.[9]

In immigration practice, the meaning and scope of removability matter more than ever. Removability questions have become more contested in cases involving noncitizens defending charges of deportation. Removability determinations may carry great consequences as well. Because the immigration laws foreclose discretionary relief in many cases, formally contesting removability may provide the noncitizen with the only opportunity to avoid deportation.[10] A noncitizen who succeeds in contesting removability "wins" in the removal proceeding because the immigration judge (IJ) must terminate the proceedings.[11] In a meaningful number of cases, termination does occur. In fiscal year 2012, IJs terminated more than one in ten cases filed by the Department of Homeland Security (DHS) in immigration courts.[12] In thousands of other cases, contesting the specific reasons for removability (for instance, whether removability is based on a prior conviction, and if so, the nature of that conviction) can

7. *See* 8 U.S.C. § 1182(a)(6)(A).

8. *See id.* § 1227(a)(2); *id.* § 1182(a)(2).

9. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2093 (2008) (discussing "de facto" government policy of tolerating unauthorized immigration, insofar as a majority of individuals who lack immigration status are not actually removed).

10. *See* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 268 (2012).

11. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUST., FY 2012 STATISTICAL YEAR BOOK B1 (Mar. 2013), http://www.justice.gov/eoir/statspub/fy12syb.pdf ("If the immigration judge decides that removability has not been established by DHS, he or she may terminate the proceedings.").

12. *Id.* at D2 (showing that 13.3% of all removal cases resolved through termination, 16.1% resolved through the grant of discretionary relief, 70.0% resolved through removal, and 0.6% resolved through other means). The number of terminations as a percentage of the Executive Office for Immigration Review's (EOIR) overall docket appears to have increased over the past decade. *See id.* (showing the percentage of cases terminated from FY 2008 to FY 2012 grew from 7.4% to 13.3%). In fiscal year 2000, only six percent of all cases resulted in termination. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUST., STATISTICAL YEAR BOOK 2000 I2–I3 (Jan. 2001), http://www.justice.gov/eoir/statspub/SYB2000Final.pdf. While the termination of removal proceedings in many cases is the result of the DHS failing to establish removability, termination may also occur under circumstances that still lead to the removal of the individual, for instance where DHS seeks termination of the immigration court proceedings because the agency wishes to remove the individual through administrative mechanisms that do not involve a removal order issued by an immigration judge.

also affect the individual's right to seek discretionary relief. A viable removability challenge may have other ramifications for the individual facing deportation beyond outright termination of the proceedings. Removability determinations may lead to the release on bond of noncitizens who are otherwise subject to draconian mandatory detention statutes.[13] Judicial review of removal orders,[14] questions related to the execution of wrongful removal orders (i.e., orders that lack a legal basis),[15] and defenses to criminal prosecutions for immigration-related crimes[16] may also hinge on questions related to removability.

Removability thus affects multiple government actors in a variety of ways. For the federal courts, removability questions constitute one of the few avenues through which the judiciary can affect the scope and application of federal immigration law.[17] For the immigration enforcement agencies, removability questions implicate the legality of agency action.[18] Furthermore, the expanding series of sub-federal laws that attempt to regulate immigration[19] have the effect of requiring state governmental

13. *See* 8 U.S.C. § 1226(c)(1) (providing mandatory detention for aliens who are inadmissible or deportable based on criminal grounds); Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999*)* (providing opportunity to seek release on a bond for noncitizen who is substantially likely to prevail, including during the removability phase of the hearing); *see also* Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1850–58 (2011) (describing and identifying procedural shortcomings in the *Joseph* hearings).

14. *See* 8 U.S.C. § 1252(a)(2)(C) (depriving federal courts of judicial review over final removal orders against a noncitizen who "is removable" as a result of certain crime-based grounds of removability); Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 61–65 (2010).

15. Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 148–49 (2010).

16. *See* 8 U.S.C. § 1326 (criminalizing and defining illegal re-entry); *infra* notes 88–93 and accompanying text.

17. *See* Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1524–25 (2010) (noting that the federal courts defer to the plenary power of Congress to regulate immigration).

18. *See* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 98–102 (2012) (distinguishing between minor, "bureaucratic mistakes" in the deportation system, which are "unlikely to have serious consequences," and "forensic mistakes," the most serious being the deportation of U.S. citizens, which are "inherently more serious because they involve incorrect decisions undertaken by those who have been given legal authority to act decisively in the public sphere" (emphasis omitted)).

19. Significant scholarly literature on immigration federalism, or the appropriate balance of power between federal and nonfederal authorities in regulating immigration, has emerged in the past decade. *See, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011) (explaining "mirror-image theory" justification for subfederal immigration laws, such as Arizona's SB 1070, and critiquing subfederal immigration laws as unconstitutional); Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389 (2011) (arguing for preemption of subfederal laws that sanction employers for employing

actors who lack expertise in the immigration laws to structure their behavior around potentially complex questions related to removability. For instance, § 6 of the infamous Arizona immigration law SB 1070, though invalidated by the Supreme Court in 2012 in *Arizona v. United States*,[20] would have authorized the warrantless arrest of any individual whom Arizona law enforcement had reason to believe "committed any public offense that makes the person removable from the United States."[21]

The much-anticipated *Arizona* decision resolutely affirmed the federal government's central role in the regulation of immigration.[22] But the opinion also reflected a less recognized conceptual shift in the Court's treatment of removability. Justice Kennedy's opinion observed that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."[23] Justice Kennedy recognized the misperception, often present in immigration-related discourse, that being removable is equivalent to engaging in criminal behavior.[24] Instead, Justice Kennedy drew attention to the critical distinction between an individual's being subject to removal and committing a crime.[25] In addition, *Arizona* acknowledged the unsettled nature of removability itself, notably using the phrase "*possible* removability"[26] more than once to describe the legal posture of persons targeted by SB 1070.[27] The Court also noted that "possible removability" not only conflicts with the procedural framework envisioned by the federal immigration laws, but is also complicated by the fact that, substantively, "[t]here are significant complexities involved in . . . determin[ing] whether a person is removable."[28]

The *Arizona* view of removability, as complex and distinct from illegality, is still an evolving one. According to the conventional story about removability—the story that typically dominates immigration practice, policy, and discourse—removability inquiries are simple, settled, and easy to determine. But the standard narrative that removability

undocumented immigrant workers); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (arguing for the constitutionality of some forms of state and local immigration regulation); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (questioning the prevailing doctrine that the federal government has exclusive authority over immigration).

20. 132 S. Ct. 2492, 2510 (2012).

21. Support Our Law Enforcement and Safe Neighborhoods Act § 6, ARIZ. REV. STAT. ANN. § 13-3883(a)(5) (2010).

22. *See* David Martin, *Reading* Arizona, 98 VA. L. REV. IN BRIEF 41, 41–42, 47 (2012) (noting the attention paid by both sides of the immigration debate to the Supreme Court decision in *Arizona* and that the decision favored federal government authority in immigration regulation).

23. *Arizona*, 132 S. Ct. at 2505 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)).

24. *See id.* at 2499, 2504–05, 2530–31.

25. *Id.* at 2504.

26. *Id.* at 2505 (emphasis added); *accord id.* at 2506; *id.* at 2507.

27. *Id.* at 2505–07.

28. *Id.* at 2506.

involves a straightforward inquiry, this Article contends, is both incomplete and inaccurate. As one court explained, the removability "determination can be relatively straightforward," while the question of whether a person is entitled to discretionary relief "is often complex and fact-intensive."[29] But a more pernicious aspect of the simple view of removability has surfaced in public rhetoric. The public's receptivity to the simple story of removability is most visible in the already noted rallying cry of the anti-immigrant movement: "What part of illegal don't you understand?"[30]

Viewing removability as simple is not necessarily a bad thing. In many individual cases, it is both accurate and harmless to contend that removability is easy to determine.[31] But a central premise of this Article is that removability is far more complex than the current legal system and public discourse suggest. *Arizona* correctly relied on the notion that determining removability is complex as a basis for its finding that the state of Arizona was ill-equipped to engage in removability determinations.[32] The issues at play in *Arizona* did not leave room to explore the nuances associated with the federal government's treatment of removability. At the federal level, for instance, respondents in immigration courts routinely concede removability, without the benefit of counsel and at times during group removal proceedings.[33] Other times, removability is examined not by an immigration judge, but by a low-level immigration officer with the authority to issue removal orders that bypass the immigration courts.[34] And yet a closer look at removability across the federal system suggests that removability is more dynamic and shifting than the current system accounts for. The narrative of complex removability in this Article focuses on areas of federal policy and practice that inadequately account for removability's contested nature.

This Article tells a story about removability in which it is complex,

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29. Morales-Izquierdo v. Gonzales, 486 F.3d 484, 491 (9th Cir. 2007) (en banc).

30. *See supra* note 1.

31. In holding that criminal defense counsel had an affirmative duty to correctly advise noncitizen defendants of the immigration consequences of a guilty plea, the majority opinion in *Padilla v. Kentucky* correctly recognized that in Mr. Padilla's case removability was "succinct, clear, and explicit." *See* 130 S. Ct. 1473, 1483 (2010). The Court went on to acknowledge, "[T]here will . . . undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain," but "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.*; *see also infra* note 159 and accompanying text (discussing Justice Alito's emphasis on the complexity of categorical approach determinations in his concurring opinion in *Padilla*).

32. *See Arizona*, 132 S. Ct at 2505–07 (noting that "the removal process is entrusted to the discretion of the Federal Government," and that "removability [decisions] . . . . touch on foreign relations and must be made with one voice," not through state governments acting without the authorization of the federal government).

33. *See infra* notes 398–405 and accompanying text.

34. *See infra* note 405 and accompanying text.

contested, and far from settled. Several rapidly evolving areas of immigration doctrine underscore removability's contested nature. For example, individuals may not be removable at all because they are U.S. citizens. But whether an individual charged with removability is a U.S. citizen, or has a colorable claim to U.S. citizenship, may depend on legal and factual complexities that make an immediate answer unclear.[35] Whether a noncitizen's prior conviction falls into a category of offenses that makes the noncitizen removable is, potentially, a complex matter that can trigger years of litigation. The issue is further complicated because the judiciary and administrative agencies are still debating many of the basic guidelines for analyzing the immigration consequences of crime.[36] Whether the courts should suppress evidence of alienage may also involve the application of rapidly evolving legal standards and contested factual allegations.[37] Even if a noncitizen does not have an immigration status that the Immigration and Nationality Act (INA) recognizes, she might still be eligible for an exercise of administrative discretion that would prohibit U.S. Immigration and Customs Enforcement (ICE) from using its enforcement powers.[38] In each of these areas, the courts and the various immigration-related administrative agencies[39] have expended significant resources into determining whether noncitizens are removable. At the same time, the law in these areas remains unsettled.

In the immigration law scholarship, removability's shifting and contested nature has been underexamined. Although removability challenges have grown increasingly important to removal defense practice, the scholarship reflects comparatively less attention to the meaning and significance of removability. To be sure, scholars have recognized that immigration *status*, particularly unlawful immigration status, is "complex [and] highly discretionary."[40] They have helpfully reflected upon various factors that expose the erroneousness of assuming that a person without immigration documents is unquestionably "illegal." Such factors include the complexity of lawful statuses and forms of immigration relief

35. *See infra* Section II.A.

36. *See infra* Section II.B.

37. *See infra* Section II.C.

38. *See infra* Section II.D.

39. The federal administrative agencies most commonly involved in immigration enforcement and adjudication include the three core immigration sub-agencies of the Department of Homeland Security (Immigration and Customs Enforcement, Customs and Border Protection, and Citizenship and Immigration Services) and two adjudicatory sub-agencies housed under the Department of Justice (the Executive Office of Immigration Review, comprised of immigration judges; and the Board of Immigration Appeals). *See* STEPHEN H. LEGOMSKY & CRISTINA RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 2–6 (5th ed. 2009).

40. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1742–43 (2010).

available, and the possibility of acquiring permanent status.[41] Scholars have recognized that undocumented immigrants occupy a precarious place under the law and enjoy cognizable, though highly circumscribed, rights.[42] This is particularly evident in laws that are not immigration-related in nature, such as workplace rights.[43] These scholars have discussed problems with the immediate classification of noncitizens into fixed categories of "illegal," "legal," and "citizen."[44] As immigration law scholar Professor Hiroshi Motomura noted, "[T]he line between legal and illegal immigration is not—and has never been—clear and impermeable."[45] Indeed, Professor Daniel Kanstroom has emphasized various dimensions of complexity associated with deportation and removal, particularly related to the rights of individuals who have been physically deported but whose removal orders are later found to be legally defective, and has explored

41. Professor Hiroshi Motomura noted that some courts view immigration law violations as "self-executing," a belief that is premised upon the flawed understanding of the immigration laws as simple, and has discussed how the self-executing view of immigration affects the wisdom of allowing state and local government to participate in immigration enforcement. Motomura, *supra* note 9, at 2060; *see also* Stephen Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 110–11 (2009) (illustrating, through a dialectic between fictitious law professors, the tension between the views that "unlawful status is usually pretty obvious" on one side of the debate and that drawing a conclusion regarding unlawful status can be complex, even for federal immigration officials, on the other side); Motomura, *supra* note 9, at 2047–55 (describing various ways in which persons without lawful immigration status might either acquire lawful status, or not be physically deported notwithstanding the absence of such status); Neuman, *supra* note 3, at 1440 (asserting that immigration "law is more complex than most politicians and voters realize," and pointing to the wide variety of statuses and circumstances that might allow someone without formal authorization from the government to reside in the United States); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1156–57 (2009) (discussing the range of rights and limitations associated with various immigration statuses).

42. *See* Motomura, *supra* note 40, at 1742–43. Professor Motomura has helpfully explored the ways in which undocumented immigrants, despite their inability to formally assert rights in many instances, are nonetheless capable of asserting rights "indirectly and obliquely by making transsubstantive arguments" that fall into several analytic patterns. *Id.* at 1723. Motomura's analysis includes the assertion of claims by undocumented immigrants both as part of the removal process as well as under nonimmigration laws, and does so in order to articulate the scope and effects of widespread "national ambivalence" towards unauthorized immigration. *Id.* at 1723–24. By contrast, this Article focuses on the assertion of claims by individuals facing removal under the federal immigration laws in order to help shape our understanding of removability. To a lesser degree, this Article also focuses on a normative assessment of immigration policy, practice, and discourse in light of the complex nature of removability.

43. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 990–94 [hereinafter Bosniak, *Exclusion and Membership*]; Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1115–17 (1994).

44. *See generally* Bosniak, *Exclusion and Membership*, *supra* note 43, at 1000–03 (discussing distinct and conflicting legal regimes that regulate undocumented immigrants); Motomura, *supra* note 9, at 2047–55 (emphasizing that immigration status, including unlawful status, is inherently discretionary).

45. Motomura, *supra* note 40, at 1785.

how status, territoriality, finality, and time work together in unexpected and complicated ways.[46] This Article builds upon the existing literature, but focuses specifically on removability at the center of a conceptual framework. It treats removability as a specific legal inquiry, worthy of independent study, both in terms of how it works as well as how removability matters for related subjects such as unlawful status. This Article shares other scholars' normative commitment to demonstrating that illegality in the immigration laws is complex and contestable, but it does so by focusing on the boundaries of the government's capacity to remove and with a focus on federal law and policy.

In so doing, this Article maps the content and meaning of removability, and encourages readers to rethink the concept of removability–specifically, to take the "complex" view of removability more seriously. Part I explains the statutory basis for understanding removability and describes its relevance in immigration practice and policy today. Part II contends that the immigration laws reflect a story of "complex removability." To illustrate complex removability, Part II is organized around four areas in which the courts and executive branch are actively grappling with the boundaries of removability. These four areas (each of which is still in the process of evolving) are (1) the assertion of claims to citizenship as a defense to removal; (2) the application of the categorical approach in determining the immigration consequences of crime; (3) efforts to suppress evidence of alienage in removal proceedings following an unlawful search or seizure; and (4) the exercise of administrative discretion, with a focus on Deferred Action for Childhood Arrivals (DACA), created in 2012 by the Obama Administration for certain categories of people—known as DREAMers—who came to the United States as children.

After identifying complex removability as a legal phenomenon, Parts III and IV analyze what complex removability entails and how it might make a difference in immigration law, policy, and discourse today. Part III articulates common themes that help shape the narrative of complex removability. Part III begins with the observation that growing difficulties in obtaining substantive, discretionary relief have led to contests in removability. This Part goes on to discuss how challenges to removability tend to be limited across the legal system due to barriers associated with immigration detention, such as the absence of counsel and the pressures of time. Nonetheless, complex removability leads to a deeper appreciation of the fluidity and uncertainty associated with immigration status, in which removability and status are interconnected but one is not necessarily dispositive of the other. Part III proceeds to discuss the nature of removability as the product of dynamic interactions between the government and the individual, as well as the extent to which horizontal

46. *See* KANSTROOM, *supra* note 18, at 98–102; *see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

separation of powers tensions are relevant to removability determinations.

Finally, Part IV provides, in broad sketches, several recommendations that follow from rethinking removability. It first suggests removing the conditions that necessitate complex challenges to removability, for instance, by restoring substantive immigration relief through legislative reform. Realizing that meaningful legislative reform might not take place, this Part also suggests additional reforms that seek to facilitate the development of removability claims for more individuals who could potentially invoke them. Part IV ends with discursive implications of rethinking removability.

I. INTRODUCING REMOVABILITY

This Part explores the preliminary question of why removability matters. It first explains the statutory basis for defining removability, a term related to concepts familiar to experts in immigration law, such as grounds of inadmissibility, grounds of deportability, and admission. It then describes how removability affects, and is affected by, other parts of the modern immigration framework, including immigration adjudication, judicial review, and the legality of agency decisions. This background underscores the erroneousness of assuming that removability is necessarily simple and clear.

A. *Understanding the Legal Basis for Removability*

When can the government deport someone? Understanding removability starts—as with most issues in immigration law—with an examination of the federal immigration statute. Under the INA, any noncitizen who the government wishes to deport must be deemed "removable" by an immigration judge (IJ).[47] It is worth noting that determining removability precedes determination of whether an individual is entitled to discretionary relief from removal. As one court explained, "[t]o order an individual removed, the immigration judge must make two determinations: (1) whether the individual is removable from the United States; and, if so, (2) whether the individual is otherwise eligible for relief from removal."[48] Removability refers to the government's legal authority to deport a person.[49] After an IJ establishes removability, then an inquiry into whether an individual may apply to remain in the country through a grant of discretionary relief[50]—must take place. Thus, entitlement to

47. 8 U.S.C. § 1229a(a)(1) (2012) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

48. Morales-Izquierdo v. Gonzales, 486 F.3d 484, 491 (9th Cir. 2007) (en banc); *see also* Matovski v. Gonzales, 492 F.3d 722, 727 (6th Cir. 2007) (explaining the two phases in removal proceedings).

49. 8 U.S.C. § 1229(a)(e)(2) (defining "removable").

50. *E.g.*, *id.* § 1227(a)(1)(E)(iii) (granting discretion to the Attorney General to waive

discretionary relief constitutes a separate inquiry from removability.[51]

Determining removability inevitably rests in part on a close reading of numerous statutory provisions. Technically, since 1996, the definition of removability has depended on whether a noncitizen has violated either the grounds of inadmissibility, found at § 1182 of Title 8 of the United States Code, or the grounds of deportability, found at § 1227 of the same title.[52] Which provision applies depends on whether a noncitizen has been formally "admitted" to the United States.[53] If admitted, the grounds of deportability apply; if applying for admission (i.e., never "admitted"), the grounds of inadmissibility apply.[54] Though not identical, the grounds of inadmissibility and deportability generally describe categories of behavior that can lead to removal. These categories include immigration-related offenses (such as entering without inspection or overstaying one's visa), criminal grounds, and national security grounds, among others.[55]

The term "admission," like many other terms in immigration law, is a statutory term of art with a precise definition that does not necessarily comport with common sense. An explanation of the "admission" concept demonstrates one of the many ways in which legal fictions permeate the immigration laws. An individual has only been "admitted" after a successful inspection by an immigration officer.[56] Thus, although the "undocumented" population includes an almost even distribution of individuals who entered lawfully but overstayed their visas and individuals who crossed a border without authorization, the former group has been "admitted" while the latter has not.[57] These two groups of undocumented

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deportation "for humanitarian purposes, [i.e., persecution,] to assure family unity, or when it is otherwise in the public interest").

51. *See id.* § 1229a(c)(4) (describing applications for relief from removal).

52. *See id.* §§ 1182, 1227.

53. *See id.* § 1229a(e)(2) ("The term 'removable' means—(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or (B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title."); *id.* § 1101(a)(13)(A) (defining "admission" to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer").

54. Prior to 1996, the immigration laws distinguished between persons who were "excludable" and those who were "deportable"—the key distinction being whether the person had physically entered the United States through authorized means. For a brief history, see David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 172–73 (2012).

