Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement

Kevin R. Johnson

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Los Olvidados:* Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement

Kevin R. Johnson**

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* LOS OLVIDADOS, THE FORGOTTEN, is the title of a 1950 film by Spanish filmmaker Luis Buñuel about impoverished children living on the streets of Mexico City. See VIRGINIA HIGGINBOTHAM, LUIS BUÑUEL 77-82 (1979) (describing film's plot). The beginning of the film features a panorama of famous cities as the narrator states that "this film, based on real life, is not optimistic ... but leaves the solution to this problem in the hands of the progressive forces of our time." GWYNNE EDWARDS, THE DISCREET ART OF LUIS BUÑUEL 92 (1982). I feel the same way about this Article's approach to the issues discussed.

** Professor of Law, University of California at Davis. A.B. 1980, University of California at Berkeley; J.D. 1983, Harvard University. Arturo Gándara and Virginia Salazar offered helpful comments on the prefatory story. Chris Cameron, Richard Delgado, Sergio García-Rodríguez, Peter Margulies, Hiroshi Motomura, Michael Olivas, Steve Roscow, Robert Rubin, and Jim Smith provided constructive feedback on a draft of this Article and helped correct a multitude of errors and sharpen the analysis immeasurably. My colleague John Oakley provided me with useful materials on the question whether lawful permanent residents are constitutionally entitled to the franchise and engaged in helpful discussions with me on the subject. Ming-Yuen Fong and Saul Garcia conducted the labor-intensive review of Supreme Court decisions and legislative histories of immigration legislation. Despite the long hours and tedium of the task as well as my unrealistic demands, they did an excellent job in good humor. Kerry Bader, Kathryn Gimple, and Nipa Rahim also provided helpful research assistance. I appreciate the help, support, and encouragement of all these people and am confident that they cannot imagine how much they influenced this Article. Finally, generous financial assistance from the UC Davis School of Law and the UC Davis Academic Senate is deeply appreciated.

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I. INTRODUCTION

"I had never heard of New Haven, Connecticut. But that is where we ended up after leaving Peru. I also never had a lawyer as a boss. But Lillian and I got work with two lawyers. Let me tell you what happened . . .

The 'Senate investigators' called me at work. They said that they wanted to talk to me about my old boss. They said that they had nothing to do with 'La Migra.' I wondered.

My friend Pablo had been picked up by La Migra. He had been here for ten years and didn't want to be sent back to Mexico. He was jailed in bad conditions. They kept telling him that he would be sent back because there were too many 'wetbacks' in this country.

Other friends told me stories like Pablo's. We knew that La Migra would do whatever it took. It reminded me of the police in Peru.
I was worried that these ‘investigators’ would tell La Migra about me. Didn’t they all work together anyway? But I was afraid not to talk to them.

I told them about the trip to the United States from Peru. We were lucky and quickly got work in the home of the rich lawyers. They paid us well. They gave us room and board in a big house. Lillian watched their baby boy and I drove them around town and did odd jobs.

Life had been hard in Peru. Work was hard to find. Wages were low. We worked long hours. El Sendero Luminoso [the Shining Path] made life dangerous. The government wasn’t any better. Even so, the decision to leave family and friends was not an easy one.

Coming to the United States was hard. The trip was dangerous and expensive. We paid all the money we had to fly to the United States as tourists. Friends had told us that along the border there were many Migra officers with guns and jeeps and helicopters and bright lights. ‘If you try to go it alone, they will kill you,’ we were told.

I told the ‘Senate investigators’ all that I knew. They kept saying that the lawyers, our old bosses, broke the law. I told them that the couple had been good to us. I explained that I had moved out because I was arguing too much with Lillian.

After my talk with the ‘investigators,’ newspaper reporters came looking for me. They asked a lot of questions about one of my old bosses, the woman.

Then La Migra found me. I received a letter addressed to me (Victor Cordero) in an official-looking envelope. After reading it a few times, a friend and I figured it out. They wanted me to turn myself in!

I should have known better than to have believed the ‘Senate investigators.’ They all work together, just like in Peru.

I didn’t want to be jailed. I didn’t want to go home. I didn’t want to leave Lillian. But there was no choice. These words rang in my ears: ‘they will kill you.’ The guns, jeeps, helicopters, and bright lights and the stories of Pablo and the others kept coming back to me.

I wrote a note to Lillian. The next day, I got on a plane for the long trip home to Peru.”

The prefatory story might sound vaguely familiar. President Clinton’s first Attorney General nominee, Zoë Baird, employed the two undocumented persons (Victor and Lillian
Cordero) on which the story is loosely based. The nomination of Baird, who had employed the Corderos in violation of federal law, sparked a national furor. The controversy refused to die quickly. A second Attorney General candidate, a respected federal district court judge, who employed an undocumented worker from Trinidad in her home when it was lawful, was pressured by the Clinton administration to withdraw from consideration.

Heated debates (particularly in law school faculty lounges, I assume) took place in the aftermath of the withdrawal of the two Attorney General candidates. Among the frequently discussed issues were the propriety of the developing litmus test for a high level appointment in the Clinton administration (i.e., a nominee could never have employed undocumented workers, even if entirely legal at the time, or failed to pay social security taxes), the alleged double standard used in applying the test to fill Cabinet positions, and the manner in

1. This story is not all factual. Indeed, I made parts of it up out of whole cloth. Based on my experience representing and working with undocumented persons, I filled in the gaps in the publicly available information about Victor and Lillian Cordero with details about what might have been. Because it in no way purports to represent the “truth,” use of the story might be subject to criticism. See Daniel A. Farber & Suzanna Sherry, Telling Stories out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807, 832-35 (1993).

2. Nothing in the story is meant to suggest that, assuming these facts to be true, the Corderos might or might not have been eligible for asylum in this country, or any other type of relief from deportation. See Huaman-Cornelio v. Board of Immigration Appeals, 979 F.2d 995 (4th Cir. 1992) (denying asylum to Peruvian national claiming fear of political persecution by the Shining Path). Political persecution by guerrillas and security forces in Peru, however, has been well-documented. See, e.g., AMNESTY INT’L, REPORT 1993, at 236-39 (1992).


6. See, e.g., Michael Kranish, Woes Over Workers: Clinton Denies a Double Standard, BOSTON GLOBE, Feb. 9, 1993, at 1; Catherine S. Manegold, Looking for an Attorney General: The Reaction; Women are Frustrated by Failed Nominations,
which the debacle highlighted the national childcare problem with its disparate impact on career women.\footnote{See, e.g., Erica Jong, The Mother of All Debates, N.Y. Times, Feb. 10, 1993, at A23; Anthony Lewis, Abroad at Home; It's Gender, Stupid, N.Y. Times, Feb. 8, 1993, at A17.}

However, a pressing issue to an isolated segment of society implicated by the Attorney General nominating process went largely unnoticed. The national dialogue had a very real impact on the lives of undocumented persons in this country. As a result of the new public awareness, undocumented domestic workers feared the loss of their jobs and worse.\footnote{See Douglas Martin, After Wood and Baird, Illegal-Nanny Anxiety Creeps Across Many Homes, N.Y. Times, Feb. 15, 1993, at A13.} Furthermore, the publicity intensified already simmering anti-immigrant sentiment in a nation reeling from an economic recession.\footnote{See Sergio Garcia-Rodriguez, Burdening the Care Giver, Recorder (San Francisco), Feb. 24, 1993, at 9. See generally infra text accompanying notes 82-129 (analyzing “new” nativism).}

This national discussion, however, was oblivious to its impact on one of the most vulnerable groups in American society. The human toll on the lives of two fairly ordinary undocumented persons is telling. Contacted by the Immigration and Naturalization Service (INS) after his identity came to light in Baird's nomination process, Victor Cordero returned to Peru rather than face likely deportation proceedings.\footnote{See Illegal Worker Disappears, N.Y. Times, Jan. 23, 1993, at 8; see also Linda Himelstein, INS Summons Peruvian Couple, Legal Times, Jan. 25, 1993, at 1 (explaining circumstances concerning INS attempts to contact Corderos).}

His estranged wife, Lillian Cordero, who had cared for Zoë Baird's child, was fired immediately by a successor employer when her immigration status became public and soon thereafter returned to Peru.\footnote{See Stuart Taylor, Jr., Inside the Whirlwind, Am. Law., Mar. 1993, at 64, 69; Baird's Former Nanny Agrees to Leave the Country, INS Says, L.A. Times, Jan. 29, 1993, at A24.}

Despite a willingness to work at jobs that citizens apparently did not desire\footnote{See Nomination of Zoë E. Baird as Attorney General, Hearing of the Senate Judiciary Comm., Fed. News Serv., Jan. 19, 1993, available in LEXIS, Nexis Library, Fednews File (testimony of Baird describing efforts to obtain childcare).} and despite the fact that they in no way contributed to any of the social ills often attributed to “illegal aliens,”\footnote{See infra text accompanying notes 89-92 (discussing scapegoating of} the plight of the Corderos was buried in the
discussion of the events. Their story went virtually untold. Its absence from the public discussion lends credence to the claims of critical race theorists, as well as critics of other stripes, who contend that the dominant in society often are ignorant of the travails of the subordinated. The episode also offers some revealing insights into immigration law and enforcement.

Why was the human tragedy of the Corderos and undocumented workers for the most part ignored in the Attorney General uproar? This Article attempts to shed some light on this question as well as to sketch an explanation for a broader phenomenon with ramifications for the interpretation and enforcement of the immigration laws. The political insularity of noncitizens, particularly those who come to the United States outside the avenues provided by the immigration laws, has consequences on the enforcement of the laws and the ability to change them. Many undocumented persons, marginalized through use of the label “illegal aliens,” live and work

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As is expected in the wake of a critical movement, the use of narrative in legal scholarship has provoked debate. Compare Farber & Sherry, supra note 1 (critically analyzing narrative in scholarship) with Richard Delgado, On Telling Stories in School: A Reply to Farber and Sherry, 46 VAND. L. REV. 665 (1993) (responding to criticism).

15. The term “noncitizens” as used in this Article refers to two distinct groups, persons in the country who are undocumented and persons who are lawful permanent residents (LPR). An undocumented person is in the country in violation of the immigration laws. Undocumented persons for purposes of this Article include those who entered surreptitiously, see Immigration & Nationality Act (INA) §§ 241(a)(1)(B), 275(a) (codified as amended at 8 U.S.C. §§ 1251(a)(1)(B), 1325(a) (1988)), as well as persons who entered lawfully but remain here without proper documentation, for example, persons who overstayed their nonimmigrant visas, see INA § 241(a)(1)(C)(i), 8 U.S.C. § 1251(a)(1)(C)(i); see also T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 215-58 (2d ed. 1991) (discussing nonimmigrant visas). In contrast, an immigrant lawfully admitted to this country is an LPR. See INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1988). After five or more years of continuous residence in the United States, a LPR may be eligible to become a naturalized citizen. See INA § 316(a), 8 U.S.C. § 1427(a).

16. See Kevin R. Johnson, A “Hard Look” at the Executive Branch's Asylum...
in this country for lengthy periods without ever becoming lawful permanent residents or naturalized citizens. A large population of lawful permanent residents who never become naturalized also remain indefinitely in this country. As noncitizens, undocumented and lawful permanent residents lack the right to vote.17 Though advocacy groups are able to exert some political pressure on their behalf, noncitizens cannot directly participate in the electoral process. Indeed, if they enter the political fray, noncitizens risk deportation by a government that they fear. Government therefore proceeds without direct input from a virtually invisible group of people whose daily lives are most vitally affected by its workings.

Another factor minimizes the influence of noncitizens in the political process. Many of today's "legal" and "illegal" immigrants are people of color, especially from Mexico.18 As has been the case with past immigrant generations, they have been subject to discrimination.19 Unlike their European predecessors, however, the animus directed at the new immigrants may enjoy greater resilience. The color of their skin indefinitely ensures their weakness in the political process, even for those "illegals" who navigate the arduous process to become "legal."20

It would be extraordinary if the political insularity of the noncitizen population, which is most directly affected by the immigration laws and their enforcement, had no consequences. Though at times enjoying the support of diverse coalitions,21

Decisions, 1991 Utah L. Rev. 279, 281 n.5; see also Ibrahim J. Wani, Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law, 11 Cardozo L. Rev. 51, 53 (1989) (arguing that legal fictions in immigration law often are "distortions and misrepresentations" that are "used to achieve ends that would be unthinkable in other areas of American law and popular belief").

17. See infra text accompanying notes 41-42, 318-41.
19. See infra text accompanying notes 82-129.
20. See generally Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992) (arguing that racism is a permanent part of United States society).
21. See infra text accompanying notes 55-60. Such coalitions sometimes have resulted in immigration laws notable for their compromises. See, e.g., IRCA §§ 101(a), 201, 302, 8 U.S.C. §§ 1324a, 1255a, 1159-60 (1988) (providing for imposition of sanctions on employers who employ undocumented labor as well as amnesty and special agricultural worker programs); Charles Gordon & Stanley Mailman, Immigration Law and Procedure: Special Alert, Immigration Act of 1990 § 1.02 (1991) (observing that Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), has both "humanitarian" and "excessively severe" components and that many practitioners and scholars will regard the statute as
noncitizens lack the hard cash of electoral politics—votes—essential to protect their interests.\textsuperscript{22} One therefore might expect that noncitizens generally would find it particularly difficult to persuade Congress to "override" harsh interpretations of the immigration laws by the judiciary, a difficult endeavor even for well-organized interest groups composed of voting citizenry. This is true even when the interpretation is inconsistent with majoritarian will.\textsuperscript{23} Moreover, without an electoral (or any other) check by the group most deeply affected by enforcement of the immigration laws, the bureaucracy hardly could be expected to correct unlawful, or lawful but heavy-handed, conduct in the ordinary course. Limited political power makes it inherently difficult to curb the misconduct of immigration agencies, especially in their everyday business which is effectively invisible to the average citizen.\textsuperscript{24}

Evidence supports the legitimacy of these concerns. Congress has rarely overridden Supreme Court decisions adverse to immigrants, particularly those of far-reaching significance to the noncitizen community, and has failed to even scrutinize some of the most egregious.\textsuperscript{25} Administrative agencies charged with enforcing the immigration laws, such as the INS and its enforcement arm, the Border Patrol, have been subject to persistent, credible, and deeply disturbing charges of unlawful, overreaching, and abusive conduct.\textsuperscript{26} Significant changes have been slow in coming or have not come at all. Under these circumstances, neither the legislative nor

\textsuperscript{22} See infra text accompanying notes 49-81; see also Stephen H. Legomsky, Political Asylum and the Theory of Judicial Review, 73 MINN. L. REV. 1205, 1208 (1989) ("[L]ike other classes of aliens, asylum applicants are politically powerless. Unable to vote or to hold office, aliens lack the tools available to other constituencies for influencing legislative and executive policy.") (footnote omitted); Gerald M. Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 MICH. L. REV. 1092, 1136 (1977) ("Aliens are unable to participate in the political process—forming alliances, trading support, and acquiescing in certain losses in order to make possible later gains—that permits other groups to promote their own interests in the legislative forum.").

\textsuperscript{23} See infra text accompanying notes 181-278.

\textsuperscript{24} See infra text accompanying notes 262-317.

\textsuperscript{25} See infra text accompanying notes 181-261.

\textsuperscript{26} See infra text accompanying notes 262-78.
executive branches appear particularly accountable to the people most directly impacted by immigration law and enforcement. Judicial intervention that remedies this deficiency, as we shall see, also is a rarity.

One initially might not be troubled by this scenario. Although lawful permanent residents stand on different legal footing, undocumented noncitizens by definition are in the United States without legal authority. Consequently, some might argue that neither Congress nor the executive branch is obligated to consider the interests of the undocumented. Rather, the argument goes, the federal government should be able to treat the undocumented in the manner demanded by a majority of the electorate. This is true in some respects. The argument misses the mark, however, because of what I believe are mistaken assumptions about majoritarian desires. With respect to abuses by the immigration bureaucracy, Congress—representing the people—has passed immigration laws that are designed at least in part to protect noncitizens. Under the law, the immigration bureaucracy is obligated to serve the noncitizen community as well as enforce the integrity of the borders. With respect to overriding Supreme Court decisions, it is entirely possible that a majority of the citizens—call it the Silent Majority—may oppose the interpretation of the laws and that, for reasons of practical politics, Congress fails to act. The point that this Article seeks to emphasize is that, even when the interests of noncitizens are supported by a majority of the electorate, they may well lose in the political process. In other words, a dysfunctional political system molds immigration law and enforcement.

Some may quarrel with the implicit assumption about majoritarian desires on the ground that public opinion polls suggest that a majority of the public consistently has desired limits on immigration. Even assuming that these surveys

27. With respect to LPRs, the argument might be that, in order to participate in the political process, LPRs need only satisfy minimum requirements to become naturalized citizens. See infra note 50 (discussing some of requirements). It is uncertain how this justifies limiting their ability to obtain protection of laws passed by Congress for their benefit before they become citizens. In any event, the naturalization process may be significantly more difficult to navigate for noncitizens than widely perceived. See generally DAVID S. NORTH, THE LONG GRAY WELCOME: A STUDY OF THE AMERICAN NATURALIZATION PROGRAM (1985).

accurately gauge public opinion on the question of reducing the flow of immigrants to this country, it is not necessarily true that a majority of citizens agree that unlawful and unfair treatment of noncitizens by the immigration bureaucracy should be the rule or that inflexible and unjust interpretations of the immigration laws should remain intact.29 Admittedly, nativism and restrictionism periodically command the views of a majority.30 However, in light of deeply ingrained images in the national consciousness about the virtues of immigrants, these times are not enduring, but rather are fleeting, though recurring, chapters in this country’s history. Rigid restrictionist policies are in tension with democratic ideals.32 Consequently, they are not likely to sustain majority support for an extended period absent extraordinary circumstances. In any event, the critical point for the purposes of this Article is that, even when a majority of citizens side with noncitizens, such an alliance may not prevail.

showing that 86% of those polled in California characterized immigration as a moderate or major problem); Rich Thomas & Andrew Murr, The Economic Cost of Immigration, NEWSWEEK, Aug. 9, 1993, at 18-19 (reporting results of poll showing that 60% of persons surveyed currently believed that immigration “is a bad thing for this country today”); Americans Want to Reduce Immigration, Poll Shows, REUTER NEWS REP., July 13, 1993, available in LEXIS, Nexis Library, Reuter File (reporting that CNN/USA Today/Gallup poll showed that 65% of adults “wanted immigration levels decreased,” a significant increase from a poll taken only a few weeks before, and that 60% believed that too many immigrants were coming from Latin American, Asian, and Arab countries). See generally RITA J. SIMON & SUSAN H. ALEXANDER, THE AMBIVALENT WELCOME: PRINT MEDIA, PUBLIC OPINION AND IMMIGRATION (1993) (longer-term study of public opinion on immigration).


29. See Vlæ Kershner, Support for Wilson on Immigration, S.F. CHRON., Aug. 19, 1993, at A1 (reporting results of Field Poll showing that those surveyed did not fully support some of the harshest proposals for dealing with immigration).

30. The same has been said about the popularity of constitutional rights. For that reason, constitutional rights, generally speaking, trump majoritarian desires. The Constitution, at least as interpreted by the Supreme Court, however, seldom offers protections to noncitizens. See infra text accompanying notes 172-80 (discussing the plenary power doctrine).

31. See infra text accompanying note 61.

32. See JOHN HIGHAM, SEND THESE TO ME: JEWS AND OTHER IMMIGRANTS IN URBAN AMERICA 30 (1975) (“Any restrictive policy . . . inevitably entails discriminations; and a system of discrimination that does not offend the democratic conscience has proved as yet unattainable.”).
Part II of this Article describes today’s new immigrants, analyzes the recent increase in anti-immigrant sentiment in the United States as two factors relevant to their political power, and considers a tragic example of the electoral powerlessness of noncitizens. Part III analyzes the evidence that the noncitizen population lacks the requisite power to respond effectively to adverse judicial interpretations of the immigration laws or to monitor meaningfully the administrative agencies administering those laws. This analysis is based on a review of Supreme Court decisions interpreting the comprehensive immigration statute, the Immigration and Nationality Act of 1952, as amended, through June 1993, and available evidence of the enforcement record of the INS, the agency primarily responsible for immigration enforcement. Finally, Part IV sketches some thoughts about strategies that might facilitate significant change in the current situation of noncitizens. It argues that images of the immigrant in the nation’s consciousness must change for the better before immigration law and policy will.

II. POLITICAL POWER OF THE “NEW” IMMIGRANTS

A brief review of the dynamics of immigration politics in the United States offers considerable insight into the political influence of immigrants. A popular refrain in present-day political discourse about immigration is that increased immigration enforcement is necessary and that, because abuse of the system is commonplace, tougher laws and policies are required. Locked out of the political process, noncitizens face formidable difficulties in challenging these restrictionist pleas and stemming the growth of anti-immigrant sentiment in difficult times. It seems doubtful that a majority of the electorate, for any sustained period of time, supports closing the door to all immigration and halting “abuse of the system” whatever the cost. However, because the average citizen does not perceive any direct impact from over-enforcement of the immigration laws, she is unlikely to act at all in response to such proposals. This is true even if immigration law and policy in the aggregate has significant effects on the domestic economy. More palpable bread-and-butter issues (e.g., the

economy, unemployment, inflation, taxes, etc.) animate the political actions of much of the electorate in the United States. Thus, even if a majority disagrees with the interpretation of an immigration law or the manner in which it is enforced, corrective action through the political process often is unlikely.

A. Immigrants Past and Present

Before the late 1800s, the United States imposed relatively few restrictions on immigration. Although often greeted with suspicion and hostility, European immigrant groups eventually managed to assimilate for the most part into American society. Assimilation was facilitated by the fact that immigrants of this era typically became naturalized citizens. Local political machines courted the new citizens, thereby ensuring their integration into the political process and assimilation into society as a whole.

The "new" immigrants differ in salient respects from their European predecessors. Perhaps most importantly, the number of persons who have entered or remain in the United States in contravention of the immigration laws, often referred to as "illegal aliens," grew dramatically by some accounts in the

37. See ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 32-51 (1961); Oscar Handlin, Why the Immigrant Supported the Machine, in THE CITY BOSS IN AMERICA 98 (Alexander B. Callow, Jr. ed., 1976); see also THOMAS P. O'NEILL, MAN OF THE HOUSE 9 (1987) (telling story of Irish politician in Massachusetts who "would meet the new immigrants at the boat and take them straight over to register to vote" and then help them find a job and place to live); MALDWYN A. JONES, AMERICAN IMMIGRATION 121-25 (2d ed. 1992) (noting the significant political activity of immigrants in the 1800s).

At various times in United States history, the impact of new immigrant citizens on the political process resulted in the growth of anti-immigrant sentiment. See SCIRP REPORT, supra note 34, at 167-76 (discussing political genesis of "alien" acts of late 1700s and rise of Know-Nothing Party in the 1800s); see also SAMUEL C. BUSEY, IMMIGRATION: ITS EVILS AND CONSEQUENCES 138-51 (photo reprint 1969) (1856) (condemning "political power of foreign votes").
The Justice Department estimated that, by 1987, between four and five million "illegal aliens" lived in the United States. Undocumented persons in this country cannot vote or possess other benefits of citizenship. Although the Constitution does not compel the result, the states have unanimously disenfranchised all noncitizens, lawful permanent residents (i.e., immigrants who by definition are here lawfully and permanently, but who have not been naturalized) as well as the undocumented. All noncitizens are lawfully excluded from the electoral process. Moreover, many lawful permanent residents decline to take the steps necessary to become citizens and thus are indefinitely excluded from the electorate.

Besides the fact that a significant number are in the United States unlawfully, another characteristic of the "new" immigrants limits their political power. Many are people of color from Mexico, Central America, Viet Nam, and other developing nations. For a variety of reasons, such as their color and lan-


40. See Immigration and Naturalization Service, U.S. Dep't of Justice, 1991 Statistical Yearbook of the Immigration and Naturalization Service 169 (1992) [hereinafter 1991 INS Statistics]. This estimate, which showed a significant increase in the undocumented population from previous estimates, may not accurately reflect the current state of affairs, particularly in light of the many people legalized under IRCA's amnesty provisions. See Jeffrey S. Passel et al., Undocumented Immigration Since IRCA: An Overall Assessment, in UNDOCUMENTED MIGRATION TO THE UNITED STATES 257 (Frank D. Bean et al. eds., 1990) (summarizing findings of several studies and concluding that "there has been a clear reduction in the flow of undocumented immigrants across the U.S.-Mexico border in the post-IRCA period") (emphasis deleted).