55. As scholars have shown, the grounds of exclusion and deportation historically reflected those segments of society deemed undesirable. *See, e.g.*, KANSTROOM, *supra* note 46, at 5 (arguing that a deportation system constitutes a form of "discretionary social control" and reflects xenophobic biases in society).

56. 8 U.S.C. § 1101(a)(13)(A).

57. *See Fact Sheet: Modes of Entry for the Unauthorized Migrant Population*, PEW HISP. CENTER (May 22, 2006), http://pewhispanic.org/files/factsheets/19.pdf (indicating that forty to fifty percent of the currently unauthorized population entered lawfully through recognized ports of entry).

immigrants are thus in procedurally different postures vis-à-vis the immigration statute if placed in removal proceedings. The first group, having been previously admitted on a valid visa, is subject to grounds of deportability.[58] The second group, having entered without inspection, would be deemed to have never been "admitted" and would therefore face removal under the grounds of inadmissibility.[59] But the lawfulness of one's status, alone, does not necessarily dictate which grounds apply. Although lawful permanent residents are generally subject to the grounds of deportability, they might face permanent deportation under the grounds of inadmissibility if, for instance, they traveled abroad and sought re-admission at the border.[60]

Moreover, the potential lack of clarity around the definition of "admission"[61] can further complicate the preliminary question of which statutory provision should serve as a benchmark against which to evaluate removability. The grounds of inadmissibility and deportability contain small but significant differences, with the inadmissibility grounds encompassing a slightly broader realm of conduct.[62] Sometimes, whether the grounds of inadmissibility or the grounds of deportability apply matters. Finding that an individual is subject to grounds of deportability, but not inadmissibility, can prevent DHS from establishing removability in certain cases. For instance, the Board of Immigration Appeals (BIA) ruled in 2012 that refugees, even though conditionally admitted to the United States, have nonetheless been "admitted" such that they are subject only to grounds of deportability (and not grounds of inadmissibility),[63] thereby

58. 8 U.S.C. § 1227(a)(1)(B) (describing "[c]lasses of deportable aliens" as those who are "in and admitted in the United States" who are deemed to have engaged in certain forms of conduct, such as being "present in the United States in violation of the [INA]").

59. 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.").

60. *See* 8 U.S.C. § 1101(a)(13)(C) (describing categories of lawful permanent residents who should be regarded as "seeking an admission . . . for purposes of the immigration laws"); Vartelas v. Holder, 132 S. Ct. 1479, 1490 (2012) (holding that 8 U.S.C. § 1101(a)(13)(C)(v), which treats a returning lawful permanent resident who has committed an offense described at 8 U.S.C. § 1182(a)(2), does not apply retroactively to offenses committed prior to the statute's enactment in 1996).

61. *See, e.g.*, Quilantan, 25 I. & N. Dec. 285, 285, 290–92 (B.I.A. 2010) (holding that, for purposes of adjustment of status, an alien has been "admitted" if they can "prove procedural regularity in his or her entry, which does not require the alien to be questioned by immigration authorities or be admitted in a particular status"); Areguillin, 17 I. & N. Dec. 308, 310 (B.I.A. 1980) (same).

62. *See* Richard Frankel, *Illegal Emigration: The Continuing Life of Invalid Deportation Orders*, 65 SMU L. REV. 503, 513–15 (2012).

63. D-K-, 25 I. & N. Dec. 761, 761 (B.I.A. 2012) (holding that refugees, who have been conditionally admitted to the United States, have nonetheless been "admitted" under the statute and therefore may face removal proceedings only if charged with deportability grounds and not inadmissibility grounds).

slightly minimizing the range of circumstances that might subject a refugee to deportation.[64]

The mere fact that removability involves a potentially detailed statutory analysis does not, by itself, suggest anything remarkable about the removability inquiry. The next section describes why removability matters during the removal process.

B. *Why Removability Matters*

In individual immigration cases, removability determinations go to the heart of the immigration enforcement agency's authority to sanction an individual.[65] As noted above, removability is fundamentally a statutory question of whether the person has violated one of two sections of the INA.[66] But removability determinations also affect the government's enforcement powers beyond the threat of deportation itself, including its detention authority and judicial review.

Importantly, to establish removability, DHS must meet a requisite legal burden. As a preliminary matter, the government must prove alienage—or that the individual charged with removability is not a citizen of the United States.[67] Where the grounds of deportability apply, the government also bears the burden of proving removability "by clear and convincing evidence" that is "reasonable, substantial, and probative."[68] When an individual is charged under grounds of inadmissibility, however, the individual bears the burden of proving admissibility.[69] The applicable burdens of proof illustrate the potential significance of a seemingly technical detail like being charged on inadmissibility versus deportability grounds. As noted above, the government's inability to establish removability leads to termination of the proceedings.[70]

Removability has rigid, seemingly black-and-white consequences in some respects, but reflects a sense of gradation in other respects. Whether a person is removable at all ultimately bears upon the government's power to exact what many perceive as the ultimate sanction in the immigration realm: physical deportation from the United States. But different shades of removability exist too, and the kind of removability that applies can have

64. *See also* Frankel, *supra* note 62, at 515–20 (describing DHS's practice of subjecting wrongfully deported individuals seeking to return to the United States to the more stringent inadmissibility standards rather than the deportability standards).

65. *See, e.g.*, D-K-, 25 I. & N. Dec. at 770 ("[R]emovability is a threshold determination.").

66. *See supra* Section I.A.

67. 8 C.F.R. § 1240.8(c) (2013).

68. 8 U.S.C. § 1229a(c)(3)(A) (2012).

69. *See id.* § 1229a(c)(2) ("In the proceeding the alien has the burden of establishing—(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible . . . or (B) . . . that the alien is lawfully present in the United States pursuant to a prior admission.").

70. *See supra* Section I.A.

profound consequences. For instance, an individual found to be removable because of a conviction for an "aggravated felony"[71] could face immigration consequences that are qualitatively—and procedurally—different than an individual who is found to be removable because she lacks proper immigration papers.[72] Aggravated felony convictions categorically disqualify most noncitizens from even applying for many forms of discretionary relief.[73] For unlawful permanent residents, aggravated felony grounds can also result in truncated administrative removal proceedings before front-line immigration officers that deprive them of a court hearing before an IJ.[74] Thus, *whether* a person is removable matters. But the *kind* of removability that attaches may matter just as much.

Contesting removability constitutes one of the few avenues that can weaken the otherwise rigid application of the mandatory immigration detention statutes. While DHS has the authority to detain any person charged with removability,[75] the INA requires that certain categories of noncitizens be detained with no opportunity to seek release on bond from an IJ.[76] The majority of persons subject to mandatory detention are inadmissible or deportable under one of the criminal-based grounds of inadmissibility and deportability.[77] The mandatory detention statutes, while heavily critiqued,[78] have nonetheless persisted since 1996 and help explain why the number of noncitizens in immigration detention has skyrocketed over the past fifteen years.[79] However, one of the few avenues for seeking release from mandatory detention that the courts have recognized is a hearing in which the noncitizen must show that the government is "substantially unlikely" to prevail in establishing its case, which noncitizens may satisfy by showing that they are not removable under one

71. *See generally* 8 U.S.C. § 1101(a)(43) (listing approximately twenty-eight categories and subcategories of crimes that constitute aggravated felonies for immigration purposes).

72. *Id.* § 1182(a)(6)(A)(i).

73. *See* 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05[2][c]–[d] (2013) (describing the immigration consequences of aggravated felony convictions).

74. *See* 8 U.S.C. § 1228(a)(3); 8 C.F.R. § 238.1 (2013) (describing administrative removal proceedings for noncitizens who are not lawful permanent residents and who have convictions that are aggravated felonies).

75. 8 U.S.C. § 1226(a).

76. *See id.* § 1226(c); *see also id.* § 1226a(a) (requiring mandatory detention of suspected terrorists).

77. *See id.* § 1226(c)(1).

78. *See, e.g.*, Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 51 (2010) (emphasizing the continuing "excessiveness" of immigration detention despite the Obama Administration's proposed reforms).

79. DHS currently operates approximately 33,400 immigration detention bed spaces. U.S. DEP'T OF HOMELAND SEC., FY 2012 BUDGET IN BRIEF 10 (2012), http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf.

of the alleged grounds.[80] An early assessment of the noncitizen's removability argument may thus strip DHS of the authority to categorically require detention without bond.[81]

The availability of judicial review may also hinge on questions related to removability. The current version of the INA continues to reflect the principle that judicial review cannot be taken for granted in the immigration context.[82] If a noncitizen "is removable" due to a prior conviction, then the individual is barred from seeking federal judicial review over denials of discretionary relief, or questions of fact.[83] However, judicial review remains available for "questions of law," including whether the immigrant is removable at all.[84]

Furthermore, because removability is primarily a legal rather than a discretionary question, incorrect removability determinations may lead to the execution of removal orders that lack a legal basis altogether. Wrongful removal orders raise a host of questions with which the courts continue to wrestle. These questions include whether noncitizens who are physically deported have a right to return to the United States when they are subsequently found to have been not removable or when the type of removability associated with a removal order is later found to be incorrect, a question that goes to the legality of certain federal regulations.[85] The practical difficulty that deported noncitizens face in trying to return to the

80. Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999). However, one study has shown that *Joseph* hearings are rarely granted in practice. *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 87–88 (2011).

81. Joseph, 22 I. & N. Dec. at 803.

82. Judicial review has historically been circumscribed for noncitizens. *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1419–38 (1997) (describing the history of judicial review in the immigration context).

83. *Compare* 8 U.S.C. § 1252(a)(2)(C) (2012) (precluding judicial review of final orders of removal against criminal aliens), *and id.* § 1252(a)(2)(B) (precluding judicial review of denials of discretionary relief), *with id.* § 1252(a)(2)(D) ("Nothing in subparagraph (B) or (C) . . . shall be construed as precluding review of constitutional claims or questions of law . . . .").

84. *See supra* note 83.

85. A pair of federal regulations known as the "post-departure bar" precludes noncitizens from filing a motion to reopen or reconsider a removal case after their physical departure from the United States, even where the original removal orders were wrongfully executed. *See* 8 C.F.R. § 1003.2(d) (2013) (governing motions filed with the BIA); *id.* § 1003.23(b)(1) (governing motions filed with the immigration courts). The post-departure bar has been challenged in federal court and found invalid by at least nine federal courts of appeal. *See* Garcia-Carias v. Holder, 697 F.3d 257, 263 (5th Cir. 2012); Jian Le Lin v. U.S. Att'y Gen., 681 F.3d 1236, 1238 (11th Cir. 2012); Contreras-Bocanegra v. Holder, 678 F.3d 811, 816–18 (10th Cir. 2012) (en banc); Prestol Espinal v. Att'y Gen., 653 F.3d 213, 217–18 (3d Cir. 2011); Luna v. Holder, 637 F.3d 85, 101–02 (2d Cir. 2011); Pruidze v. Holder, 632 F.3d 234, 235 (6th Cir. 2011); Marin-Rodriguez v. Holder, 612 F.3d 591, 593–95 (7th Cir. 2010); Coyt v. Holder, 593 F.3d 902, 906–07 (9th Cir. 2010); William v. Gonzales, 499 F.3d 329, 331–34 (4th Cir. 2007).

United States following a wrongful removal order has also surfaced recently in arguably egregious circumstances: in 2012, the Solicitor General's office admitted that it misrepresented agency policy in its brief before the Supreme Court in a case involving the agency's policy on facilitating the return of such individuals.[86]

Removability implicates the criminal justice system as well. Immigration-related crimes have become the most heavily prosecuted federal crimes over the past two decades.[87] The penalties for illegal reentry are harsh, and, depending on the circumstances, sentences can run as high as twenty years.[88] Few defenses to an illegal reentry charge exist.[89] But criminal defense attorneys may employ arguments grounded in removability issues in order to defend against a charge of illegal reentry, for instance through a collateral attack on the prior removal order,[90] or a claim of U.S. citizenship.[91] Similar arguments may also become critical to ameliorating the otherwise harsh sentencing scheme associated with illegal reentry.[92] Longer sentences for illegal reentry may depend on the nature of the removal order previously issued, such as whether the removal order followed a conviction for an aggravated felony.[93] Thus, individuals seeking to avoid certain sentencing enhancements in the illegal reentry context may, and often do, argue for a reexamination of the immigration court's removability findings.[94]

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86. Letter from Michael R. Dreeben, Deputy Solicitor Gen., to the Honorable William K. Suter, Clerk, U.S. Supreme Court (Apr. 24, 2012), *available at* http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20Letter%20to%20Supreme%20Court,%20Including%20Attachments%20-%20April%2024%202012.pdf; *see also* Nancy Morawetz, *Convenient Facts:* Nken v. Holder, *the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1600 (2013).

87. Illegal reentry charges were the most frequently charged federal crime in the first half of fiscal year 2011. *See Illegal Reentry Becomes Top Criminal Charge*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 10, 2011), http://trac.syr.edu/immigration/reports/251/ (showing upward trend in rate of prosecution since 1991); *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (discussing and theorizing about the criminal prosecution of immigration-related offenses); Doug Keller, *Re-thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65 (2012) (critiquing the massive expansion of illegal entry and illegal reentry prosecutions and analyzing an eighty-year history of immigration offenses).

88. 8 U.S.C. § 1326(b)(2).

89. *See* Keller, *supra* note 87, at 115–16 (discussing citizenship claims and collateral attacks as the only defenses to illegal reentry, both of which "can require time-consuming research").

90. *See* 8 U.S.C. § 1326(d) (providing implicitly for collateral attacks and requiring (1) exhaustion of administrative remedies, (2) that the underlying proceedings "improperly deprived" the noncitizen of judicial review, and (3) that "entry of the order was fundamentally unfair").

91. *See id.* § 1326 (requiring alienage for a conviction for illegal reentry).

92. *Id.* § 1326(b) (imposing twenty-year maximum sentence for one "whose removal was subsequent to a conviction for commission of an aggravated felony").

93. *Id.*

94. *See* Koh, *supra* note 10, at 274–78 (describing dual use of the categorical approach in

Removability, when properly contested, can thus involve high stakes. For those who feel—as many do—that deportation deprives one of "all that makes life worth living,"[95] then removability determinations matter. But little has been written in the immigration law scholarship to present removability as a unifying theme.

II. COMPLEX REMOVABILITY THROUGH FOUR EMERGING AREAS OF IMMIGRATION LAW

This Part lays out a narrative of complex removability by describing four areas of immigration law in which removability is contested, complex, and evolving. Under this account, the lines around who is removable are being actively drawn and redrawn by various actors. In the process, the scope of the government's removal power is being continuously negotiated through legal and factual determinations.

Section A addresses the issue of citizenship—in some ways the most basic dividing line in immigration law—and a jurisdictional bar to the immigration agency's enforcement authority. Section B discusses the problem of lawful residents whose post-entry conduct places them at risk of removal, with a focus on the categorical approach—the methodology used by adjudicators to identify the immigration consequences of past criminal convictions. Section C discusses the constitutional boundaries of the government's power to establish removability over persons who might lack lawful status by focusing on attempts made by noncitizens in removal proceedings to suppress evidence of alienage. Finally, Section D explores immigration statuses that confer little more than safety from deportation. This section focuses on Deferred Action for Childhood Arrivals (DACA), a form of administrative discretion that does not equate to permanent, or even statutorily sanctioned, immigration status, but that prevents the government from exercising its removal power. The areas of law discussed in this Part are not exhaustive. Indeed, there are other areas in which removability is contested in the immigration laws, such as where the retroactive application of the immigration laws is challenged,[96] or where a prior "conviction" might not exist.[97] But the four dimensions of removability discussed in this Part help illustrate the potentially complicated nature of removability and provide an initial framework for a

immigration and illegal reentry contexts).

95. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("[Deportation of one who claims to be a citizen] may result . . . in loss of both property and life; or of all that makes life worth living.").

96. *See, e.g.*, Kate Aschenbrenner, *Beyond "Because I Said So": Reconciling Civil Retroactivity Analysis in Immigration Cases with a Protective Lenity Principle*, 32 REV. LITIG. 147, 175 (2013); Anjum Gupta, *Detrimental Reliance on Detrimental Reliance: The Courts' Conflicting Standards for the Retroactive Application of New Immigration Laws to Past Acts*, RUTGERS L. REV. COMMENTARIES 1, 1 (2011).

97. *See infra* note 171.

conversation about removability.

A. *Questioning Basic Distinctions in Immigration Law: Claims to U.S. Citizenship*

Claims to U.S. citizenship among individuals apprehended by immigration enforcement authorities constitute an initial dimension of complex removability. At first blush, using U.S. citizenship as a fundamental dividing line in immigration law seems like a natural and straightforward framework. But legal and factual complexity can make the distinction between citizens and noncitizens unclear and unresolved.[98] For starters, citizenship is not visible. It is not necessarily easily verifiable. The United States does not operate a citizenry database to identify whether a person is a citizen (much less a lawful resident), as Justice Sonia Sotomayor confirmed during oral arguments in *Arizona v. United States*.[99] Indeed, the complexity of the law governing citizenship, addressed below, would preclude a national citizenry database from ever being fully reliable. As political theorist Judith Shklar has asserted, "There is no notion more central in politics than citizenship, [yet] none more variable in history, or contested in theory."[100]

The laws governing citizenship in the United States find their origins in the two theoretical justifications for citizenship in Western philosophy: *jus soli* (birthright citizenship) and *jus sanguinis* (inherited citizenship). The United States generally follows a *jus soli* principle, in that pursuant to the

98. For a compelling examination of the implications of an immigration enforcement system in which meaningful numbers of U.S. citizens have been removed, faced charges of removal, and been detained by immigration authorities, see Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, B.C. L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272827.

99. During a colloquy on the reliability and contents of federal databases used to issue immigration detainers instructing state and local law enforcement officials to detain individuals suspected of immigration violations pending federal action, Justice Sotomayor asked, "Well, how does that database tell you that someone is illegal, as opposed to a citizen?" In response, Solicitor General Donald Verrilli explained, "[T]here is no reliable way in the database to verify that you are a citizen, unless you are in the passport database. So you have lots of circumstances in which people who are citizens are going to come up [with] no match." Transcript of Oral Argument at 65:13–67:5, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf.

100. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1 (1991); *see also* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 17 (2006) (describing citizenship as "highly enigmatic" and "highly fragmented, if not incoherent"); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 1 (1997) (arguing that "through most of U.S. history, lawmakers pervasively and unapologetically structured U.S. citizenship in terms of illiberal and undemocratic racial, ethnic, and gender hierarchies, for reasons rooted in basic, enduring imperatives of political life"). To be sure, the academic literature on citizenship's contested nature—including the unequal access of certain groups to full citizenship and the disconnect between citizenship as status and citizenship as political or social identity—is both vast and beyond the scope of this Article.

Fourteenth Amendment, all persons born in the United States are citizens.[101] Many noncitizens also acquire citizenship through naturalization, a relatively straightforward administrative process that usually involves meeting certain residence and good moral character requirements.[102] The naturalization process exemplifies the standard citizenship narrative, in which immigrants "come to this country, take up residence, and eventually obtain full membership rights, represented in the grant of citizenship status."[103]

However, not all U.S. citizens come from the standard narrative. *Jus sanguinis* principles have also influenced certain statutory provisions that govern citizenship and can lead to individuals being U.S. citizens through their parents, sometimes unknowingly. Under the general rules of "acquired" citizenship, individuals who are born abroad to at least one U.S. citizen and who meet other statutory criteria[104] are deemed to automatically acquire citizenship at birth.[105] About 2.5 million U.S. residents appear to have acquired citizenship at birth abroad.[106] A similar principle governs the children of those who naturalize. A foreign-born child can obtain "derived" citizenship if at least one parent naturalizes before the child turns eighteen and meets other statutory criteria.[107] Acquired and derivative citizenship rules confer citizenship by operation of law, even if the individual is unaware of their U.S. citizenship status or lacks documentary proof of it.[108]

U.S. citizenship acts as a complete defense to allegations lodged by ICE because the immigration agency has no jurisdiction over U.S. citizens.[109] In

101. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

102. *See* 8 U.S.C. § 1427 (2012) (describing requirements for naturalization).

103. Pham, *supra* note 41, at 1161 (citing T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 1 (1998)).

104. These statutory criteria have changed over time and reflect gender preferences that the courts have upheld. *See infra* notes 142–50 and accompanying text.

105. *See* 8 U.S.C. § 1401(c)–(h); *see also* David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313, 322–27 (2005) (describing relevant statutory provisions); Lee J. Terán, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583, 607–20 (2012) (explaining acquired citizenship, including changes to acquired citizenship statutes over time).

106. *See B05001: Citizenship Status in the United States: Universe: Total Population in the United States 2010 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B05001&prodType=table (last visited Sept. 15, 2013).

107. *See* 8 U.S.C. § 1433(a).