42. See 1991 INS Statistics, supra note 40, at 142 (showing that only about 37% of LPRs who immigrated here in 1977 became naturalized through fiscal year 1990).

43. See Simon, supra note 28, at 49 (reviewing public opinion polls on immigration and concluding that people "hold more negative attitudes toward the undocumented immigrants than they do toward refugees and immigrants generally"); see also T. Alexander Aleinikoff, Good Aliens, Bad Aliens and the Supreme Court, in 9 in Defense of the Alien 46 (1987) (arguing that Supreme Court was influenced in immigration cases by whether noncitizen was lawfully in country ("good alien") or not ("bad alien").

44. See 1991 INS Statistics, supra note 40, at 20 (presenting data of immigrants granted lawful permanent residence in the United States in fiscal year 1991 showing that 14 of the top 15 nations that sent 77.5% of new immigrants (with nearly 52% from Mexico) to United States were developing nations populated by
guage differences, these immigrants may not assimilate as easily into dominant American society as their European prede-cessors. Nativism reinforced by racism toward the new immigrants therefore may enjoy greater staying power than that directed at past immigrant generations. The nagging persistence of discrimination against Asian-Americans, many of whose families immigrated here generations ago, lends support to the concern. This presence of racism also is consistent with the resurgence in hate crimes against immigrants of color.

people of color); see also Peter H. Schuck & Theodore Hsien Wang, Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990, 45 STAN. L. REV. 115, 133 (1992) (finding that in 1989-90 about 70% of the judicial immigration caseload came from countries populated predominantly by people of color: Caribbean/Central America, Mexico, East Asia, Middle East, and South Pacific).

45. See LAMM & IMHOFF, supra note 39, at 99-124 (emphasizing that, because English is the "tie that binds" American society, increasing immigration of non-English speakers threatens domestic tranquility); Michael S. Teitelbaum, Right Versus Right: Immigration and Refugee Policy in the United States, 59 FOREIGN AFFAIRS 21, 43 (1980) (noting growing numbers of Spanish speakers immigrating to United States and the fear of linguistic divisions similar to those that exist in Canada); see also ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 109 (1992) ("[A] common language is a necessary bond of national cohesion in so heterogeneous a nation as America.").

The push for "English only" laws may be one reaction to the language differences of many of today's immigrants. See, e.g., Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 MINN. L. REV. 269, 340-50 (1992). Not coincidentally, John Tanton, who helped found the restrictionist Federation for American Immigration Reform, see infra text accompanying notes 94-95 & note 95, established US. English, an organization advocating a constitutional amendment designating English as the official language in the United States. See id. at 341 & n.401.

46. See U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 23 (1992) [hereinafter CIVIL RIGHTS COMM'N] ("Not only do most [Asian] immigrants have limited English proficiency . . . but they bring with them cultures and religions that are unfamiliar to the American public. These differences often generate misunderstandings that contribute to anti-Asian sentiments."). But see infra text accompanying note 107 (observing indicators that at least some immigrants in fact are assimilating).

47. See, e.g., CIVIL RIGHTS COMM'N, supra note 46, at 22-48 (documenting hate crimes against Asians, including numerous murders).

48. See, e.g., Michael J. Núñez, Note, Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico, 43 HASTINGS L.J. 1573 (1992) (discussing violence against Mexican citizens seeking entry to United States); Deborah Sontag, Across the U.S., Immigrants Find the Land of Resentment, N.Y. TIMES, Dec. 11, 1992, at A1 (reporting hate crimes against various immigrant groups, primarily people of color). Hate crimes often go unreported, or are reported without mention of any racial component. See, e.g., CIVIL RIGHTS COMM'N, supra note 46, at 30-31 (noting that intense media coverage of massacre of minority schoolchildren in Stockton, California failed to mention the possibility that the killings were racially motivated, which the California Attorney General ultimately concluded was the case); see also
1. Limitations on noncitizen influence

Noncitizens lack access to the political process. Because noncitizens cannot vote, politicians and administrators have limited incentive to respond to noncitizen demands, legitimate or not, particularly when facing resistance from a voting constituency. Perhaps more importantly, many undocumented persons fear apprehension by the INS and deportation. In other words, they risk removal from the country if they become politically visible.49 Lawful permanent residents fear jeopardizing their legal status and possible deportation as well as undermining their eligibility for naturalization.50 No other group faces such dire consequences from political action. Especially when combined with disenfranchisement, fear of retaliation might naturally be expected to chill noncitizens from engaging in political activity to challenge the status quo.51 It therefore should not be surprising that noncitizens in the United States generally tend to shy away from politics.


50. See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding constitutionality of deporting LPR for past membership in communist party); Philip Monrad, Comment, Ideological Exclusion, Plenary Power, and the PLO, 77 Cal. L. Rev. 831, 835 n.21 (1989) (describing case in which INS sought to deport Palestine Liberation Organization members who were LPRs on account of political activities); see also Katherine L. Pringle, Note, Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens, 81 Geo. L.J. 2073 (1993) (noting various restrictions on First Amendment rights of LPRs).

Naturalization requires, among other things, that a LPR establish "good moral character" and "attachment to constitutional principles." INA § 316(a), 8 U.S.C. § 1427(a) (1988). These requirements might tend to make any LPR considering naturalization cautious of acting politically. Certain political actions may indeed undermine eligibility for naturalization. See INA § 313, 8 U.S.C § 1424 (1988) (listing political organizations, including Communist Party, in which membership bars naturalization); see, e.g., Price v. INS, 962 F.2d 836 (9th Cir. 1992), cert. denied, 51 U.S.L.W. 3451 (1994) (denying petition for naturalization because LPR refused to specifically list every political organization with which he had been affiliated); see also Petition of Williams, 474 F. Supp. 384 (D. Ariz. 1979) (denying naturalization petition on ground that LPR who stated that religious beliefs prevented her from voting, being active in politics, serving on juries, and bearing arms and who refused to perform any obligations of citizenship that conflicted with religious beliefs, was not "attached" to constitutional principles).

51. Even without the chilling effect of possible deportation, other factors, such as difficulties with English, lack of familiarity with political institutions in the United States, and cultural differences may make political participation difficult for some noncitizens. See Harles, supra note 49, at 111-12.
Because undocumented noncitizens by definition remain in this country unlawfully, they might arguably be deserving of similar treatment (at least in terms of voting rights) as convicted felons who in many states lose voting rights for violating the social contract. (The same argument obviously cannot forcefully be made with respect to lawful permanent residents.) Imprisoned felons therefore cannot use the vote to “check” prison administrators. Still, consistent with the terms of their incarceration, they in theory may attempt political activity such as writing their legislators without risk of officially sanctioned, or at least lawful, retribution. Convicted felons released from prison, even if prohibited from voting, may engage in other political activities without qualification. Undocumented noncitizens, in contrast, run the daily risk that, if they engage in political activities of any sort, they will come to the attention of the INS and be deported. By necessity, they place a premium on low visibility and avoid the community prominence that political activity might bring.

Put simply, the persons most directly and detrimentally affected by INS enforcement excesses and deficiencies in providing services lack both formal and informal standing in the political system. To exacerbate the difficulties of political mobilization, undocumented noncitizens who may be adversely affected by overzealous INS enforcement tomorrow often are not in the United States to complain today. The transient nature of part of the undocumented population therefore is a critical piece of the puzzle. Although not easy to organize other disempowered (and sometimes transient) groups such as the homeless or welfare recipients, it is inherently more difficult to mobilize people not physically present in the jurisdiction who may be affected by government conduct within the jurisdiction in the future.

52. Although prison officials may limit the activities of prison unions organized to improve prison conditions, the mere existence of such organizations illustrates that some political activities by this disenfranchised group—even when incarcerated—are tolerated. See Jones v. North Carolina Prisoners’ Labor Union, 433 U.S. 119 (1977).


To avoid exaggerating the one-sidedness of the political dynamic, we must acknowledge that noncitizens in fact have some input into the political process. Immigrant and refugee rights groups lobby the legislatures and agencies and advocate in the courts to protect noncitizens. These groups, with the assistance of others, have enjoyed some success in convincing Congress to enact laws, such as the Refugee Act of 1980, and at times to override Supreme Court decisions. Perhaps more importantly, immigrant advocates have served as a moderating influence on immigration legislation. As certain provisions of the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990 attest, the "immigrant lobby," including influential organizations such as the American Immigration Lawyers Association and the Mexican American Legal Defense and Education Fund, have significantly influenced immigration legislation by ameliorating some harsh provisions and including some favorable to noncitizens, as well as delaying so-called reform bills for lengthy periods. At various times, business interests (particularly agricultural ones) desirous of cheap labor have joined coalitions with immigrant rights organizations in supporting the easing of restrictionist policies.

56. See infra text accompanying notes 181-261.
57. See, e.g., IRCA § 274B, 8 U.S.C. § 1324b (1988) (barring discrimination based on national origin or citizenship status in hope of limiting negative impact of IRCA's provisions prohibiting employers from hiring undocumented labor); infra text accompanying note 238 (describing IRCA's amnesty provisions).
58. See infra note 134 (citing to 1990 Act's new "temporary protected status" provisions).
59. See infra note 238 and accompanying text (discussing lengthy debate over IRCA and resulting compromises).
60. See KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924, at 151-57 (Z. Bankowski et al. eds., 1984) (documenting efforts of business to loosen immigration restrictions during "labor shortage" in 1920s); John A. Scanlan, Immigration Law and the Illusion of Numerical Control, 36 U. MIAMI L. REV. 819, 836 (1982) (recognizing goal of business to ease restrictive immigration policies); see also JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 33-57 (1971) (arguing that Border Patrol's enforcement efforts were closely related to labor needs of agribusiness); Carl Hampe, Intent of Congress Behind Certain Provisions of the Immigration Reform and Control Act, 2 GEO. IMMIGR. L.J. 499, 502 (1988) (statement of minority counsel for Senate Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, stating that IRCA's special agricultural workers program "was put in place only to provide labor for U.S. agricultural employers"); Legomsky, supra note 22, at 1208 (noting that "aliens sometimes benefit from the lobbying activities of groups with whom they share common interests" and giving example of grower support for agricultural provisions of IRCA that
Moreover, immigrant advocacy groups periodically have tapped into a sympathetic public sentiment. Citizens, through their elected representatives, at times have been willing to protect noncitizens and would-be immigrants. In particular, refugees fleeing political, religious, and other sorts of persecution traditionally have held a special place in a national psyche molded by the proverbial notion that the United States is a "nation of immigrants," as exemplified by the Statue of Liberty's imagery.\textsuperscript{61} Despite embracing these lofty ideals, citizens generally are not keenly aware of the intricacy of immigration issues and lack the personal interest that might motivate them to mobilize politically around them. The daily lives of the vast majority of the American public have little to do with the INS, the Executive Office for Immigration Review, which adjudicates certain immigration claims,\textsuperscript{62} or the Immigration and Nationality Act.\textsuperscript{63} Moreover, the dealings that the ordinary citizen might have with the immigration bureaucracy generally are not extended, frightening, or particularly memorable.\textsuperscript{64} Indeed, the average citizen's only exposure to the subject of immigration may be hearing immigrants blamed in times of societal stress for the social ills of the day.\textsuperscript{65} On the other hand, noncitizen encounters with immigration laws and


\textsuperscript{62} See 8 C.F.R. § 3.0 (1993); \textit{see also infra} text accompanying notes 286-91 (discussing Executive Office for Immigration Review).


\textsuperscript{64} \textit{But see}, \textit{e.g.}, Murrillo v. Musegades, 809 F. Supp. 487, 490-97 (W.D. Tex. 1992) (enjoining verbal harassment and physical abuse by Border Patrol of Chicano high school students and employees, all citizens, because of skin color and appearance).

\textsuperscript{65} \textit{See infra} text accompanying notes 82-129.
enforcement, and their views about immigrants generally, are distinctly different in kind and quality.

As is true of other interest groups, the political power of noncitizens ebb and flows with political and economic tides. Economic concerns in particular deeply affect the electorate’s views on immigration and immigrants. Consequently, similar to United States economic history, anti-immigrant sentiment has had a cyclical character to it.66 Noncitizens and their advocates therefore have been weaker in the political marketplace at some times than at other times. This is an important part of the dynamic concerning the influence of noncitizens.

In the end, it is important to remember that noncitizens in good times and bad have lacked the political power necessary to most effectively protect their interests.67 Even if adequately represented in the political process, noncitizens as a distinct numerical minority composed of a large number of people of color necessarily would encounter severe disadvantages.68 For this reason, they constitute the quintessential discrete and insular minority deserving of judicial protection in the Carolene Products sense.69 Surprisingly enough, immigration laws af-


67. But cf. Peter H. Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1, 23 (1984) (stating that in some states, ethnic groups, including disenfranchised “aliens,” exert considerable political power); Michael S. Teitelbaum, Advocacy, Ambivalence, Ambiguity: Immigration Policies and Prospects in the United States, 136 PROCEEDINGS AM. PHIL. SOC’Y 208, 218-21 (1992) (contending that interest groups, including growers and “Mexican-American political activists,” are able to forestall desire of public to restrict immigration). Congress, at times, has been protective of certain groups of immigrants, such as the Irish and the Cubans, with significant constituencies in the United States. See, e.g., Immigration Act of 1990 § 132, 104 Stat. 4978, 5000 (codified at 8 U.S.C. § 1153 (Supp. 1992)) (providing in carefully crafted language that Irish receive 40% of visas for three-year period); Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (providing that Cubans paroled into country may be eligible to become lawful permanent residents in shorter period of time than persons of other nationalities).

68. See JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161-62 (1980) (advocating judicial review to facilitate representation of “discrete and insular” minorities in political process and arguing that “aliens” deserve such protection because of lack of right to vote, the American tradition of hostility toward “foreigners,” the fact that legislatures are almost entirely composed of citizens who have spent their entire life in United States, and the stereotyping of recent immigrants).

fecting the noncitizen minority generally receive a minimum of judicial scrutiny.\textsuperscript{70}

2. \textit{The vocal, sometimes successful, minority}

In light of the political impotence of noncitizens, one might expect a vocal minority of citizens, particularly well-funded organizations, to successfully pressure the executive branch to pursue anti-immigrant agendas.\textsuperscript{71} This in fact does occur at times. Some might not be concerned if a \textit{majority} of the voting public desired the pursuit of restrictionist policies and such policies were enacted through the appropriate processes into law. However, the making and pursuit of policy by a well-organized \textit{minority} contrary to majoritarian desires, even if weakly held ones, raises a number of serious concerns.

A brief, though perhaps superficial, look at the commitment of major interest groups to immigration issues helps illustrate how in certain circumstances minority sentiment might prevail over majority will. First, the Vocal Minority is composed of people committed to restricting immigration and increasing enforcement and willing to devote the time and resources to further that end. Second, the Silent Majority believes that the immigration laws, including its service provisions, should be fairly and uniformly administered and that enforcement is one element of an overall immigration policy.\textsuperscript{72}

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\textsuperscript{70}. See infra text accompanying notes 167-80 (discussing plenary power doctrine).


\textsuperscript{72}. See Peter H. Schuck, \textit{The Emerging Political Consensus on Immigration
Although adhering to those views, the Silent Majority as a group is not vitally committed to these values. It, for example, is unwilling to act in the political marketplace with the vigor necessary to ensure that the balanced immigration program it supports is implemented. Third, noncitizens, documented and lawful permanent residents alike, obviously are those most vitally concerned with fair implementation of the service provisions of the immigration laws. In addition, they probably are less concerned with border enforcement, but certainly are opposed to abuse of the enforcement power. Their political influence primarily is a function of the force exerted by immigrant advocacy groups, including the votes of its members as well as those that the group influences, and citizens, including the Silent Majority, who tend to be “pro-immigrant” on service and some enforcement issues. Business (particularly agricultural) interests, in pursuit of a ready labor supply, sometimes might side with noncitizens. The Silent Majority and noncitizens would be expected to be natural political allies with respect to their view on service issues and to curtail enforcement abuses. They may differ, however, in their views about the need for enforcement.

At any one time, each of these groups in theory has a certain amount of influence on the various actors in the political process. As political scientists tell us, that influence is a function of a wide variety of factors, including the percentage of the group willing to participate in political activities, the cohesiveness of the group, the resources it is willing to devote, the effectiveness of their organization, and economic and other circumstances at that time. At times, the Vocal Minority—mobilized, organized, and committed—might be expected to have greater

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Other groups may align themselves with the Silent Majority. Governments of countries from where immigrants came also have been known to protest INS enforcement practices. See, e.g., Roberto Sanchez, Border Patrol Accused of Illegal Searches, Phoenix Gazette, Feb. 25, 1993, at B1. There also presumably exists a group of voters who are indifferent to immigration issues. Although not necessarily in agreement with the Silent Majority, their inaction, which is not based on support or antipathy for immigrants’ rights, more resembles that of the Silent Majority than the Vocal Minority.

73. See supra text accompanying notes 49-70 (discussing reasons for lack of citizen commitment to immigration issues).

74. See supra text accompanying note 60. However, unlike the Vocal Minority, business interests often focus on other sorts of legislation, such as farm subsidies, rather than immigration matters. Distracted by other agendas, these groups may behave as members of the Silent Majority do.
influence than would the weakly committed Silent Majority.\textsuperscript{75} Noncitizens are not willing, or perhaps not able, to organize politically and participate in the activities necessary to change the dynamic.

Although this phenomenon might be characteristic of a number of subject areas where strong (often referred to pejoratively as "special") interest groups might prevail over a majority,\textsuperscript{76} it may be more likely to occur on immigration matters. Though vaguely supportive of fair enforcement and service, members of the Silent Majority perceive themselves as only tangentially involved with and generally uninterested in the immigration laws and their enforcement. Few close analogies come to mind. For example, welfare and social security disability programs may not be perceived as directly affecting the average citizen. Still, those affected by those laws in theory have recourse to direct political participation,\textsuperscript{77} and have successfully engaged in political action in certain circumstances.\textsuperscript{78}

\textsuperscript{75} See Deborah J. Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 5 n.18 (1988) ("[E]ven a majority of voters may not control the content of federal programs. The national electorate has become so large, and its majority so diffuse, that federal legislators and administrators may be more responsive to special interest groups and lobbyists than to the majority's will.") (footnote omitted); see also infra text accompanying notes 188-89 (discussing characteristics of groups likely to successfully obtain congressional overrides).

\textsuperscript{76} See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 124-31 (1956); Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371, 392 (1983); see also Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1986) (arguing that judicial review should be exercised to ensure that the public good has been promoted and that government has not simply capitulated to powerful private groups). Public choice theory, which attributes voting decisions to the economic power of interest groups, is roughly consistent with this thesis. For contrasting, though equally interesting, discussions of this theory and its impact on judicial review, compare DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) with GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW (1991).

\textsuperscript{77} Of course, these groups encounter difficulties because they comprise a minority of the population. In other words, the poor and minorities are marginalized by the very fact that they are poor and minorities. See Kenneth L. Karst, Citizenship, Race, and Marginality, 30 WM. & MARY L. REV. 1 (1988); see also Stephen Loffredo, Poverty, Democracy and Constitutional Law, 141 U. PA. L. REV. 1277, 1278-79 (1993) ("[T]he poor are generally recognized as a politically powerless minority . . . .").

\textsuperscript{78} See generally LAWRENCE N. BAILIS, BREAD OR JUSTICE: GRASSROOTS ORGANIZING IN THE WELFARE RIGHTS MOVEMENT (1974) (analyzing welfare rights movement in Massachusetts); FRANCIS F. PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS (1977) (analyzing mobilization of unemployed and workers, welfare recipients, and civil rights activists).
The Vocal Minority differs from other numerical minorities, such as the homeless, social security recipients, and others, including noncitizens, who pressure legislatures and administrative bodies. They are not the persons most directly affected by the enforcement of the immigration laws. However, they are the only group that actively represents voters on the single issue of immigration. Though their self-interests are not as central to immigration decisions as those of noncitizens, this minority may prevail in the political process.79

A final ingredient further complicates the dynamic. The powers of the Vocal Minority might be expected to increase exponentially during times of increased anti-immigrant sentiment, which in turn is roughly correlated with the relative level of societal stress.80 In relatively calm times when immigration is not a major item on the political agenda, the Vocal Minority, the Silent Majority, and noncitizens oftentimes may play to a stalemate in the political marketplace.81 Though not as powerful as interest groups representing voting constituents, immigrant rights advocates may derail punitive measures in calm times. Fewer such measures are proposed and limited resources can be directed to defeat them. Even when there is pressure for legislation not in the interests of noncitizens, advocacy groups may be able to ameliorate some of the harsher provisions in the legislation. In contrast, when nativist sentiment is at its zenith, the Vocal Minority, with little resistance, may be able to prevail. More “reform” measures will be proposed and the Vocal Minority even may grow in number. This is true even when the Silent Majority remains a majority and opposes the Vocal Minority’s proposals. Ambivalence of the Silent Majority due to general societal tension, as well as other more tangible political and economic concerns, may result in its unwillingness to vigorously resist the direction in which the Vocal Minority seeks to take the political process.


80. See infra text accompanying notes 82-129 (discussing “new” nativism and historical predecessors).

81. See infra text accompanying notes 183-89 (recognizing similar phenomenon with respect to congressional overrides of Supreme Court decisions).
B. The “New” Nativism and Its Impact

Nativism and racism have a lengthy pedigree in United States immigration history.\(^{82}\) A few examples should suffice to illustrate this point. Chinese immigrants in the late 1800s were subject to a series of draconian laws, many of which remained on the books until the 1940s, virtually eliminating immigration from China.\(^{83}\) Mexicans, along with some Chicanos, were repatriated en masse during the Great Depression\(^ {84}\) and subject to an INS deportation effort with the racist moniker “Operation Wetback” in 1954.\(^ {85}\) Internment of Japanese-Americans, many of whom were not recent immigrants at all, but were native-born citizens, is an infamous chapter in United States constitutional law.\(^ {86}\) President Truman unsuccessfully sought to veto the Immigration and Nationality Act of 1952 because of its national origin quota system, which remained the central organizing principle of United States immigration law until 1965.\(^ {87}\) History may look back on the executive branch’s treatment of Haitian asylum-seekers as another such episode.\(^ {88}\) These harsh measures all arose in times of turmoil. Unfortunately, other examples are plentiful.

This nation historically has been susceptible to the search for scapegoats for the woes of the nation, particularly during lagging economic times.\(^ {89}\) It often is not feasible for politicians


\(^{83}\) See Altimurikoff & Martin, supra note 15, at 1 (referring to laws restricting Chinese immigration passed by Congress in 1882, 1884, 1888, and 1892 as “statutes—like many later immigration laws—that were the product of economic and political concerns laced with racism and nativism”); see also Fred W. Riggs, Pressures on Congress: A Study of the Repeal of Chinese Exclusion (1950) (discussing repeal of exclusion laws, which was motivated in part to improve relations with an ally (China) during World War II). See generally Bill Ong Hing, Making and Remaking Asian America Through Immigration Policy 1850-1990 (1993) (analyzing impact of exclusionary immigration policies on development of Asian-American community); Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 79-131 (1989) (chronicling harsh treatment directed at Chinese immigrants).

\(^{84}\) See generally Abraham Hoffman, Unwanted Mexican Americans in the Great Depression (1974).


\(^{86}\) See Korematsu v. United States, 323 U.S. 214 (1944).

\(^{87}\) See H. Doc. No. 520, 82d Cong., 2d Sess. 1, 4-5 (1952) (veto message of President Truman).

\(^{88}\) See, e.g., infra text accompanying notes 130-59 (analyzing the plight of Haitians).

\(^{89}\) See Gordon W. Allport, The Nature of Prejudice 236-38 (abridged
to blame, as Karl Marx did, economic downturns on the cyclical nature inherent in the capitalist system. Immigrants, often viewed as outsiders to the community, periodically have been one of the groups singled out for blame in the political process. This scapegoating function unfortunately is alive and well today. Antipathy toward the immigrant has increased in the United States, if not the world. With a slow economy, current political discussion of immigration in the United States tends to focus on how to stop the "flood" of "illegal aliens" from entering the United States and displacing "American" workers.


91. A unified Germany, with a significant refugee population, also has seen a resurgence of concern with the numbers of refugees coming to the country that, as the increase in hate crimes against immigrants illustrates, is explained in part by racism. See Daniel Kanstroom, Wer Sind Wir Wieder? Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany, 18 YALE J. INT'L L. 155, 155-61 (1993).


THOMAS MULLER, IMMIGRANTS AND THE AMERICAN CITY (1993) offers a balanced discussion from a variety of perspectives on the pros and cons of immigration. See also Gerald P. López, Undocumented Mexican Migration: In Search of a Just Immi-
In the 1992 presidential campaign, for example, both Democratic and Republican candidates promised to increase immigration enforcement efforts. Organizations advocating limits on immigration have become increasingly visible with growing political influence. The well-financed Federation for American Immigration Reform, which stridently advocates the need to place a moratorium on immigration, has embarked on an increasingly effective publicity campaign. Local grass roots
restrictionist organizations, which not infrequently espouse thinly veiled racist arguments for curtailing immigration, also have grown in number.95

The woes of President Clinton in his attempt to select an Attorney General illustrate how immigration has grown in the national political consciousness. In the confirmation hearings of Zoë Baird96 and Janet Reno, a few senators interrogated the respective nominee about immigration enforcement.97 One senator in particular fanned the anti-immigrant flames when questioning Reno by gratuitously mentioning that an alleged conspirator in a much-publicized bombing was an “illegal alien,” that an “illegal alien” may have been involved in killings at the Central Intelligence Agency, and that some of the follow-

95. See Amy Chance, Controls Defended as Economic, Not Racist, SACRAMENTO BEE, Jan. 24, 1993, at A10 (quoting leader of newly formed restrictionist group: “It’s like animals. When there’s scarcity, they don’t breed. When there’s plenty, they breed.”); see also LINDA CHAVEZ, OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION 92 (1991) (stating that Chavez, a well-known conservative, resigned from U.S. English, which also was founded by Tanton, see Perea, supra note 45, at 341 & n.401, when she learned of this anti-Hispanic statement); Amy Chance, Illegal Aliens Increasingly Blamed for State’s Problems, SACRAMENTO BEE, Jan. 24, 1993, at A1 (quoting FAIR founder, John Tanton: “Will the present majority peaceably hand over its political power to a group that is simply more fertile? . . . On the demographic point, perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down!”).


ers of a religious cult figure in a violent stand-off with federal law enforcement officers in Waco, Texas were "thought to be illegal aliens."98 As one might expect in response to such grilling, the now-confirmed Attorney General nominee, Janet Reno, promised to make immigration a priority.99

Racial animus may explain some of the vehemence behind recent demands for increased immigration enforcement.100

98. See id. (questioning by Sen. Simpson); see also Hearings Before a Subcomm. of the Comm. on Appropriations, House of Representatives, 103d Cong., 1st Sess. 220 (May 4, 1993) (Rep. Harold Rogers (R-Ky) telling acting INS Commissioner that "I hope we do something before one of these illegal aliens commits another terrorist act.").

This rhetoric has been sparked by the reporting that an alleged conspirator in the bombing in the World Trade Center was an "illegal alien" and another, who entered the United States as a result of a mistaken visa decision by the State Department, has an asylum claim pending. See, e.g., Ralph Blumenthal, $100,000 from Abroad Linked to Trade Center Suspects, N.Y. TIMES, Apr. 25, 1993, at 45; Francis X. Clines, The Twin Towers: After Bombing, New Scrutiny for Holes in Immigration Net, N.Y. TIMES, Mar. 12, 1993, at A1; Michael Hedges, New York Bombing Suspect Arrested, WASH. TIMES, Mar. 5, 1993, at A10. In addition, press reports have mentioned that a number of those in a besieged religious cult camp in Texas were suspected to be "illegal aliens." See Mary Jordan & Sue Pressley, Freed Cult Members Depict Horror Scene, WASH. POST, Mar. 4, 1993, at A1. Spurred by these events, along with the suspected involvement of an "illegal alien" in a shooting outside Central Intelligence Agency headquarters, Congress began considering "reform" of the immigration and asylum laws in early 1993. See Holly Idelson, Immigration Distress Signals: Asylum System Under Siege, 51 CONG. Q. 1227 (1993); see also infra note 121 (listing bills pending in Congress to amend asylum provisions of INA).

The United States, in the name of fighting terrorism, hopefully will not overreact as it did in the infamous Palmer Raids during the "Red Scare" of World War I. After a bombing of Attorney General A. Mitchell Palmer's home, as well as some other bombings, the Justice Department conducted a number of raids to round up "subversives" resulting in the deportation of many alleged communist "aliens." Many were active in leftist labor organizations. It never was established that any of the persons deported were terrorists. See generally EDWIN P. HOYT, THE PALMER RAIDS 1919-20: AN ATTEMPT TO SUPPRESS DISSENT (1969); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS 208-37 (1963); NATIONAL POPULAR GOVERNMENT LEAGUE, REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (1920) (prepared by committee of lawyers, including Roscoe Pound and Felix Frankfurter).

99. See Nomination of Janet Reno, supra note 97. This questioning apparently left an impression on Reno. See This Week with David Brinkley (ABC television broadcast, June 20, 1993), available in LEXIS, Nexis Library, Current file (interview with Reno in which she emphasized need for change in INS); Marcia Coyle et al., INS Overhaul, NAT'L L.J., Apr. 5, 1993, at 11 (reporting that Attorney General Reno visited INS offices during first full week on job).

100. See, e.g., Douglas Jehl, Buchanan Raises Specter of Intolerance, Critics Say, L.A. TIMES, Mar. 17, 1992, at A1 (quoting Republican presidential candidate Patrick Buchanan on immigration: "[I]f we had to take a million immigrants in say, Zulus, next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of
The impact of a crackdown on "illegal" immigration unquestionably would fall disproportionately on people of color from developing nations. The "new" immigrants, perhaps more appropriately called the "new" out-group, tend to be people of color. As many restrictionists readily admit, immigration from Mexico is the focal point of their concern. This helps explain why restrictionist rhetoric often is colored by not-so-subtle racist overtones.

101. See ALLPORT, supra note 89, at 33-35 (analyzing prejudice against immigrants by "in-groups").

102. See supra text accompanying notes 43-48.

103. See, e.g., Garrett, supra note 93 (discussing Republican party platform); see also CORNELIUS, supra note 66, at 15 (discussing survey showing that Mexican immigrants were perceived as having more negative impact on American society than immigrants from Canada and Western Europe).

104. See, e.g., supra note 95.

Because of the complexity of the political dynamic, however, the claim of racism must be considered carefully. A few of the open questions about the views of minorities on immigration illustrate this point. It has been argued, for example, that some African-Americans want to restrict immigration because of the alleged preferences of whites to hire undocumented Latinos rather than black citizens. See Jack Miles, Blacks vs. Browns, ATLANTIC MONTHLY, Oct. 1992, at 41; see also Lisa C. Ikemoto, Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles," 66 S. CAL. L. REV. 1581 (1993) (perceptively analyzing Korean-American/African-American tensions in South Central Los Angeles, California and the Spring 1992 uprisings). But cf. William Schneider, Americans Turn Against Immigration, 25 NAT'L J. 1900 (1993) (reporting poll results showing that less than 50% of blacks strongly felt the need to limit immigration, the smallest percentage of any group). Some surveys also suggest that Latino citizens desire less immigration, although they apparently do not view it as a high priority. See RODOLFO O. DE LA GARZA ET AL., LATINO VOICES: MEXICAN, PUERTO RICAN & CUBAN PERSPECTIVES ON AMERICAN POLITICS 87-89, 100-101 (1992) (reporting on a survey showing that although a majority of Latinos agreed that "there are too many immigrants," less than 1% agreed immigration was the "principal national problem"); see also Vlue Kershner, Liberal Latino Wants Tougher Immigration Law, S.F. CHRON., July 13, 1993, at A1 (reporting that a Latino California legislator, known as a champion of immigrant rights, supported a moratorium on legal immigration so long as "civil and constitutional rights are protected"); Hispanics for Moratorium, PR NEWSWIRE, July 12, 1993, available in LEXIS, Nexis Library, Prnewswire Library (reporting that National Hispanic Alliance in a letter to the President urged a three- to five-year moratorium on all immigration). As these examples suggest, it is overly simplistic to generalize
Besides fears about the economic impact of immigration or unconscious racism, uncertainty and insecurity caused by changing demographics may enhance the concern with immigration.\textsuperscript{105} The new immigrants are changing more than simply the complexion of United States society. Many languages other than English today are commonly spoken in this country, particularly in large urban centers.\textsuperscript{106} The new immigrants also bring with them a variety of diverse cultures. Some say that, although there is evidence to the contrary, today's immigrants are less interested in assimilating (or maybe less able to assimilate) into mainstream America than past immigrant generations.\textsuperscript{107}

Most members of the in-group understandably are comfortable with the status quo. Some feel threatened by change, particularly change that goes to the heart of daily life. Moreover, the often-unstated fear—a fear that may come to pass in some states in the near future, and already is true in a few large cities\textsuperscript{108}—may be that the current majority soon will become

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and conclude that all attempts to limit immigration are racist. It is fair to say, however, that the restrictionist efforts of some are motivated by conscious or unconscious racism. See \textit{supra} text accompanying notes 100-104.

\textsuperscript{105} See Nathan Glazer, \textit{The Integration of American Immigrants}, 21 LAW \& CONTEMP. PROBS. 256, 265-69 (1956); Schuck, \textit{supra} note 72, at 23.

This reminds me of two very different stories relayed to me within months of each other about the changing demographics of Monterey Park, a suburb of Los Angeles, which suggests the importance of perspective in evaluating the changes taking place. See \textit{National Board of the Changing Relations Project, Newcomers and Established Residents in U.S. Communities} 14-16 (1993) (studying six cities with large foreign-born populations and noting that Monterey Park's foreign-born population grew from 8% in 1950 to 51.8% in 1990). On the one hand, an Asian-American student rejoiced in the fact that, due to the rapid growth of the Asian immigrant population, the city was changing. On the other hand, my aunt (who later moved), a long-time resident of the area, lamented the fact that she felt as if she lived in a foreign country. Tensions in Monterey Park evidently have resulted from the changes. See L.A. Chung, \textit{State's Asians Stung by Immigration Backlash}, S.F. CHRON., June 22, 1993, at A7.

\textsuperscript{106} See Felicity Barringer, \textit{For 32 Million Americans, English Is a Second Language}, N.Y. TIMES, Apr. 28, 1993, at A18 (reporting that 1990 Census showed that persons for whom English was foreign language increased by one-third from 1980).

\textsuperscript{107} See \textit{supra} text accompanying notes 43-48. \textit{But cf.} \textit{De La Garza et al.}, \textit{supra} note 104, at 42 (reporting survey results showing that over 60% of U.S.-born Mexican-Americans spoke only English or spoke more English than Spanish in the home).

a minority and transform the in-group into an out-group.\footnote{109}

One of history's clearest lessons is that the majority in a society has not always been fair to the minority.

Whatever the cause, the new nativism is alive and well. California, especially hard-hit by the national recession, has proved to be fertile soil for the growth of anti-immigrant sentiment.\footnote{110} As of March 1993, over twenty proposed bills pending in the California legislature, several patently unconstitutional, were designed to punish the undocumented.\footnote{111} A Dem-

\textit{sity, DALLAS MORNING NEWS}, Apr. 27, 1993, at 12A (reporting that the majority of both California's and Texas's populations may soon be "minorities"); see also Ramon G. McLeod, \textit{U.S. Population in 2050 Will Be Half Minorities}, S.F. CHRON., Dec. 4, 1992, at A1 (reporting United States Census estimate that a majority of United States population will be non-white by 2050).

\footnote{109} See \textit{SCHLESINGER}, supra note 45, at 120.


\footnote{111} See Assembly Bill (AB) 150, Cal. Legislature, 1993-94 Sess. (requiring Medi-Cal providers to report undocumented patients to INS to receive reimbursement); AB 151 (denying workers' compensation benefits to undocumented workers); AB 263 (limiting Aid to Families with Dependent Children to "aliens" residing in state for less than twelve months); Senate Bill (SB) 406 (prohibiting workers' compensation for psychiatric injury to undocumented employees); SB 733 (requiring employment and job training agencies to verify legal status of persons seeking to use services); SB 1131 (requiring person seeking emergency or pregnancy-related services from Medi-Cal program to establish legal immigration status); AB 983 (prohibiting Department of Motor Vehicles from renewing drivers licenses or identification cards absent proof of citizenship or legal status); AB 2171 (similar but also requiring persons authorized to be in United States for limited time to have license or identification expire at end of authorized stay); SB 976 (similar and making it a misdemeanor to assist undocumented person to obtain a drivers license or identification); AB 149 (prohibiting allocation of state funds for education of "undocumented aliens"); AB 1801/AB 2228 (prohibiting any student "not lawfully residing in United States" from enrolling in any public post-secondary school); AB 1968 (requiring school district to report to INS names of students who cannot establish legal status); AB 299 (requiring housing programs to request proof of legal status); AB 86 (making any alien residing in state guilty of misdemeanor upon first conviction and felony upon second conviction); AB 87 (requiring study to estimate costs of building prison for undocumented aliens or residents in Baja California); AB 1043 (requiring state to refer prisoners to INS); AB 1525 (allowing governor to call into service National Guard to patrol U.S.-Mexico border); SB 345 (requiring Department of Corrections to provide prison facilities, transportation, and general support for expediting deportation hearings); SB 691 (prohibiting local ordinances forbidding cooperation between local law enforcement officers and INS); SB 284
ocratic mayoral candidate in Los Angeles in 1993 claimed that gangs of "illegal aliens" killed over 100 citizens in the past year and, to avoid the necessity of time-consuming trials, criminal aliens should be immediately deported. Efforts to "Light Up the Border" through the use of automobile headlights in hopes of deterring border crossings have been organized to "stop the Mexicans."

This anti-immigrant fervor may have indirectly fueled already simmering racial tensions. In California's capital, Sacramento, fire bombings were directed at a state anti-discrimination agency as well as African-American, Jewish-American, and Japanese-American targets. A Japanese-American congressman, whose family spent World War II in an internment camp as a result of a xenophobic fear of the Japanese, attributed the crimes to the fact that so many politicians—liberal as well as conservative—had scapegoated immigrants for California's problems. Such claims, though not empirically verifiable, raise troublesome concerns that have been voiced by immigrants' rights attorneys.


5. 116. Anti-immigrant sentiment also touched my relatively quiet, rural campus at the University of California at Davis. An undergraduate student, a Mexican immigrant who had become a lawful permanent resident during her freshman year
More broadly, the new nativism has had an impact on immigration policies in the United States. It almost inevitably influenced the nearly blanket INS opposition to the claims of persons seeking asylum in the United States in the 1980s as well as the INS's pursuit of policies designed to deter Central American asylum-seekers from pursuing their claims. At various politically opportune times, the executive branch has attempted to show a renewed commitment to halt illegal immigration from Mexico, as has Congress.

and who had also become politically active, allegedly was accosted by two assailants who threatened her with a knife, cut her hair, beat her, threatened her life, and wrote "wetback" and other epithets on her. See Dan Morain, Immigrants Advocate Tells of Racial Assault, L.A. TIMES, Apr. 28, 1993, at A3. The next night, she was stopped in the hallway in a campus building after leaving a student meeting, pushed into a stairwell and punched in the mouth. See id. The student ironically had previously been featured in a local newspaper as a success story of the immigrant community. See Amy Chance, A Success Story for UC Davis Student from Mexico, SACRAMENTO BEE, Jan. 24, 1993, at A10. The incident illustrates the heightened tensions surrounding the issue of immigration and the volatility of the hostile feelings about immigrants in California today.

117. See Dick Kirschten, Catch-up Ball, 25 NAT'L J. 1976 (1993) (reporting that the Clinton administration felt political pressure to take tough stands on immigration issues and was doing so). Besides the executive and legislative branches, nativism also may affect judges reviewing immigration decisions. See STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 241-53 (1987) (arguing that social, political, and economic forces may affect judicial review of immigration decisions in United Kingdom and United States); see, e.g., Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985) (rejecting Haitians argument on the ground that "it would ultimately result in our losing control over our borders").

118. See, e.g., Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (enjoining various practices of INS, including detention, that discouraged Salvadorans from pursuing right to apply for asylum). By labelling the influx of Central Americans in south Texas as "asylum abuse," the INS justified unprecedented, expedited procedures that virtually assured quick denial of most well-founded as well as baseless—asylum claims. See A.B.A. COORDINATING COMM. ON IMMIGRATION LAW, LIVES ON THE LINE: SEEKING ASYLUM IN SOUTH TEXAS (1989); see also Robert E. Koulish, Systemic Deterrence Against Prospective Asylum Seekers: A Study of the South Texas Immigration District, 19 N.Y.U. REV. L. & SOC. CHANGE 529 (1992) (documenting INS and immigration court practices in South Texas that deterred asylum-seekers from pursuing claims); IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE ENHANCEMENT PLAN FOR THE SOUTHERN BORDER (1989), reprinted in Appendix 6 to Central American Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the Comm. on the Judiciary, 101st Cong., 1st Sess. 289-308 (1989)) [hereinafter Central American Asylum-Seekers] (discussing enhanced enforcement efforts to deal with "widespread abuse of the asylum process by applicants who make frivolous claims"); id. at 32-51 (prepared statement of Alan C. Nelson, Commissioner, Immigration and Naturalization Service on the need to increase enforcement efforts to combat "asylum abuse").

119. See, e.g., Tim Golden, U.S. Blockade of Workers Enrages Mexican Town,
Further restrictionist changes in immigration law and policy have been encouraged by the depiction of "asylum abuse" by the popular media.\textsuperscript{121} Well-publicized efforts to smuggle Chinese, some of whom may have legitimate asylum claims, in deplorable conditions on ships into the United States\textsuperscript{122} have fueled proposals for reform, including one from President Clinton with bipartisan support.\textsuperscript{123} In addition, public and\textsuperscript{120} See, e.g., House, Senate Approve 1994 Appropriations for INS, State Dept., 30 INTERPRETER RELEASES 1033 (1993) (summarizing congressional debate in which House of Representatives violated its own budget rules by increasing INS appropriation so that more money could go to border patrol); 139 CONG. REC. H4429 (daily ed. July 1, 1993) (Rep. Traficant stating that "America is being literally overrun with illegal immigration..., We cannot complain about illegal aliens jumping our fence without putting in the funds and backing up the personnel to handle that.").

\textsuperscript{121} The popular television show "Sixty Minutes" presented a decidedly one-sided account alleging widespread abuse of the asylum process and emphasizing that an alleged co-conspirator in the World Trade Center bombing was seeking asylum. See 'Sixty Minutes' Segment Reveals Massive Asylum and Immigration Fraud, PR NEWSWIRE, Mar. 15, 1993, available in LEXIS, Nexis File. Soon after, Congress began considering various pieces of asylum "reform" legislation, which among other things would have provided for summary exclusion of applicants at ports of entry, would have overridden an important Supreme Court decision (in favor of the noncitizen) interpreting the asylum laws, and generally would have made it more difficult for certain noncitizens to apply for and obtain asylum. See Asylum Reform Act of 1993, H.R. 1679, 103d Cong., 1st Sess.; Exclusion and Asylum Reform Amendments of 1993, H.R. 1355, 103d Cong., 1st Sess.; Immigration Preinspection Act of 1993, H.R. 1153, 103d Cong., 1st Sess.; Terrorism Prevention and Protection Act of 1993, H.R. 1301, 103d Cong., 1st Sess. (1993).

Some persons who previously had been granted asylum could have been denied the opportunity even to apply if some of the bills had been in effect at the time of their entry into the United States. See Bob Herbert, In America: Send Them Back?, N.Y. TIMES, June 30, 1993, at A15 (telling stories of two young men from Afghanistan who used fraudulent documents to come to the United States and later were granted asylum but would have been returned to Afghanistan if some of the proposed legislation had been in effect); see also Jeffrey J. Chase, "Mummy, We're Free!"—In Defense of Asylum Rights, WALL ST. J., Sept. 19, 1993, at A20 (asking Congress to consider impact of summary exclusion proposals on legitimate refugees fleeing persecution).


\textsuperscript{123} See Thomas L. Friedman, Clinton Seeks More Powers to Stem Illegal Im-
congressional attention has been focused on the story of a blind Muslim cleric seeking asylum who was implicated (and later indicted) as the "mastermind" of a much-publicized bombing.\textsuperscript{124} Even if the allegations are true, one isolated incident obviously does not mean that \textit{all} asylum applicants, or even more than a handful, have engaged in criminal activities of that magnitude. The mere fact that so much attention was focused on a single incident lends support to its extraordinary nature.\textsuperscript{125} Few could suggest that any significant percentage of asylum-seekers from Haiti, Central America, or many other nations come to the United States to engage in "terrorist" acts or less extreme abuses of the asylum system. Even if some do, there are ample means for the immigration bureaucracy to deal with any would-be asylum-seeker who poses a danger to the community.\textsuperscript{126}

The backlog of asylum applications also has been pointed to as an indicator of systemic abuse.\textsuperscript{127} One oft-ignored possi-
bility is that the number of applications may be due to increased political or other persecution in the world.\textsuperscript{128} The backlog also may be the result of bureaucratic inefficiency.\textsuperscript{129} In light of the other possibilities, as well as the grave life and liberty interests at stake in the making of an asylum decision, one should be extremely cautious before labelling an increase in asylum requests as “abuse” and rashly making far-reaching policy judgments. Such care is missing from the debate on the need for asylum reform.

Although the growth in restrictionist sentiment has had an impact, we do not know how many voters strongly share the desire for increased immigration enforcement and restrictions at any cost. Even if a Silent Majority opposed the proposed changes in policy, it for whatever reason—ambivalence, distraction by other issues, indifference toward people unlike them, to name a few possibilities—does not appear to have emerged as a significant force in the political process. The Vocal Minority for the moment has prevailed.

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\textit{TIMES, Apr. 25, 1993, at 1.}
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\textsuperscript{128} See U.S. COMM. FOR REFUGEES, \textit{World Refugee Survey: 1989 in Review} 5, 30-31 (1990) (showing that world’s refugee population totalled 15 million in 1990, up about 50% from five years before). The current human rights abuses in Bosnia-Hercegovina, which some have claimed are the most horrible since Nazi Germany, suggest that this may be the case. See Sara Fritz, \textit{Hawks, Doves Among Public Switch Sides}, \textit{L.A. TIMES}, May 9, 1993, at A1 (“[A] powerful image that haunts Americans whenever they see pictures of the brutality in Bosnia is that of the Holocaust in Nazi Germany.”).

\textsuperscript{129} See Deborah E. Anker, \textit{Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment}, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 456-57 (1992) (finding that principal causes of delay in asylum adjudication may be bureaucratic inefficiencies, particularly the nearly two-year delay in providing transcripts of immigration court proceedings necessary for appeal); \textit{Meissner Praised in Senate Confirmation Hearing}, \textit{Refugee Rep.}, Sept. 30, 1993, at 8-9 (stating that, during confirmation hearings, Doris Meissner, now INS Commissioner, attributed “asylum abuse” as resulting primarily from delays by government in deciding asylum cases). This is supported by the fact that annual filings of asylum applications have declined since 1989. See \textit{1991 INS Statistics, supra} note 40, at 78. In addition, the backlog is due in part to the executive branch’s settlement of a lawsuit claiming discrimination against thousands of Salvadoran and Guatemalan asylum-seekers that required a de novo rehearing of all their claims. See \textit{infra text} accompanying notes 283-84 (discussing American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991)).
C. Political Failure and Haitian Repatriation

A recent example of the political marginalization of the noncitizen population is the executive branch’s grudging treatment of Haitians fleeing political violence in their homeland. Immigrant and refugee groups, with the assistance of Haitian and African-American advocacy organizations, unsuccessfully pressed three presidents to halt a program of interdicting Haitians on the high seas before they could reach the shores of the United States to apply for asylum. Indifferent to the pleas, the executive branch ratcheted up the severity of the measures to halt the flow of Haitians fleeing a violent military coup. Congress and the judiciary refused to intervene. Consequently, interdiction combined with repatriation remain the official policy.  