108. *See, e.g.*, United States v. Smith-Baltiher, 424 F.3d 913, 920–21 (9th Cir. 2005) ("Smith was entitled to U.S. citizenship, along with its rights and privileges, from the moment of birth, not upon the issuance of a certificate of citizenship or any other formal determination by the INS or any other governmental official.").

109. The stated policy of ICE is to "ensure claims to U.S. citizenship receive immediate and

order to establish removability, the government must prove alienage, i.e., that the individual being targeted for removal is not a citizen of the United States.[110] U.S. citizenship should insulate an individual from related immigration sanctions such as detention.[111] Citizenship is particularly critical to individuals who the immigration agency alleges are "criminal aliens."[112] Because acquired and derivative citizenship claims confer citizenship by operation of law (typically, as of the date the child was born or the date that the parent naturalized), citizenship may also exist regardless of whether the individual has a prior criminal conviction that would make an alien removable. Thus, some people who are neither born in the United States nor have directly applied for naturalization nonetheless are citizens, even though the immigration agency may allege that they are "criminal aliens" or not lawfully present. One survey of immigration detainees in a New York City facility found that eight percent had potential, not-yet-litigated claims to citizenship.[113]

The harshness of the immigration and criminal laws make citizenship claims particularly high-stakes matters. The immigration laws bar most noncitizens from eligibility for relief from removal if they have been convicted of an aggravated felony.[114] Illegal reentry charges often follow for individuals who live in the United States but have been legally barred from doing so through removal orders.[115] Citizenship offers one of the few defenses to an illegal reentry charge.[116] Thus, the results of one's claim to U.S. citizenship may carry monumental consequences for the individual.

Despite the seemingly clear legal rules designed to prevent the detention and deportation of U.S. citizens, news reports of this very occurrence have surfaced with troubling frequency over the past decade.[117]

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careful investigation and analysis." *See* Memorandum from John Morton, Assistant Sec'y, Immigration & Customs Enforcement, to Field Office Directors, et al., at 1 (Nov. 19, 2009), *available at* http://www.ice.gov/doclib/detention-reform/pdf/usc_guidance_nov_2009.pdf ("As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a [U.S. citizen].").

110. 8 C.F.R. § 1240.8(c) (2013).

111. *See* Memorandum from John Morton, *supra* note 109, at 1.

112. *See* 8 U.S.C. § 1228 (providing for the expedited removal of criminal aliens); 8 C.F.R. § 238.1 (same).

113. CITY BAR JUSTICE CTR., N.Y.C. BAR ASS'N, NYC KNOW YOUR RIGHTS PROJECT: AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 8, 12 (Nov. 2009), http://www2.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf (noting that, in a sample of 158 detainees, 8% were eligible for relief due to derivative citizenship).

114. *See* 6 GORDON ET AL., *supra* note 73, § 71.05[2][c].

115. *See* 8 U.S.C. § 1326.

116. *See supra* note 89–92 and accompanying text.

117. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 637 (2011) (noting the beginning of media reporting in 2008 on the detention of U.S. citizens by ICE). Furthermore, data obtained from ICE

A study conducted by political scientist Professor Jacqueline Stevens estimates that at least one percent of individuals detained by ICE and facing potential removal had claims to U.S. citizenship that were ultimately affirmed by an IJ.[118] Professor Stevens notes that, while one percent may seem like an insignificant number, over time the result may plausibly be that "since 2003, ICE has incarcerated over 20,000 U.S. citizens, and deported thousands more."[119] These numbers do not include those who do not pursue their claims,[120] or whose claims are colorable but nonetheless unsuccessful. The deportation and detention of U.S. citizens appear to take place notwithstanding statutory[121] and regulatory protections,[122] as well as agency policy,[123] that seem aimed at preventing the erroneous removal of citizens.[124]

Examining both the factual complexity and the legal complexity associated with claims to citizenship can shed light on why arguably excessive numbers of U.S. citizens may have been subject to ICE's enforcement powers in recent years. The factual complexity associated with claims to citizenship has several dimensions. First, as noted earlier, citizenship may not be immediately ascertainable. Most citizens do not carry their birth certificates or passports,[125] and cannot produce them

through the Freedom of Information Act indicates that, over a fifty-month period from fiscal year 2008 through the beginning of fiscal year 2012, 834 U.S. citizens were issued "detainers" by ICE—that is, notices given by ICE to local, state, and federal law enforcement agencies to temporarily detain individuals based on suspected immigration law violations. *See Who Are the Targets of ICE Detainers?*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Feb. 20, 2013), http://www.trac.syr.edu/immigration/reports/310.

118. Stevens's estimate only includes those individuals who pursued their citizenship claims in immigration court, not those with potential claims that were not pursued. Stevens, *supra* note 117, at 629.

119. *Id.* at 630.

120. *Id.* at 629 ("[A]nother .05% of those detained at the border or in an ICE facility who sign removal orders and are physically removed are U.S. citizens.").

121. *See, e.g.*, 8 U.S.C. § 1252(b)(7)(B) (2012) (providing for de novo review of removal orders where a claim of U.S. nationality is made). By contrast, the INA forecloses judicial review of many removal orders, particular where no constitutional or legal question exists. *See generally id.* § 1252(a)(2).

122. *See, e.g.*, 8 C.F.R. § 235.3(b)(5) (2013) (requiring claims to citizenship to be referred to an immigration court for full hearing, even where the case was initially processed for expedited removal order at the border).

123. *See* Memorandum from John Morton, *supra* note 109, at 1.

124. *See also* Terán, *supra* note 105, at 591 ("[I]t is not uncommon that children born abroad to U.S. parents are deported or removed from the United States, sometimes repeatedly, despite the fact that they are U.S. citizens." (footnote omitted)).

125. Although there is empirical data on the number of citizens who do not have ready access to their birth certificates or passports, *see infra* note 127, whether most citizens do not carry their birth certificates or passports—while intuitive—is usually simply asserted by those discussing the issue. *See* Kenia Acevedo, Comment, *Exploitative Framings: How Laws and Human Rights Violations in Mexico Are Being Used to Justify S.B. 1070*, 31 CHICANA/O-LATINA/O L. REV. 75, 85 (2012) (asserting that most U.S. citizens do not carry passports); Serge Egelman & Lorrie Faith

during immigration enforcement actions that take place within the United States, such as during workplace raids or criminal arrests.[126] Some people, including citizens, do not own either type of document.[127] Mental illness and poverty may compound the inability to prove, on the spot, one's citizenship. As noted, some individuals may be citizens without knowing it, due to the rules governing acquired and derivative citizenship. Alas, one study found that over a fifty-month period from 2008 through 2012, 834 persons later found to be U.S. citizens had been temporarily detained by local law enforcement authorities acting at the direction of ICE.[128]

Examples have surfaced in which individuals have presented, or potentially could have presented, valid proof of citizenship in the form of birth certificates, passports, and affidavits, and yet still were unable to persuade the agency of the merits of their claims.[129] One of the more well-publicized cases involves Mark Lyttle, who was a U.S. citizen by birth with no ties to Mexico, did not speak Spanish, and yet was ordered removed three times by agency officials.[130] According to a complaint filed by Lyttle for his wrongful deportation, Lyttle had ample evidence of his U.S. citizenship–including a social security number, his mother's name, sworn statements, and criminal background checks–and was still processed by immigration enforcement authorities and ultimately ordered to be

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Cranor, *The Real ID Act: Fixing Identity Documents with Duct Tape*, 2 I/S: J.L. & POL'Y INFO. SOC'Y 149, 149 (2006) (same); Renata Robertson, Note, *The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens*, 15 SCHOLAR 567, 572 (citing Andrew Becker, *Observe and Deport*, MOTHER JONES (Apr. 23, 2009, 8:35 AM), http://www.motherjones.com/politics/2009/04/observe-and-deport (asserting that most U.S. citizens do not carry passports or birth certificates)); *Policy Brief on Proof of Citizenship*, BRENNAN CENTER FOR JUST. (Sept. 12, 2006), http://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Citizenship.pdf (noting that "[m]any people believe that all Americans have readily available documents that prove their citizenship" and asserting that "Americans who have [birth certificates, naturalization certificates, or passports] do not usually carry it around with them").

126. *See generally* Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1149–68 (2008) (describing expanded interior enforcement efforts in immigration).

127. *See Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CENTER FOR JUST. 2 (Nov. 2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (estimating that as many as thirteen million U.S. citizens may not have ready access to documentary proof of citizenship).

128. *See Who Are the Targets of ICE Detainers?*, *supra* note 117.

129. *See* Stevens, *supra* note 117, at 654–82 (discussing examples of U.S. citizens deported and detained).

130. *See* Stevens, *supra* note 117, at 674–76 (describing the Mark Lyttle case); *see also* William Finnegan, *The Deportation Machine*, NEW YORKER, Apr. 29, 2013, at 24, *available at* http://www.newyorker.com/reporting/2013/04/29/130429fa_fact_finnegan (subscription required) (describing the Mark Lyttle case).

removed.[131]

Second, in these cases, removability can depend as much on the legal strength of an individual's claims as on how the immigration agency responds to the citizenship claim raised by individuals in immigration detention. A strong pro-enforcement culture at ICE seems to be obscuring citizenship claims, including even otherwise legally clear claims to citizenship. The reality is that for someone in immigration detention, making a citizenship claim can be a high-risk proposition. Detainees with potential claims to citizenship have been threatened by ICE officials with the possibility of criminal prosecution should they insist that they are U.S. citizens.[132] The risk is compounded by the invisibility of citizenship. As Professor Stevens notes, "[I]ndividuals in ICE custody who are U.S. citizens but have not had their claims legally recognized at first inspection are impossible to distinguish from noncitizens making false claims to U.S. citizenship."[133] That at least some detainees with citizenship claims are threatened with accusations of fraud serves as one data point to suggest that some number of frontline agency officials are simply not taking claims to citizenship seriously.[134] Thus, the governmental bureaucracy has been unable to adequately recognize citizenship claims and incorporate them into the current enforcement framework.

Third, the practical barriers that accompany physical detention by ICE present another dimension of the factual complexity associated with claims to citizenship. Detained individuals cannot easily retrieve proof of citizenship.[135] What might have been relatively straightforward efforts to establish citizenship have been thwarted by the fact that immigration detainees have no right to government-appointed counsel, are often detained far away from family and friends, and lack access to legal resources.[136] In cases involving acquired or derivative claims to citizenship, sometimes critical documentary evidence is needed to corroborate factual circumstances from the past, such as proof of adoption

131. Complaint at 10–11, 14, Lyttle v. United States, 867 F. Supp. 2d 1256 (M.D. Ga. 2012) (No. 4:11-cv-142).

132. Criminal liability for asserting that one is a citizen could come from the illegal reentry statute at 8 U.S.C. § 1326 (2012) (in civil removal cases that have not yet entered the criminal justice system) and the federal crime of false personation of a U.S. citizen at 18 U.S.C. § 911. *See* Stevens, *supra* note 117, at 677–82 (discussing the example of Mario Guerrero, who was born in Mexico but acquired U.S. citizenship at birth through his U.S. citizen father, and was criminally prosecuted on two separate occasions for immigration-related crimes, one of which included falsely impersonating a U.S. citizen).

133. Stevens, *supra* note 117, at 628–29.

134. *See id.* at 654–82 (discussing the response of DHS agents to claims of U.S. citizenship).

135. *See* IMMIGRANT LEGAL RES. CTR., NATURALIZATION AND U.S. CITIZENSHIP: THE ESSENTIAL LEGAL GUIDE § 12.5 (11th ed. 2011) (discussing documentation required for certain acquired citizenship claims and noting that obtaining documentary proof, such as proof of parents' U.S. citizenship status or proof of past residence, may be extremely difficult).

136. *See* Kalhan, *supra* note 78, at 46–47; Stevens, *supra* note 117, at 680–81.

from a distant year. In such cases, obtaining the evidence requires navigating multiple governmental bureaucracies. Thus, the more complicated claims to citizenship remain undeveloped due to the practical difficulties of obtaining specific evidence.

Factual challenges to obtaining proof of citizenship have arisen on a broader scale as well. For many years prior to 2009, the Department of State had an agency-wide practice of denying U.S. passports to individuals born along the Texas–Mexico border by midwives, due to concern that since the 1960s, midwives had forged the birth certificates of certain Mexican individuals in order to facilitate immigration fraud.[137] The State Department's routine denial of passports ultimately ended after a lawsuit in the late 2000s alleged that the practice amounted to ethnic and national origin discrimination.[138] But the litigation serves as yet another example of the potentially unsettled nature of citizenship as well as the government's role in either facilitating or foreclosing these claims.

Beyond factual complexity, the substantive laws governing citizenship are sufficiently complicated that it sometimes takes federal court intervention to adjudicate citizenship. Determining which statutory criteria apply as a threshold matter may require significant research, because the law at the time of the child's birth determines the relevant criteria and the statutes have changed frequently over time.[139] Questions over the meaning of those statutory criteria have also become subject to debate amongst appellate courts. Certain versions of the federal statutes require an individual claiming acquired or derivative citizenship to prove the legal nature of their relationship to the U.S. citizen parent, for instance by showing that the citizen parent "legitimated" a child born out of wedlock or that the citizen parent had "custody" over the child.[140] These claims often rest on state law treatment of legitimation or paternity.[141] Courts have

137. *See* Press Release, American Civil Liberties Union, State Department Agrees to Fair Issuance of Passports to Mexican Americans (June 26, 2009), http://www.aclu.org/racial-justice/state-department-agrees-fair-issuance-passports-mexican-americans.

138. *See* Complaint at 3, Castelano v. Rice, No. 7:08-cv-00057 (S.D. Tex. Sept. 16, 2008). The lawsuit was settled in 2009 with the State Department agreeing to implement new procedures for the processing of passport applications by affected class members. *See* Press Release, American Civil Liberties Union, *supra* note 137.

139. *See* Sepulveda, 14 I. & N. Dec. 616, 617 (B.I.A. 1974); *see also* Keller, *supra* note 87, at 116 ("Determining whether someone has a potential derivative-citizenship defense may involve significant legal research into the changing derivative citizenship requirements and factual research into the defendant's history.").

140. *See, e.g.*, Anderson v. Holder, 673 F.3d 1089, 1092 (9th Cir. 2012) (determining that the citizenship of an individual charged with removal would be determined if his U.S. citizen father's "paternity . . . [was] established while [he was] under the age of twenty-one years by legitimation," as required by the 1952 version of immigration statutes (alterations in original) (quoting 8 U.S.C. § 1409(a) (1952)).

141. *See id.* (using state law to decide legitimation). When the realities of transnational migration are taken into account—in which records may be unavailable or border crossings

thus navigated the intersection of family and immigration law in response to claims raised by individuals affected at the crossroads of criminal and immigration law.

Other citizenship cases have reached the federal courts, including the Supreme Court, through equal protection-based challenges to an explicit gender preference in the acquired citizenship statute, in which the provision governing individuals with only one U.S. citizen parent favors the children of U.S. citizen mothers over U.S. citizen fathers.[142] Although the gender dimension of the cases has attracted the attention of scholars,[143] the role of these cases in the growing landscape of removal defense and the convergence of criminal and immigration laws has gone generally unnoticed.[144] Take, for instance, the Supreme Court's 2001 decision in *Nguyen v. INS*.[145] The opinion dealt primarily with the legitimacy of the gender classifications in the immigration laws. Commentators have critiqued the gender equality principles set forth in *Nguyen*.[146] But an examination of the facts leading Tuan Nguyen to pursue his citizenship claim makes clear that *Nguyen* was very much a removal defense case about whom the government had jurisdiction to deport. Nguyen lived in the United States since age six.[147] Despite his strong ties to the country, he was

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frequent—then demonstrating that an individual meets statutory rules involving physical presence or parental custody arrangements may become factually complex as well.

142. *See* Nguyen v. INS, 533 U.S. 53, 56–57, 73 (2001); Miller v. Albright, 523 U.S. 420, 424 (1998); United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2012) (per curiam).

143. *See, e.g.*, M. Isabel Medina, *Real Differences and Stereotypes—Two Visions of Gender, Citizenship, and International Law*, 7 N.Y. CITY L. REV. 315, 316–19 (2004) (critiquing the cases); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222, 223–24 (2003) (same).

144. A growing literature on the convergence of the immigration and criminal laws has emerged over the past decade. *See, e.g.*, Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 651–55 (2004) (discussing criminalization of noncitizens after September 11th and through proposals to involve local law enforcement in immigration enforcement); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (asserting that immigration law has adopted criminal law's punitive aspects while rejecting criminal law's procedural protections); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (arguing that the Supreme Court has rejected, and may further reject, traditional characterizations of deportation as purely civil in nature); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (exploring the convergence of criminal and immigration laws, as well as the implications of convergence for political theories of national membership).

145. 533 U.S. 53 (2001).

146. *See* Medina, *supra* note 143, at 333–44, 344 (discussing gender stereotypes reflected in *Nguyen* and observing that "[t]he *Nguyen* case embraces a view of gender and citizenship at odds with the Court's own legal norms of gender equality"); Weinrib, *supra* note 143, at 226 (asserting that *Nguyen* "is, fundamentally, a case about sex").

147. *Nguyen*, 533 U.S. at 57.

rendered ineligible for discretionary relief in the aftermath of the 1996 immigration laws,[148] which made his claim to citizenship essential if he wished to remain in the United States. Ruben Flores-Villar's situation was similar to Nguyen's. Flores-Villar's equal protection-based challenge to the citizenship provision setting forth different requirements for the children of U.S. citizen mothers versus fathers was rejected by the Supreme Court in 2011.[149] The case had attracted the amicus support of various organizations and individuals that emphasized that the survival of the citizenship statutes had been premised on outdated gender stereotypes.[150] But Flores-Villar, like Nguyen, was an alleged "criminal alien."[151] He pursued his citizenship claim as a defense to criminal prosecution for illegal reentry.[152] Acquired and derivative citizenship claims have thus constituted sites in which racialized and gendered hierarchies have been negotiated.[153] But they have also served as mechanisms through which individuals have gone from one end of the "citizen-alien" spectrum to the other: from "criminal aliens" subject to criminal sanction to U.S. citizens immune from civil and criminal immigration-related enforcement authority.

This is not to suggest that citizenship is always, or even mostly, plagued by factual and legal uncertainty. Admittedly, citizenship is clear for many individuals. But where the claims are not clear—and where the human stakes are arguably highest—the level of factual and legal complexity runs deep and has meaningful consequences that go to the heart of the government's immigration enforcement power. Citizenship claims thus illustrate how removability matters, how it is complicated, and how

148. Nguyen had come to the U.S. at age six as a lawful permanent resident, and was raised in the United States by his U.S. citizen father. *Id.* After sixteen years of living in the United States, he pled guilty to two criminal charges that the INS characterized as both aggravated felonies and crimes involving moral turpitude. *Id.* By the time of his appeal to the BIA, he had lived in the United States for twenty-two years. *Id.*

149. Albeit, the Court was equally divided due to Justice Elena Kagan recusing herself. Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (per curiam), *aff'g by an equally divided court*, 536 F.3d 990 (9th Cir. 2008).

150. *See, e.g.*, Brief of Amici Curiae Equality Now et al. in Support of Petitioner at 1–2, *Flores-Villar*, 131 S. Ct. 2312 (No. 09-5801), 2010 WL 2602011, at *1–2; Brief of the National Women's Law Center et al. as Amici Curiae Supporting Petitioner at 2, *Flores-Villar*, 131 S. Ct. 2312 (No. 09-5801), 2010 WL 2602010, at *2; Brief Amici Curiae of Professors of History, Political Science, and Law in Support of Petitioner at 1–3, *Flores-Villar*, 131 S. Ct. 2312 (No. 09-5801), 2010 WL 2602009. For further background on the historians' amicus brief in *Flores-Villar*, see Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. REV. 1485 (2011).

151. *See* United States v. Flores-Villar, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312.

152. *Id.*

153. As noted, the Supreme Court issued an equally divided opinion that affirmed, without opinion, the Ninth Circuit's ruling that had rejected Flores-Villar's equal protection arguments. *See Flores-Villar*, 131 S. Ct. 2312; *Flores-Villar*, 536 F.3d 990.

outcomes in citizenship claims may depend just as much on the government's actions—in responding to individual claims, in imposing difficulties to obtaining proof, or in construing the law—as on the merits of the individual's claim. As the next sections show, citizenship claims represent only one dimension of complex removability.

B. *The Categorical Approach and the Immigration Consequences of Crime*

In some cases, removability inquiries focus on preventing the loss of status caused by post-entry conduct, as opposed to proving that one has status (as in the citizenship context). The legal complexity surrounding the immigration consequences of crime serves as a second lens for examining complex removability. The intersection of criminal and immigration laws[154] has grown with such force in recent years that in 2010, in *Padilla v. Kentucky*,[155] the Supreme Court recognized that deportation caused by criminal convictions is "intimately related to the criminal process"[156] and held that criminal defense attorneys have an ethical obligation to correctly advise noncitizen defendants of the immigration consequences of a guilty plea.[157] In *Padilla*, Justice Samuel Alito concurred in the judgment that criminal defense counsel who affirmatively mislead their clients have breached an ethical duty, but criticized the majority's holding that criminal lawyers also have an obligation to *correctly* advise their clients on the relationship between deportation and a guilty plea.[158] Notably for purposes of this Article, in criticizing the majority, Justice Alito asserted that identifying the immigration consequences of crime "is often quite complex" and "not an easy task."[159] Indeed, determining whether a given criminal conviction triggers an immigration sanction can require extensive analysis of criminal and immigration statutes, prior case law, and the criminal record of conviction. The assessment cannot be made quickly, or with obvious answers.

The immigration laws have long provided for adverse immigration consequences based on the existence of a past criminal conviction. However, the INA (like other federal immigration laws before it) does not contain a list of every criminal statute that leads to immigration

154. *See supra* note 144.

155. 130 S. Ct. 1473 (2010).

156. *Id.* at 1481.

157. *Id.* at 1486.

158. *Id.* at 1487 (Alito, J., concurring in the judgment).

159. *Id.* at 1488; *see also* Arizona v. United States, 132 S. Ct. 2492, 2506 (2012) (citing Justice Alito's concurrence in *Padilla* regarding the complexity of removability determinations). Although this Article uses Justice Alito's concurrence to discuss the categorical approach, the view of complex removability in this Article does not necessarily endorse Justice Alito's call to limit the holding of *Padilla* to cases of affirmative misadvice by criminal defense counsel. *See also supra* note 31.

penalties.[160] Instead, the grounds of inadmissibility or deportability describe the crimes in categorical terms by employing statutory terms of art such as "crime[s] involving moral turpitude"[161] and "crime[s] of violence,"[162] or by referencing common law crimes such as "theft,"[163] "burglary,"[164] and others.[165] Without a statute specifying precisely which crimes lead to removability, the administrative agencies and courts must have some system for determining the immigration consequences of crime. For over a century, adjudicators have used the categorical approach to assess whether a particular conviction triggers removability and other immigration sanctions.[166]

As a threshold matter, the conviction must rise to the level of a removable offense.[167] For noncitizens facing deportation, the government has the burden of proving that the noncitizen is removable—in other words, that the criminal conviction falls within a particular ground of deportability.[168] For noncitizens facing denial of admission on criminal-based grounds, the noncitizens faces the burden of showing that the conviction does not constitute a basis for inadmissibility,[169] although the arguments presented in the deportability and inadmissibility contexts may be similar.[170] Thus, if it cannot be established that the noncitizen's conviction falls within the relevant grounds of inadmissibility or deportability, then removability comes into question.[171] In some cases, the

160. In addition to permanent deportation, immigration consequences of crime may include mandatory detention during the pendency of removal proceedings, 8 U.S.C. § 1226(c) (2012), bars on discretionary relief from deportation, *see, e.g.*, *id.* § 1229b(b)(1), and bars to eligibility for immigration benefits such as acquiring lawful status, *see, e.g.*, *id.* § 1255(a) (stating that adjustment of status is only available if the "alien . . . is admissible," which the alien may not be if he or she has committed a crime).

161. *Id.* § 1182(a)(2)(A)(i) (referencing but not defining "crime[s] involving moral turpitude").

162. *Id.* § 1101(a)(43)(F) (cross-referencing 18 U.S.C. § 16 (2012) for the definition of "crime of violence").

163. *Id.* § 1101(a)(43)(G).

164. *Id.*

165. *E.g.*, *id.* § 1101(a)(43) (describing types of aggravated felonies); *id.* § 1182(a)(2)(C) (defining as inadmissible aliens who commit controlled substance offenses).

166. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1673–74 (2011). For a discussion on the historical use of the categorical approach in immigration cases, see *id.* at 1688–1702.

167. *See* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2).

168. *Id.* § 1229a(c)(3)(A) (placing burden on government to prove deportability by "clear and convincing evidence").

169. *See id.* § 1229a(c)(2)(A).

170. *See, e.g.*, Fajardo v. U.S. Att'y Gen., 659 F.3d 1303 (11th Cir. 2011) (hearing petition of a noncitizen seeking termination of removal proceedings based on the argument that convictions did not trigger grounds of inadmissibility as crimes involving moral turpitude under categorical or modified categorical approaches).

171. *See* 8 U.S.C. § 1229a(e)(2) (defining "removable" as either inadmissible or deportable). The noncitizen can seek other methods for contesting removability based on prior

availability of discretionary relief is irrelevant because the adjudicator must terminate the removal proceedings, absent any additional grounds of removability.[172] In other cases, the type of removability established may definitively bar the individual from applying for discretionary relief.[173]

Like an intricate matching exercise, the essence of the categorical approach requires adjudicators to analyze the immigration consequences of a criminal conviction by scrutinizing at least two sets of statutes: (1) the federal immigration provision describing the removable offense, and (2) the particular criminal statute under which the noncitizen was convicted.[174] Various rules govern this matching exercise.[175] Significantly, the categorical approach—as historically understood—avoids inquiry into the factual circumstances behind the conviction.[176] To the extent that the categorical approach allows factual evidence to affect the determination, extra-statutory evidence is strictly limited to a specific list of documents from the criminal case known as the "record of conviction."[177] The

convictions other than invoking categorical approach arguments. For instance, the noncitizen might argue that the offense does not meet the statutory definition of a "conviction" under the INA, although doing so can present formidable challenges because Congress broadened the definition in 1996. Saleh v. Gonzales, 495 F.3d 17, 23 (2d Cir. 2007) (discussing the "consistent broadening of the meaning of 'conviction' in the INA," particularly the expansion by Congress in 1996); *see also* 8 U.S.C. § 1101(a)(48)(A) (defining a "conviction" for immigration purposes). Another possibility would involve seeking relief through state law, such as by a post-conviction vacation or even a gubernatorial pardon. These areas of law, like the others discussed in this Article, involve a significant degree of complexity. *See* Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 384–85 (2012) (noting limitations on the use of pardons and other "back-end processes" to preclude immigration consequences of convictions); Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665 (2008) (critiquing the BIA rule that only permits immigration relief where plea was vacated to correct procedural or substantive deficiencies in criminal process).

172. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580 (2010) (holding that the alien was not removable and thus not reaching the issue of discretionary relief); *see also supra* note 11. In many cases, a successful argument under the categorical approach is necessary in order to maintain eligibility for discretionary relief. *See, e.g.*, 8 U.S.C. § 1229b(a) (making an aggravated felony a disqualifying factor for cancellation of removal); *Carachuri-Rosendo*, 130 S. Ct. at 2580 (holding that the alien's crime was not an aggravated felony and thus the alien remained eligible for discretionary relief).

173. *Compare* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."), *with id.* § 1229b(a). Some courts have also held that respondents seeking discretionary relief have the burden of proving that their convictions do not constitute aggravated felonies or other crimes that would disqualify them for relief. *See, e.g.*, Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (en banc).

174. *See* Koh, *supra* note 10, at 266–67 (explaining the basic rules of the categorical approach).

175. *Id.*

176. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1688–97 (2011) (discussing the historical prohibition on considering extra-record factual evidence).

177. *Cf.* Shepard v. United States, 544 U.S. 13, 26 (2005) (defining the "record of conviction"

categorical approach is thus comprised of a series of rules, or steps, that adjudicators must follow in order to reach the substantive decision as to whether a crime leads to a range of immigration consequences, including removability.[178] While the categorical approach can cut both ways for the noncitizen—since it shields inquiry into both good and bad facts—I have argued elsewhere that the categorical approach generally favors noncitizens and should be preserved in its most robust form.[179]

Cases involving the categorical approach have grown extraordinarily complex, both in identifying the rules of the categorical approach and in applying them. Indeed, an en banc panel of the Ninth Circuit Court of Appeals—which has the second largest volume of immigration cases in the country[180]— suggested in 2011 that "over the past decade, perhaps no other area of the law has demanded more of our resources."[181] And in the midst of increasing litigation, the categorical approach has become controversial and arguably confusing.[182] Inter- and intra-circuit disagreement and inconsistency over the categorical approach are now common,[183] as are sharp differences between the federal judiciary and the administrative immigration agencies over the categorical approach's application.[184] Some courts have criticized the categorical approach as counterfactual and

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under the categorical approach of the Armed Career Criminal Act of 1984 as "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information").

178. *See* Koh, *supra* note 10, at 278–95 (dividing the categorical approach into four main stages of analysis).

179. *Id.* at 279, 294.

180. Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics: March 31, 2012*, U.S. CTS. 34 (Mar. 31, 2012), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/B07Mar12.pdf (noting that of the 1,716 immigration offense cases heard by the U.S. courts of appeals, the Ninth Circuit had 447 cases, behind the Fifth Circuit's 880 and ahead of the Eleventh Circuit's 106).

181. United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc) (citing numerous en banc cases in the Ninth Circuit), *abrogated on other grounds by* Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (en banc), *and* Descamps v. United States, 133 S. Ct. 2276 (2013); *see also* Admin. Office of the U.S. Courts, *supra* note 180, at 30–34 (noting that of the 8,082 cases appealed to the Ninth Circuit, 447, or over 25% of criminal cases, were for immigration offenses).

182. *See, e.g.*, Nijhawan v. Holder, 129 S. Ct. 2294, 2299 (2009) (observing that "the categorical method is not always easy to apply"); Singh v. Ashcroft, 383 F.3d 144, 148 (3d Cir. 2004) (characterizing its categorical approach jurisprudence as "not a seamless web").

183. *See, e.g.*, *Singh*, 383 F.3d at 148; *Aguila-Montes de Oca*, 655 F.3d at 923–24 (intra-circuit); *id.* at 931 (inter-circuit).

184. *See* Silva-Trevino, 24 I. & N. Dec. 687, 693, 695 (Op. Att'y Gen. 2008) ("Although to date the Department generally has deferred to the relevant circuit court in deciding which approach to use in a given case, providing a consistent, authoritative, nationwide method for interpreting and applying ambiguous provisions of the immigration laws . . . is one of the Department's key duties.").

counterintuitive,[185] because it forbids adjudicators from weighing factual allegations. One scholar compared the categorical approach to property law's rule against perpetuities in terms of its complexity, and noted that "[e]ven lawyers who regularly practice [in the area] can struggle to understand the doctrine and its occasionally perplexing results."[186] Similarly, federal appeals courts' treatment of aspects of the categorical approach has been described as "a bit of a jumble," "ambiguous," "conflicting," and "reflecting . . . stop-and-start analysis."[187] From the immigration enforcement agency's perspective, the categorical approach at times makes it more difficult to establish removability, and does so in a manner that seems to rest on the wording of statutes or the contents of criminal court documents.[188]

Two broader factors seem to have increased litigation related to the categorical approach in the federal courts of appeal. First, for noncitizens facing deportation due to criminal conviction, pursuing arguments under the categorical approach is often the only viable legal strategy—either to contest removability altogether or to qualify for discretionary relief.[189] Due to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[190] convictions considered "aggravated felonies" completely bar even the possibility of most forms of discretionary relief.[191] Second, those same laws drastically expand the kinds of crimes that constitute removable offenses.[192] It has thus become extremely common for ICE to allege that relatively minor offenses, like shoplifting, nonetheless carry the draconian result of permanent banishment from the country with no opportunity for discretionary relief.[193] A number of criminal sentencing

185. *E.g.*, Johnson v. United States, 559 U.S. 133, 151 (2010) (Alito, J., dissenting) (criticizing possible "untoward consequences" of the categorical approach under the Armed Career Criminal Act); Tijani v. Holder, 628 F.3d 1071, 1075 (9th Cir. 2010) (acknowledging the categorical approach's "[c]ounterfactual and counterintuitive" nature); Latu v. Mukasey, 547 F.3d 1070, 1076 (9th Cir. 2008) (O'Scannlain, J., dissenting) (critiquing the majority's "counter-intuitive holding" that a hit-and-run statute does not involve a crime involving moral turpitude); *see also* Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1301 (2011) ("Some courts have questioned the [categorical] approach as unduly formulaic, as [it] requires the immigration judge to put on blinders as to what 'really happened.'" (citing Montero-Ubri v. INS, 229 F.3d 319, 321 (1st Cir. 2000) and United States v. Miller, 478 F.3d 48, 52 (1st Cir. 2007))).

186. Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 625 (2011).

187. *Aguila-Montes de Oca*, 655 F.3d at 931.

188. *Cf.* Koh, *supra* note 10, at 261–62.

189. *See id.* at 269–70.

190. Pub. L. No. 104-208, 110 Stat. 3009-546.

191. *See* 6 GORDON ET AL., *supra* note 73, § 71.05(2)(c).

192. *See* Das, *supra* note 166, at 1672.

193. *See, e.g.*, Viveiros v. Holder, 692 F.3d 1, 2 (1st Cir. 2012) (noting that DHS had asserted that shoplifting was a crime of moral turpitude).

statutes also give rise to the categorical approach, and the categorical approach in the sentencing context has likewise been the subject of frequent and intense litigation.[194] The prominence of the categorical approach at the intersection of the criminal and immigration laws cannot be overstated.

Over the past decade, as the courts have responded to the 1996 immigration laws, they have slowly (statute-by-statute) redefined the precise reach of those laws.[195] The Supreme Court has clarified, for instance, that one-time drug possession,[196] a second drug possession (most of the time),[197] and certain D.U.I.[198] convictions do not constitute aggravated felonies. Since 1996, the federal appeals courts have analyzed countless state criminal statutes to identify their immigration consequences.[199] Much of the complexity associated with the categorical approach arises from the methodology itself, which involves a detailed, sometimes painstaking examination of immigration law as well as state case law.[200]

An additional layer of complexity arises because the categorical approach itself is undergoing fluctuation and change, both in the core features and in the finer details of the approach's application. In the past five years in particular, some courts and administrative adjudicators have taken significant steps to dilute the categorical approach's core features, at times in radical ways.[201] For instance, in 2008 and 2009, former Attorney General Michael Mukasey and the Supreme Court issued decisions in *Silva-Trevino*[202] and *Nijhawan v. Holder*,[203] respectively, that suggested that one of the fundamental features of the categorical approach—the prohibition on relitigating the facts of the criminal trial in later criminal

194. *See* Keller, *supra* note 186, at 625; Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1146–48 (2010).

195. *See* Das, *supra* note 166, at 1673 ("A New York drug conviction may or may not be an 'illicit trafficking' aggravated felony. A California assault conviction may or may not be a 'crime involving moral turpitude.'" (footnote omitted)).

196. Lopez v. Gonzales, 549 U.S. 47, 50–52 (2006).

197. Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580 (2010).

198. Leocal v. Ashcroft 543 U.S. 1, 3–4 (2004).

199. *See* United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) ("In the twenty years since *Taylor*, we have struggled to understand the contours of the Supreme Court's [categorical and modified categorical] framework[s]. Indeed, over the past decade, perhaps no other area of the law has demanded more of our resources."), *abrogated on other grounds by* Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (en banc), *and* Descamps v. United States, 133 S. Ct. 2276 (2013).

200. *See* Koh, *supra* note 10, at 278–79.

201. *Id.* at 278–94.

202. 24 I. & N. Dec. 687 (Op. Att'y Gen. 2008).

203. 557 U.S. 29 (2009).

proceedings—need not apply in all cases.[204] As immigration law professor Alina Das has shown, *Silva-Trevino* and *Nijhawan* contravened nearly one hundred years of immigration precedent.[205] This trend, while rejected by several courts of appeal,[206] nonetheless shows that government authorities have set forth substantially different views of the categorical approach.

In 2013, the Supreme Court issued a pair of decisions, *Moncrieffe v. Holder*[207] and *Descamps v. United States*,[208] which appear to have reinvigorated the categorical approach. While the Court's holding in *Moncrieffe* clarified that possession of marijuana with intent to distribute was not an aggravated felony for immigration purposes,[209] the Court repeatedly emphasized that the categorical approach should focus on statutory analysis over factual investigation.[210] *Moncrieffe* gives rise to strong arguments that further weaken the holding of *Silva-Trevino*.[211] Similarly, in *Descamps*, a criminal sentencing case that raised categorical approach questions salient to immigration adjudications, the Court loudly affirmed a robust version of the categorical approach, in which consultation of the record of conviction through the modified categorical approach may occur only in a limited set of circumstances.[212] Through their strong endorsement of the categorical approach, *Moncrieffe* and

204. *Id.* at 34–36 (holding that whether the definition of an aggravated felony included fraud in which the loss was over $10,000 called for a "circumstance--specific" analysis in which adjudicators can look beyond the record); *Silva-Trevino*, 24 I. & N. Dec. at 689–90 (announcing that IJs evaluating crimes involving moral turpitude should be permitted to proceed to an extra step during the categorical approach that would permit the consideration of extra-record evidence).

205. Das, *supra* note 166, at 1719–25.

206. Olivas-Motta v. Holder, 716 F.3d 1199, 1200 (9th Cir. 2013) (rejecting deference to *Silva-Trevino*); Prudencio v. Holder, 669 F.3d 472, 476 (4th Cir. 2012) (same); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) (holding that "Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude"); Jean-Louis v. Att'y Gen. 582 F.3d 462, 473 (3d Cir. 2009) (characterizing *Silva-Trevino* as "bottomed on an impermissible reading of the statute which . . . speaks with the requisite clarity"). *Contra* Bobadilla v. Holder, 679 F.3d 1052, 1057 (8th Cir. 2012) (holding *Silva-Trevino*'s methodology "must be given deference by a reviewing court"); *see* Ali v. Mukasey, 521 F.3d 737, 742 (7th Cir. 2008) (deferring to the BIA's decision that immigration judges "may go beyond the record of conviction to characterize or classify an offense").

207. 133 S. Ct. 1678 (2013).

208. 133 S. Ct. 2276 (2013).

209. *Moncrieffe*, 133 S. Ct. at 1693–94.

210. *See, e.g.*, *id.* at 1684–85, 1690–94 (finding no "case-specific factfinding . . . apparent in the INA" and rejecting "*post hoc* investigation into the facts of predicate offenses").

211. *See id.*

212. *Descamps*, 133 S. Ct. at 2285 ("[T]he modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute."); *id.* at 2293 (holding that "[t]he modified [categorical] approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one," but may be used "only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction").

Descamps appear to have pushed back the BIA's attempt to invite immigration adjudicators to examine facts and find removability with greater ease, often through creating more avenues for fact-finding.[213] The Court may also have introduced a much-needed antidote to some of the complexity that has arisen in the categorical approach.

The categorical approach nonetheless remains complicated at various levels. As with other dimensions of complex removability, this Article does not mean to suggest that deep legal complexity accompanies every single case involving a noncitizen facing immigration sanctions due to prior convictions. On balance though, the legal terrain associated with determining the immigration consequences of criminal activity is contested and dynamic. It suggests that removability might often not be a foregone conclusion for lawful residents in removal proceedings because of criminal convictions.

C. *The Constitutional Boundaries of the Government's Removal Powers: Suppressing Evidence of Alienage*

Citizenship and the categorical approach are not the only complex areas of removability. Removability can become complex even when an individual does not have a claim to lawful status under the INA, and does not expect to acquire lawful status in the near future. Suppression motions in the immigration context, in which individuals facing removal allege that evidence of their alienage was obtained unlawfully and request that IJs suppress that evidence,[214] present a third dimension of complex removability.

In recent years, the expansion of immigration enforcement has prompted noncitizens and their attorneys to pursue motions to suppress evidence of alienage in immigration court.[215] In the mid-2000s, the Bush Administration aggressively deployed immigration "raids" to apprehend removable individuals.[216] Many were the result of ICE's Fugitive Operations Team, a federal initiative launched in 2003 to apprehend individuals with prior removal orders.[217] Other raids took place at workplaces where federal officials suspected that employers were hiring

213. *See, e.g.*, Lanferman, 25 I. & N. Dec. 721, 727–29 (B.I.A. 2012) (adopting an approach in which the documents of an alien's record of conviction should always be considered).

214. *See Motions to Suppress in Removal Proceedings*, AM. IMMIGR. COUNCIL, http://www.americanimmigrationcouncil.org/clearinghouse/litigation-issue-pages/enforcement-motions-suppress (last visited Nov. 28, 2013).

215. *See* BESS CHIU ET AL., CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 12 (2009), *available at* http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf.

216. *Id.* at 1.