In 1981, in response to increasing numbers of Haitians coming to the United States on boats, President Reagan commenced an unprecedented program under which Coast Guard cutters interdicted Haitians and interviewed them on board the ship to determine whether they should be brought to the United States to pursue claims to asylum.  

With judicial approval, the policy continued unbroken for a decade until, in the fall of 1991, a military coup toppled the democratically elected government in Haiti. The State Department concluded that political violence in the coup’s wake was rampant.  


133. See DEPARTMENT OF STATE, 103D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, at 421 (Joint Comm. Print 1993) ("Haitians suffered frequent human rights abuses throughout 1992 including extrajudicial killings by security forces, disappearances, beatings and other mistreatment of detainees and prisoners, arbitrary arrest and detention, and executive interference with the judicial process . . . . At year’s end, widespread abuses continued, and there was no evidence either that the military was willing to stop such practices or that the civilian Government was able to bring the military under control."); DEPARTMENT OF STATE, 102D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, at 633-34 (Joint Comm. Print 1992) ("Following the
though President Bush briefly lifted the interdiction program, he quickly re instituted it and refused to grant "temporary protected status" to Haitians in the United States.134

Interviewing persons on-board ships became onerous in light of the increasing numbers fleeing Haiti and the administration began detaining them in Guantánamo Bay, Cuba to screen for *bona fide* asylum-seekers. After that policy was upheld by the courts,135 the executive branch took, and the Supreme Court upheld, the extraordinarily stringent measure of immediately returning interdicted persons directly to Haiti without any screening for legitimate asylum-seekers.136 Thus, in the face of its obligations under international law,137 the United States returned at least some Haitians to a land where they faced likely political persecution.

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The various administrations' decisions to implement increasingly extreme policies were partly attributable to the Supreme Court's unswerving deference to the executive branch's judgment in a series of recent immigration decisions. See, e.g., INS v. Elias-Zacarias, 112 S. Ct. 812 (1992); see also Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Aendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1, 27-37 (1993).

A variety of factors acting in confluence explain the inhospitable treatment accorded the Haitians. The executive branch’s impermissible consideration of the foreign policy consequences of refugee admissions is perhaps the prime culprit. The long history of disparate treatment of Haitians from a fervently anti-communist nation and Cubans from a communist one is explicable by reference to foreign policy. The Haitians also ran head-on into a generally unsympathetic attitude among a segment of the electorate toward immigration. Election year politics necessarily helped contribute to the Bush administration’s escalating hard line on Haitian asylum-seekers. The treatment of the Haitians was criticized to some degree but countervailing forces, including restrictionist groups preaching the harms of excessive immigration, helped maintain

138. This analysis is elaborated in Johnson, supra note 136.

139. See, e.g., United States Refugee Programs: Hearing Before the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 14 (1980) (Senator Dennis DeConcini commenting to Secretary of State Cyrus Vance: “If you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are a boat refugee from Baby Doc’s Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes.”). A recent example of this phenomenon is the arrest of a Haitian who hijacked a plane to Miami and was charged with air piracy, while a Cuban who did the same was not. See Howard Kleinberg, A Hijacker Is a Hijacker, Whether from Cuba or Haiti, STAR TRIB., Mar. 24, 1993, at 15A.

140. See supra text accompanying notes 82-129 (discussing “new” nativism).

The executive branch also might have been concerned that the Haitian exodus might turn into a repeat of the Mariel boatlift, in which thousands of Cubans later found to be undesirable came to this nation. See Mark D. Kemple, Note, Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law, and Human Considerations, 62 S. CAL. L. REV. 1733 (1989). Another possible explanation for the strength of the resistance to the admission of Haitian asylum-seekers may be that a number carried the HIV virus. Until ordered by a court to do so, the executive branch refused to bring Haitians found to have a credible fear of persecution to the United States to pursue their asylum claims and instead detained them in Guantánamo Bay, Cuba. See Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993); see also id. at 1038 (referring to Guantánamo Bay detention facility as “nothing more than an HIV prison camp”); Clinton Continues Summary Return of Haitians; U.S. Lawyers Investigate In-Country Processing, REFUGEE REP., Jan. 29, 1993, at 3 [hereinafter Return of Haitians] (quoting Professor Harold Koh as referring to facility as “the first HIV concentration camp in history”). In enacting legislation allowing for the exclusion of HIV-positive persons to the United States, see National Institutes of Health Revitalization Act of 1993, § 2007, Pub. L. No. 103-43, 103d Cong., 1st Sess. (1993), congressional debate often centered on the Haitians. See 139 CONG. REC. S1719 (1993) (Sen. Nickles expressing concern that HIV population in Haiti may be as high as eleven percent and fear of spread of disease in United States); see also id. (denying that racism motivated HIV exclusion legislation and finding an anomaly in the fact that laws bar importation of diseased fruit but not immigration of diseased people).
the status quo. President Clinton, reneging on a campaign promise, continued to pursue Haitian interdiction and repatriation.\(^1\)

The color of the Haitians, apparently the only group ever singled out for the extraordinary interdiction and repatriation program, may have indirectly influenced the formulation of the executive branch's evolving interdiction and repatriation policies and decisions to allow them to remain in place.\(^2\) Subtle racism inevitably diminished the domestic resistance to a harsh program directed exclusively at a group of black noncitizens.\(^3\) As aspiring immigrants of color, the Haitians were on the margins politically. Few strong political allies rallied to their cause.

For whatever reason, the executive branch continued the interdiction and repatriation program. Congress showed its unwillingness to intervene. The House of Representatives rejected a proposal that would have afforded temporary protected status in the United States to all Haitians.\(^4\) Although the House passed a bill that would have afforded limited relief to Haitians then in United States custody, it died in the Senate.\(^5\) Debate of this modest act often focused on anti-immi-

\(^1\) During the campaign, candidate Bill Clinton harshly criticized President Bush's policies toward the Haitians. See, e.g., Arthur Brice, Immigration: One Candidate Grabs Issue, ATLANTA J. & CONST., Mar. 6, 1992, at B1. President-elect Clinton promised to change the administration's policy of immediate return of all Haitians. See Norman Kempster & Mike Clary, Clinton Says He'd Cancel Order of Haitians' Return, L.A. TIMES, Nov. 13, 1992, at A20. Shortly before the inauguration, Clinton announced that his administration at least temporarily would continue the repatriation policy, though it hoped to improve processing of asylum claims filed in Haiti. See Elaine Sciolino, Clinton Says U.S. Will Continue Ban on Haitian Exodus, N.Y. TIMES, Jan. 15, 1993, at A1.


\(^3\) See James Harney, Critics of U.S. Policy See Racist Overtones, USA TODAY, Feb. 3, 1992, at 2A (quoting Professor Stephen Legomsky as stating that the public "would never stand for [treatment of the Haitians] if the boat people were Europeans").


grant themes, such as the loss of "American jobs" and the fear of a Haitian "tidal wave." Thus, Haitians were the losers in the political branches, in which their influence was limited.

The judiciary, in turn, deferred to the judgment of the political branches in the treatment of the Haitians. After pressure applied by some advocacy groups on the executive branch failed to halt the program, a full-blown litigation strategy was pursued to no avail. The Supreme Court first denied certiorari in a case upholding one version of the program and later reversed a decision enjoining a harsher version.

Perhaps because of the efforts to eliminate the entire program, little attention was paid to the failings of the immigration bureaucracy in implementing the few protections that existed for Haitians. For example, when a screening program was in place, although the INS determined that some interdicted Haitians had a credible fear of persecution, faulty recordkeeping resulted in the mistaken return of at least fifty of them to Haiti. In addition, in-country processing of asy-

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In advocating legislative relief for the Haitians, one member of Congress observed:

[The hypocrisy of [the interdiction policy] is glaringly evident. In the early 1980's, we opened our borders to hundreds of thousands of Cuban refugees fleeing the dictatorship of Fidel Castro. And it was not long ago that the administration was criticizing the British Government in Hong Kong for returning Vietnamese refugees to their homeland against their will. Yet when a few thousand Haitian refugees desire to enter the United States, the administration closes the door and turns out the light.]

Id. at 810 (statement of Rep. Collins). The hypocrisy failed to convince Congress to act.

146. See, e.g., 138 CONG. REC. H808 (daily ed. Feb. 27, 1992) (statement of Rep. Stearns opposing Haitian Refugee Protection Act and emphasizing that "[t]he fear that many Floridans have expressed to me is that [the act] will create additional waves of Haitians coming into Florida"); Cuban and Haitian Immigration: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the Comm. on the Judiciary, 102d Cong., 1st Sess. 182, 193 (1991) (prepared statement of Daniel A. Stein, Executive Director, Federation for American Immigration Reform opposing end to interdiction program and emphasizing, among other things, the high unemployment rate and the problems caused by Haitians displacing domestic labor).

147. See infra text accompanying notes 342-56 (discussing efficacy of litigation in facilitating social change).


150. See U.S. GEN. ACCOUNTING OFFICE, REFUGEES: U.S. PROCESSING OF HAITIAN ASYLUM SEEKERS 2 (Apr. 9, 1992). The report, however, cautioned that, because INS records were incomplete, it might have understated the problem. See id. at 2-3.
lum applications, which President Clinton promised to improve while continuing interdiction and repatriation, appears problematic.\textsuperscript{151} Besides encountering lengthy delays, bona fide asylum-seekers may be intimidated and afraid to apply in Haiti in light of the omnipresent political violence.\textsuperscript{152} To make matters worse, the opportunity to apply for asylum in the United States is little known in rural areas where political violence often is most prevalent. The inherent weaknesses of in-country processing were perhaps best illustrated by the arrest, while United States officials helplessly watched, of a Haitian found to be eligible for asylum.\textsuperscript{153}

The plight of the Haitians should trouble anyone aware of a few details of the political violence in Haiti. Extrajudicial executions, including that of twenty-five year old Matine Remilien, co-founder of a new political party calling for deposed President Jean Bertrand-Aristide's return to power, are commonplace as are torture and mistreatment of perceived political opponents, arbitrary arrests, and detention.\textsuperscript{154} Amnesty International has documented incidents of persecution of supporters of the democratically elected Aristide by the military, in particular the "disappearance" of Adelin Telemaque who was severely beaten in front of witnesses when caught writing a pro-Aristide political slogan on a wall.\textsuperscript{155} After being told by the United States consulate to secure additional proof of his claim of persecution, Carl Henri Richardson, who had campaigned on behalf of Aristide, was arrested by soldiers and beaten into unconsciousness.\textsuperscript{156}

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\item \textsuperscript{151} See supra note 141.
\item \textsuperscript{152} See Return of Haitians, supra note 140, at 5 (quoting Professor Harold Koh: "In-country processing is a rich person's option that is available to people who have time to wait, who can afford to be seen repeatedly in public, and who have the means to travel repeatedly.").
\item \textsuperscript{153} See DeWayne Wickham, Janet Reno Faces Big Job: Turn Things Around at Justice, GANNETT NEWS SERV., Mar. 15, 1993, available in LEXIS, Nexis Library, Gns File.
\item \textsuperscript{155} See AMNESTY INT'L REPORT 1992, at 34 (1992); see also AMNESTY INT'L REPORT 1993, at 146-49 (documenting numerous other similar incidents).
\item \textsuperscript{156} See Anne Fuller & Andrew Levin, US Haitian Refugee Policy—A Brutal 'Alternative', CHRISTIAN SCI. MONITOR, Sept. 8, 1992, at 19.
\end{itemize}
The stories of individual Haitians are not well known. Rather, there is a more general sense of chaos and violence in the so-called Third World among desperately poor peoples, which when presented in abstracted form, is less than gripping to the ordinary citizen. If the political system accurately gauged the will of the public, would the United States have treated the Haitians in this way? We will never know.

D. Preliminary Observations

The noncitizen population in the United States is composed of people who live and work on the margins. While contributing to the economy, they are blamed by some for a litany of society’s woes. Barred by law from the political process, noncitizens have limited ability to resist the attacks, protect their interests, and improve their lives. Many are further marginalized by their color, a stigmatizing attribute that also limits the political power of citizens. The plight of Haitians seeking asylum in this country is only one recent example of the weakness of noncitizens in the political arena. Although often less than clear, a majority of voters may agree with noncitizens but fail to act. Further exploration will make this clearer.

III. THE ABILITY OF NONCITIZENS TO CHANGE THE LAW AND ITS ENFORCEMENT

Part II sketched some impressionistic thoughts about the political power of noncitizens. This Part presents and analyzes further evidence bearing on the ability of noncitizens to influence the process.

159. There is some evidence that the United States would not have treated Haitians as it did. See Cathy Booth, Send ’Em Back, TIME, July 8, 1992, at 43 (reporting that 57% of persons in Miami, an area that would be most affected by generous treatment of the Haitians, favored giving them temporary refuge in the United States).
A. Overriding Supreme Court Decisions

Before reviewing congressional overrides of Supreme Court decisions, some preliminary observations are in order. Salient characteristics of the immigration laws, as well as the nature of judicial review of immigration decisions, suggest that the power of noncitizens and their proxies is limited. Perhaps most importantly, the Immigration and Nationality Act (INA) is well known for its generous delegations of discretion to the executive branch.\(^{160}\) Congress, one might guess, generally does not delegate such unbridled discretion to agencies adjudicating the rights of citizens. In the immigration realm, Congress may conveniently dispose of thorny policy judgments with limited political payoffs (because the rights of a voting constituency are not at stake) by dumping the problem on the agency.\(^{161}\)

The immigration laws also include substantive provisions that are difficult to reconcile with generally applicable legal principles.\(^{162}\) For example, the INA barred the admission of communists for almost forty years,\(^{163}\) a prohibition in direct

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\(^{160}\) See Amanullah v. Nelson, 811 F.2d 1, 4 (1st Cir. 1987) ("By statutory enactment, Congress has delegated its unusually broad dominion in the immigration field to the Attorney General."); Jean v. Nelson, 727 F.2d 957, 965-67 (11th Cir. 1984) (en banc) (referring to "sweeping delegations of congressional authority" in INA to Attorney General and stating that "the Attorney General . . . is the beneficiary of broad grants of discretion under the statute"), aff'd on other grounds, 472 U.S. 846 (1985); see, e.g., INA § 244, 8 U.S.C. § 1254 (1988) (affording Attorney General discretion to grant relief of suspension of deportation); id. § 245, 8 U.S.C. § 1255 (affording Attorney General discretion to grant relief of adjustment of status); see also Kevin R. Johnson, Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration, 71 N.C. L. Rev. 413, 455-56 (1993) (analyzing the special impact of plain meaning interpretation of immigration laws resulting from broad discretion delegated by INA to executive branch).


\(^{161}\) See Plyler v. Doe, 457 U.S. 202, 237 (1982) (Powell, J., concurring) ("Perhaps because of the intractability of the problem, Congress—vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens—has not provided effective leadership in dealing with [the illegal alien] problem.").

\(^{162}\) See generally Schuck, supra note 67 (analyzing discrepancies between classical immigration law and mainstream legal doctrines).

conflict with fundamental First Amendment principles.\textsuperscript{164} Upheld by the Court in \textit{Kleindienst v. Mandel},\textsuperscript{165} the exclusion remained for the most part intact until Congress substantially modified it in 1990.\textsuperscript{166}

Nor do the courts generally have the power to interfere with Congress's substantive judgments—even if those judgments would be patently unconstitutional if the rights of citizens were at stake. In addition to the now-popular deference frequently accorded agency action,\textsuperscript{167} the plenary power doctrine circumscribes judicial review of immigration decisions of either Congress or the executive branch, the so-called political branches.\textsuperscript{168} This judicial hands-off policy is unlikely to change in the near term. Congress obviously is one of the doctrine's principal beneficiaries and thus lacks any incentive to require thorough judicial scrutiny of the immigration laws. The executive branch, which enjoys a reservoir of delegated discretion over immigration matters, naturally would not desire any change in the status quo and has been lax to limit its discretion.\textsuperscript{169} Crabbed judicial review, however, represents nothing less than a radical departure from elementary separation of powers principles.\textsuperscript{170} Needless to say, doctrines completely


\textsuperscript{165} 408 U.S. 753 (1972) (affirming the Attorney General's denial of visa to Belgian journalist and Marxist theoretician).


\textsuperscript{169} See Roberts, supra note 160.

\textsuperscript{170} See \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is em-
precluding judicial review are few and far between when the rights of citizens are at issue.171

A few examples of invocation of the plenary power doctrine demonstrate its dramatic implications. Draconian immigration laws designed not only to discriminate against, but to punish, Chinese immigrants were shielded by its immunity.172 The doctrine in more recent years has been invoked to uphold congressional limitations on the eligibility of noncitizens for certain public benefits.173 In declining the invitation to invali-

phatically the province and duty of the judicial department to say what the law is."); see also LEGOMSKY, supra note 117, at 178 (discussing Marbury v. Madison principles and observing that “[m]ost are unaware that there is a vast . . . body of [immigration] law that the [Supreme] Court has explicitly treated as an exception to the principle of constitutional review”); Henkin, supra note 168, at 863 (“The [Supreme] Court has left only immigration and deportation outside the reach of fundamental constitutional protections.”); cf. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 319-20 (1990) (arguing that “the Executive almost always wins if the courts sit on the sidelines” in foreign policy matters).


date such laws, the Supreme Court observed with candor that "Congress regularly makes rules that would be unacceptable if applied to citizens."174

Despite strong reasons for not applying the doctrine, the Court recently reaffirmed this approach to the judicial review of immigration law and policy. The Court rejected a constitutional challenge to a new regulation promulgated by the Justice Department generally requiring the detention of undocumented children unless released to parents, close relatives, or legal guardians but not to responsible, unrelated adults.175 In so doing, the Court emphasized that

[for reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Over no conceivable subject is the legislative power of Congress more complete. Thus, in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.176

The plenary power doctrine thus shielded the Attorney General's judgment even though the INS failed to establish the need for the new regulation, which represented a change in policy.177 Further, when the regulation was adopted, the detention conditions by the INS's own admission were "deplorable,"178 thus making deference appear anomalous.


None of this is to suggest that the Court never has deviated from the plenary power doctrine. The Court sporadically has protected LPRs, sometimes even undocumented ones. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (holding that states cannot bar undocumented children from public schools); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (striking down statute limiting civil service employment to citizens); In re Griffiths, 413 U.S. 717 (1973) (striking down exclusion of LPRs from law practice).

176. Id. at 1449 (emphasis added) (second bracketed letter in original) (citations and quotations omitted).
178. See Flores, 113 S. Ct. at 1460-61 (Stevens, J., dissenting); see also Mi-
The plenary power doctrine has a profound, though subtle, impact on the interpretation of the immigration laws. When the courts interpret an ordinary statute, the Constitution serves as a moderating influence that tends to limit the possibility for extreme constructions. Invocation of the plenary power doctrine, however, eliminates any constitutional constraints in interpreting the immigration laws, thereby freeing, if not requiring, judges to allow extreme interpretations of the statute by the executive branch to stand. Thus, the doctrine allows the agency and the courts far greater freedom in interpreting the INA than is generally available under other bodies of law. Consequently, a plenary power world creates the distinct potential for immigration law and policies to linger at the fringes of lawfulness.

In summary, Congress at various times in our history—perhaps at the behest of vocal minorities active at the time—has enacted laws that adversely affect noncitizens. The executive branch not infrequently acts in an even less solicitous manner. Nor can the courts, constrained by the plenary power doctrine, be depended upon to intervene to correct a dysfunctional political process. Under those circumstances, it would seem inherently difficult for noncitizens to override adverse judicial interpretations of the immigration laws (even those that run afoul of majoritarian spirit) and curb agency conduct that violates the law.

179. See T. Alexander Aleinkoff, Aliens, Due Process and "Community Ties": A Response to Martin, 44 U. PIT. L. REV. 237, 258-59 (1983) (arguing that certain applications of plenary power doctrine precluded dialogue between the courts and Congress on due process protections); Motomura, Phantom Constitutional Norms, supra note 172, at 562 (articulating how equal protection bar to racial discrimination affected Supreme Court's interpretation of Internal Revenue Code and conclusion that statute prohibited federal tax exemption for nonprofit private schools that discriminate); see also Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (emphasizing that Court should interpret statutes in a manner so as to avoid constitutional questions). I owe this thought (and many others) to Hiroshi Motomura.

180. See Motomura, Phantom Constitutional Norms, supra note 172, at 580-600.
1. Overrides generally

In theory, if Congress disagrees with the Supreme Court's interpretation of a statute, it may amend the statute.\(^1\) That, however, is easier said than done. Professor William Eskridge's empirical study of congressional overrides of Supreme Court decisions in the 90th (1967-68) through the 101st (1989-90) Congresses found that Congress overrode only 121 Supreme Court decisions and 220 lower court decisions.\(^2\)

In light of the hundreds of Supreme Court decisions over the time period, the number of overrides is relatively small. This may be a product of the fact that Supreme Court cases "involve big stakes and sharply clashing interests" in which the winners are able to stave off override attempts.\(^3\) This might be expected in the few high-profile, controversial immigration cases.\(^4\) The federal government, a strong lobbyist,\(^5\) com-

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1. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") (citations omitted).


3. See id. at 377.

4. See supra text accompanying notes 130-59 (discussing Haitian repatriation and Supreme Court's upholding of program).

5. Cf. Eskridge, supra note 182, at 366-67 & n.103 (noting instances in
bined with restrictionist groups that have come to the forefront, might be expected to effectively resist a pro-immigrant override. One might expect that overrides are more likely in low stakes matters without "sharply clashing interests." As we shall see, many if not most of the few congressional overrides of Supreme Court interpretations of the Immigration and Nationality Act do not implicate hotly contested questions. Based on the results of his study, Professor Eskridge hypothesized that "[g]roups are most likely to organize when they are small, cohesive, and sociopolitically privileged. Diffusion, heterogeneity, and political marginalization render groups less likely to become organized, but sometimes potentially more powerful if organized." Organization obviously is critical to any override attempt. For that reason, consumers, welfare and other benefit recipients (i.e., diffuse, heterogeneous, or politically marginalized groups), for example, generally are unlikely to command the legislative interest that business and labor organizations, women, the disabled, and environmentalists (i.e., small, cohesive, or sociopolitically privileged groups) do.

Whatever the cause, the paucity of overrides has implications. The Supreme Court may read its own preferences into a statute without colorable threat of congressional override or, if it agrees with Congress's policy choices, defer to it through invocation of some sort of deference doctrine. Consequently, the judiciary, and often the executive branch through its interpretations of the laws, enjoy the final say about the
meaning of laws. As shall become apparent, this is especially true in immigration law.

2. The Immigration and Nationality Act: 1952 to June 1993

Intuition suggests that noncitizens, because of their "diffusion, heterogeneity, and political marginalization," would find it difficult to engage in the necessary organization to override Supreme Court decisions. Professor Eskridge's study shows that 3% (4 of 121) of congressional overrides of Supreme Court decisions from 1967-90 were immigration cases, which placed immigration in a tie for eleventh out of twenty-two subject matter categories. The small number of overrides of immigration decisions prevented the formulation of any generalized conclusions on the subject.

In light of the insularity of immigration law, one might even be surprised that there were four overrides. One explanation may be that the powerful Senate and House Judiciary Committees have jurisdiction over immigration matters. These committees had primary or exclusive jurisdiction over 54% of the overrides during 1967-90. The number of immigration overrides thus may be attributable more to the vagaries of committee assignments than to the political clout of noncitizens.

The complex nature of the immigration laws, and the courts' difficulty in interpreting them, also might necessitate more overrides in the immigration area than in other areas. Their complexity may only be outmatched by their lack of clarity, a further factor militating in favor of frequent judicial inter-

192. See Eskridge, supra note 182, at 361.
193. Id. at 344. The top ten subject matters were criminal law (15%); antitrust (9%); civil rights (9%); bankruptcy (8%); federal jurisdiction and procedure (7%); environmental law (7%); income tax (7%); copyright, trademark, and patent law (7%); intergovernmental relations and federalism (5%); and longshoreman and shipping (5%).