217. *Id.* at 5; Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 513–18 (2011) (describing Fugitive Operations Teams and home raids).

unauthorized workers.[218] Advocates reported that ICE officials, often in collaboration with local police, targeted workplaces, neighborhoods, and homes to question individuals suspected of immigration violations.[219] Raids often were unannounced, involved the use of force, separated families, and instilled fear in immigrant communities.[220] Many immigration advocates intuitively sensed that ICE's actions exceeded the limits of appropriate government action. Moreover, many of the noncitizens identified through immigration raids and other enforcement actions had few legal options to pursue discretionary relief from deportation. Reports also surfaced of individuals being pressured to agree to their own removal, or being criminally prosecuted in mass hearings involving truncated procedures.[221]

Motions to suppress emerged in the late 2000s as a strategic response by immigration advocates to the government's use of raids against noncitizens.[222] Motions to suppress generally seek to exclude from a removal hearing evidence of the individual's alienage.[223] As with claims to citizenship, without evidence of alienage, removal proceedings must be terminated.[224] Unlike claims to citizenship, a successful motion to suppress does not confer any legal status on a noncitizen.[225] Instead, a motion to suppress operates purely as a defensive strategy by attacking removability, while leaving the individual's immigration status unchanged.[226] Immigration lawyers in recent years have filed an increasing number of motions to suppress in immigration court,[227] and have prevailed in a small, but significant, number of cases.[228]

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218. *See Worksite Enforcement Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 30, 2009), http://web.archive.org/web/20100706021916/http://www.ice.gov/pi/news/factsheets/worksite.htm (archived) (showing an increase in the total number of worksite enforcement arrests from 1,292 in 2005 to 6,287 in 2008).

219. *See* CHIU ET AL., *supra* note 215, at 3; Katherine Evans, *The Ice Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 572–73 (2009) (describing tactics used during home-based immigration raids).

220. *See* CHIU ET AL., *supra* note 215, at 3.

221. *See* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651, 665–87 (2009).

222. *See* CHIU ET AL., *supra* note 215, at 12.

223. *See Motions to Suppress in Removal Proceedings*, *supra* note 214.

224. *Compare* EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 11, at B1, *with* 8 C.F.R. § 1240.8(c) (2013), *and* 8 U.S.C. § 1229a(c)(3)(A) (2012).

225. *See* CHIU ET AL., *supra* note 215, at 24–25.

226. *See id.*

227. *See id.* at 14 ("Since 2006, there has been a nine-fold increase in the filing of suppression motions, a twenty-two-fold increase in suppression motions related to home raids, and a five-fold increase in the grant rate of suppression motions."); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1627 (2010) (noting that suppression motions are "far more numerous" now than when *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), was decided).

228. *See Motions to Suppress in Removal Proceedings*, *supra* note 214 (listing immigration

Several evolving sources of law may potentially support an effort to suppress evidence of alienage. The Fourth Amendment serves as the most obvious legal authority for a suppression motion, given that it has long been invoked in the criminal context to exclude evidence obtained through an unlawful search or seizure.[229] In 1984, however, the Supreme Court ruled in *INS v. Lopez-Mendoza*[230] that the exclusionary rule generally does not apply in immigration cases.[231] The Court echoed the longstanding—though heavily criticized[232]—rule that deportation proceedings are civil actions to which criminal constitutional protections do not apply.[233] The Court emphasized that the vast majority of noncitizens apprehended by immigration enforcement officials agreed to voluntary departure and therefore did not contest the allegations behind deportation.[234] The Court also suggested that the now-renamed Immigration and Naturalization Service (INS) had developed an adequate regulatory scheme to deter constitutional violations, and that alternative remedies, such as bringing a civil suit and seeking declaratory relief, were available to noncitizens.[235] Notably, the Court pointed to "a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions,"[236] suggesting that introducing the exclusionary rule would upset that simplicity.[237] Thus, *Lopez-Mendoza*—the bedrock case standing for the principle that the exclusionary rule does not apply in immigration proceedings—affirmed the idea that removability is generally a simple matter.

Although the central holding of *Lopez-Mendoza* remains good law, it has shown signs of weakening in recent years.[238] For starters, the

court, BIA, and federal court decisions involving suppression motions); *see also* Chacón, *supra* note 227, at 1614 ("Interestingly, the number of circumstances that some courts are willing to recognize as 'egregious violations' has increased a bit in recent years.").

229. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (providing for the suppression of evidence obtained through Fourth Amendment violations).

230. 468 U.S. 1032 (1984).

231. *Id.* at 1050 ("In these circumstances we are persuaded that the *Janis* balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS.").

232. *E.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts on Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1899–1914 (2000); Markowitz, *supra* note 144, at 1301.

233. *Lopez-Mendoza*, 468 U.S. at 1038.

234. *Id.* at 1044 ("Over 97.5% apparently agree to voluntary deportation without a formal hearing.").

235. *Id.* at 1044–45.

236. *Id.* at 1048.

237. *Id.*

238. *See* Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 SAN DIEGO INT'L L.J. 53 (2010) (commenting on the weakening of the *Lopez-Mendoza* rule not requiring application of the Fourth Amendment in immigration proceedings).

immigration enforcement landscape has radically changed in the almost thirty years since *Lopez-Mendoza* was decided.[239] Indeed, some commentators have persuasively argued in favor of overturning it,[240] in large part due to strong evidence that the justifications proffered by the Court have become outdated.[241] More importantly, a plurality of the *Lopez-Mendoza* Court recognized in dicta that the Fourth Amendment might apply in the case of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained," or if evidence of widespread constitutional violations were to become apparent.[242]

Relying on the Court's language regarding egregious violations of the Fourth Amendment serving as the basis for suppression in the immigration context, several federal courts of appeal have explicitly recognized that the exclusionary rule might apply to immigration cases in a range of circumstances. These cases have suggested that the *Lopez-Mendoza* exception applies to widespread constitutional violations,[243] deliberate constitutional violations,[244] conduct that undermines the reliability of the evidence,[245] conduct that a "reasonable officer should have known" violates the Constitution,[246] stops based on race or "grossly improper"

239. In fiscal year 2011, the number of formal removals eclipsed voluntary returns for the year, for the first time since fiscal year 1941; the number of formal removals in fiscal year 2011 was also almost twenty-one-times higher than in fiscal year 1984, the year *Lopez-Mendoza* was decided. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 (2012) (showing 391,953 formal removals and 323,542 voluntary returns in fiscal year 2011, and 18,696 formal removals and 909,833 voluntary returns in fiscal year 1984), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

240. *See, e.g.*, Chacón, *supra* note 227, at 1624–27; Stella Burch Elias, *'Good Reason to Believe': Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1115, 1155–57.

241. *See* Elias, *supra* note 240, at 1115, 1140–54.

242. *Lopez-Mendoza*, 468 U.S. at 1050–51. It is worth noting that while the language with respect to egregious violations appeared in a plurality opinion, because four of the dissenting Justices would have applied the Fourth Amendment across the board in removal proceedings, in reality eight Justices shared the belief that at minimum egregious circumstances would warrant application of the Fourth Amendment. *See* Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 271 (3d Cir. 2012) (describing how "eight Justices agreed that the exclusionary rule should apply in deportation/removal proceedings involving egregious or widespread Fourth Amendment violations").

243. *Oliva-Ramos*, 694 F.3d at 279–82.

244. Orhorhaghe v. INS, 38 F.3d 488, 501–02 (9th Cir. 1994); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 n.5 (9th Cir. 1994) ("We emphasize that [we do not] hold that *only* bad faith violations are egregious, but rather that *all* bad faith constitutional violations are egregious.").

245. *Oliva-Ramos*, 694 F.3d at 278; Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

246. Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1018–19 (9th Cir. 2008); *Gonzalez-Rivera*, 22 F.3d at 1449.

factors,[247] stops that involve lengthy detentions,[248] and stops that employ a "show or use of force,"[249] or lack any "articulable suspicion whatsoever."[250] The Ninth Circuit held, for instance, that egregious violations of the Fourth Amendment took place when immigration agents failed to obtain either a search or arrest warrant before entering a private home and that the agents should have known that the Fourth Amendment prohibits warrantless, nonconsensual searches of one's residence.[251] In a groundbreaking decision issued in 2012, the Third Circuit adopted the *Lopez-Mendoza* exceptions to a pre-dawn home immigration raid, and articulated a flexible standard for assessing when the Fourth Amendment could apply the exclusionary rule to suppress evidence of alienage in removal proceedings.[252] The Court of Appeals emphasized "that there is no one-size-fits-all approach to determining whether a Fourth Amendment violation is egregious," and listed a number of factors that could trigger application of the exclusionary rule.[253] If courts had applied and invoked the *Lopez-Mendoza* exceptions more broadly, these exceptions might have suppressed evidence in thousands of other cases, given the evidence that warrantless searches of private homes were fairly rampant during the Bush Administration home raids.[254]

The Fifth Amendment's Due Process Clause also serves as a source for motions to suppress. This is not surprising; indeed, procedural due process has frequently served as a catchall claim for constitutional rights that otherwise do not apply in the immigration context.[255] The Fifth

247. Puc-Ruiz v. Holder, 629 F.3d 771, 779 (8th Cir. 2010); *Almeida-Amaral*, 461 F.3d at 235–37; *Orhorhaghe*, 38 F.3d at 498.

248. *Almeida-Amaral*, 461 F.3d at 236.

249. *Id.*

250. *Puc-Ruiz*, 629 F.3d at 779; *accord Almeida-Amaral*, 461 F.3d at 236.

251. *Lopez-Rodriguez*, 536 F.3d at 1018–19.

252. Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 278–79 (3d Cir. 2012).

253. *Id.* at 279. These factors include: the intentionality of the violation; the characteristics and severity of the offending conduct; the use of threats, force, or other forms of coercion to execute the search or seizure; the extent to which agents used unreasonable force; whether the seizure or arrest was based on racial or ethnic factors (or some other grossly improper consideration); and the bad faith of the ICE officers. Abbey Augus & Matt Craig, *Practice Advisory: Understanding* Oliva-Ramos v. Attorney General *and the Applicability of the Exclusionary Rule in Immigration Proceedings*, N.Y.U. IMMIGRANT RTS. CLINIC 5–6 (Nov. 30, 2012), http://www.law.nyu.edu/sites/default/files/ECM_PRO_074309.pdf.

254. *See* Katherine Evans, *The Ice Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 572, 584–87 (2009) (describing a "pattern of practice," based on reports of home raids nationally, in which immigration agents lack judicial warrants and fail to obtain consent to enter); *see also* Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013) ("Breaking into someone's home at 4:00 a.m. without a warrant or any legitimate basis need not also include physical injury or the threat thereof for such conduct to qualify as egregious.").

255. *See* Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 493 (2011) (arguing that courts should continue to rely on procedural due process arguments under the Fifth Amendment to "ensure that immigration proceedings are fair, just, and

Amendment gives noncitizens the right to removal proceedings in which evidence—including evidence of alienage—is used in a "fundamentally fair" manner.[256] Thus, statements obtained in violation of due process, such as coerced confessions or involuntary admissions, have been excluded under the Fifth Amendment.[257]

Relatedly, regulatory provisions may also provide a basis for excluding evidence of alienage in removal proceedings. The Supreme Court has long held that immigration authorities, and administrative agencies generally, must adhere to federal regulations.[258] In 1980, the BIA held that evidence obtained in violation of INS regulations could be suppressed, so long as (1) the violated regulation was promulgated to serve "a purpose of benefit to the alien," and (2) the violation caused prejudice to the noncitizen.[259] *Lopez-Mendoza*, decided four years later, did not change the BIA's holding.[260] Importantly, several federal regulations govern immigration agents' conduct during raids and other immigration arrests. For instance, absent a reasonable suspicion that an individual is or is attempting to violate an immigration provision, immigration officers must not "restrain the freedom of an individual, not under arrest, to walk away."[261] Another regulation requires aliens who are "arrested without a warrant and placed in formal [removal] proceedings" to "be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government."[262] Similar arguments are available based on violations of other federal immigration regulations, such as those addressing the right to counsel,[263] consent to enter,[264] and coerced statements.[265] At the same time, the legal basis for some of these suppression motions has been narrowed by the BIA's holding that, for instance, certain advisals required by regulation need not be given before a person is formally charged with

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sufficiently transparent" rather than seek to expand the application of the Sixth Amendment); *see also* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 487–88 (2013) (discussing the role of the Fifth Amendment in immigration adjudication).

256. Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

257. *See, e.g.*, Garcia, 17 I. & N. Dec. 319, 320–21 (B.I.A. 1980).

258. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–68 (1954). *Accardi* involved an immigration regulation, and the Supreme Court subsequently applied what has been called the *Accardi* doctrine to a range of administrative agencies. *See generally* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569 (2006).

259. *Garcia-Flores*, 17 I. & N. Dec. at 329.

260. 468 U.S. 1032, 1050–51 (1984); *accord id.* at 1045 ("Evidence seized through intentionally unlawful conduct is excluded by Department of Justice policy from the proceeding for which it was obtained.").

261. 8 C.F.R. § 287.8(b) (2013).

262. *Id.* § 287.3(c).

263. *See id.* § 292.5(b).

264. *See id.* § 287.8(f)(2).

265. *See id.* § 287.8(c)(2)(vii).

removability and placed in removal proceedings.[266] In some immigration courts, regulatory arguments have had more success than constitutional ones.[267]

Thus, motions to suppress are factually and legally complex matters. The substantive law governing motions to suppress in the immigration context remains unsettled and developing. One area of particular uncertainty involves the application of the exclusionary rule to egregious conduct committed by *local* law enforcement officers.[268] Factually, suppression motions require extensive allegations and proof in order to succeed.[269] Furthermore, noncitizens—including their counsel—must take strong precautionary measures to not concede alienage at any point prior to termination of the proceedings, including during informal negotiations with ICE attorneys.[270] Otherwise simple acts such as requesting a copy of one's "A-file"[271] should be done without disclosing the country of nationality.[272]

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266. E-R-M-F-, 25 I. & N. Dec. 580, 585 (B.I.A. 2011).

267. *See* Motomura, *supra* note 40, at 1767–69 (discussing successful suppression motions following immigration raids of factories in Van Nuys, California based on regulatory arguments).

268. For instance, a case pending before the Eleventh Circuit involves the application of the exclusionary rule to the conduct of Palm Beach Gardens Police Department officers. Jimenez-Domingo v. Holder, No. 12-14048 (11th Cir. filed Aug. 6, 2012); *see also* Melissa Crow & Matthew Price, Lopez-Mendoza *Reconsidered: The Changing Face of Immigration Enforcement*, AM. IMMIGR. LAW. ASS'N IMMIGR. SLIP OPINION BLOG (Dec. 8, 2012), http://www.aila.org/content/default.aspx?bc=45346|45345 (discussing *Jimenez-Domingo*). On August 13, 2013, an immigration judge in Miami, Florida granted a motion to suppress based on egregious constitutional violations committed by local law enforcement officers. Redacted Decision of the Honorable Denise Noonan Slavin, Immigration Court, Executive Office for Immigration Review, U. MIAMI SCH. L. (Aug. 12, 2013), *available at* http://www.law.miami.edu/clinics/pdf/2012/immigration-082913-Written-Decision-Order-Bonilla-REDACTED.pdf.

269. *Motions to Suppress in Removal Proceedings: A General Overview*, LEGAL ACTION CENTER AM. IMMIGR. COUNCIL 28 (2011), http://www.americanimmigrationcouncil.org/sites/default/files/motions_to_suppress_in_removal_proceedings-_a_general_overview_11-12-13_fin.pdf ("To establish a *prima facie* case [for suppression], the motion must . . . be specific and detailed . . . and . . . list the evidence to be suppressed.").

270. Maria T. Baldini-Potermin et al., *Motions to Suppress: Breathing New Life into the Exclusionary Rule in Removal Proceedings*, *in* IMMIGRATION AND NATIONALITY LAW HANDBOOK 415, 423–25 (Richard J. Link ed., 2008–09 ed. 2008).

271. An A-file is the individual case file compiled by immigration authorities, which often serves as the single source of discovery in immigration cases. *See* Dent v. Holder, 627 F.3d 365, 368 (9th Cir. 2010) ("An A-file is the file maintained by various government agencies for each alien on record.").

272. Although the government is required to provide a copy of the "A-file" as a matter of due process in the Ninth Circuit, *id.* at 374, in many instances individuals facing removal must file a Freedom of Information Act (FOIA) request in order to obtain a copy of the file. *See id.* (noting the government's argument "that an individual seeking access to records about himself 'must submit a written request' to the Freedom of Information Act . . . office" (quoting 8 C.F.R. § 103.21 (2013)). The FOIA form used for immigration purposes, Form G-639, requests that the individual list his or her country of birth. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., FORM G-639,

To be clear, despite the federal courts' and administrative agencies' relative receptiveness to entertaining motions to suppress, successfully prevailing in one's case through termination of the proceedings remains fairly difficult.[273] In a number of jurisdictions, courts have held that evidence of identity cannot be suppressed,[274] so that an individual whose name is matched to a government database that provides evidence of alienage will still be found removable.[275] Furthermore, because of the complexity of suppression motions, noncitizens often require counsel—preferably, experienced counsel—in order to identify viable claims and succeed.[276] Nonetheless, the complex issues that motions to suppress raise show that removability can be far more complicated than simply demanding that individuals show the government their papers. As the motion to suppress example and the next section on administrative discretion show, a meaningful portion of the immigrant population may have unauthorized presence but still prevail on removability.

D. *Immigration "Relief" Without Statutory Sanction: Administrative Discretion and Deferred Action*

Administrative discretion in immigration law serves as a fourth dimension of complex removability. The term "administrative discretion" refers to the Executive Branch's ability to decline to seek the removal of certain individuals or categories of individuals. It is well-established in immigration law that Congress has plenary power to describe the rules governing who should be admitted and removed.[277] However, as Professors Adam Cox and Cristina Rodriguez have shown, the President has long exercised immigration power as well.[278] As Professors Cox and Rodriguez

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FREEDOM OF INFORMATION/PRIVACY ACT REQUEST (2012), *available at* http://www.uscis.gov/files/form/g-639.pdf.

273. *See* Treadwell, *supra* note 217, at 567.

274. *See, e.g.*, United States v. Scroggins, 599 F.3d 433, 450 (5th Cir. 2010); United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Oscar-Torres, 507 F.3d 224, 230 (4th Cir. 2007). *But see, e.g.*, United States v. Aragon-Robles, 45 Fed. App'x 590, 591 (9th Cir. 2002) (holding that identity-related evidence could be suppressed if seized unconstitutionally on the basis of race).

275. *See* CHIU ET AL., *supra* note 215, at 24 ("Suppression motions are inconsequential if ICE has an alternative source of evidence wholly independent of the constitutional violation.").

276. *See id.* at 24 (noting the difficulty of winning a suppression motion); *cf. id.* at 25 ("[S]uppression motions have not traditionally been a standard part of removal defense practice").

277. The plenary power doctrine is one of the most heavily critiqued doctrines in immigration law. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

278. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 459, 483–505 (2009).

explain, Congress has enacted harsh rules governing removal—rules that make approximately 11 million individuals subject to possible deportation in comparison to the approximately 400,000 deported last year.[279] The Executive Branch possesses a great degree of prosecutorial discretion over whom to remove, thus amounting to what Professors Cox and Rodriguez call a "de facto delegation" of immigration power.[280] It is worth noting, of course, that underenforcement is not unique to immigration law, given that most other civil enforcement contexts—tax laws, securities laws, etc.—involve a mismatch between statutory rules and prosecutorial resources.[281]

The exercise of prosecutorial discretion to prevent the removal of certain individuals or groups is not new in immigration law,[282] but in the past two years, the Obama Administration has brought the issue to the front lines of immigration law and policy.[283] In June 2011, ICE Director John Morton issued a memorandum to the agency's attorneys, officers, and agents prioritizing certain types of cases for removal (ranging from national security risks to "those who have engaged in immigration fraud") while indicating that other cases (such as those involving U.S. military veterans and long-time lawful permanent residents) should "warrant

279. *Id.* at 512–13 (characterizing immigration as a field in which, similar to criminal law, "extremely broad . . . liability, coupled with the existence of prosecutorial discretion and inevitable underenforcement of the law, results in the delegation of great authority to the officials who decide whether to initiate" either a criminal prosecution or an immigration enforcement action); ANDORRA BRUNO, CONG. RESEARCH SERV., R42958, UNAUTHORIZED ALIENS: POLICY OPTIONS FOR PROVIDING TARGETED IMMIGRATION RELIEF 1 (2013), *available at* http://www.fas.org/sgp/crs/homesec/R42958.pdf (noting that the "unauthorized alien population" is "estimated to number more than 11 million today"); Elise Foley, *Obama Deportation Toll Could Pass 2 Million at Current Rates*, HUFFINGTON POST (Jan. 31, 2013, 7:01 PM), http://www.huffingtonpost.com/2013/01/31/obama-deportation_n_2594012.html (noting that more than 400,000 individuals were removed in the 2012 fiscal year).

280. Cox & Rodríguez, *supra* note 278, at 517–18. To be clear, the Executive Branch has very little discretion through its immigration judges, who are limited by statutory rules restricting eligibility for discretionary relief from removal.

281. *See, e.g.*, Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 456–57 (2011).

282. *See* KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 7–8 (2013), *available at* http://www.fas.org/sgp/crs/misc/R42924.pdf (describing the history of prosecutorial discretion generally); Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, U.C.L.A. Sch. of Law, et al., to the President of the United States (May 28, 2012), *available at* http://www.nilc.org/document.html?id=754 (explaining, on behalf of ninety-six immigration law professors, that the Executive Branch has historically exercised prosecutorial discretion in immigration matters through various mechanisms, namely deferred action, parole-in-place, and deferred enforced departure). *See generally* MANUEL & GARVEY, *supra*, at 10–13 (describing the exercise of prosecutorial discretion in the immigration context).

283. For a history on the use of prosecutorial discretion in immigration law prior to the Obama Administration's actions, see generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–65 (2010).

particular care."[284] The 2011 Morton Memo, which built upon a series of similar memos, attracted attention because it was issued by an Administration that reached record numbers of deportations despite citing its political support for comprehensive immigration reform as a justification for its enforcement policies.[285] Although advocates criticized the agencies for inconsistent implementation, ICE and the Executive Office for Immigration Review (EOIR) engaged in noticeable steps to implement the memos.[286] For instance, immigration courts suspended their dockets for short intervals while the ICE Chief Counsel's office engaged in case-by-case review to determine which individuals might receive prosecutorial discretion.[287]

A year after the Morton Memo, on June 15, 2012, the Obama Administration announced far more groundbreaking news when it indicated that it would categorically extend a form of administrative discretion known as "deferred action" to certain young people who became undocumented when they were children and met other age, education, and residency requirements.[288] Under the name "Deferred Action for

284. Memorandum from John Morton, Dir., Immigration & Customs Enforcement, to All Field Office Dirs., et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 5 (June 17, 2011) [hereinafter 2011 Morton Memo], *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

A second memorandum issued that same day advised the agency's personnel to refrain from seeking removal against "the victims and witnesses of crime, including domestic violence, and individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties." Memorandum from John Morton, Dir., Immigration & Customs Enforcement, to All Field Office Dirs., et al., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 1 (June 17, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf. One year earlier, Director Morton had indicated that ICE had the resources to remove approximately 400,000 noncitizens and set forth priority categories for enforcement. *See* Memorandum from John Morton, Assistant Sec'y, Immigration & Customs Enforcement, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), *available at* http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf.

285. *See* Foley, *supra* note 279.

286. *See* Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES (Nov. 12, 2011), http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html.

287. Memorandum from Peter S. Vincent, Principal Legal Advisor, Immigration & Customs Enforcement, to All Chief Counsel and Office of the Principal Legal Advisor (Nov. 17, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf.

288. The specific eligibility criteria are: (1) being under the age of thirty-one as of June 15, 2012; (2) arrival in the United States before the age of sixteen; (3) continuous residence in the United States from June 15, 2007 to the present; (4) physical presence in the United States on June 15, 2012, and at the time of application; (5) either entry without inspection before June 15, 2012, or expiration of valid immigration status on or before June 15, 2012; (6) as of the date of the application, being in school, having graduated or obtained a certificate of completion from high

Childhood Arrivals" (DACA), the program offers benefits that are tangible but limited. Its main features are a two-year reprieve from removal and a two-year work authorization card.[289] With work authorization comes the ability to apply for a Social Security number and, in most states, a driver's license.[290] Individuals who face pending removal proceedings, or have previously been ordered removed but never left the country, have the most to gain from DACA because it provides a defense to removal (or execution of a previously issued removal order).[291] The availability of protection for such individuals is meaningful, given that a prior removal order could ordinarily make an individual a "fugitive alien."[292] But the Administration was very clear about DACA's limitations. DACA does not lead to a permanent, or even statutorily sanctioned, status in the United States.[293] Thus, under the immigration statute, DACA recipients continue to be removable—and are generally not eligible for statutory relief from removal—but should not be physically removed.

Despite its limitations, DACA represented a political and moral victory to its recipients and supporters. DACA's creation followed Congress's refusal to pass the DREAM Act, legislation that would have provided a formal pathway to lawful residence for young people who came to the United States as children and had completed either higher education or

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school, having obtained a GED, or having been honorably discharged from the military; and (7) not having been convicted of a felony, "significant misdemeanor," or three nonsignificant misdemeanors, and not otherwise threatening national or public safety. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., FORM I-821D, INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2013), *available at* http://www.uscis.gov/files/form/i-821dinstr.pdf; *see also* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2013), *available at* http://www.uscis.gov/files/form/i-821d.pdf.

289. *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, NAT'L IMMIGR. L. CENTER (Mar. 5, 2013) [hereinafter *DACA FAQ*], http://nilc.org/FAQdeferredactionyouth.html.

290. A majority of the states have indicated that they will issue driver's licenses to DACA recipients. *See Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?*, NAT'L IMMIGR. L. CENTER (June 19, 2013), http://www.nilc.org/dacadriverslicenses.html (listing state policies). *But see infra* text accompanying notes 304–06 (discussing Arizona and North Carolina).

291. *DACA FAQ*, *supra* note 289.

292. *See Fugitive Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/fugitive-operations (last visited Sept. 5, 2013) ("A fugitive alien is a person who has failed to leave the United States after he or she receives a final order of removal, deportation or exclusion, or who has failed to report to ICE after receiving notice to do so.").

293. Similarly, DACA provided no immediate benefit to the family members of its recipients. *See* Memorandum from Janet Napolitano, *supra* note 288, at 3 ("This memorandum confers no substantive right, immigration status or pathway to citizenship.").

military service.[294] When the proposed legislation failed to receive the requisite number of votes in Congress,[295] its advocates shifted their efforts to administrative solutions since the coming election year would prevent the DREAM Act from being reintroduced in Congress.[296]

For the most part, the basic eligibility requirements for DACA are fairly simple to meet in individual cases. The adjudication times for DACA are fast by immigration standards,[297] and a number of applicants have made use of free legal clinics to prepare their applications without hiring lawyers.[298] But DACA (and other exercises of administrative discretion in immigration law) directly raises at least two areas of complexity in the removability inquiry.

First, DACA creates a seemingly simple administrative program that must still account for an otherwise intricate statutory and regulatory immigration (and criminal) law framework. Like a raft floating atop an ocean, DACA offers temporary safety to those who would otherwise drown in the statute's harsh rules on removability. But the process of sorting out the raft from the ocean has raised a number of questions along the way. Soon after DHS released the details of the administrative process, in August 2012, attorneys and advocates identified harder questions that went beyond DACA's seemingly easy eligibility requirements, and that reflected the layering of DACA's administrative nature atop the broader legal framework.[299] Questions ranged from whether DACA applicants should disclose the use of false Social Security numbers—despite the

294. Also known as the Development, Relief, and Education for Alien Minors Act, the DREAM Act was initially introduced in the Senate in 2001, S. 1291, 107th Cong. (2001), and also had parallel versions in the House.

295. *See* Elise Foley, *DREAM Act Vote Fails in Senate*, HUFFINGTON POST (Dec. 18, 2010), http://www.huffingtonpost.com/2010/12/18/dream-act-vote-senate_n_798631.html; *see also* Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631–38 (2011) (describing history of the DREAM Act and the 2010 legislative session).

296. *See* Press Release, America's Voice, Will There Be Any Relief for Dreamers This Election Year? Only the President Can Make It Happen (May 31, 2012), http://americasvoiceonline.org/press_releases/will-there-be-any-relief-for-dreamers-this-election-year-only-the-president-can-make-it-happen.

297. *See DACA FAQ*, *supra* note 289 (noting that "USCIS has said it is taking them, on average, 4 to 6 months to make a decision on an application"); *Deferred Action Approval Averages*, LEXSPOT, https://lexspot.com/daca_approvals (last visited Nov. 28, 2013) (noting that DACA approval times had lengthened considerably and were up to five months).

298. *See, e.g.*, Elizabeth Slagle Todaro & Karla McKanders, *Leveling the Playing Field: Pro Bono's Impact on Immigration*, TENN. B.J., Jan. 2013, at 14 (noting legal clinics being set up for DACA applicants); *Dreamers*, TEX. C.R. PROJECT, http://www.texascivilrightsproject.org/dreamers/ (last visited Nov. 28, 2013) (listing DACA clinics across Texas).

299. Dan Berger & Stephen Yale-Loehr, *Deferred Action for Childhood Arrivals: Should Undocumented Young People Apply?*, LEXISNEXIS EMERGING ISSUES ANALYSIS, Sept. 2012, *available at* LEXIS, 2012 EMERGING ISSUES 6632 (noting several "unresolved or thorny issues," but that "[s]everal nonprofits have developed excellent guides that address" them).

point-blank question in one of the required forms to list "all numbers ever used"[300]—to how to describe one's manner of entry so as not to undermine potential future claims to permanent immigration status.[301] DACA's treatment of prior criminal convictions, too, announced a completely new series of rules for assessing the immigration consequences of crime that runs counter to the "usual" rules of immigration law.[302] To be sure, the Administration sought to provide as much assurance as it could to DACA stakeholders; for instance, the Administration clarified that most users of false social security numbers need not disclose that fact in their DACA applications and stated its intent to not refer low-priority cases to ICE following a denial of DACA.[303] Nonetheless, DACA calls for the permanent disclosure of personal, and potentially incriminating, information to the very agency—DHS—that has the authority to detain and deport. Much of the promise of DACA lies in the political goodwill of the current Administration and in the hope for a broader legislative solution.

Second, DACA presents a dimension of complex removability because of its inherently tenuous nature and its contribution to our understanding of the relationships among removability, unauthorized presence, and illegality. The Administration has been clear from the onset that DACA

300. Outside the DACA context, use of a false Social Security number can have adverse immigration consequences and lead to criminal liability. *See* Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010) (finding noncitizen's prior conviction for misuse of Social Security number under 42 U.S.C. § 408(a)(7)(B) (2012) constituted a crime involving moral turpitude, thus making him removable).

301. *Cf.* Quilantan, 25 I. & N. Dec. 285, 293 (B.I.A. 2010) (holding that an alien who falsely claims U.S. citizenship is not properly admitted, but that "an alien who physically presents herself for questioning and makes no knowing false claim to citizenship is 'inspected,' even though she volunteers no information and is asked no questions by the immigration authorities").

302. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Jan. 18, 2013), http://www.uscis.gov (follow "Consideration of Deferred Action for Childhood Arrivals Process" hyperlink under "Humanitarian") (indicating that any conviction for driving under the influence will constitute a "significant misdemeanor" that will render an individual ineligible for DACA). In contrast, under the federal immigration statute, a conviction for simple DUI does not constitute a ground of either inadmissibility or removability. *See* Lopez-Meza, 22 I. & N. Dec. 1188, 1194 (B.I.A. 1999). In certain respects, the criminal guidelines surrounding DACA are more forgiving than the INA, as interpreted by the agency and the courts, for instance with respect to simple drug possession offenses and expunged offenses. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012) (inadmissibility for controlled substance offenses); *id.* § 1227(a)(2)(B)(i) (deportability for controlled substance offenses); Nunez-Reyes v. Holder, 646 F.3d 684, 689–90 (9th Cir. 2011) (en banc) (holding, consistent with the majority rule in the BIA and other circuit courts, that offenses expunged under state law can serve as a basis for removability, but declining to apply the rule retroactively in the Ninth Circuit).

303. Several months after the announcement of the DACA process, CIS clarified that the Employment Authorization Document only required applicants to list Social Security numbers officially issued by the Social Security Administration. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Jan. 18, 2013), http://www.uscis.gov (follow "Consideration of Deferred Action for Childhood Arrivals Process" hyperlink under "Humanitarian"; then follow "Frequently Asked Questions" hyperlink in the second paragraph).

and other forms of administrative relief are temporary and contingent upon the Executive Branch's willingness to interpret the immigration laws consistent with DACA. Other governmental authorities—such as state governments and vocal minorities in the immigration enforcement agency and the Judiciary—have refused to accept the legitimacy of DACA. Various actors have sought to emphasize DACA-eligible individuals' continuing unauthorized status notwithstanding their non-removability in the eyes of the President. Arizona Governor Jan Brewer ordered that the state not issue driver's licenses to DACA recipients.[304] The state of North Carolina reluctantly decided to issue driver's licenses,[305] but those licenses read "NO LAWFUL STATUS" across the front.[306] Ten ICE officers filed a lawsuit in federal district court, seeking declaratory and injunctive relief to invalidate DACA and announcing their belief that DACA constitutes an invalid exercise of executive authority because the immigration statute mandates the removal of DACA-eligible individuals.[307] And Justice Scalia, in his dissenting opinion in *Arizona v. United States*, included a scathing critique of DACA—even though the program was announced just two weeks prior to the issuance of the opinion and was therefore not part of the Court's record.[308] It should come as no surprise, then, that media descriptions of DACA recipients have varied, ranging from "young immigrants" to "illegal."[309]

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304. Ariz. Exec. Order No. 2012-06, 18 Ariz. Admin. Reg. 2237, 2237 (Sept. 7, 2012), *available at* http://www.azsos.gov/aar/2012/36/governor.pdf.

305. Letter from Grayson G. Kelley, Chief Deputy Att'y Gen., N.C. Dep't of Justice, to J. Eric Boyette, Acting Comm'r, N.C. Div. of Motor Vehicles 2–3 (Jan. 17, 2013), *available at* http://www.wral.com/asset/news/local/2013/01/17/11992902/AG_letter_to_DMV_on_DACA_licenses.pdf (arguing that the North Carolina Department of Transportation is required by law to issue driver's licenses); Press Release, N.C. Dep't of Transp., Div. of Motor Vehicles, NCDOT to Issue Driver Licenses for Those Who Quality Under DACA (Feb. 14, 2013), *available at* http://www.ncdot.gov/download/dmv/DACA/PressReleaseDACA.pdf.

306. *See* Larry Copeland, *N.C.'s Immigrant Driver's License Plan Sparks Protests*, USA TODAY (Mar. 8, 2013), http://www.usatoday.com/story/news/nation/2013/03/07/ncs-immigrant-drivers-license-plan-sparks-protests/1972119.

307. Complaint at 13–14, Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. Aug. 23, 2012), 2012 WL 3629252. On July 31, 2013, the district court dismissed the lawsuit for lack of subject matter jurisdiction under the Civil Service Reform Act. Order at 6-7, Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. July 31, 2013). Prior to dismissing the lawsuit, the Court had indicated that it believed the ICE agent plaintiffs were likely to succeed in their claim that DACA violated 8 U.S.C. § 1225(b)(2)(A) (2012), but declined to issue a preliminary injunction in light of its jurisdictional concerns. Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. Apr. 23, 2013), 2013 WL 1744422, at *13, *19–20.

308. 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part) (arguing that "[t]he husbanding of scarce enforcement resources can hardly be the justification for" the DACA program given the administrative cost of processing applications for DACA); Memorandum from Janet Napolitano, *supra* note 288.

309. *See, e.g.*, Copeland, *supra* note 306 (discussing driver's licenses issued by the state of North Carolina to DACA recipients); *Young Illegal Immigrants Seek Work Permits* (NPR radio

DACA and other forms of administrative discretion occupy a slightly different place in comparison to the other areas of immigration law discussed in this Part. The preceding discussion of complex removability—involving claims to citizenship, the categorical approach to assessing the immigration consequences of crime, and motions to suppress evidence of alienage—present examples in which removability is *primarily* a legal question, and affects persons in removal proceedings.[310] The legal outcomes in those examples are heavily dependent on facts and, importantly, on agency behavior, but the key question is whether the individual is removable. But administrative discretion in immigration law presents a lens through which to examine removability's contested nature, even in cases where individuals might technically be removable or have not yet had their removability adjudicated. Indeed, as each of the Administration's memoranda regarding the exercise of administrative discretion clarifies, the availability of administrative discretion does not carry with it an enforceable right.[311] But DACA nonetheless challenges the conventional wisdom that unlawful status (or any immigration status) is simple. It also highlights how removability and unlawful status are distinct but closely related—and inherently complex—concepts. In combination with the other three areas of law, a (slightly messy) story of complex removability emerges. The next Part draws out several common themes that tie these four dimensions of complex removability together.

III. RECURRING THEMES IN COMPLEX REMOVABILITY

One of the basic goals of this Article is to challenge the conventional wisdom that removability is inevitably streamlined and simple. Both legally and factually, the dimensions of complex removability discussed in Part II—claims to citizenship, the categorical approach, motions to suppress, and administrative discretion—reveal that removability is not necessarily a settled matter.

Having established *that* removability is complex as a matter of law, fact, and principle, this Part seeks to articulate *how* (and to some degree *why*) removability has become complicated. It does so by articulating several recurring themes in complex removability. The first is a simple observation: removability has grown more complex in large part because of the relative absence of substantive, discretionary relief from removal under the current statute. The second theme focuses on the effect of immigration detention—specifically the absence of counsel and the pressures of time—on challenges to removability. The third theme involves

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broadcast Sept. 26, 2012), *available at* http://www.npr.org/2012/09/26/161820071/young-illegal-immigrants-seek-work-permits.

310. *See supra* Sections II.A–C.

311. *See, e.g.*, 2011 Morton Memo, *supra* note 284, at 6; Memorandum from Janet Napolitano, *supra* note 288, at 3.

the relationship between complex removability and immigration status, and underscores the fluidity and uncertainty that attaches to immigration status. The fourth theme explores the social and legal production of removability, and emphasizes that removability is often created through dynamic interactions between the government and the individual. Finally, this Part observes that different authorities may have conflicting visions of removability, and that (despite the narrative of plenary power in the immigration realm) no single governmental entity speaks with definitive power when it comes to questions of removability.

A. *(Un)availability of Substantive Immigration Relief*

Like a steam valve moving pressure from one end of the system to another,[312] the absence of formal substantive relief from removal appears to have driven the growing complexity of removability. Under current law, particularly since 1996, many individuals facing removal—even those with strong family, community, or time-based ties to the United States—simply do not have a way to directly seek a reprieve from removal. Indeed, various scholars have explored the human and legal costs associated with IIRIRA.[313]

For individuals with prior criminal convictions, IIRIRA drastically contracted the availability of discretionary relief from removal.[314] Categorical approach claims have grown because over the past several decades, and since 1996 in particular, Congress has progressively increased the immigration penalties associated with criminal convictions and broadened the categories of crimes that lead to those penalties.[315] A growing number of convictions lead to deportation and also preclude discretionary relief.[316] Categorical approach arguments have thus become crucial to either contesting removability altogether or challenging the kind of removability alleged (e.g., removability for an aggravated felony

312. Similar analogies to pressures systems have been made with respect to immigration federalism. Peter Spiro has suggested that "steam-valve virtues of federalism" exist by allowing states to regulate immigration, because doing so "diminishes the pressure on the structure as a whole." *See* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1636 (1997).

313. *See, e.g.*, KANSTROOM, *supra* note 46, at 10 ("The 1996 laws have been severely criticized for the devastation they have wrought on families, for their rigidity, and for their retroactivity.").

314. Prior to 1996, most individuals facing deportation due to prior convictions could seek discretionary relief under § 212(c) of the INA. The 1996 laws abolished § 212(c) relief and replaced it with a form of relief known as "cancellation of removal," which became unavailable to anyone with an aggravated felony conviction. *See* 8 U.S.C. § 1182(c) (1994) (repealed 1996); INS v. St. Cyr, 533 U.S. 289, 294–97 (2001) (explaining the availability of § 212(c) relief and the repeal of eligibility for such relief through IIRIRA and AEDPA). *See generally* Marin, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978) (developing factors for the exercise of discretion in § 212(c) applications).

315. *See supra* notes 190–92 and accompanying text.

316. *See* Koh, *supra* note 10, at 269–73.

conviction).[317] Similarly, claims to U.S. citizenship made during removal proceedings and illegal reentry prosecutions are often most contested where the individuals face allegations and charges that could lead to harsh civil and criminal sanctions with little middle ground.[318]

Other aspects of complex removability appear to have arisen because of a mismatch between the equitable claims of those facing removal and the options available under the law. The 1996 statutes (and subsequent developments) made it more difficult for individuals without immigration status, even those with clean criminal records, to develop substantive defenses to removal, such as through asylum or family-based mechanisms. The rule that requires an individual to file asylum claims within one year of arriving in the United States, among other rules, has prevented countless individuals from obtaining asylum.[319] In the family-based context, the three- and ten-year unlawful presence bars to admission—triggered through the accrual of unlawful status plus a physical departure from the United States—made it far more arduous for the relatives of citizens and lawful permanent residents to acquire lawful status than it had been prior to 1996.[320] With few options available under the law, workplace immigration raids ended with the removal of workers, often whose only transgression was working and living in the United States without papers.[321] Although ICE claimed that most home raids were intended to identify "fugitive aliens" (i.e., individuals previously ordered removed), one study showed that ICE regularly engaged in "collateral arrests" that led to the removal of any resident identified through the raid, many of whom had no prior immigration or criminal violations.[322] Motions to suppress evidence of alienage arose in a context where the immigration laws foreclosed opportunities for most unauthorized immigrants to obtain lawful status, but where ICE nevertheless pursued enforcement against those with arguably

317. *See supra* note 189 and accompanying text.

318. *See supra* Section I.B.