The study further concluded that noncitizens gained in 2% (two cases) of the total cases overridden within 10 years of the Court's decision. See id. at 348. From 1978 to 1984, 80% of the Supreme Court decisions (four of five cases) in which noncitizens lost were not overridden by Congress. See id. at 351.
194. See id. at 376.
195. See id. at 344.
196. See id.; see also id. at 339 (noting great increase in size of staffs of House and Senate Judiciary committees).
197. See Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (referring to INA and stating that "Congress ... has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle").
Moreover, due to substantive controversies separate and apart from Supreme Court decisions, Congress has revisited immigration policy a number of times. That fact alone has increased the likelihood of overrides, particularly when change without controversy can be achieved through inclusion in an omnibus piece of immigration legislation.

Even so, any success enjoyed by noncitizens in overriding Supreme Court decisions might well overstate their influence in the political process. The vast majority of immigration decisions, of which Congress generally is unaware, are finally decided in the lower courts. Most adverse lower court decisions therefore are left wholly intact. Professor Eskridge, for example, located a single override of a lower court decision interpreting the INA during 1967-90. That override attempted to facilitate criminal immigration enforcement.

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198. See, e.g., infra text accompanying notes 206-21 (discussing Errico and Reid, two Supreme Court decisions grappling with an opaque provision of INA).

199. See 1991 INS STATISTICS, supra note 40, at A.1-12 to A.1-21 (identifying 57 separate pieces of "immigration and naturalization legislation" from passage of INA in 1952 through 1990).

200. See infra text accompanying notes 222-40 (discussing overrides of Boutilier and Phinpathya).

201. See Eskridge, supra note 182, at 415-16.

202. A particularly troubling example of a lower court case not even considered by Congress is Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 484 U.S. 826 (1987). In that case, the court of appeals affirmed the Board of Immigration Appeals denial of asylum to a Salvadoran woman forced to watch relatives dismembered and murdered and later was raped while political slogans were chanted, on the ground that she had not been persecuted "on account of...political opinion." Id. at 288. Although harshly criticized, see ALENIKOFF & MARTIN, supra note 15, at 811 n.36 (referring to Campos-Guardado as a "stunning example of a nearly inexplicable hard-line decision, using highly restrictive 'on account of' doctrine"); T. Alexander Aleinikoff, The Meaning of 'Persecution' in United States Asylum Law, 3 INT'L J. REFUGEE L. 5, 25 (1991) (criticizing decision in similar vein), Congress apparently never scrutinized the case.

203. See Eskridge, supra note 182, at 428.


Another example of Congress overriding lower court decisions (before the 1967-90 time frame scrutinized by Professor Eskridge) to pursue enforcement goals can
Moreover, default principles endorsed by the Supreme Court circumscribe appellate review of agency immigration decisions.\(^\text{205}\) In this light, the override of less than a handful of Supreme Court decisions in almost a quarter-century has limited significance in evaluating the political influence of the non-citizen community. Scrutiny of the four immigration decisions overridden from 1967-90 sheds further light on the issue.

\textbf{a. Four overrides: 1967-1990}

\textbf{(1) INS v. Errico (1966) and Reid v. INS (1975).}

Two of the Supreme Court decisions overridden during 1967-90 involved the same section of the INA. In \textit{INS v. Errico},\(^\text{206}\) the Court, in an opinion by Chief Justice Warren, interpreted section 241(f) of the Immigration and Nationality Act, which at the time provided as follows:

The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the U.S. by fraud or misrepresentation \textit{shall not apply to an alien otherwise admissible at the time of entry}

be seen in the Refugee Resettlement Amendment, Pub. L. No. 86-648, 74 Stat. 504 (1960). Sections 8 and 9 of that Act overrode Mendoza-Rivera v. Del Guercio, 161 F. Supp. 473 (S.D. Cal. 1958), \textit{aff'd}, 267 F.2d 451 (9th Cir. 1959), and Rojas-Gutierrez v. Hoy, 161 F. Supp. 448 (S.D. Cal. 1958), \textit{aff'd}, 267 F.2d 490 (9th Cir. 1959), which held that marihuana was not a “narcotic drug” for exclusion and deportation purposes under the INA. Congress amended the INA to make it clear that exclusion or deportation could be based on “narcotic drugs or marihuana” convictions. \textit{See S. REP. NO. 1651, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S.C.C.A.N. 3124, 3135 (explaining changes as consistent with “original intent of Congress” and that “concern with violation of laws relating to marihuana was as great as its concern with violations of laws relating to other narcotic drugs”). Congress also overrode Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), \textit{vacated on other grounds}, 374 U.S. 528 (1963), which held that the term “psychopathic personality” for purposes of exclusion was unconstitutionally vague if read to include homosexuality. Congress amended the provision to provide that persons deemed to suffer from a “sexual deviation” could be excluded from the United States. \textit{See Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965); see also infra text accompanying notes 222-32.}

Finally, two lower court decisions involving the applicability of the INA that favored noncitizens were overridden along with United States v. Menasche, 348 U.S. 528 (1956). \textit{See In re Naturalization of Wolff, 270 F.2d 422 (3d Cir. 1959), cert. denied, 362 U.S. 928 (1960); Medalion v. United States, 279 F.2d 162 (2d Cir. 1960); see also infra Appendix.}

\(^{205}\) \textit{See generally Johnson, supra note 160.}

who is the spouse, parent, or a child of a U.S. citizen or of an alien lawfully admitted for permanent residence.207

Two noncitizens, both of whom had children born in the United States (thus making the children citizens), attempted to invoke the protections of section 241(f). The INS sought to deport them on the grounds that they employed fraud in entering the country to avoid then-existing national origin quota restrictions and therefore were not "otherwise admissible at the time of entry."208 Liberally construing the statutory provision, the Court held that, despite the fact that the fraud was designed to evade quota restrictions, the noncitizens were entitled to the mandatory section 241(f) waiver.

Because Errico and its apparent deviation from the plain meaning of the statute resulted in some divergent interpretations in the lower courts, the Court revisited section 241(f) in Reid v. INS.209 In Reid, the INS sought to deport the Reids, who attempted to invoke section 241(f), on the ground that they entered the United States without inspection,210 even though they entered the country through use of false documentation. The Court, in an opinion by Justice Rehnquist, interpreted section 241(f) so as to affirm the agency's deportation order.211 Noting that "Errico was decided by a divided Court over a strong dissenting opinion,"212 the Court limited that holding to cases in which the INS sought to deport noncitizens because entry was obtained through fraud, not when deportation was based on the separate ground of entry without inspection as in the case before the Court.213

207. Id. at 215 (emphasis added) (quoting INA § 241(f), 9 U.S.C. § 1251(f)). This section was added to the INA by Pub. L. No. 87-301, § 16, 75 Stat. 649, 655 (1961).


209. 420 U.S. 619, 620-21 & n. 1 (1975) (citing inconsistent lower court authority); see also Elwin Griffith, Reforming the Immigration and Nationality Act: Labor Certification, Adjustment of Status, the Reach of Deportation, and Entry by Fraud, 17 U. Mich. J.L. REP. 265, 290-91 (1984) ("Needless to say, the Errico approach left the lower courts in a state of confusion about the appropriate application of section 241(f).")


211. See Reid, 420 U.S. at 624-31.

212. Id. at 628.

213. See id. at 624-31.
The complexities of the interpretation and application of section 241(f) after these two Supreme Court decisions should be obvious. Not surprisingly, the lower courts encountered difficulties reconciling *Errico* and *Reid*.214 The 1981 amendments to section 241(f) represent a response to the confusion sown by the two divergent interpretations of the section. The House Report states the following:

[T]wice litigation involving the proper interpretation of [section 241(f)] has reached the Supreme Court with no clear resolution.... The Committee amendment reconciles the confusing and conflicting judicial and administrative interpretations of the scope of this provision, and clarifies that the waiver is only intended to apply to immigrants and that it is available for innocent (as well as fraudulent) misrepresentations.215

The 1981 amendments, however, definitely had a substantive slant. They made it clear that the section 241(f) waiver applied to willful or innocent fraud and, more importantly, that its relief was discretionary rather than mandatory (as it previously had been).216 The amendment thus afforded the agency

214. Compare Persaud v. INS, 537 F.2d 776, 778-79 (3d Cir. 1976) (minimizing Reid's limitation of Errico) with Pereira-Barreira v. United States Dep't of Justice, 523 F.2d 503, 508-09 (2d Cir. 1975) (holding that Reid limited Errico to its facts). See also William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1435, 1438 (1988) (listing Reid as decision “disavowing significant reasoning” of Errico).

215. H.R. REP. NO. 264, 97th Cong., 1st Sess. 25 (1981), reprinted in 1981 U.S.C.C.A.N. 2577, 2594; see also id. at 9-10, reprinted in 1981 U.S.C.C.A.N. 2578-79 (stating that amendments were designed to “improve the efficiency of the [INS] by streamlining certain . . . procedures, clarifying various ambiguities in current law and eliminating unnecessary reporting requirements,” and that the House Judiciary Committee “attempted to restrict the scope of this legislation to those reforms which are urgently needed and noncontroversial”).

216. INA § 241(f), 8 U.S.C. § 1251(f) (repealed and recodified as amended in 1990). As amended, § 241(f) read, in pertinent part, as follows:

The provisions of this section relating to deportation of aliens . . . on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien . . . who—

(i) is the spouse, parent, or child of a citizen . . . or of an alien lawfully admitted . . . for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible . . . at the time of such entry except for those grounds of inadmissibility . . . which were a direct result of
the discretion, which obviously would substantially limit judicial review on the question of section 241(f)'s applicability, in deciding whether the noncitizen was entitled to the benefits of the section. The ultimate victor in the congressional response to the Court's decisions in Errico and Reid thus was the INS. The executive branch, not surprisingly, supported the override. The acting INS Commissioner testified that "differing administrative and judicial interpretations have left the law in a state of confusion which makes it virtually impossible for the INS to uniformly administer Section 241(f)."\(^{217}\) The Department of Justice in a previous attempt to "clarify" the section had argued that "litigants have sought to expand Section 241(f) into a charter of amnesty, waiving all restrictions for those who had entered the United States through fraud."\(^{218}\)

In short, Congress attempted to clarify confused Supreme Court caselaw in favor of the government "to obviate the need for further litigation."\(^{219}\) The override apparently reflects the handiwork of diligent committee staffers\(^{220}\) and the power of the federal lobby.\(^{221}\)

(2) Boutilier v. INS (1967). In Boutilier v. INS,\(^{222}\) the Court, in an opinion by Justice Clark, relied on legislative history in interpreting "psychopathic personality," which could

\[\text{(emphasis added).}\]


\(^{218}\) See id.

\(^{219}\) See id.

\(^{220}\) See Eskridge, supra note 182, at 345 (attributing overrides in "low visibility" issues of criminal law, bankruptcy, and federal jurisdiction and procedure as the "result of ambitious codification and reform efforts by judiciary subcommittees responsible for each of those areas of law").

\(^{221}\) See supra note 185 and accompanying text. Congress later repealed § 241(f) and recodified it as amended when it revamped the deportation and exclusion provisions of the INA. See also Immigration Act of 1990, § 602(a)(1)(H), 104 Stat. 4978, 5079 (1990) (codified at 8 U.S.C. § 1251(a)(1)(H)).

\(^{222}\) 387 U.S. 118, 120 (1967) ("The legislative history of the [Immigration and Nationality] Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals . . . ."); see also William N. Eskridge, Jr., Gadamer/Statutory Interpretation, 90 COLUM. L. REV. 609, 609-11, 639-46, 651-59, 661 (1990) (analyzing Boutilier's method of statutory interpretation).

In dissent, Justice Douglas emphasized that "[t]he term 'psychopathic personality' is a treacherous one like 'communist' or in an earlier day 'Bolshevik.' A label of this kind when freely used may mean only an unpopular person. It is much too vague by constitutional standards for the imposition of penalties or punishment." Boutilier, 387 U.S. at 125 (Douglas, J., dissenting).
serve as the basis for exclusion under section 212(a)(4) of the Immigration and Nationality Act, to include homosexuality. Repeated concerted override attempts were unsuccessful in the 1980s. Congress finally overruled Boutilier in the Immigration Act of 1990.

The override reflects, among other things, the increased political strength of the organized lesbian and gay community. The overriding of Boutilier became an important issue to lesbian and gay organizations, similar in some respects to the current controversy concerning the ban on lesbians and gays from serving in the military. The issue did not appear to animate the advocacy efforts of immigrant and refugee groups to the same degree. Changing social mores also influenced the congressional response. Moreover, the fact that the provision was enacted in a much larger amendment of the INA, the Immigration Act of 1990, with a large number of


224. See Eskridge, supra note 182, at 358 & n.77 (collecting citations to proposed override legislation).


226. See Eskridge, supra note 182, at 357-59, 411-12.


229. See, e.g., Statement of Ira J. Kurzban, Esq., President, American Immigration Lawyers Association, in Exclusion and Deportation Hearings, supra note 227, at 257 (discussing elimination of ideological exclusions and not mentioning lesbian and gay exclusion); Statement by International Human Rights Law Group (1987), in Exclusion and Deportation Hearings, supra, at 325 (same); Lawyers Committee for Human Rights, in Exclusion and Deportation Hearings, supra, at 337 (same).

significant changes, 231 made its passage much more likely. 232 In light of these facts, the override should be treated cautiously in calibrating the political strength of noncitizens.

(3) INS v. Phinpathya (1984). In INS v. Phinpathya, 233 the Supreme Court, in an opinion by Justice O'Connor, literally interpreted the "continuous physical presence" requirement for eligibility for relief known as suspension of deportation under section 244 of the Immigration and Nationality Act. 234 In so doing, the Court deviated from longstanding lower court precedent and endorsed the harsh decision of the agency to deny relief to a person who had interrupted a stay of eight years (as of the year that she applied for relief) in the United States with a three month trip to her native country. 235 Two years later, Congress in a comprehensive amendment to the INA, the Immigration Reform and Control Act of 1986, overrode Phinpathya by providing that a noncitizen had established a "continuous physical presence" so long as any "absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence." 236

231. See ALEINIKOFF & MARTIN, supra note 15, at 61-62 (noting that the 1990 Act "worked a major overhaul of the legal migration system" by, among other things, expanding employment-based immigration, adding visa numbers, creating a new category of "diversity immigrants," rewriting exclusion and deportation grounds, and creating "temporary protected status" for persons fleeing civil war and the like).

232. See infra text accompanying notes 237-40 (noting similar phenomenon in override of Phinpathya).


234. See INA, § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1988) (providing that applicant for suspension of deportation must have "been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of . . . application").

235. See STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 524 (1992) (referring to Phinpathya as "a bombshell" and noting that the Court "took on an issue that was not raised by the facts, that no one had argued or briefed, that required the disapproval of twenty years of virtually unbroken case law, that reached a result at odds with the [Board of Immigration Appeals] interpretation, and that produced law far more extreme than what even the INS had sought"); Eleanor Pelta, INS v. Phinpathya: Literalist Statutory Interpretation in the Supreme Court, 23 SAN DIEGO L. REV. 401, 406-11 (1986) (criticizing Court's interpretation of statute for, among other things, being inconsistent with a long line of authority, including the Court's interpretation of similar language in a different INA provision in Rosenberg v. Fleuti, 374 U.S. 449 (1963)).

236. IRCA § 315(b)(2), 8 U.S.C. § 1254(b)(2) (1988). The House previously had passed a bill five months after Phinpathya that would have overridden the decision. See 130 CONG. REC. 16,848-50 (1984). However, the bill died in the Senate.
Except to immigration practitioners, the "continuous physical presence" requirement for suspension of deportation is little known. It is, of course, important to undocumented persons seeking to become lawful permanent residents through suspension of deportation. From that respect, the override's more liberal treatment of brief trips out of the country was a significant gain. The issue, however, definitely did not rise to the significance in the eyes of public and Congress as, for example, such matters as the treatment of asylum-seekers, and therefore was an unlikely candidate to draw significant opposition. This is especially true because, as was the Boutilier override, the Phinpathya override was buried in a law with more significant changes to the immigration laws that dominated congressional debate over the bill. The lengthy debate over IRCA primarily focused on the controversial issues of employer sanctions and amnesty for certain undocumented immigrants, not on whether a provision of the INA concerning suspension of deportation would be changed. Of course, immigrants' rights groups supported the change in the face of executive branch opposition. As with previous overrides we have considered, the override of the Supreme Court's plain meaning interpretation may have been facilitated by an active and informed Judiciary Committee staff.

(4) Common features. After reviewing the Supreme Court decisions that were overridden, the political power of noncitizens appears all the more limited. Two of the four overrides favored the executive branch rather than the noncitizen. Factors other than noncitizen influence played critical roles in ensuring passage of the two overrides in their favor. The over-

237. See, e.g., supra text accompanying notes 130-59 (discussing Haitian repatriation).

238. See H.R. REP. No. 682(I), supra note 204, at 51-56, reprinted in 1986 U.S.C.C.A.N. 5655-60 (summarizing lengthy history of legislation and major issues of debate, which did not focus on Phinpathya). The central issues of debate are reflected in IRCA's three purposes: "to control illegal immigration to the U.S., make limited changes in the system for legal immigration, and provide . . . for certain undocumented aliens who have entered this country prior to 1982." Id. at 45, reprinted in U.S.C.C.A.N. 5649. For a discussion of the many compromises in IRCA's legalization provisions, see Bill Ong Hing, The Immigration and Naturalization Service, Community-Based Organizations, and the Legalization Experience: Lessons for the Self-Help Immigration Phenomenon, 6 GEO. IMMIGR. L.J. 413, 475-91 (1992) (Appendix B).


240. See supra text accompanying notes 195-96, 220.
rides also tended to involve narrow, noncontroversial questions of little general significance to the noncitizen community.

b. The bigger picture. This section attempts to take a more complete look at the Supreme Court's interpretation of the Immigration and Nationality Act (INA) and congressional responses to those decisions. From December 1952 when the INA went into effect241 through June 1993 (the end of the October 1992 Term), the Supreme Court decided 71 cases, which are listed in the Appendix, that interpreted or applied the INA.242 At the outset, it is important to note that the relatively

242. Let me describe the methodology employed to compile the Appendix. Cases referring to the Immigration and Nationality Act initially were identified through computer searches of United States Supreme Court decisions. Each decision uncovered through this search was read and a summary of the important characteristics of the case prepared. All decisions that were determined to interpret and apply the INA were included in the Appendix. To locate any other INA cases not revealed through computer searches, research assistants reviewed the index of each volume of the Supreme Court Reporter from 1952 to the present and identified a few cases that were added to the Appendix. These cases also were read and summarized.

The selection of cases "interpreting or applying" the INA required some judgment calls. The primary criterion used in deciding to include a case was whether interpretation or application of the INA was necessary to the decision. To avoid overcounting decisions, I excluded reversals and remands in light of a recent decision or a change in the statute. I also excluded one case in which a lower court decision in favor of the noncitizen was affirmed per curiam by an equally divided court. See Brownell v. Rubinstein, 346 U.S. 929 (1954) (per curiam).

Determining "winners" and "losers" as a general rule was fairly straightforward. However, a few judgment calls were made based on my reading of the decision and its impact. Some of the more difficult judgments are explained in the Appendix.

In determining whether Congress "overrode" a decision, see infra note 243 (defining override), research assistants reviewed the legislative history for all enacted public laws involving immigration that were reprinted in U.S.C.C.A.N. All reports on immigration legislation enacted by Congress during the relevant time period that were reprinted in U.S.C.C.A.N. were reviewed for references to court decisions. Legislative history not reprinted in U.S.C.C.A.N. also was reviewed in some instances.

One final caveat is in order. The sample did not include all cases involving the INS, or all decisions having some impact on immigration law and policy. Nor are decisions interpreting immigration laws other than the INA included. Rather, the sample is limited strictly to decisions interpreting or applying the INA. A wider sampling of cases might reflect even more skewed results in favor of the government, particularly in recent times. A number of recent non-INA cases involving immigration-related issues have been decided adversely to the noncitizen and in favor of the executive branch. See, e.g., United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (holding that Haitian asylum-seekers were not entitled under Freedom of Information Act to certain information relevant to their claim); Ardestani v. INS, 112 S. Ct. 515 (1991) (holding that successful asylum applicant may not recover attorneys' fees from government under Equal Access to Justice Act).
small sample size militates in favor of caution in drawing inferences from the study. The Appendix also lists the INA section interpreted, the winner and loser, whether the decision was overridden, and, if so, who the “ultimate winner”—the group that obtained the benefit of the override—was.

Table 1 shows a breakdown of the results in cases involving noncitizens and the federal government, and citizens and the federal government.

In reviewing the Court’s immigration decisions, I saw one pattern worthy of mention that is not directly related to my purpose in reviewing the cases. Besides frequently dissenting from decisions against noncitizens, see, e.g., supra note 222 (discussing Justice Douglas’s dissent in Boutilier v. INS, 387 U.S. 118 (1967)), Justice Douglas repeatedly voted to grant certiorari in immigration cases because of the important life and liberty interests at stake, see, e.g., Cheng Fu Sheng v. INS, 393 U.S. 1064 (1969) (Douglas, J., dissenting from denial of certiorari); Ng Kam Fook v. Esperdy, 375 U.S. 955 (1963) (Douglas, J., dissenting from denial of certiorari); see also United States Congress, House Comm. on the Judiciary, Special Subcomm. on H. Res. 920, Associate Justice William O. Douglas, 91st Cong., 2d Sess. 66-69 (1970) (investigating propriety of Justice Douglas’s letter to INS Commissioner stating that, based on knowledge of the region, a Kurd resisting deportation to Iraq would be subject to “severe persecution” if returned there). As a young man with acquaintances in the Industrial Workers of the World, Douglas was well aware of President Wilson’s mass deportation of noncitizen union members. See WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 77-80 (1974); see also supra note 98 (mentioning Palmer Raids during this time period).

243. “ Overrides” are defined here as changes to the law in which Congress consciously responds to a Supreme Court interpretation of the INA and attempts to change the result achieved by the interpretation. See Eskridge, supra note 182, at 332 n.1 (employing similar definition). A classic override purports to “correct” a misinterpretation by the Court. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991). Similar to Professor Eskridge’s study, this one classifies congressional action as an override only when legislative history focuses on one or more Supreme Court decisions. See Eskridge, supra note 182, at 332 n.1.

I distinguish between an override and a change in the statute. Congressional action was classified as a “change” when the section was amended not because of any disagreement with the Supreme Court’s interpretation but to change the policy preferences reflected in the statutory provision. An example is when Congress amends a statute after the Court upholds its constitutionality. See, e.g., supra text accompanying notes 165-66 (discussing Kleindienst v. Mandel, 408 U.S. 753 (1972)). The Appendix does not purport to be a comprehensive list of all changes to the INA section interpreted by a particular decision but generally only lists those changes that somehow are tied to a Supreme Court decision (for example, when a House or Senate report mentions the decision).