319. *See* 8 U.S.C. § 1158(a)(2)(B) (2012). *See generally* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1 (2001) (describing and critiquing the one-year deadline and expedited removal procedures for entrants at the border as two major restrictions on asylum created by the 1996 laws).

320. *See* 8 U.S.C. § 1182(a)(9). The creation of a provisional waiver for immediate relatives of U.S. citizens in 2013 will likely ameliorate some of the effects of the unlawful presence bars. *See* Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536, 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103, 212) (describing the need for provisional waivers).

321. For background on an immigration raid that took place in Postville, Iowa with particularly harsh consequences on meatpacking plant workers, see Moyers, *supra* note 221.

322. MARGOT MENDELSON, SHAYNA STROM & MICHAEL WISHNIE, COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM (2009) (reporting that forty percent of fugitive operations teams' arrests in 2007 were "collateral arrests"), *available at* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

strong ties to the country.[323] A similar dynamic exists in the case of the "DREAMers" who advocated for DACA. With DACA, the implementation of broad-scale administrative relief arose because Congress declined to pass the DREAM Act, a measure that would have led to permanent immigration relief for DREAMers.[324] DACA recipients generally have no other option under the law; indeed, DACA is far inferior to permanent forms of immigration relief or status. DACA recipients typically have compelling moral claims to the United States, however, having come to the United States as children and pursued an education.

Assessing removability on a very broad scale reveals that removability is complex *because* substantive immigration relief is woefully unavailable. The notion that the absence of substantive claims would lead to procedural ones is a recurring theme in immigration law. Professor Hiroshi Motomura observed over twenty years ago that the unavailability of substantive, constitutional rights foreclosed by the plenary doctrine has led to the greater use of statutory interpretation and procedural claims that he characterized as "phantom constitutional norms" and "procedural surrogates" for constitutional decision making.[325] Today, the same pattern of movement is taking place: Inadequate substantive claims lead to either technical, quasi-procedural claims (the categorical approach and motions to suppress in particular, and citizenship claims to a limited degree) or attenuated relief (such as DACA).

Furthermore, Professor Motomura's critique of the use of phantom norms and procedural surrogates extends to complex removability as well. Professor Motomura noted that statutory decision making informed by constitutional norms, for instance, suffers from the "[p]roblem of [a]wkward or [u]npredictable [s]ubconstitutional [s]olutions," in which individual cases may result in justice for the immigrant, but broader, more coherent answers to constitutional problems do not receive full treatment.[326] Similarly, the use of procedure-based arguments, though "ameliorat[ing] the harshness of the plenary power doctrine," fails to produce broader consistency in the law.[327] In the same vein, understanding complex removability requires an acknowledgment that some of its dimensions may lead to unsatisfactory results. Motions to suppress, for instance, ultimately do not confer lasting status on an individual[328] and

323. *See supra* Section II.C.

324. *See supra* Section II.D.

325. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Phantom Norms*]; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) [hereinafter Motomura, *Procedural Surrogates*].

326. Motomura, *Phantom Norms*, *supra* note 325, at 600–02.

327. Motomura, *Procedural Surrogates*, *supra* note 325, at 1679.

328. *See supra* notes 225–27 and accompanying text.

often depend heavily on the quality of the individual's lawyers.[329] DACA results in little more than a work permit and an assurance of nonremoval.[330] Categorical approach claims, too, often depend on merit-neutral factors such as the wording of the criminal statutes.

B. *Detention, Counsel, and Time*

Taking a step away from the broader forces leading to complex removability, when it comes to individual cases, contesting removability is often a crapshoot. Success often rests upon two preconditions: (1) having a lawyer and (2) having the time to pursue the removability argument. Without a lawyer or time, the legal claims made available by complex removability may realistically be meaningless to many. Claims to citizenship, arguments under the categorical approach, and motions to suppress can be particularly labor-intensive efforts that call for extensive factual investigation and legal analysis.[331]

Individuals in immigration detention, in particular, have neither counsel nor time. One does not have a right to government-appointed counsel in removal proceedings.[332] Some challenges to removability are so factually and legally complex that not just any lawyer will do. Rather, sophisticated and experienced counsel may be the deciding factor that leads to a successful claim. But immigration detainees frequently lack the time to obtain counsel who can assess whether the detainee might have a basis for contesting removability. In many cases, under the threat of prolonged detention and unable to pay for an attorney, detainees concede removability and accept removal.[333] In other cases, individuals facing contestable charges of removability—particularly under the categorical approach or claims to citizenship—may only receive the benefit of counsel much later in the enforcement process, such as pending review before the federal courts of appeal (through pro bono lawyers)[334] or when facing criminal prosecution on illegal reentry charges (through court-appointed criminal defense counsel).

The challenges posed by detention, counsel, and time are endemic to all kinds of claims in the immigration context, including removal and

329. *See supra* note 276 and accompanying text.

330. *See supra* Section II.D.

331. *See supra* note 269.

332. *See* 8 U.S.C. § 1229a(b)(4) (2012) (providing the right to counsel "at no expense to the Government" in removal proceedings).

333. *See infra* notes 398–400.

334. Some federal courts have meaningful pro bono representation programs in which law firms agree to represent appellants and are guaranteed an oral argument before the court of appeals. *See* Leonard J. Feldman, *The Ninth Circuit's Pro Bono Program: Making a Difference One Appellant at a Time*, FED. LAWYER, May 2008, at 44, 44 (describing accommodations made by the Ninth Circuit to facilitate pro bono representation).

discretionary relief.[335] Individuals in immigration detention are far less likely to have lawyers,[336] and far less likely to prevail in a claim,[337] than individuals who are in removal proceedings but not detained. The degree to which the reality of immigration detention affects the development of immigration jurisprudence merits special emphasis (even if it is not unique to removability per se) because it underscores how material reality and the development of immigration law are deeply connected but poorly matched.

C. *Immigration Status and Removability*

This section examines the relationship between removability (i.e., the government's ability to pursue removal against an individual) and the concept of immigration status (i.e., the legal category that confers formal rights and benefits on an individual to reside in the country). For starters, complex removability underscores the uncertainty that can accompany immigration status. Scholars have recognized that the very notion of unauthorized presence in the United States is complicated, both because it is not always clear whether a person's presence is actually unauthorized and because that status could change with political and administrative developments.[338] As Justice Brennan's majority opinion recognized in *Plyler v. Doe*,[339] a 1982 Supreme Court case that many scholars regard as the "high water mark" of immigrants' rights,[340] that "there is no assurance that a child subject to deportation will ever be deported."[341]

The four dimensions of removability discussed in this Article illustrate how immigration status can be fluid. Others have noted that immigration status follows a rough hierarchy of rights.[342] A basic way of conceptualizing the hierarchy would be to imagine a ladder on which U.S. citizens occupy the top rung with the greatest status, followed by lawful permanent residents, temporary visa holders, and undocumented

335. *See* Kalhan, *supra* note 78, at 46–49.

336. One study found that, in New York City, "[s]ixty percent of detained immigrants do not have counsel by the time their cases are completed" while only "[t]wenty-seven percent of nondetained immigrants do not have counsel by the time their cases are completed." *See* Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* (pt. 1), 33 CARDOZO L. REV. 357, 363 (2011).

337. The same study discussed *supra* found that for nondetained immigrants, 74% who are represented have a successful outcome, in comparison to 13% who are not represented. Of detained immigrants, 18% who are represented have a successful outcome, in comparison to 3% who are not represented. *See id.* at 363–64 ("The two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination) are having representation and being free from detention." (footnote omitted)).

338. *See supra* notes 40–46 and accompanying text.

339. 457 U.S. 202 (1982).

340. *E.g.*, Motomura, *Procedural Surrogates*, *supra* note 325, at 1690.

341. *Plyler*, 457 U.S. at 226.

342. *See* Legomsky, *supra* note 41, at 106–07; Pham, *supra* note 41, at 1151.

migrants.[343] Arguably, the "criminal alien" classification occupies the bottom rung of the immigration status ladder. The concept that an individual can ascend or descend this ladder (like the children's game Chutes and Ladders) is nothing new. Indeed, the immigration statute has long recognized that individuals can adjust and lose their status.[344]

The removability framework reinforces the intricacy and fluidity of this ladder. For instance, complex removability suggests that the ladder may require more rungs than articulated above. Administrative discretion through programs like DACA suggests an amorphous middle ground between authorized and unauthorized status but with the right to engage in work. The potential for movement within the hierarchy is noteworthy as well. The citizenship dimension of complex removability, particularly claims to citizenship brought by individuals in immigration detention, suggests that one can move quite radically from one end of the ladder (the "criminal alien" rung) to the other (the U.S. citizen rung).

Shifting the focus from status to removability also reveals the limitations of thinking about immigration purely in terms of formal status. Status and removability exist in similar but not identical spheres. With citizenship, one is trying to *confer* status (or rather, show that it has already been conferred by operation of law) and trying to prove it so as to prevent removal. With the categorical approach, one is trying to *prevent the loss of status* resulting from prior convictions or other post-entry conduct. With motions to suppress, one is trying to argue that removal is not justified, notwithstanding the absence (and anticipated absence) of status. With administrative discretion, one is similarly trying to argue that removal is not justified, notwithstanding the absence of status, and in anticipation that Congress might confer status in the future. Put differently, immigration status is not necessarily dispositive of removability, and vice versa, but both are fundamental to understanding the power to remove individuals from the country for alleged immigration law violations.

D. *Dynamic Interactions Between the Government and the Individual*

Focusing on immigration status without thinking about removability can lead to the mistaken assumption that immigration law violations are created exclusively by the individual noncitizen without government

343. *See* Legomsky, *supra* note 41, at 106–07 (discussing hierarchy of rights "starting with personhood and progressing to physical presence, residence, lawful residence, and citizenship"); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 92–101 (describing six categories of membership levels reflecting a rough hierarchy of rights, from "applicant at the border," "parolee," "entrant without inspection," "admitted nonimmigrant," "lawful permanent resident (or immigrant)," to "[U.S.] citizen").

344. *See, e.g.*, 8 U.S.C. § 1255(a) (2012).

participation. Removability is complex, not only because the law is unsettled in many areas, but also because removability is the product of a dynamic relationship between the state and the individual. In other words, how government institutions at all levels interact with the noncitizen may determine removability just as much as the formal doctrine. Each of the four dimensions of complex removability reflects, to varying degrees, how removability is produced.

Thus, while the vast categorical approach case law guides adjudicators and lawyers on the kinds of crimes that fall within the ambit of the federal immigration statutes, individual outcomes frequently depend on the nature of both the noncitizen's and the government's actions. For instance, to benefit from arguments available under the categorical approach, the noncitizen formally contests removability. Conceding removability may prevent the individual from making a categorical approach argument,[345] and in reality, various forms of pressure to concede removability exist.[346] In some cases, analysis of the statutory language under the categorical approach alone is inconclusive. In those cases, to establish removability, the government must obtain and submit evidence of removability from the record of conviction.[347] The government's failure to request records from the criminal case can preclude it from establishing removability and can therefore lead to termination of the removal proceedings.[348] In other words, removability determinations may ultimately rest both on what the noncitizen did (e.g., receiving a criminal conviction) and on what the government does or fails to do (e.g., obtaining criminal records).

The nature of suppression claims in immigration also shows how removability can depend on the dynamic interactions between the government and the noncitizen, rather than on the actions of the noncitizen alone. Motions to suppress require, at bottom, an allegation that the government acted wrongfully, such as by knowingly violating the Fourth Amendment, undermining the fundamental fairness of the proceedings, or disregarding its own rules.[349] Suppression motions thus scrutinize the government's actions more so than the noncitizen's actions. Motions to suppress depend on whether ICE agents obtain consent to enter a home, and then on whether the noncitizen refuses to admit her country of origin in subsequent communications with the government.[350] And suppressing alienage may only be possible if the government's interactions with the noncitizen continue to operate according to a certain series of rules, in

345. *See infra* note 404.

346. *See infra* text accompanying notes 398–405.

347. *See supra* note 168.

348. *See supra* note 224.

349. *Cf.* Motomura, *supra* note 40, at 1771 (analyzing suppression motions as invoking arguments that question the competence of the governmental authority in a particular manner).

350. *See* Baldini-Potermin et al., *supra* note 270, at 416, 424–25.

which the noncitizen refuses to concede alienage throughout the proceedings.[351] Removability outcomes thus depend on the shifting relationship between the government and the noncitizen.

Similarly, citizenship claims may depend on whether detention officials take such claims seriously.[352] Resistance from the government may come in the form of policy choices. For instance, the State Department's periodic refusal to issue U.S. passports to individuals born in circumstances under which the agency suspected fraud by the individual's doctor or midwife has a significant effect on many citizenship claims.[353] Citizens may also confront barriers to their citizenship claims on an individual level when government enforcement agents refuse to explore the legitimacy of an individual's potential citizenship claim.[354]

The case of DACA and DREAMers presents a slightly different, but related, aspect of removability's production. The legal developments related to DREAMers—both legislative and administrative action—were the product of grassroots organizing campaigns and activism.[355] Most were led by DREAMers themselves, undocumented students who publicly identified themselves as lacking immigration status and possessed deep confidence in the normative merit of their claims to membership in the United States.[356] For DREAMers and other individuals who might qualify for prosecutorial discretion, the immigration statutes fail to make it possible for them to remain in the United States with a formal status. Nevertheless, the Administration has acknowledged the value of allowing them to avoid deportation.[357] This recognition, however, would likely not have come about without the political activism of the DREAMers themselves.[358]

To be sure, the development of any area of the law inevitably involves the contributions of the government and the governed. But thinking about removability as a product of dynamic interactions between the government and the individual contrasts with the narrative of unlawfulness typically seen in public rhetoric. Typically, immigration law violations and unlawful status are conceptualized in terms of the individual's actions: breaking a law, crossing a border, receiving a conviction. The default tendency in public discourse is to associate removability with illegality and, by

351. *Id.* at 424.

352. *See supra* text accompanying notes 129–36.

353. *See supra* text accompanying note 137–39.

354. *See supra* text accompanying notes 129–36.

355. *See* Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J., (Oct. 14, 2012, 8:46 PM), http://online.wsj.com/article/SB10000872396390443982904578046951916986168.html (subscription required) (describing the political activism of the DREAMer movement).

356. *See id.*

357. *See id.*

358. *See id.*

implication, criminality.[359] Simplistic narratives of removability lead to the assumption that persons who violate the immigration laws are "illegal" and, therefore, criminal.[360] But the simple story of removability ignores the government's role in establishing and determining removability, as well as the extent to which removability often hinges on legal or factual complexity.

E. *Whose Vision of Removability?*

Finally, complex removability raises a common question related to *who* decides removability, even at the federal level. The *Arizona v. United States*[361] decision was significant because it affirmed a centuries-old doctrine known as federal exclusivity, which establishes that the federal government—and not the states—has exclusive control over immigration matters.[362] In comparison to the voluminous recent literature addressing immigration federalism with respect to the role of states and localities in regulating immigration,[363] there is little analysis on the allocation of power *within* the federal government when it comes to immigration. The core doctrine operating in immigration law has been the plenary power doctrine, which posits that Congress, not the courts, has complete and unfettered discretion over immigration and that the Executive's power is less clearly defined.[364] But as Professor Daniel Kanstroom has noted, "[D]eportation involves many different government actors—legislative, executive/administrative, and judicial—whose goals may differ substantially."[365] A closer look at removability shows, indeed, a series of contests amongst federal actors when it comes to identifying the precise boundaries of power over removability.

The most obvious area of tension exists between the Article III federal courts and the immigration-related administrative agencies of the Executive Branch. The categorical approach in particular illustrates how removability has become subject to a tug-of-war between the Judiciary and the Executive Branch over authority in immigration.[366] The question of

359. Neuman, *supra* note 3, at 1441 ("'[I]llegal alien' is a pejorative term, which may be interpreted as implying that the alien is a criminal.").

360. *See* Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 199–200 (2007).

361. 132 S. Ct. 2492 (2012).

362. *See* Rodriguez, *supra* note 19, at 575–76.

363. *E.g.*, *id.* at 569–74, 570 n.8.

364. *See* Cox & Rodriguez, *supra* note 278, at 460–62.

365. *See* KANSTROOM, *supra* note 18, at 32.

366. *E.g.*, Silva-Trevino, 24 I. & N. Dec. 687, 693 (Op. Att'y Gen. 2008) ("Although to date the Department generally has deferred to the relevant circuit court in deciding which approach to use in a given case, providing a consistent, authoritative, nationwide method for interpreting and applying ambiguous provisions of the immigration laws . . . is one of the Department's key duties.").

whether adjudicators should engage in factual determinations to assess crimes involving moral turpitude—the key issue at stake in former Attorney General Mukasey's surprise intervention in *Silva-Trevino*—serves as a stark example.[367] *Silva-Trevino* represented a politicized effort to corrode the categorical approach in contravention of judicial precedent.[368] In the four years following *Silva-Trevino*, most of the federal courts of appeal that considered *Silva-Trevino* rejected its analysis[369] and refused to extend the judicial deference ordinarily given under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[370] In categorical approach questions other than those raised in *Silva-Trevino*, the question of whether, and to what degree, the administrative agency's views should prevail remains an ongoing issue in litigation.

Similar tensions between the Judiciary and executive agencies exist with claims to citizenship and motions to suppress. In the suppression context, given the heavy emphasis on constitutional law, one scholar has questioned the institutional competence of immigration judges to adjudicate motions to suppress.[371] Practitioners note that some immigration judges may respond to motions to suppress with hostility.[372] The federal courts of appeal, however, appear to have led towards measured success with suppression motions.[373] A 2013 case involving a claim to citizenship illustrates tension between executive agencies and the Judiciary.[374] Esteban Tiznado-Reyes was deported, prosecuted for illegal reentry, sentenced to serve fifty-one months in prison, deported again, and prosecuted a second time for illegal reentry. During his second federal criminal trial on the illegal reentry charges, a jury found that Mr. Tiznado-Reyes was a U.S. citizen.[375] Nonetheless, despite having been found a citizen by a federal

367. *See* Koh, *supra* note 10, at 291–94 (describing criticisms of the *Silva-Trevino* decision).

368. *See* Holper, *supra* note 185, at 1241–42 (describing the *Silva-Trevino* decision as lacking the "law-like procedures" required to earn *Chevron* deference); Laura S. Trice, *Adjudication By Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeal Decisions*, 85 N.Y.U. L. REV. 1766, 1776–80 (2010) (describing the procedural deficiencies accompanying *Silva-Trevino*).

369. *See supra* note 206.

370. 467 U.S. 837, 842–43 (1984) (setting forth a two-part test for courts to determine whether to defer to agency decisions, in which (1) "[i]f the intent of Congress is clear," then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," and (2) "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

371. *See* Chacón, *supra* note 227, at 1628–30.

372. *See* Baldini-Potermin et al., *supra* note 270, at 425.

373. *See supra* text accompanying notes 243–53.

374. *See* Tim Vanderpool, *Deportation Dilemma: Is the Government Trying to Boot an American Citizen?*, TUCSON WEEKLY (Jan. 3, 2013), http://www.tucsonweekly.com/tucson/deportation-dilemma/Content?oid=3610673 (reporting on ICE's efforts to deport an individual whose U.S. citizenship had been definitively decided by a federal district court).

375. *See* Emergency Petition for Writ of Mandamus at 10–11, *In re* Tiznado-Reyna, No. 12-

court, ICE attempted to remove him for a third time and placed him in immigration detention (including in solitary confinement) during the removal proceedings.[376] A struggle between executive agencies and the Judiciary is nothing new in the law—administrative law scholars and the federal courts have been grappling with the contours of judicial deference to administrative agencies ever since the rise of the administrative state.[377] Nevertheless, the Judiciary plays a meaningful role in determining removability, even though that role is limited by the contours of the plenary power doctrine.

In discussing the tension between the Judiciary and the administrative agencies operating in the immigration realm, it is important to remember that administrative actors are no monolith. Multiple agencies comprise the overall administrative state in the immigration context.[378] The agencies most relevant to removability discussions are DHS (specifically, ICE, the enforcement agency) and DOJ (specifically, EOIR for its role in trial-level immigration adjudication through the immigration courts and immigration judges, as well as the BIA as the appellate administrative agency).[379] Even within these agencies, removability determinations may differ depending upon the actor. EOIR and the BIA are adjudicative agencies whose adjudications bear some resemblance to formal judicial adjudications involving administrative procedures and a formal record.[380] In the immigration context, however, often the governmental actors who determine removability are frontline enforcement agents who are bound by few procedural requirements.[381]

Tension also exists between Congress and the President. In the immigration context, courts have not clearly allocated power between the

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73953 (9th Cir. Dec. 3, 2012).

376. *See id.* at 4–7. The Emergency Petition was summarily denied shortly thereafter as not "warrant[ing] the intervention of this court by means of the extraordinary remedy of mandamus." *See* Tiznado-Reyna, No. 12-73953, slip op. at 1 (9th Cir. Dec. 14, 2012).