I recognize that, for some of the more recent decisions, especially those decided in the 1990s, Congress still may override the decision. As of this date, however, they have not. If past history proves to be a reliable guide, Congress will override few if any of the more recent Supreme Court decisions.
TABLE 1

Noncitizens Versus Government

<table>
<thead>
<tr>
<th>Cases (%)</th>
<th>Government Prevailed</th>
<th>Cases (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>17 (32.7%)</td>
<td>35 (67.3%)</td>
<td></td>
</tr>
</tbody>
</table>

Total Decisions: 52

Citizens Versus Government

<table>
<thead>
<tr>
<th>Cases (%)</th>
<th>Government Prevailed</th>
<th>Cases (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>11 (73.3%)</td>
<td>4 (26.7%)</td>
<td></td>
</tr>
</tbody>
</table>

Total Decisions: 15

As Table 1 shows, the government, often the INS, prevailed in approximately two-thirds of the decisions over noncitizens. This victory percentage seems high, particularly in light of the abundance of criticism leveled at the immigration bureaucracy over the years. The raw numbers must be treated with some caution, however, because they do not account for the relative importance of the decisions. Although noncitizens were net losers by a large margin in the Supreme Court in the 1980s, this was not always the case. INS v. Cardoza-Fonseca, for example, was an extremely important victory for asylum-seekers. Similarly, several losses in the

244. All percentages stated in this Section are rounded to the closest .1%.

In compiling Table 1 dealing with decisions involving noncitizens and the government, the following should be noted. In one case, INS v. Chadha, 462 U.S. 919 (1983), which invalidated a legislative veto of an agency immigration decision, the noncitizen and the executive branch had roughly congruent interests in the outcome and the Court ruled in their favor against Congress. In two other cases, De Canas v. Bica, 424 U.S. 351 (1976), and Toll v. Moreno, 458 U.S. 1 (1982), noncitizens were adversaries to entities other than the federal government. Noncitizens won one of those cases (Toll) and lost the other (De Canas). In Saxbe v. Bustos, 419 U.S. 65 (1974), the government prevailed in pressing its interpretation of the INA that benefited noncitizens (and, incidentally, agricultural interests) over a farm labor union. None of these four cases is included in Table 1, which exclusively considers cases in which noncitizens and the federal government are adversaries. If all Supreme Court decisions requiring interpretation or application of the INA (including these four cases) in which noncitizens were parties to a case are considered, noncitizens prevailed in about 35.7% of the total (20 of 56).

245. See infra text accompanying notes 262-317.


247. See Deborah Anker & Carolyn P. Blum, New Trends in Asylum Jurispru-
Court for noncitizens involved relatively narrow issues that may not be of general significance to the noncitizen community.248

One of the more startling, and completely unexpected, revelations from the review of the Supreme Court’s decisions also is reflected in Table 1. Citizens, in suits in which the executive branch was an adversary (often actions attempting to strip them of their citizenship in denaturalization or expatriation proceedings), won almost three-quarters of their cases in the Supreme Court. Thus, while noncitizens lost two-thirds of their cases against the federal government, citizens won three-fourths of their cases. Put simply, the Court in the aggregate was much more likely to protect citizens than noncitizens. The pattern suggests that the Court places a high value on citizenship and is willing to protect citizens resisting its loss.249

The equities intuitively may appear to weigh more heavily in favor of naturalized citizens who may have been in this nation for many years than for noncitizens who may have been here for a shorter time and know that their presence here is unlawful.


248. See, e.g., INS v. Doherty, 112 S. Ct. 719 (1992) (revolving around procedural morass involving motion to reopen deportation proceedings); infra text accompanying notes 306-17 (discussing Doherty).

249. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (“American citizenship . . . is ‘one of the most valuable rights in the world today . . . .’”) (citation omitted); United States v. Zucca, 351 U.S. 91, 99-100 (1956) (“The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged.”); United States v. Minker, 350 U.S. 179, 193 (1956) (Black, J., concurring) (“Former cases have held that Congress has full power to bar or exclude aliens from the country. But citizenship, whether acquired by birth or by naturalization, cannot be taken away without a judicial trial in which the Government carries a heavy burden.”) (citations omitted).

It is uncertain whether the lower courts share the Supreme Court’s solicitude for citizens in denaturalization proceedings. For example, John Demjanjuk, an accused Nazi war criminal known as “Ivan the Terrible,” was denaturalized, see United States v. Demjanjuk, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982), and later extradited to Israel, see Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986), vacated, No. 85-3435, 1993 WL 469786 (6th Cir. Nov. 17, 1993). Israel’s Supreme Court later found that Demjanjuk was not Ivan the Terrible and that the case was one of mistaken identity. See Court in Israel Clears Demjanjuk of Being Ivan,” a Nazi Criminal, N.Y. TIMES, July 29, 1993, at A1.
Table 2 reflects a breakdown by decade of Supreme Court decisions between noncitizens and the federal government.

**Table 2**

<table>
<thead>
<tr>
<th>Noncitizens Versus Government by Decade</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government Prevailed Cases (%)</td>
</tr>
<tr>
<td>-----------------------------------</td>
</tr>
<tr>
<td>1954-59</td>
</tr>
<tr>
<td>1960-69</td>
</tr>
<tr>
<td>1970-79</td>
</tr>
<tr>
<td>1980-89</td>
</tr>
<tr>
<td>1990-June '93</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>

Except for the 1960s (not coincidentally the heyday of the Warren Court) when noncitizens prevailed in exactly one-half of the cases, they always have been considerably less successful than the federal government (the executive branch and Congress) in the Supreme Court. Moreover, in recent years, noncitizens have been markedly less successful. Since 1980, the executive branch has prevailed in over 80% of the INA cases, which is significantly greater than the 67% success rate for the entire time period. One explanation is that an increasingly more conservative Supreme Court has shown greater willingness to defer to the judgment of the immigration bureaucracy and Congress.\(^{250}\) Another entirely consistent explanation is that the current Court is not particularly sympathetic to the claims of noncitizens.

With respect to congressional overrides of Supreme Court interpretations of the INA, Congress overrode seven of the seventy-one decisions (9.9%),\(^{251}\) including the four from 1967-90 previously discussed. This may seem to be a relatively high percentage. Only three other INA decisions were overridden.

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251. Note that this might overstate matters because two of the decisions that were overridden (Errico and Reid) involved the same esoteric provision of the INA. See supra text accompanying notes 206-21.
from 1952-66 and 1991-93, the time period not covered by Professor Eskridge’s study. Each involved overrides sought by the federal government to the detriment of noncitizens. In United States v. Menasche,252 the Court narrowly interpreted Section 405(a) of the INA to allow the noncitizen to apply for relief under a more generous predecessor statute. Congress overrode that interpretation in 1961 as “contrary to the intent of Congress” and bound noncitizens to the provisions of the INA.253 In Shaughnessy v. Pedreira254 and Brownell v. Tom We Shung,255 the Court interpreted the INA’s judicial review provisions liberally to allow multiple avenues for review. By making the court of appeals the sole avenue for judicial review of deportation orders and habeas corpus the exclusive mode of appeal of exclusion orders, Congress overrode the interpretations because of alleged lengthy delays caused by lawsuits filed by “undesirable aliens.”256

In five of the seven overrides (71.4%), the ultimate winner was the government.257 Noncitizens were the ultimate winners in two of the seven overrides (28.6%). The government clearly was more able than noncitizens to convince Congress to override an adverse Supreme Court decision.258 This appears particularly true when one considers that several lower court decisions adverse to the government have been overridden.259

255. 352 U.S. 180 (1956).
256. H.R. REP. NO. 1086, supra note 253, reprinted in 1961 U.S.C.C.A.N. 2950, 2967 (expressing a desire to halt delays in deportation by “judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose” of delay, particularly by “subversives, gangsters, immoral [sic], or narcotics peddlers”); see Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 649, 651-53 (1961).
257. The “ultimate winner” is the group that gained the benefits of the override. Thus, it generally was the loser in the Supreme Court. This is true with respect to all but Reid v. INS, 420 U.S. 619 (1975), in which the government prevailed and the statute was amended as sought by the executive branch to narrow the provision further than had been done by the Court’s interpretation. See supra text accompanying notes 206-21.
258. This is consistent with the observation that the federal government can be an effective lobby. See supra note 185.
259. See supra note 204 (discussing congressional overrides of lower court decisions). This review did not attempt to identify all congressional overrides of lower court interpretations or applications of the INA. My research, however, identified five lower court decisions that were overridden by Congress. See supra note 204.
Table 3 illustrates the elapse of time between the Court's decision and the congressional override.

<table>
<thead>
<tr>
<th>Decision (Year)</th>
<th>Year of Override</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Menasche (1955)</td>
<td>1961</td>
<td>6</td>
</tr>
<tr>
<td>Shaughnessy (1955)</td>
<td>1961</td>
<td>6</td>
</tr>
<tr>
<td>Brownell (1956)</td>
<td>1961</td>
<td>5</td>
</tr>
<tr>
<td>Errico (1966)</td>
<td>1981</td>
<td>15</td>
</tr>
<tr>
<td>Boutilier (1967)</td>
<td>1990</td>
<td>23</td>
</tr>
<tr>
<td>Reid (1975)</td>
<td>1981</td>
<td>6</td>
</tr>
</tbody>
</table>

Mean Difference: 9

As one might expect, it generally takes some time before Congress overrides the Court's construction of a statute, if it ever does. If one throws out the overrides of Menasche, Shaughnessy, and Brownell, which alleviated perceived problems in the early interpretation of a new, complex law,\textsuperscript{260} and Phinpathya, which may not have been overridden so quickly if not for the fact that Congress was considering comprehensive immigration reform at the time, then the average time between decision and override would be closer to fifteen (about 14.67) years. However, it is difficult to base firm conclusions on review of such a small sample.

Several inferences may be drawn from a review of the Supreme Court's interpretations of the INA and congressional overrides from 1952-93. Noncitizens, particularly today, are unlikely to prevail against the immigration bureaucracy or Congress in the Supreme Court. The difference between the success rate of noncitizens and citizens is dramatic; citizens are much more likely than noncitizens to prevail. In addition, although some Court decisions involving the INA are overridden, few that involve significant issues to the noncitizen community

\textsuperscript{260} See supra text accompanying notes 252-56; infra Appendix (describing decisions).
The most divisive immigration decisions, such as the one allowing Haitian repatriation or the one defining political persecution,\(^\text{261}\) are not likely to be overridden. Moreover, when there is an override, it is likely to favor the government.

**B. Policing the Immigration Bureaucracy?**

The immigration bureaucracy, particularly the INS, has been much maligned for most of recent memory.\(^\text{262}\) The General Accounting Office, for example, has identified, among other deficiencies, coordination problems, enforcement shortcomings, mismanagement, faulty recordkeeping, and poor fiscal controls.\(^\text{263}\) Despite unrelenting criticism, major reforms have been few and far between. To the extent that administrative agencies theoretically are politically accountable through the election of the President,\(^\text{264}\) noncitizens lack the franchise necessary to ensure accountability of the immigration bureaucracy.\(^\text{265}\) Because administrative agencies with control over

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\(^{262}\) See ALENIKOFF & MARTIN, supra note 15, at 102 ("INS was once respected as a relatively well-run and efficient administrative agency, even by those who disagreed with many of the policies carried out. But those days are long in the past."); MILTON D. MORRIS, IMMIGRATION—THE BELEAGUERED BUREAUCRACY 87-88 (1985) ("In recent years, few agencies of the federal government have been as vigorously or persistently criticized as those engaged in enforcing immigration policy. The INS in particular has been a target of widespread criticism, even among public officials."); see also H. REP. NO. 216, 103d Cong., 1st Sess. (1993) (entitled "The Immigration and Naturalization Service: Overwhelmed and Unprepared for the Future").


\(^{264}\) See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . ."). This theory of political accountability of administrative agencies was seriously questioned long before *Chevron*. See generally THEODORE J. LOWI, THE END OF LIBERALISM 195-97, 271-94 (2d ed. 1979). I find this theory to be deeply problematic, particularly when it comes to the immigration bureaucracy. Few voters appear to base their choice in selecting a presidential candidate on the candidate's position on immigration.

\(^{265}\) I previously have touched on this theme in Johnson, supra note 160, at 443-54.
the life, liberty, and destiny of many immigrants in fact are not subject to the "check" of the ballot box, the political process cannot be relied upon to correct unlawful or simply heavy-handed conduct. Put differently, noncitizens are not a constituency with the power to influence, much less "capture," the agency that has great powers over them.266

The immigration laws are administered by the INS and the Executive Office for Immigration Review, both organizationally located in the Justice Department.267 The location of the immigration agencies in a department primarily devoted to law enforcement and headed by the nation's chief law enforcement officer, may place pressures on these agencies to emphasize immigration enforcement even if the laws passed by Congress call for a more balanced approach. Because an electorate composed exclusively of citizens generally does not elect the President on the basis of the administration's immigration policy, this imbalance is unlikely to be corrected through electoral politics. Congress, for the same reasons that it is unlikely to override Supreme Court interpretations of the immigration laws, cannot be expected to intervene.

The accountability question, however, becomes considerably more complicated once the multi-faceted nature of the immigration bureaucracy's constituency is considered. The diverse constituency results from the INS's dual functions of enforcement and service, which at times place conflicting demands on the agency that are difficult to reconcile.268 The

266. See supra note 79 (citing authorities describing phenomenon of "agency capture").
268. See U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 40 (1980) ("The root of the problems encountered by United States citizens and residents in the service side of INS stem in large part from the conflicting missions of INS—service and enforcement."); SUSAN G. BAKER, THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT 133-34 (1990) (concluding that competing missions of INS impeded implementation of IRCA's legalization program in New York City); see also infra text accompanying notes 363-64 (discussing proposals of two former INS Commissioners that might alleviate conflict).

The conflicting functions are exemplified by an INS sting operation in which the INS sent a letter to undocumented persons and invited them to appear to obtain a work permit. Those that appeared were arrested and deported. See H.G. Reza, Immigrants Deported in INS Sting Operation, L.A. TIMES, July 31, 1993, at A1. Such operations clearly inspire fear of the INS in the immigrant community and are likely to hinder the INS in attempts to gain the trust of that community necessary to perform its service function.
INS serves noncitizens through adjudicating applications for the various forms of relief provided by the Immigration and Nationality Act. In serving noncitizens, the INS acts in accordance with the desires of the Silent Majority who desire humanitarian and fair treatment of noncitizens and admission of certain immigrants into the national community. At the same time, the INS is obligated to enforce the integrity of the borders, thereby serving those citizens (particularly the Vocal Minority but to a lesser degree, the Silent Majority) placing a premium on immigration enforcement.\textsuperscript{269} When the INS vigorously pursues enforcement priorities at the expense of all others, it acts in a manner entirely consistent with the demands of one of the agency's primary constituencies.

The problem boils down to the fact that the INS, being responsive primarily to the enforcement constituency, might be expected to overemphasize enforcement. The group of voters strongly favoring strict enforcement may be perceived as the only one likely to apply political pressure of any significance, thereby holding the agency accountable if it does not act as desired. Particularly today, this group, even if only a Vocal Minority, is vigilant and appears willing to act.\textsuperscript{270} Consequently, the INS may fear most groups that strongly advocate increased immigration enforcement, such as the Federation for American Immigration Reform (FAIR). As is the case in lobbying Congress, small, cohesive, sociopolitically privileged, and homogeneous groups, like FAIR, might well enjoy a distinct advantage over other groups in influencing agency action.\textsuperscript{271}

It is true that immigrant and refugee rights groups monitor the INS and attempt to make it accountable to a "constituency" lacking the right to vote. Without doubt, these groups have influenced some agency decisions. For example, the INS

\textsuperscript{269} See supra text accompanying notes 71-81.

\textsuperscript{270} See supra text accompanying notes 94-95 (discussing activities of FAIR and local affiliates).

\textsuperscript{271} See supra text accompanying notes 188-89.
revamped the affirmative asylum decisionmaking process by creating a group of asylum officers with some independence from INS enforcement operations. The proposal originally would have eliminated the immigration court's role in certain asylum decisions. In response to objections from immigrant advocacy groups, the INS removed that part of the proposal from the final rule. Similarly, after discussions with noncitizen advocates, the INS relaxed its policy of detaining all asylum applicants in exclusion proceedings.

Of course, this analysis begs the question whether noncitizens, who cannot vote, are a constituency of the immigration bureaucracy or, for that matter, legislative representatives. One could argue that disenfranchised noncitizens are not because they cannot vote and because some are not in this country lawfully. The problem with these arguments is that the laws passed by representatives of the citizenry protect noncitizens in various ways. By so doing, the laws transform noncitizens into de facto constituents or, in contract parlance, third party beneficiaries. Moreover, because they are directly affected, noncitizens are the most self-interested in bureaucratic compliance with the law on service issues and in curbing enforcement abuses. Consequently, they are the most likely (and, in law and economics jargon, the most cost-effective) monitors of the immigration bureaucracy.

In any event, despite monitoring by advocacy groups, the root causes of the pattern of enforcement problems remain uncorrected. The explanation perhaps is the dynamic resulting in the Vocal Minority prevailing over the Silent Majority. To reiterate, the average citizen is not directly affected by the INS on anything resembling a regular basis. Immigration enforcement is not a visible part of the daily life of the average American. Outside of border communities, the most visible enforcement takes place far away from our homes and further


274. See id.

275. See INS Liberalizes Policy for Releasing Asylum-Seekers, 69 INTERPRETER RELEASES 503 (Apr. 27, 1992); see also INS Pilot Project to Parole 200 Detained Asylum Applicants, 67 INTERPRETER RELEASES 530 (May 7, 1990) (discussing INS pilot project of paroling detained asylum applicants that led to decision to change policy).

276. See supra text accompanying notes 71-81.
away from our collective consciousness. Indeed, the desperation of the persons seeking to enter at the border by whatever means may be unpleasant for many to ponder. In a different vein, immigration enforcement affects people from a different culture who often are "foreign" in many respects. Citizens intellectually troubled by frequent reports of abuse at the borders cannot be expected to explore beyond the headlines, much less mobilize politically to cease questionable practices, particularly when the abuse involves different people figuratively in a different world. In any event, it is difficult to believe that a majority of the public, even the Vocal Minority endorsing tough border enforcement, supports the more egregious Border Patrol abuses. Still, because the Vocal Minority demands more enforcement, it seems unlikely that it would be as ready to act to halt such abuse.

1. Trends in immigration litigation in the 1980s

Professor Peter Schuck and Theodore Wang drew two conclusions from their empirical study of immigration litigation in the 1980s that are particularly relevant here: (1) the immigration bureaucracy is not especially responsive to criticism, and (2) structural flaws in the administrative structure may impede its ability to fairly apply and enforce the immigration laws.

Evidence supporting the conclusions included the fact that the success rates for affirmative challenges to statutes, regulations, and patterns or practices in the circuit courts increased from 20% in 1979 to 32% in 1989-90.

277. See infra text accompanying notes 292-305.

278. See, e.g., Ellen Gamerman, New Panel Would Probe Charges of Border Patrol Abuse, STATES NEWS SERV., May 13, 1993, available in LEXIS, Nexis Library, Current File (quoting claim of Dan Stein, Executive Director of FAIR, to the effect that criticism of Border Patrol for abuses of noncitizens was "political").

279. See Schuck & Wang, supra note 44, at 177.

280. See id. at 154-56. Overall, however, there was a higher affirmance rate of INS decisions in all reviewing courts in statutory review decisions—primarily claims to relief under the INA as opposed to affirmative challenges to statutes and regulations—from 1979 (68%) to 1989-90 (71%). See id. at 169 n.262; see also Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 DUKE L.J. 984, 1022 (analyzing data for 1984-85 showing that 83% of INS rulemakings reviewed by courts were affirmed in full, a rate higher than that of several other agencies); 1991 INS STATISTICS, supra note 40, at 166 (stating that United States prevailed in over 91% of habeas corpus proceedings challenging exclusion orders and over 64% of appeals of deportation orders in 1990). Nationals of El Salvador, however, enjoyed a relatively high success rate on their asylum claims, especially when compared to the low success rate before
The critical summary of the study’s conclusions stated the following:

[Aliens often prevail over the INS in asylum litigation and impact litigation. These results suggest that the government currently contests many meritorious claims by aliens, which in the interests of all parties would best be resolved at an early, pre-litigation stage . . . . In particular, aliens were successful in overturning administrative denials of asylum requests . . . . The fact that all these valid claims had been considered . . . by the [Executive Office for Immigration Review], and in many cases by district directors as well, is indicative of a major failing in the Justice Department’s processes for screening, adjudicating, and deciding to litigate these claims, and thus presents important opportunities for reform. Furthermore, aliens and advocacy groups were also highly successful in impact lawsuits, most of which challenged the INS’ failure to implement new immigration policies in the manner prescribed by Congress. The nature and quality of these lawsuits, coupled with Congress’ failure to overturn their results, provide a clear signal that some important aspects of the INS’ administrative performance are deeply and systematically flawed . . . .

[Our impact litigation data furnish much unmistakable evidence that the INS’ enforcement orientation has often hindered its ability to provide effective services and fair adjudication. The many successful challenges to the INS’ asylum and legalization programs suggest that the problem of integrating enforcement, service, and adjudication functions to produce consistent, judicially-approved standards may be an endemic one.]

The INS and the immigration courts. See Schuck & Wang, supra note 44, at 166.

The Supreme Court has demonstrated a general willingness to defer to the immigration bureaucracy’s judgment in all types of cases in recent times. See generally Johnson, supra note 160 (analyzing Court’s deference to judgment of the INS despite red flags suggesting impropriety of deference). Two recent examples are the Court’s refusal to disturb the unprecedented version of the Haitian interdiction program, see supra text accompanying notes 130-59, and the sanctioning of the denial of an asylum hearing to former Provisional Irish Republican Army member Joseph Patrick Doherty, who claimed a well-founded fear of persecution if returned to the United Kingdom, see infra text accompanying notes 306-17.

281. Schuck & Wang, supra note 44, at 176-78 (emphasis added) (footnotes omitted).

In reviewing the success of impact litigation geared toward agency reform, the study noted that

[1]he success of aliens in impact litigation reflects the INS’ difficulties in implementing the Refugee Act and IRCA. The INS’ adherence to its tradi-
The empirical study's conclusions stand as nothing less than a stinging indictment of the immigration bureaucracy. Some well-publicized pieces of litigation illustrate the problems identified by the study. In Orantes-Hernandez v. Thornburgh, the court of appeals affirmed a broad injunction barring the INS from engaging in policies that the district court found to be designed to deter Salvadorans from seeking asylum and that interfered with the right to counsel. That lengthy litigation lasted for nearly a decade, through numerous appeals, only for the INS to lose on all counts. In American Baptist Churches v. Thornburgh, the executive branch settled a class action by Salvadorans and Guatemalans challenging the impartiality of the adjudication of their asylum claims. The settlement required the federal government to rehear the claims of over 100,000 class members, obviously a time-consuming and costly endeavor not agreed to lightly. Finally, in INS v. Jean, the Court found that the INS, in defending its

ational strategies for preventing aliens from entering the United States illegally probably caused it to interpret too narrowly the rights the new statutes conferred on aliens . . . . Another problem for the INS was its continued use of ideological and geographic factors in asylum adjudications, despite the Refugee Act's repeal of such provisions in favor of a more universal human rights standard. The INS, it appears, remained wedded to the old criteria.

Id. at 160 (emphasis added) (footnotes omitted).

282. 919 F.2d 549 (9th Cir. 1990).


285. 496 U.S. 154 (1990) (holding that INS was required to pay attorneys' fees under Equal Access to Justice Act in class action). As the district court in the case summarized,

The government took an unusually unwaivering [sic] and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.

detention policies toward Haitian asylum-seekers and expedited exclusion proceedings in the 1980s, asserted wholly unjustified legal positions that required nearly ten years of litigation.

The INS is not the only agency whose decisionmaking has been questioned. The Executive Office for Immigration Review (EOIR), in charge of immigration adjudication,\(^{286}\) generally has not been the subject of the trenchant criticisms levelled at the INS. However, as the conclusions of Schuck and Wang's empirical work suggest, the available evidence places in serious doubt whether the EOIR has remained faithful to the laws passed by Congress. For example, in addition to the success enjoyed by asylum applicants in the courts of appeals, impermissible foreign policy, and possibly numbers-conscious, bias is suggested by the overall pattern of asylum decisions.\(^{287}\) Structural characteristics of the organizational hierarchy no doubt contribute to the concerns. The Attorney General appoints the members of the EOIR's appellate body, the Board of Immigration Appeals (BIA).\(^{288}\) The BIA not surprisingly is composed primarily of persons with immigration enforcement backgrounds.\(^{289}\)

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286. The immigration courts and the Board of Immigration Appeals were removed from the INS in 1983 when the Executive Office for Immigration Review was created. See 48 Fed. Reg. 8038 (1983) (amending 8 C.F.R. pts. 1, 3, 100) (final rule).