377. *See* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 543 (2010) ("The Supreme Court's *Chevron* decision has prompted an amazing amount of scholarly and judicial analysis, criticism, and debate.").

378. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 2–5 (5th ed. 2009) (describing the roles of various administrative agencies in regulating immigration).

379. *See id.*

380. *See generally* 8 C.F.R. §§ 1003.1–.8 (2013) (procedures governing BIA); *id.* §§ 1003.12–.47 (procedures governing immigration courts).

381. *See, e.g.*, Koh, *supra* note 255, at 512–15 (describing the absence of accountability for frontline ICE officers administering stipulated orders of removal); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 175–93 (2006) (describing the failure of agency officials to follow mandatory procedural safeguards associated with expedited removal, even in the presence of third-party observers).

President and Congress.[382] By creating DACA, the Obama Administration engaged in an arguably controversial exercise of its prosecutorial discretion under the immigration laws. But this view is not universal. According to the lawsuit filed by ICE agents,[383] DACA represents an overstepping of the President's powers because the federal immigration statute is otherwise written in mandatory terms.[384] In response, Professor David Martin—who served as general counsel of the immigration agency when the statutes that formed the basis of the agents' lawsuit were enacted—argued that the lawsuit is premised on incorrect readings of the statute that would lead to unwise policy outcomes.[385] Without engaging in the merits of the constitutionality or wisdom of DACA, the point here is simply that DACA reveals a broader dynamic in which Congress and the President have different views of removability. The ICE lawsuit demonstrates that the government's power to remove may depend on who has authority to speak on removability questions.

IV. RETHINKING REMOVABILITY

But why does—or should—complex removability matter? What might the policy and legal implications of taking complex removability more seriously look like? This Part sets forth three general areas in which rethinking removability might make a difference. It does so in fairly broad strokes, identifying several areas of immigration policy, procedure, and discourse that might demand reconsideration in light of the growing complexity of removability.

The first general implication of rethinking removability may be the simplification of removability by ameliorating some of the conditions that complicate it. If the absence of substantive relief has driven removability's complexity, then one response would be to increase the availability of substantive relief through a variety of mechanisms. The most obvious form of substantive relief, which began to gain significant traction in 2013,

382. *See* Cox & Rodriguez, *supra* note 278, at 460–61 (describing how the courts have historically set forth two visions of the "President's power over immigration: one grounded in inherent executive authority under the Constitution, the other rooted in the modern administrative state's conception of executive authority originating exclusively from Congress's decision to delegate").

383. Complaint, Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. Aug. 23, 2012), 2012 WL 3629252; *see also supra* note 307.

384. *Id.* at 2. Similarly, Professors Robert Delahunty and John Yoo view the President as acting only as a delegate of Congress and have argued that the Administration, through creating DACA and declining to enforce federal immigration statutes against a specific group of persons, amounts to a violation of the President's duties under the Take Care Clause of the Constitution. Robert J. Delahunty & John Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–85 (2013).

385. Martin, *supra* note 54, at 167–69.

consists of comprehensive immigration reform proposals that involve opportunities for much of the unauthorized population to eventually obtain full citizenship.[386]

Should Congress enact comprehensive immigration reform that contains legalization provisions,[387] then such reform would constitute one step towards simplifying removability. But any short-term immigration reform in Congress is likely to involve political trade-offs, which may preclude more fundamental reworking of the system, such as meaningful restorations of discretionary decision making at several levels of the immigration system. Under current law, discretionary determinations are explicitly forbidden at various points throughout the system, especially for immigration judges and federal courts reviewing detention and removal decisions.[388] Additionally, statutory reform that could impact complex removability would also include scaling back some of the criminal grounds of removability in the immigration statutes, as well as the categorical disqualifications that prevent individuals from seeking discretionary relief.

By suggesting that Congress simplify removability by restoring substantive relief, this Article does not mean to suggest that complex removability is a bad thing. Rather, as described below, a second recommendation involves allowing individuals to pursue more challenges to removability when the law warrants. But efficiency, uniformity, and fairness costs rise when removability challenges become the only means by which individuals with otherwise meritorious claims to membership in the United States can avoid deportation. Permitting more individuals to seek discretionary relief or restructuring the statute so that the agency is required to focus its scarce resource on individuals with more serious convictions might simplify removability.

A second implication of rethinking removability may involve questioning the administrative policies and judicial interpretations that fail to allow individuals in removal proceedings to pursue removability challenges. Broadly speaking, the current system of immigration adjudication reflects the assumption that removability is simple, when in

386. Whether any comprehensive immigration reform will include a pathway to citizenship for individuals who currently lack immigration status was a subject of controversy in early 2013. *See* Ashley Parker, *House G.O.P. Open to Residency for Illegal Immigrants*, N.Y. TIMES (Feb. 5, 2013), http://www.nytimes.com/2013/02/06/us/politics/house-gop-explores-immigration-changes-short-of-citizenship.html (reporting on House Republicans' receptivity to providing an avenue to lawful permanent resident status, but not citizenship, for undocumented immigrants).

387. *See, e.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

388. *E.g.*, 8 C.F.R. § 1003.2(c) (2013) (forbidding the BIA from reopening proceedings "for the purpose of affording the alien an opportunity to apply for any form of discretionary relief . . . if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing").

fact it is not, which leads to a deep disconnect between how the law is developing (or could develop) and how it is applied.

The deficiencies in the legal framework with respect to removability can be seen in Gabriela Cordova-Soto's case.[389] Ms. Cordova-Soto entered the United States as an infant after her parents brought her across the border.[390] She lived in the United States for twenty-six years before ICE apprehended her.[391] While in the United States, she obtained lawful permanent resident status, married a U.S. citizen, and had four U.S. citizen children.[392] In 2005, she was convicted for simple possession of a controlled substance, but given a suspended sentence that involved no actual jail time.[393] Upon reporting to probation, she was referred to ICE and placed in an immigration detention facility, where ICE agents told her she would have no chance of winning her case and that signing a stipulated removal order would enable her to obtain a faster deportation.[394] ICE classified the single drug possession offense as an "aggravated felony," which would disqualify her from seeking discretionary relief from removal.[395] Believing that she had no grounds to fight her case, Ms. Cordova-Soto accepted the stipulated removal order, which an immigration judge signed days later without ever speaking with her.[396] What Ms. Cordova-Soto did not know was that a circuit split had developed over whether a single drug possession conviction did, indeed, constitute an aggravated felony. Just five months after Ms. Cordova-Soto was removed, the applicable federal appeals court held that the offense was not an aggravated felony.[397] That same year, the Supreme Court agreed.[398] When ICE discovered that Ms. Cordova-Soto unlawfully re-entered the country to reunite with her family, it reinstated the prior stipulated removal order. This led to her immediate deportation, again without an immigration court hearing and again with no opportunity to revisit the charges lodged against

389. Cordova-Soto v. Holder, 659 F.3d 1029, 1032 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 647 (2012); Cordova-Soto v. Holder, 732 F.3d 789 (7th Cir. 2013). I worked on amicus briefs to the BIA and the Seventh Circuit in support of administrative reopening of the respondent's stipulated removal order. *See* Brief of Amicus Curiae National Immigration Law Center in Support of Respondent, Cordova-Soto v. Holder, A091 045 891, (B.I.A. Aug. 30, 2012) (on file with Florida Law Review); Brief of Amicus Curiae National Immigration Law Center in Support of Petitioner Gabriela Cordova-Soto, Cordova-Soto v. Holder, No. 12-3392 (7th Cir. Mar. 8, 2013) [hereinafter Cordova-Soto 7th Cir. Brief] (on file with Florida Law Review).

390. *Cordova-Soto*, 732 F.3d at 790.

391. *Id.*

392. *Id.* at 791.

393. *Id.* at 790; Cordovo-Soto 7th Cir. Brief, *supra* note 389, at 5.

394. *Id.* at 5.

395. *Id.*

396. *Id.*

397. Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006).

398. Lopez v. Gonzales, 549 U.S. 47, 50 (2006).

her.[399] On appeal, the Tenth Circuit found that because Ms. Cordova-Soto had not filed a petition for review of the original stipulated removal order within thirty days of that order, it lacked jurisdiction to review her removal at all.[400] On further appeal, the Seventh Circuit found that the statute prohibited her from administratively reopening the stipulated removal order.[401] Thus, Ms. Cordova-Soto never had counsel and never appeared before an immigration judge or any other court,[402] but was removed through procedures that assumed removability (as an aggravated felon) to be a foregone conclusion, which precluded revisiting the question.

Ms. Cordova-Soto's case is not unique in that a wide range of laws, policies, practices, and conditions currently allow removability to be treated as a cursory and unreviewable matter. The desire to be released from incarceration drives many noncitizens' decisions to concede removability rather than pursue potential arguments, particularly where the law itself remains unsettled.[403] Immigration judges, too, have an incentive to gloss over the removability stage of immigration proceedings because they face strict case completion deadlines—particularly when respondents are detained[404]—and yet still face historic backlogs in the immigration courts.[405] It should come as no surprise that many respondents concede removability or choose not to fight their removal, even if they have viable claims.[406] In other instances, immigration judges may conduct proceedings in a manner that exerts significant pressure on respondents to concede

399. Cordova-Soto v. Holder, 659 F.3d 1029, 1030–31 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 647 (2012).

400. *Id.* at 1032 (citing 8 U.S.C. § 1252(b)(1) (2012)).

401. *See* Cordovo-Soto v. Holder, 732 F.3d 789, 794–96 (7th Cir. 2013). The Court relied on 8 U.S.C. § 1231(a)(5) (2012), which prohibits reopening a reinstated removal order, and emphasized that Ms. Cordovo-Soto could have filed a timely motion to reopen within thirty days of the stipulated removal order entered in 2005. *See id.* The Court acknowledged that some circuits did not allow noncitizens to reopen their removal orders from outside of the United States at the time, but nonetheless placed the blame on Ms. Cordovo-Soto for re-entering the country following the removal order rather than filing a motion to reopen. *See id.*

402. The Seventh Circuit acknowledged that "the immigration judge signed off on her 2005 stipulation without addressing whether it was intelligent and voluntary [as required by 8 C.F.R. § 1003.25(b) (2013)], even though she was not represented by counsel during the proceedings." *Id.* at 795.

403. *See* Kalhan, *supra* note 78, at 46–47.

404. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 4 (2006), *available at* http://www.gao.gov/assets/260/251155.pdf (stating that "EOIR evaluates the performance of the immigration courts based on the immigration courts' success in meeting case completion goals").

405. *See Immigration Court Backlog Tool*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/court_backlog (select "Immigration" under "Charge Type" then select "Average Days" under "What to Graph") (last visited Oct. 9, 2013) (showing a near continual increase in immigration court wait times, from 379 days in 1998 to 763 days in 2013).

406. *See* Kalhan, *supra* note 78, at 46–47.

removability. It is fairly common for immigration judges to hold group removal proceedings, in which groups of up to twenty-five individuals often concede removability and agree to removal.[407] Furthermore, one generally cannot withdraw factual admissions or concessions of removability, absent extraordinary circumstances.[408] Courts have applied the presumption against withdrawal even where the record suggests the possibility that the government would not have been able to establish removability if required to do so.[409] Through a variety of mechanisms, approximately two-thirds of deportees are removed through truncated procedures in which individuals have limited opportunities to contest removability, and never appear before an immigration judge.[410]

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407. Aspects of the practice of holding group removal hearings has been questioned at times by the federal courts of appeal. *See, e.g.*, United States v. Lopez-Vasquez, 1 F.3d 751, 752–54 (9th Cir. 1993) (en banc) (finding a violation of due process where the immigration judge held a group deportation hearing and asked respondents to stand if they wished to waive appeal). However, the federal courts have upheld the practice itself. *See, e.g.*, United States v. Calles-Pineda, 627 F.2d 976, 977 (9th Cir. 1980).

408. *See* Velasquez, 19 I. & N. Dec. 377, 382 (B.I.A. 1986).

409. *See, e.g.*, Pagayon v. Holder, 675 F.3d 1182, 1192 (9th Cir. 2011) (holding that, in finding an alien removable, an IJ is entitled to rely upon the alien's pleading-stage admission that he was convicted of a removable offense); Perez-Mejia v. Holder, 641 F.3d 1143, 1153–54 (9th Cir. 2011) (treating admissions as binding, and requiring no further evidence from ICE to establish removability even though the conviction was subject to a modified categorical approach), *amended on other grounds by* 663 F.3d 403 (9th Cir. 2011); Hoodho v. Holder, 558 F.3d 184, 190–92 (2d Cir. 2009) (holding that an attorney's concession of an alien's removability "obviated the need for" the government and immigration judge to develop the record "along the lines specified by the modified categorical approach").

410. Nearly two-thirds of all removal orders issued in the last fiscal year involved the use of procedures in which the individual did not appear before an immigration judge. *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 239, at 102 (showing 391,953 removals); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK, at D2, Q1 (2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf (suggesting that immigration judges entered 138,864 removal orders, or about 83% of all removal orders that were not grants of voluntary departure). The forms of removal reflected by the Office of Immigration Statistics Yearbook data include expedited removal, 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2012) (indicating that certain aliens arriving at ports of entry "shall" be ordered removed "without further hearing or review"), reinstatement of removal, *id.* § 1231(a)(5) (providing for removal, without right to immigration court hearing, for noncitizens apprehended in the United States after the receipt of a prior removal order); 8 C.F.R. § 241.8(a) (2013) (same), and administrative removal, 8 U.S.C. § 1228(b) (applying to immigrants who are not lawful permanent residents and who have convictions that are aggravated felonies); 8 C.F.R. § 238.1(b)(ii)–(iii) (same). In addition, though not reported by either DHS or EOIR, approximately 14,846 individuals in fiscal year 2011 received stipulated orders of removal from immigration judges, which involve the noncitizen waiving their right to appear before an immigration judge. *See* LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 129 (2012), *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf (showing 14,846 stipulated removal orders entered in 2011); *see also* 8 U.S.C. § 1229a(d) (stipulated removal statute); 8 C.F.R. § 1003.25(b) (stipulated removal regulation); Koh, *supra* note 255, at 478–79

There are various ways to grapple with the implications of complex removability from a policy and law reform perspective, some of which this Article identifies, but each of which could serve as the subject of a separate article. For instance, a right to government-appointed counsel for individuals with viable challenges to removability would lead to greater access to available legal claims.[411] The role of IJs, too, might be reexamined in light of the complexity of removability, and result in the imposition of an increased obligation upon IJs to identify cases involving contested removability.[412] A heightened IJ burden towards respondents in removal proceedings would impact practices such as holding group hearings, requiring concessions of removability, or signing removal orders without holding an in-person hearing with the respondent.[413] The legal framework governing administrative and judicial review of removal orders should also be subject to deeper critique in light of removability's contested nature and the lack of consensus amongst different governmental actors. Removability constitutes one of the few areas in which judicial review of removal orders is squarely permitted by statute. But an intricate series of timing requirements[414] and regulatory restrictions[415] can make judicial and even administrative review challenging for pro se individuals in particular. Without recounting each rule here, courts and agencies could reinterpret some rules to provide for greater rights to review, particularly where removability challenges are at issue.

Finally, rethinking removability has immediate discursive implications. The most obvious involves the use of the term "illegal" in the media and other public conversations about immigration.[416] The term is problematic, not only for its stigmatizing effects, but because it may be legally inaccurate, particularly in the case of individuals who actually have a claim to status. It obscures the various ways in which illegality is not dispositive of one's removability. The current public discourse on "illegal" immigration, however, often reflects the assumption that if an individual is "illegal," the only logical consequence is to physically expel that individual from the United States.

The criminal justice system provides an example of how accurate understandings of doctrinal reality can (and should) shape public discourse. It is well understood that in the criminal justice system, an individual is

(describing data on stipulated orders of removal prior to 2011).

411. *See supra* notes 332–37 and accompanying text.

412. *See* 8 C.F.R. § 1240.11(a)(2) (requiring IJs to advise aliens of any "apparent eligibility" for relief).

413. *See* Koh, *supra* note 255, at 487–88 (discussing the limited procedural protections in removal proceedings).

414. *See, e.g.*, 8 U.S.C. § 1252(b)(1) (requiring a petition for review to be filed within thirty days of the date of the final order of removal).

415. *See supra* note 85 and accompanying text (explaining the post-departure bar).

416. *See supra* note 1.

innocent until proven guilty. One result of this widespread understanding is that media reports of criminal trials refer to persons with pending criminal charges as a "suspect," "alleged criminal," or "defendant."[417] In the same vein, public rhetoric on immigration might use a phrase like, "allegedly removable" to describe a person suspected of violating the immigration laws.[418] Indeed, in the spring of 2013, the Associated Press announced plans to discontinue using the term "illegal immigrant," noting that the word "illegal" should "only . . . refer to an action, not a person." The Associated Press further directed reporters to "[s]pecify wherever possible how someone entered the country illegally and from where," and indicated that DREAMers "should [not] be described as having immigrated illegally."[419] Several major media sources followed suit, citing in part the complexity of the laws and the inaccuracy of using the terms "illegal," and "undocumented" to describe a person who has violated the immigration laws.[420]

CONCLUSION

Ultimately, this Article calls for adopting a more nuanced understanding of removability. It places the concept of removability—rather than unlawful immigration status—at the center of the discussion, and outlines what removability is and why it matters in the immigration context. Using four areas of emerging law—claims to citizenship, the categorical approach, motions to suppress, and administrative discretion—this Article suggests that removability is in many ways complex, contested,

417. *E.g.*, Katherine Bindley, *Michael Shane Hagger, Alleged Criminal, Taunts Police on Facebook Page*, HUFFINGTON POST (July 5, 2012, 11:51 AM), http://www.huffingtonpost.com/2012/07/05/michal-shane-hagger-taunts-police-on-facebook_n_1651197.html; William Glaberson, *For 3 Years After Killing, Evidence Fades as a Suspect Sits in Jail*, N.Y. TIMES (Apr. 15, 2013), http://www.nytimes.com/2013/04/16/nyregion/justice-denied-after-a-murder-in-the-bronx-a-sentence-to-wait.html; Bridget Murphy, *Carlos Ortiz, Co-Defendant in Aaron Hernandez Case, to Remain in Jail, for Now*, HUFFINGTON POST (July 9, 2013, 12:57 PM), http://www.huffingtonpost.com/2013/07/09/carlos-ortiz-jail-aaron-hernandez_n_3567720.html.

418. Some immigration advocates have already started to do so. *E.g.*, Ben Winograd, *California Governor Vetoes TRUST Act*, AM. IMMIGR. COUNCIL IMMIGR. IMPACT (Oct. 1, 2012), http://immigrationimpact.com/2012/10/01/california-governor-vetoes-trust-act.

419. Paul Colford, *'Illegal Immigrant' No More*, ASSOCIATED PRESS BLOG (Apr. 2, 2013), http://blog.ap.org/2013/04/02/illegal-immigrant-no-more.

420. Deirdre Edgar, *L.A. Times Updates Guidelines for Covering Immigration*, L.A. TIMES (May 1, 2013, 4:11 PM), http://www.latimes.com/news/local/readers-rep/la-me-rr-la-times-guidelines-immigration-20130501,0,5876110.story (indicating that the term "'[i]llegal immigrant[]' is overly broad and does not accurately apply in every situation," and that even "'undocumented immigrant[]' similarly falls short of our goal of precision" because "[i]t is also untrue in many cases, as with immigrants who possess passports or other documentation but lack valid visas"); Greg Moore, *Why the Denver Post Is Dropping the Term 'Illegal Immigrant,' Except in Essential Quotes*, DENVER POST (May 2, 2013, 10:17 AM), http://blogs.denverpost.com/editors/2013/05/02/denver-post-style-illegal-immigrant/976 (similar).

and subject to change. It then extracts several common themes that characterize complex removability today, and discusses the relationship between complex removability and the absence of substantive immigration relief; the roles of counsel, detention and time; the interplay between removability and immigration status; the role of the government in producing removability; and the extent to which different governmental institutions play a role in determining removability.

This Article acknowledges that some of the implications of rethinking removability—both simplifying removability and allowing its complexity to bloom—are wide-ranging and raise objections regarding political feasibility and cost. Complex removability also raises a number of questions that have not been addressed by this Article: How might complex removability influence the criminal justice system's role in immigration enforcement? How might other dimensions of complex removability shape its broader features? Is there a normatively optimal level of complexity that might inhere in removability? To what degree is complex removability an inevitable feature of our immigration system?

This Article seeks to challenge some of the prevalent ways of thinking about immigration status and the government's ability to physically remove people from the country. This Article recognizes the limits of some of the proposals as well as the broader host of questions that arise, but has sought to identify as a preliminary matter some ways in which rethinking removability could make a difference. This analysis applies both to the way the legal system responds to removability and also to the way the nation thinks about immigration in everyday life. As it turns out, there is a great deal about removability that we do not understand. This Article is a first step towards more clarity.