287. See U.S. GENERAL ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW APPLICANTS DEPORTED 15, 22-23 (1987) (showing disparate treatment between asylum decisions of Poles and Iranians, who fled nations having good U.S. relations, and Salvadorans and Nicaraguans, leaving countries having bad U.S. relations and that, for the time period of the study, 96% of the final agency dispositions of asylum claims agreed with the State Department's advisory opinion on the application); see also Aleinikoff, supra note 202, at 8-10 (suggesting that BIA interpreted "persecution on account of . . . political opinion" in "narrow and technical" manner possibly because of concern with increasing numbers of asylum-seekers); Johnson, supra note 16, at 346-47 (analyzing evidence of possible bias in agency asylum decisions); Derek Smith, Note, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 VA. L. REV. 681, 711-19 & n.145 (1989) (concluding that BIA's decisions reflect foreign policy bias and noting that Board treats similar claims differently depending on applicant's nationality). Compare Matter of Salim, 18 Immig. & Nat. Dec. 311 (BIA 1982) (finding that applicant from Afghanistan who fled forced conscription into government army was eligible for asylum) with INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (affirming Board of Immigration Appeals ruling that Guatemalan who fled forced conscription into guerrillas was not eligible for asylum).

288. See 8 C.F.R. § 3.1 (1992); ALEINIKOFF & MARTIN, supra note 15, at 111-12 & n.11.

289. See Johnson, supra note 160, at 448 n.156 (outlining career history of current Board members). Until 1993, nomination to the Board was treated like any other political appointment. See "Plum Book" Reflects Few Political Immigration
At least some practitioners believe that the immigration judges, who conduct trial-style hearings in the immigration courts, are unduly sympathetic with INS enforcement goals. The belief that the administrative hearing body is biased toward those who practice before it is troubling. A system that lacks the appearance of even-handedness is not one likely to inspire the confidence necessary to minimize the likelihood of appeals that slow down the system. In addition, an empirical study of adjudications in one immigration court found, among other problems, that ideological bias and foreign policy judgments not permitted by law influenced asylum decisions.

2. INS enforcement excesses

The Border Patrol performs the INS’s enforcement function. In a time of renewed focus on border enforcement, there have been all too frequent allegations of serious, shocking abuses by Border Patrol officers. Officers have been charged


290. See Gerald H. Robinson, A Paradox of Asylum Law—The More Due Process, the Harder the Case, 28 WILLAMETTE L. REV. 833, 835 (1992) (“To the extent that INS personnel, or former INS personnel functioning as IJs [immigration judges], are involved in the asylum process, for many, only the most obvious asylum cases will be approved, regardless of the amount of legal authority cited to show that a lesser burden of proof is required. For some IJs, a grant of asylum is tantamount to a personal gift, bestowed grudgingly on only a few, as if the trier of fact were made personally poorer by each award.”) (footnote omitted); Frederick M. Muir, Legal Aid Raps Immigration Judge; Foundation Asks He Be Barred from Hearing Its Cases, L.A. TIMES, Feb. 5, 1988, pt. 2 at 7 (reporting claims that an immigration judge repeatedly demonstrated bias against Central American asylum-seekers); Susan Freinkel & Alexander Peters, Alien Justice, RECORDER (San Francisco), Jan. 29, 1991, at 6-7 (noting that attorneys had nicknamed one immigration judge “Dr. Death” because of lack of sympathy for asylum claims and reporting that four of six immigration judges in San Francisco district previously served as trial attorneys for INS); see also Bruce J. Einhorn, Political Asylum in the Ninth Circuit and the Case of Elias-Zacarias, 29 SAN DIEGO L. REV. 597, 612-13 (1992) (article by immigration judge suggesting that the Ninth Circuit decision on imputed political opinion doctrine was in error).

291. See Anker, supra note 129, at 445-48; see also Martin, supra note 61, at 1333-34 (describing subtle foreign policy bias of some immigration judges against communist nations).

292. See, e.g., AMERICAS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO (1992) (reporting shootings, use of lethal force, physical abuse, and racially discriminatory conduct by Border Patrol); AMERICAN FRIENDS SERVICE COMMITTEE, SEALING OUR BORDERS: THE HUMAN TOLL (1992) (same); NATIONAL HUMAN RIGHTS COMM’N, REPORT ON HUMAN RIGHTS VIOLATIONS OF MEXICAN MIGRATORY WORKERS ON ROUTE TO THE NORTHERN BORDER CROSSING THE BORDER AND UPON ENTERING THE SOUTHERN UNITED STATES BORDER STRIP 52-
with crimes ranging from first degree murder of a Mexican citizen to a severe beating of a legal United States resident believed to be an "illegal." An American Friends Service Committee report documented some unfortunate byproducts of increased border enforcement, such as psychological and verbal abuse (including racial and ethnic insults), physical abuse (such as shootings, beatings, sexual assaults, illegal or inappro-


appropriate searches), and illegal or inappropriate seizures.\textsuperscript{295} Specific examples included threats by Border Patrol officers directed at a Salvadoran woman and abusive language deriding her mother,\textsuperscript{296} and taunts of a Guatemalan about his sexuality combined with threatened sexual assault.\textsuperscript{297} A significant number of victims of abuse (17.7\%) were United States citizens, which might concern even those with little sympathy for undocumented persons.\textsuperscript{298} To make matters worse, according to the report, the Border Patrol lacks the controls necessary to ensure officer accountability for misconduct.\textsuperscript{299}

Americas Watch also found human rights abuses to be prevalent along the United States-Mexico border, including shootings and other uses of lethal force.\textsuperscript{300} Most shocking was the finding of sexual abuse of undocumented women.\textsuperscript{301} For example, one nineteen-year-old reported that a Border Patrol officer sexually molested her during a drug raid.\textsuperscript{302} Evidence of a callous attitude among Border Patrol officers toward persons attempting to unlawfully enter the country may tacitly encourage such misconduct. Officers routinely refer to “illegal aliens” as “tonks” because the nickname is similar to “the sound of a flashlight hitting somebody’s head: tonk.”\textsuperscript{303} By de-

\textsuperscript{295} American Friends Service Committee, \textit{supra} note 292, at 3.
\textsuperscript{296} Id. at 20 (presenting claim of Salvadoran woman that INS sought her to sign papers, presumably for voluntary deportation: “I was very upset and crying. [He] said he would get me to sign at gunpoint . . . . They . . . told me to be quiet, and used abusive language [such as] ‘A tu pinche madre’ [‘Your f . . . mother’]. This upset me even more, because I do not like anyone speaking ill of my mother. I then signed, since he had threatened me to sign at gunpoint and I was frightened.”).
\textsuperscript{297} Id. at 21 (quoting Guatemalan man stating that INS officers remarked, “You are queer, you like dick. Do you have AIDS?” and “go to the bathroom and wash off real good with the other officer so he can screw you”).
\textsuperscript{298} See id. at 4, 35.
\textsuperscript{299} See id. at 4.
\textsuperscript{300} Americas Watch, \textit{supra} note 292, at 9-36 (documenting individual incidents).
\textsuperscript{301} See id. at 34-35.
\textsuperscript{303} Americas Watch, \textit{supra} note 292, at 27 (quoting Earl Shorris, \textit{Raids, Racism and the INS}, NATION, May 8, 1989); see Rotella & McDonnell, \textit{Futile Job}, \textit{supra} note 292, at A1 (reporting that Border Patrol officers used terms “tonks” and “wets” to refer to Mexican nationals seeking to cross border despite the fact that
humanizing the undocumented in this manner, it assists officers in rationalizing the mistreatment of them.\textsuperscript{304}

In the current political environment buttressed by the Supreme Court's effective sanctioning of stringent enforcement measures,\textsuperscript{305} it may be unrealistic to expect the INS to restructure the current enforcement regime to curtail the potential for abuse. To the contrary, because of the Vocal Minority's current enforcement fervor and its effectiveness in light of the political dynamic, increased enforcement efforts have been forthcoming. Although there are natural impulses to curtail clear abuses of power resulting in negative publicity, less extreme, though still abusive, practices stemming from a zeal for enforcement are unlikely to remedy themselves.

3. The story of Joseph Patrick Doherty

One extraordinary immigration case that inspired community, congressional, and press interest shows the inherent difficulties in ensuring the executive branch's political accountability to majoritarian desires on immigration matters. Joseph Patrick Doherty, formerly a member of the Provisional Irish Republican Army, through a byzantine procedure was denied a hearing on asylum and related claims based on his fear of political persecution if returned to the United Kingdom.\textsuperscript{306} Among the reasons that the Attorney General, who reviewed and reversed BIA decisions regarding Doherty on two separate occasions, offered for the denial was that Doherty was not entitled to asylum because it would be contrary to United States foreign policy.\textsuperscript{307} Political pressure from Britain's Prime Minister, such use violates internal policy, that former INS commissioner, who was Latino, was nicknamed "Chief Tonk," and that a statue in front of Border Patrol station depicted an agent with a net and a chicken, the chicken representing Border Patrol slang for Mexicans, "pollo").

304. In this way, use of the labels of "tonks" or "wetbacks" or "pollos" serves the same abstraction function as referring to undocumented persons as "illegal aliens." See supra text accompanying note 16.

305. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that the exclusionary rule based on unconstitutional arrest and seizure generally does not apply to deportation hearings).

306. For a decidedly different, and in my view cynical and unsympathetic, view of Doherty and his conduct from an English perspective, see MARTIN DILLON, KILLER IN CLOWNTOWN: JOE DOHERTY, THE IRA AND THE SPECIAL RELATIONSHIP (1992).

Margaret Thatcher, to return Doherty to the United Kingdom evidently caused the executive branch’s insistence on returning him without even hearing the merits of his asylum claim.308

Doherty, incarcerated throughout the lengthy proceedings,309 developed a significant following in the Irish community310 and attracted considerable political interest. The Senate passed a resolution asking the Attorney General to provide Doherty with an asylum hearing.311 Refusing to relent, the Attorney General ordered Doherty’s deportation. Forty-six members of Congress filed an amici curiae brief in the Court of Appeals for the Second Circuit supporting Doherty’s petition for review of the deportation order.312 Doherty prevailed313 and the INS petitioned for certiorari. One hundred thirty-two members of Congress filed an amici brief in the Supreme Court.314 The Court deferred to the Attorney General’s judgment315 and Doherty was deported to the United Kingdom.316

If political pressure was unsuccessful in the high-profile asylum case of Joseph Patrick Doherty, it is difficult to imagine how political action focused on a single case might improve the executive branch’s treatment of the masses of more mundane, if not just as weighty, asylum cases. Despite the extraordinary level of congressional interest in his case as well as the considerable amount of media attention,317 the Attorney General

308. See DILLON, supra note 306, at xxiii-xxv.
310. See Cal McCrystal, Notebook: A Tug-of-War for America's Irish Soul, INDEPENDENT, Feb. 2, 1993, at 23 (reporting that Doherty had attained symbolic status in Irish-American community and had been designated grand marshal of St. Patrick's Day parades in cities throughout the United States).
312. Brief of Amici Curiae, Doherty v. United States Dep’t of Justice, 908 F.2d 1108 (2d Cir. 1990) (Nos. 88-4084, 89-4092). I was co-counsel on the brief.
314. Brief for Amici Curiae Members of the United States Senate and Members of the United States House of Representatives in support of Respondent, INS v. Doherty, 112 S. Ct. 719 (1992) (No. 90-925). The members joining the brief ranged in political views from Orrin Hatch (R-Utah) to Paul Simon (D-Illinois). I was co-counsel on the brief.
317. See, e.g., Wade Lambert, The Drawn-Out Case of an Irish Guerrilla
staunchly refused to afford Doherty a hearing. Doherty inspired the community but other agendas prevailed. Absent concerted effort, noncitizens definitely face an uphill battle.

IV. TELLING THE UNTOLD STORIES: CHANGING THE IMAGES OF THE IMMIGRANT

As Part III demonstrated, the legislative, executive, and judicial branches often are less than responsive to the needs of the noncitizen community, even when those needs are consistent with majoritarian desires. In order to place the pressure on the political branches necessary to change their ways, noncitizens must improve their competitiveness in the political marketplace. Insulated from society, the basic facts about the lives of noncitizens often are not widely circulated in the popular milieu. Instead, the conventional wisdom propagated by a few about "illegal aliens"—that they take jobs, sap social services, victimize citizens, etc.—remains effectively unchallenged. It is these images that inform and influence lawmakers and policymakers and, for that matter, judges. Several alternatives exist to offer a truer picture of the reality for noncitizens.

A. The Franchise

A popular misconception is that the Constitution bars voting by noncitizens. That, however, is not the case. At least white male noncitizens enjoyed suffrage in a number of states until the early 1900s. Forceful arguments have been made for the extension of the franchise to lawful permanent residents. Still, along with convicted felons, mi-


318. See Neuman, supra note 41, at 291-92 (observing that, although United States Constitution is "oblique" on the question of "alien" suffrage (including Article I's reference that members of House of Representatives shall be "chosen . . . by the People of the several States," U.S. CONST. art. I, § 2, cl. 1), "it appears to be settled doctrine that [under the Federal Constitution], alien suffrage is entirely discretionary"); Raskin, supra note 41, at 1417-41 (analyzing various constitutional provisions and concluding that the Constitution permits, but does not compel, noncitizen suffrage); see also Sugarman v. Dougall, 413 U.S. 634, 648-49 (1973) (recognizing "State's historical power to exclude aliens from participation in its democratic political institutions" and stating that "citizenship is a permissible criterion for limiting [voting] rights").

319. See Neuman, supra note 41, at 291-310; Raskin, supra note 41, at 1397-417; Rosberg, supra note 22, at 1093-100.

320. See Neuman, supra note 41, at 310-34 (arguing that allowing LPRs to vote is a "permissible option"); Raskin, supra note 41, at 1456 & n.339 (arguing
nors, and others, lawful permanent residents as well as the undocumented lack the right to vote in every state. This is true even though lawful permanent residents owe obligations to the community, including but not limited to paying taxes and military service. Expansion of the franchise to noncitizens, or even to some of them, would represent a movement toward making suffrage more inclusive. A number of countries, apparently in favor of suffrage for LPRs and claiming that, even if they had the right, the undocumented would be too fearful of deportation to register to vote; Rosberg, supra note 22, at 1110-11 (contending that the Equal Protection Clause mandates voting rights for LPRs); see also NATIONAL BOARD OF THE CHANGING RELATIONS PROJECT, supra note 105, at 7 (recommending that LPRs be permitted to vote in local elections); Sanford Levinson, Suffrage and Community: Who Should Vote?, 41 FLA. L. REV. 545, 555-57 (1989) (questioning citizenship requirement for voting); cf. López, supra note 92, at 696 ("It is not possible . . . to have persons live, work, and participate in a community over many years without creating in them a sense of entitlement to some benefits of community membership and a moral obligation based on their reasonable expectations. No matter how strongly our formal laws deny it, our conduct creates the obligation.") (footnotes omitted).

321. See Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box," 102 HARV. L. REV. 1300 (1989) (criticizing disenfranchisement of convicted felons). One argument against extending the right to vote to convicted felons is that, by violating the law, they violated the social contract and therefore are not morally competent to vote. See id. at 1304-09. The same argument might be made with respect to undocumented immigrants. However, disenfranchisement by stigmatizing outsiders may most appropriately be viewed as simply a device that artificially limits those who are defined as part of the community. See id. at 1310-14.

322. See U.S. CONST. amend. XXVI (providing 18-year-olds with right to vote). This limit on voting has been challenged because of the failure of the political process to consider adequately the interests of children. See, e.g., Paul E. Peterson, An Immodest Proposal: Let's Give Children the Vote, BROOKINGS REV., Winter 1993, at 19; Vita Wallace, Give Children the Vote, NATION, Oct. 14, 1991, at 439.


Expansion of the franchise also would be consonant with the call for a movement toward civic republicanism. See, e.g., Frank Michelman, Law's Republic, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539 (1988). See generally ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 33-54 (1975) (criticizing distinction between citizens and noncitizens in the distribution of rights). Of course, because noncitizens even with the franchise still would be outsiders with limited power, there is good reason for skepticism about the en-
cluding Sweden, Denmark, Norway, and the Netherlands, to some degree have granted noncitizens the right to vote in local and regional elections.325

There is one group of noncitizens, the undocumented, who nobody apparently claims is deserving of voting rights. This omission is a material one, if only because the undocumented population in this country may well include millions of people.326 The continued disenfranchisement of so large a group of persons physically present in this nation for extended periods (and thus subject to its laws) should be significant to anyone with anything approaching an idealistic conception of democracy.

Arguments for direct participation by noncitizens, including the undocumented, in the political process may be based on a few foundational concepts. Many, perhaps most, undocumented persons are contributing members of the community. They work, pay taxes, and participate in the community in other important ways.327 Undocumented or not, noncitizens undoubtedly comprise a part of society. Consequently, noncitizens in theory should have some input into the operation of government, just as they influence the economy through their labors and consumption.328 Empowerment of the faceless "illegal alien" population might better ensure congressional and bureaucratic accountability.329

That is not to suggest that the idea of enfranchisement of the undocumented is not without significant theoretical as well as practical problems. Many might scoff at the idea. Allowing

325. See Raskin, supra note 41, at 1459.
326. See supra text accompanying notes 39-40 (discussing estimates of undocumented population in United States).
327. See T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 CONST. COMMENTARY 9, 23 (1990) (making similar points with respect to lawful permanent residents); see also Frederick Schauer, Community, Citizenship, and the Search for National Identity, 84 MICH. L. REV. 1504 (1986) (discussing relation between citizenship and community).
328. The important question perhaps is who among noncitizens might qualify for input into the political process. For example, a residency requirement of some length of time for all voters intuitively seems reasonable.
329. Others have made the argument to extend voting rights to LPRs. See supra note 41 (citing authority). It is left for someone in the future to articulate fully the arguments for enfranchising the undocumented. The point made here is that suffrage might improve bureaucratic accountability.
the undocumented to vote is a radical thought penetrating the core of this nation’s self-definition—who is part of the community and who is not. Mere mention of the franchise possibility would further irritate the restrictionist nerve. Moreover, the perplexing duality of the undocumented—outsiders in this country unlawfully and, at the same time, present in society—complicates the question considerably. Some might argue that, because the undocumented are in this country “illegally” (and thus in violation of the social contract), they should have few, if any, rights and certainly not one of the most cherished, the right to vote. To extend the franchise to those who violate the immigration laws, so the argument goes, only would encourage their violation. The borders will mean nothing and a greater flood of “illegals” than already are coming will flock here. Extension of the suffrage to “illegal aliens” would further “devalue” the already dwindling worth of American citizenship.

Arguments of this sort might be attractive, and possibly persuasive, politically. However, they ignore the fact that, absent an unforeseeable revolution in immigration enforcement or in the world economy, undocumented persons, whether we like it or not, will remain in this country and will continue to come. In addition, some of the arguments made in opposi-

330. See Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982) ("Self-government begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.").

331. See generally Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law, 1988 Wis. L. REV. 955 (explaining this duality).

332. See Alan C. Nelson, Undermining Democracy in Takoma Park, WASH. POST, Dec. 8, 1991, at C8 (criticizing allowing undocumented residents to vote because, among other things, “it undermines the value of U.S. citizenship” and arguing that a five-year requirement for naturalization is not too much to ask).

333. See Foley v. Connellee, 435 U.S. 291, 295 (1978) (emphasizing that states need not “obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship”) (quoting Nyquist v. Mauclet, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)); Peter H. Schuck, Membership in the Liberal Polity: The Devaluation of American Citizenship, 3 GEO. IMMIGR. L.J. 1, 9 (1989) (arguing that development of constitutional and other law protecting “aliens” has “devalued” citizenship); see also David A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. PITZ. L. REV. 165, 230-34 (1983) (arguing that, because the undocumented are in this country in violation of its laws, these “clandestine entrants” are entitled to minimal due process protections).

334. See WAYNE A. CORNELIUS, MEXICAN MIGRATION TO THE UNITED STATES: THE LIMITS OF GOVERNMENT INTERVENTION 2-4 (Program in United States-Mexican
tion to extension of the suffrage are difficult to measure. The devaluation argument, for example, requires inquiry into whether there is a general understanding of the "value" of citizenship. (Noncitizens ironically may be the ones to place the highest value on citizenship.) In a sense, expanding the right to vote might dilute the individual's voting power to some degree. That dilution, however, is difficult to measure. Citizens also might gain from a more democratic government that allows more rather than less participation. It also seems unlikely that extension of the franchise might serve as a magnet to people more worried about alleviating poverty, fleeing persecution, and the like, than the luxury of voting.

All this said, I have no illusions that noncitizens, or even lawful permanent residents, will be afforded the right to vote in the near future. True, a few localities have expanded the franchise to noncitizens. A mass political movement successful in gaining the right to vote for noncitizens, however, seems little more than a pipedream, at least for now. Moreover,

Studies Working Paper No. 5, 1981) (arguing that it is difficult for the United States to limit illegal Mexican migration because of family and employer networks developed between United States and Mexico dating back to the late 1800s).

335. See Bosniak, supra note 331, at 1002-04 (suggesting that community's unwillingness to extend membership to outsiders hinders United States participation in world economy); Raskin, supra note 41, at 1466-67 (suggesting that urban unrest is less likely if noncitizens are allowed to participate in political process).

336. See Raskin, supra note 41, at 1460-67 (discussing cities, including New York and Chicago, which allow noncitizen parents to vote in school district elections, and city council decision in Takoma Park, Maryland, to allow noncitizens to vote in local elections).

A particularly compelling argument can be made for allowing LPRs to vote in school board elections. To become a naturalized citizen, a LPR must understand, read, and write "simple English" and understand the fundamentals of United States history and government. See INA §§ 312(1), (2), 8 U.S.C. §§ 1423(1), (2) (1988 & Supp. 1992). Without access to the political process to ensure that the educational system teaches these skills, some LPRs might never be able to become naturalized citizens. This issue was squarely raised in Ojeda v. Brown, Sac. 7974 (Cal. 1973), reported in Cal. Official Reports No. 16 (Advance Sheets), at 1, June 14, 1973 (on file with author) (denying petition for writ of mandate over the dissent of Chief Justice Wright and Justice Mosk). See also Padilla v. Allison, 113 Cal. Rptr. 582, 584 (1974) (holding that the 14th Amendment does not require enfranchisement of LPRs). That case involved an equal protection challenge by Spanish-speaking LPRs to the citizenship requirement for voting in school board elections. John Oakley brought this case to my attention.

337. See supra text accompanying notes 82-129 (analyzing new nativism). Even the recent "motor voter" legislation, which allows voter registration by persons applying for drivers licenses, drew heated opposition on the ground that "illegal aliens" who seek a drivers license as identification for employment purposes would engage in massive fraudulent voter registration. See, e.g., H.R. REP. No. 9, 103d
even if all noncitizens enjoyed the right to vote, in any election they would still represent a distinct minority and, similar to any minority, would find it difficult to vindicate their interests.\textsuperscript{338} The hope that the franchise might lead to affirmative change further assumes that economically marginalized undocumented persons enjoy the luxury of devoting the time and resources to participate in the democratic process.\textsuperscript{339}

One less extreme, and more practical, strategy would be a drive to convince lawful permanent residents eligible for naturalization to become citizens and participate in the political process.\textsuperscript{340} Not only is this strategy a real possibility, it might also be particularly effective for some groups, such as Mexicans, with a relatively large lawful permanent resident population in this country but who also have one of the lowest naturalization rates.\textsuperscript{341}

Despite the many caveats, the vote might at least make it theoretically possible for noncitizens to achieve reform of the immigration laws and ensure even-handed enforcement by the immigration bureaucracy. A theoretical possibility presently does not even exist. In the short term, however, it seems unten-

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\textsuperscript{338} See supra text accompanying notes 71-88; Guinier, supra note 71; see also Lani Guinier, Second Proms and Second Primaries: The Limits of Majority Rule, BOSTON REV., Sept./Oct. 1992, at 32 ("[W]ith majority rule and a racially organized majority, 'we don't count' is the 'way it works' for minorities. In a racially divided society, majority rule is not a reliable instrument of democracy.").


\textsuperscript{340} See 1991 INS STATISTICS, supra note 40, at 118 (noting 37.4% naturalization rate for lawful permanent residents admitted in 1977 through fiscal year 1990); see also Rodolfo O. de la Garza & Louis Desipio, Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage, 71 TEX. L. REV. 1479, 1522 (1993) (advocating that the federal government promote naturalization in order to increase Latino political participation).

\textsuperscript{341} See 1991 INS STATISTICS, supra note 40, at 120 (showing that Mexican naturalization rate for LPRs admitted in 1977 was 15.1% compared to overall average of over 37%).
able, particularly in light of the rise of the new nativism, to believe that the electorate will allow noncitizens to vote. Direct political participation in the electoral process fortunately is only one method of attempting to facilitate change.

B. Litigation

As the historic case of Brown v. Board of Education\textsuperscript{342} amply demonstrates, litigation often is an integral component in any comprehensive strategy for social change. Litigation by immigrant and refugee advocacy groups has successfully secured some protections and improvements for noncitizens. Litigation may fulfill other functions as well. For example, by bringing to the forefront the stories of the immigrant community, litigation may serve as a useful publicity device.\textsuperscript{343} Though unsuccessful legally, the protracted litigation over interdiction and repatriation helped bring the plight of the Haitians to national attention.\textsuperscript{344} The same can be said about litigation over the rights of Central Americans to apply for asylum.\textsuperscript{345}

Litigation, however, by definition has its limits.\textsuperscript{346} De-

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344. See supra text accompanying notes 130-59.
345. See, e.g., Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (affirming far-reaching injunction limiting INS detention of asylum-seekers from Central America).
346. See generally Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991) (questioning ability of courts and litigation to facilitate social change); Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974) (analyzing how deck is stacked against reformers seeking change through litigation). In formulating a nonviolent strategy based on civil disobedience, Martin Luther King, Jr. recognized that the law sometimes might be an impediment to change. See Martin Luther King, Jr., Letter from Birmingham Jail (1963), reprinted in 26 U.C. Davis L. Rev. 835 (1993) (observing that everything that Hitler did in Nazi Germany was "legal"). For a fascinating analysis of the effectiveness of various strategies for social change in modern Japan ranging from "denunciation" of a discriminatory status quo to more traditional forms such as litigation, see Frank K. Upham, Law and Social Change in Postwar Japan (1987).

This discussion should not be read to suggest that immigration litigation, in which I have been involved as an attorney before and after joining the academy,
spite the aggressive and often successful litigation strategy of various immigrant and refugee groups in the 1980s, the changes wrought generally were incremental and piecemeal in nature. Mounting litigation setbacks for the executive branch have not remedied the serious structural flaws in the immigration bureaucracy. The continued existence of such flaws consistently requires more costly litigation, which drains the limited resources of immigrant and refugee groups. Thus, despite successful litigation and despite the intense criticism of the immigration system in recent years, major institutional reform has not been forthcoming. Put simply, although litigation may have assisted in some ways, the continued need for it—and the monitoring function that it serves—amply illustrates its shortcomings.

Reform litigation also is fraught with hazards in light of the current composition of the courts. Although there has not proven worthwhile. Nor do I question the value of the work and commitment of the many attorneys who have devoted their working lives to protecting immigrants and refugees. Successful litigation undoubtedly has made a difference for innumerable noncitizens and clearly is one ingredient in any social movement. The question addressed here is what mix of strategies best promotes substantial reform of the immigration system.

347. See Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 BROOKLYN L. REV. 861, 872 (1990) ("Legal remedies that are designed by lawyers to impose improved conditions upon the poor aren't likely to do much to challenge subordination in the long run. In many cases, lawyer-engineered remedies will not work as intended. Even in the rare cases when such remedies do work according to plan, they still do not challenge the lived experience of subordination—the experience, that is, of other people controlling the terms of one's life.").

348. See Eva M. Rodriguez, Federal Judiciary Will Soon Feel Clinton's Stamp, LEGAL TIMES, Nov. 9, 1992, at 13 (observing that Presidents Reagan and Bush appointed a majority of Supreme Court Justices and more than two-thirds of all sitting federal judges, including a majority of all judges in each circuit court); see also Robert A. Carp et al., The Voting Behavior of Judges Appointed by President Bush, 76 JUDICATURE 298 (1993) (empirical study of published opinions by judges appointed by President Bush finding that in the aggregate they tended to decide cases in relatively conservative fashion); Sheldon Goldman, The Bush Imprint on the Judiciary: Carrying on a Tradition, 74 JUDICATURE 294 (1991) (studying President Bush's appointments to the federal judiciary and finding similarities with President Reagan's appointees). One prominent court of appeals judge went so far as to say that "Presidents Reagan and Bush have ensured that the federal courts will not be representative. Instead, they are a bastion of white America. They stand as a symbol of white power." Stephen R. Reinhardt, Riots, Racism, and the Courts, 23 GOLDEN GATE U. L. REV. 1, 7 (1993).

Advocates for the subordinated obviously have recognized the inhospitality of the current judiciary to their claims in formulating strategies. See White, supra note 53, at 535-37 (noting difficulties facing poor people's advocates due to swing to the right of federal government and courts and suggesting that impact litigation
been some success, there have been stunning litigation failures as well, particularly in the Supreme Court.\textsuperscript{349} Some refugee rights advocates, claiming that negotiations with the executive branch might have produced more favorable results, second-guessed the decision to attempt to halt the Haitian repatriation program through litigation.\textsuperscript{350} Whether or not that criticism is justified, the evaluation of possible litigation must be viewed in light of viable alternatives. During the 1980s, the Reagan administration took some rigid stands on immigration matters, which President Bush often continued.\textsuperscript{351} The Presidency has changed hands, however, and negotiation may prove more fruitful than it once was.\textsuperscript{352}

Deeper criticisms of litigation require consideration as well. In other substantive areas, critics have argued that litigation has preserved, if not strengthened, the status quo.\textsuperscript{353} Care must be taken in formulating and pursuing litigation strategies to avoid that pitfall. More fundamentally, litigation, particularly impact litigation with its laudable reform goals, may do little in the long run to empower the disempowered.\textsuperscript{354} Impact litigation in particular often treats class members as little more than passive observers, pawns of well-meaning attorneys pursuing social change.\textsuperscript{355} The nominal role of
noncitizens in the legal system can be nothing other than disempowering. That glimpse at law in action is unlikely to mobilize them to demand change when attorneys are unavailable to take charge. Empowerment is necessary to avoid future litigation. Noncitizens have limited power in society and may be left after litigation, even if successful in its aims, with the firm impression that legal institutions—strange, alienating, and foreign as they are—render them just as powerless. Lawyers therefore must address strategies besides litigation, which may require them to re-evaluate their role as attorneys promoting social change.

C. Strategies that Facilitate Storytelling

At least in the long run, political solutions to the plight of noncitizens appear more likely to bear fruit than does litigation. Indeed, mobilization may be the only long-term solution to the political powerlessness of the immigrant community and allow noncitizens to control their destiny. Concerted pressure, even during conservative presidencies, at times has convinced the INS to alleviate the harshness of its policies. Lobbying efforts might change the immigration laws and restrain the immigration bureaucracy. In light of the new nativism, however, it may be unrealistic to hope to convince Congress to affirmatively enact legislation significantly chang-
ing the status quo (at least in a manner favorable to noncitizens). Indeed, it may be overly optimistic to believe that immigrant advocates will be able to stave off the growing spate of anti-immigrant legislation.\(^{360}\) In any event, the reforms that might be achieved through lobbying and negotiation obviously would be incremental and, in that way, face limitations similar to those of litigation.\(^{361}\)

The political winds, however, may well change. At some point, broad support might coalesce around meaningful immigration reform that resolves the serious deep-seated problems in the immigration bureaucracy. Numerous immigration enforcement and adjudication reforms have been advocated for many years.\(^{362}\) A key ingredient to fundamental change in my view is a restructuring of the immigration bureaucracy. One ambitious proposal, advocated by a former INS Commissioner, calls for the removal of the INS from the Justice Department, thereby affording the agency more political independence.\(^{363}\) Another former INS Commissioner suggested removal of the Border Patrol from the INS so that the agency may devote its attentions to its service obligations.\(^{364}\) Either proposal might free the INS from attempting the near impossible task of bal-

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360. See supra text accompanying notes 110-11, 121-23 (discussing anti-immigrant legislation).
361. See supra text accompanying notes 346-47.
363. See Gene McNary, Testimony Before the Congress of the United States House of Representatives, Information, Justice, Transportation, and Agricultural Subcomm. of the Comm. on Government Operations 7-8 (Mar. 30, 1993) (unpublished manuscript on file with the author) [hereinafter McNary Testimony] (stating that Justice Department's enforcement nature was inconsistent with INS service function and emphasizing lack of Attorney General's knowledge of immigration law—"Most Attorneys General not only don't know anything about immigration, they don't have the slightest interest."); see also H.R. REP. NO. 216, supra note 262, at 27 (noting that former Commissioner McNary advocated that INS should report directly to the President as a Cabinet level position or an independent agency).
364. See Leonel J. Castillo, Summary of Testimony to the Information, Justice, Transportation, and Agricultural Subcomm. of the Comm. on Government Operations 8-9 (Mar. 30, 1993) (unpublished manuscript on file with the author); see also H.R. REP. NO. 216, supra note 262, at 23, 26 (mentioning that former Commissioner Castillo observed that the Border Patrol traditionally provided leadership to INS, which gave the INS a non-service-oriented background and that, consequently, the INS is "torn in several directions") (footnote omitted).
ancing the agency's wildly divergent service and enforcement functions.365

To facilitate favorable change at the proper time, efforts might wisely be directed at mobilizing the immigrant community in creative fashions to allow their voice to be heard. Such efforts may be the only long-run alternative likely to facilitate meaningful change in the immigration bureaucracy. To do so, lawyers may need to reconceptualize their function as agents of change. Imaginative approaches to the practice of law may assist attorneys attempting to empower marginalized peoples.366

Novel efforts at community organization and mobilization of noncitizens may educate the public about the true state of affairs, which is a prerequisite to positive change.367 The images we collectively share about immigrants affect how people (including their attorneys),368 lawmakers, and policymakers view immigrants and decide how they should be treated.369

365. See supra text accompanying notes 268-69.
366. See, e.g., GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11 (1992) (advocating active collaboration between lawyer and minority client in "lawyering against subordination" as opposed to the "regnant" idea of the lawyer for the subordinated); White, supra note 53, at 546-63 (discussing use of "speak outs" among disability recipients to allow them to describe their plight, and use of theater group of homeless, to assist in mobilizing to bring change); see also Richard F. Klawiter, Comment, ¡LA TIERRA ES NUESTRA! The Campesino Struggle in El Salvador and a Vision of Community-Based Lawyer-ing, 42 STAN. L. REV. 1625, 1680-89 (1990) (arguing that community-based strategies rather than litigation should be utilized to attack deeper causes of subordination).
367. See Mari J. Matsuda, Pragmatism Modified and the False Consciousness Problem, 63 S. CAL. L. REV. 1763, 1764 (1990) (arguing that we should listen "long and hard to less privileged voices" to rectify "historical devoicing"); Robert A. Williams, Jr., Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context, 24 GA. L. REV. 1019, 1021 (1990) ("[T]he common tendency 'to treat one's own perspective as true, rather than as one of many possible points of view,' is particularly complicated by the continuing and pervasive legacy of four centuries of white patriarchy in our society.") (footnote omitted); cf. Erwin Chemerinsky, Making the Case for a Constitutional Right to Minimum Entitlements, 44 MERCER L. REV. 525, 528-29 (1993) (noting that "[t]he poor are invisible to most Americans" and that war on poverty in 1960s followed growing public awareness of poverty).
368. See Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107 (1991) (arguing that poverty lawyers should listen to the stories of their clients).
369. See Delgado, supra note 14, at 2413 (arguing that "stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place"); Gerald P. López, Lay Lawyering, 32 UCLA L. REV. 1 (1984) (analyzing how "stock stories" affect percep-
One well-known immigration example of how stories affect legislative judgments involves the INA's judicial review provisions. In response to the much-discussed delay and manipulation of the deportation process by Carlos Marcello, a reputed racketeer, Congress significantly narrowed the review provisions. The truth of the matter was that "[t]he magnitude of the delay in [Marcello's] case was hardly typical, and in any event the bulk of that delay resulted from other countries' refusals to receive him rather than from defects in the review system." Unless appropriate measures are taken, stories of a radical sheik, Chinese being smuggled by organized crime into the country, and the like will animate legislative and regulatory change to the detriment of noncitizens. These stories may distort reality.

Many citizens are unaware of how the ordinary noncitizen lives in this country, many of whom are not nearly as lucky as Victor and Lillian Cordero temporarily were. A great number of undocumented persons, for example, live difficult lives on the economic, as well as political, margins. But how many people
know of the everyday difficulties facing undocumented persons like Maria Elena, a housekeeper living in San Francisco’s Mission District.374 What about the travails of undocumented families—men, women, and children—who pick the crops that feed the nation?375 What about the lives of undocumented workers who work behind the scenes in many of our favorite restaurants or in urban sweatshops?377 How about the success stories of undocumented noncitizens, such as the high school valedictorian who earned a scholarship to the University of Chicago and turned himself in to the INS?378 Why is it that so much is said about “asylum abuse” with so little mention made of the political persecution feared by asylum-seekers, such as the Haitians and others?381


375. See generally CLETUS E. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941 (1981) (analyzing the historical political powerlessness of farmworkers in California); PHILIP L. MARTIN, HARVEST OF CONFUSION: MIGRANT WORKERS IN U.S. AGRICULTURE (1985) (study of migrant farm-workers in the United States). Most recently, increasing numbers of indigenous people from southern Mexico, Mixtecs, have joined the farm labor force in California. See generally CAROL ZABIN ET AL., MIXTEC MIGRANTS IN CALIFORNIA AGRICULTURE: A NEW CYCLE OF POVERTY (1993). Undocumented Mexican farm labor in California, for example, includes a variety of different types of people, including those who commute daily to the United States, single males who will work for almost any rate so long as they are able to work many hours, families that migrate seasonally, and others. See JUAN L. GONZALES, JR., MEXICAN AND MEXICAN AMERICAN FARM WORKERS: THE CALIFORNIA AGRICULTURAL INDUSTRY 35-47 (1985).

376. See Pamela Burdman, Huge Boom in Human Smuggling—Inside Story of Flight from China, S.F. CHRON., Apr. 27, 1993, at A1 (describing operations that charge thousands of dollars to smuggle Chinese into United States and force them to work long hours in restaurants and other jobs to repay debt); see also Vicki Torres, 2 Men Tell of Torture at Hands of Smugglers, L.A. TIMES, Oct. 3, 1993, at B1 (reporting torture of Chinese immigrants held for ransom by smugglers).


379. See supra text accompanying notes 121-29.

380. See supra text accompanying notes 130-59.

381. A compelling example is the story of one Cambodian refugee told in his
Noncitizens, particularly the undocumented, in a sense are "closeted" and, because "information about the[ir] lives . . . may be unavailable . . . [,] storytelling may be particularly useful as a way of filling in informational gaps."\(^{382}\)

The facts about the undocumented are shielded from public view because of their political insularity as well as the relative isolation in which they live. They avoid visibility because discovery by the INS may result in deportation. A high premium is placed on secrecy, privacy and maintaining a low profile. Their world, unbeknownst to many, in numerous ways is very different from that of the average citizen. Daily fear and uncertainty, combined with difficult working conditions, mark their lives. Language barriers may contribute to the isolation. The undocumented community fears—and legitimately so—retaliation in the form of deportation by authorities for any political activity. That fear, which is not inconsequential, must be overcome if the popular images of the undocumented are to be transformed.

Besides the hardships of difficult employment conditions and the omnipresent threat of deportation, noncitizens often are the most vulnerable to crime. At the same time, they fear approaching the authorities for protection.\(^{383}\)

\underline{own words:}

When the Vietnamese came to Cambodia, I wound up running all the tin-can factories. The Vietnamese said I did a good job, and they were going to give me a big reward. They were going to send me to the Soviet Union.

So I ran to Thailand. The communists caught me and put me in a camp. In midnight, I say I go to the bathroom. I run away. They caught me again. They line us up along the road and walk behind and chop, chop, chop . . . chop our heads off. But they make us dig our graves first. Three, four, five miles, nothing but blood.

The soldiers hit me on the head with a machete. I fall. I pretend I was dead. I hide in the reeds besides a boat in a canal. I put mud and ash and urine on my wound. I cross through the jungle at night into Thailand. Church group bring me here. I haven't seen my family since 1979. But now I just heard they are alive. My mom and dad were killed by the Khmer Rouge.

At night, when I dream, I worry and wake up. I worry about my family and my country.


382. Farber & Sherry, supra note 1, at 829 n.119 (linking concept of "closeting" to lesbians and gays) (citing Pajer, supra note 14, at 512-22 and Eskridge, Critique, supra note 228, at 385-86).

383. See, e.g., H.R. REP. NO. 682(I), supra note 204, at 49, reprinted in 1986 U.S.C.C.A.N. 5653 (explaining need for IRCA's amnesty program and stating that,
Although many undocumented persons "have become a part of their communities" and "have contributed to the United States in myriad ways," they "live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill"; Michelle J. Anderson, Note, A License to Abuse: The Impact of Conditional Status on Female Immigrants, 102 YALE L.J. 1401, 1401-02, 1420-22 (1993) (discussing spousal abuse of immigrant women and their fear of reporting it to authorities); McNary Testimony, supra note 363, at 5 (stating that the "illegal alien" population "live[s] in constant fear of being detected and deported. They work at the mercy of often unscrupulous employers, they are deprived of the protection of our laws—afraid to report the crimes that are routinely committed against them.").


386. I recall that the employer trusted only Serrano with the secret recipe for
Serrano. He earned my deepest respect for his devotion to job and family. My experience with other undocumented Mexicans in that and other jobs was little different.

I have suggested that revision of the images of the undocumented in particular and noncitizens generally is a precursor to change. The reason for this is simple. As an intellectual matter, it is far easier to blame the faceless “illegal alien,” who we do not know and rarely see, for society’s woes and to label “them” as criminals stealing American jobs. At its most basic level, this is nothing other than a rationalization. “Illegal aliens”—largely non-white, often non-English speaking, and apparently willing to do the work that many citizens will not—in fact are different from the in-group. Despite the differences, it is more difficult to blame the nation’s woes on persons known to be hardworking and contributing members of society, and who make the best of difficult lives. Put differently, if “we” believe that “they” are “good” people, it is difficult to blame “them” for all that is wrong. In contrast, if “we” believe that “they” are “bad,” it becomes easier to do so.

Ignorance of the basic facts makes it simple to believe that crime is perpetrated by “criminal aliens” or that “illegal aliens” are exhausting our social services dollars. Changing the images of the immigrant in the minds of citizens and their elected representatives would diminish the possibility that anti-immigrant hysteria would shape immigration laws and policies. Perhaps more importantly, if the imagery were revised, the powers that be might be more amenable to push for the much-needed changes in the immigration bureaucracy.

This is not to suggest that the relevant information about noncitizens currently is unavailable. Many works, literary as well as legal, tell the stories of noncitizens in detail. They

387. This is suggested by psychology’s cognitive dissonance theory, which is based on the idea that individuals have a need for consistency in their thoughts and beliefs. See Leon Festinger, A Theory of Cognitive Dissonance (1957); see also Delgado, supra note 14, at 2413-14 (“Those in power sleep well at night—their conduct does not seem to them like oppression.”); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 328-44 (1987) (discussing psychological literature on racism).


paint a picture very different from the one in the minds of many. Perhaps what is missing is a triggering event that brings the issue to the forefront in a sympathetic way. For example, the nation's ignorance of the plight of farmworkers was briefly interrupted by Edward R. Murrow's television special in the 1960s, *Harvest of Shame*, which brought the issue to national attention.\(^{390}\) Chance, it seems, plays a role in social change.

There are some examples of organizations attempting to change the shared beliefs about their clientele. The United Farmworkers Union (UFW) led by the late César Chavez enjoyed some early success in bringing to light the lives of migrant farmworkers.\(^{391}\) Early in the UFW's history, Chavez encapsulated his strategy as follows:

> I have always believed that, in order for any movement to be lasting, it must be built on the people. They must be the ones involved in forming it, and they must be the ones that ultimately control it. It is harder that way, but the benefits are more meaningful and lasting when won in this fashion. It is necessary to build a power base. Money by itself does not get the job done. This is why poverty programs have so much difficulty. Although many nice things are said and many wheels are spinning, very little real social change takes place.

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To try to change conditions without power is like trying to move a car without gasoline. If the workers are going to do anything, they need their own power. They need to involve themselves in meaningful ways. Once they achieve a victory, they can make use of their power to negotiate and change things for the better.392

By cooperation with groups such as California Rural Legal Assistance, which combines law reform litigation, community organizing, and lobbying,393 the UFW tried to “humanize” the migrants in the fields for many citizens.394

392. Cesar Chavez, Introduction to Forty Acres, supra note 391, at 9-10. In a similar vein, Timothy Wexler observed with respect to the poor that:

Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves. This is not the traditional use of a lawyer's skills; in many ways it violates some of the basic tenets of the profession. Nevertheless, a realistic analysis of the structure of poverty, and a fair assessment of the legal need of the poor and the legal talent available to meet them, lead a lawyer to this role.

Wexler, supra note 54, at 1053; see Anthony V. Alfieri, The Antinomies of Poverty Law and a Theory of Dialogic Empowerment, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88) (arguing that poverty lawyers should focus on client empowerment through development of class consciousness and political organization rather than direct service and reform litigation).

Some claim that the UFW erroneously abandoned organizational activities, which reduced its later effectiveness. See Beatriz J. Hernandez, Cesar's Ghost, CAL. LAW. REV. 48 (1993) (discussing indigenous Mexican farmworkers' organizing efforts and disenchantment with UFW); see also Refugio I. Rochin, Farmworkers: Strategies for Empowerment, Paper presented at the National Council of La Raza 1993 Silver Anniversary Conference in Detroit, Michigan (July 21, 1993) (on file with the author) (discussing current conditions in which farmworkers live and advocating strategies for group empowerment).

393. See PHILIP B. HEYMANN & LANCE LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS 22-48 (1988) (case study of California Rural Legal Assistance (CRLA) describing its organization). CRLA has been involved in some novel organizing activities of the rural poor, including many undocumented persons, attempting to improve their lives. See STREET, supra note 381 (recounting organizing efforts in rural communities). For an inside account of how CRLA successfully survived attacks by federal, state, and local governments, see Michael Bennett & Cruz Reynoso, California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice, 1 CHICANO L. REV. 1 (1972).

394. Community-based strategies are not unheard of in the immigration realm. Community organizations have, at times, worked successfully with the INS to implement certain programs. See Hing, supra note 238, at 444-59 (evaluating involvement of community organizations in implementing IRCA legalization program); see also Marla Cone, Oppressed Take a Stand in Drywallers' Strike, L.A. TIMES, Sept. 7, 1992, at A1 (describing strike by drywallers, many of whom were undocumented).
This is not to suggest that the task will be easy; it most definitely will not be. With respect to noncitizens, it will be necessary not only to "humanize" them, but also to neutralize their demonization by the Vocal Minority. Mobilization will be even more difficult when policies, such as the Haitian repatriation program or the expedited asylum procedures applied to Central Americans in the 1980s, are directed only toward one segment of the noncitizen population. As with minority groups of citizens, noncitizens are not monolithic. Subgroups exist with different, sometimes conflicting, demands. As with other marginalized groups, however, the common interests of noncitizens frequently will outweigh their differences, particularly with respect to curbing INS abuses.

Filling the void through storytelling and image modification is simply the beginning. It is not simply the marginalization of noncitizens, particularly the undocumented, that requires their stories to be told. Nor should we fall into the trap, as exemplified by President Reagan’s colorful parables, of manipulating questionable, if not downright fictitious, stories to promote pre-selected policy preferences. Instead, strategies for change must employ and circulate the stories of noncitizens to assist in persuading policymakers, lawmakers, and the electorate of the need for positive reforms. This is only the first step. Innumerable reasonable changes to the immigration law and bureaucracy have been advanced in recent years. More often than not, they have fallen on deaf ears. The INS, though frequently attacked, continues business as usual. So does the EOIR. The inherent logic of reform proposals apparently has little impact. Resort to the stories of the people affected may be the last hope of spurring political action.

395. See supra note 118 and accompanying text.
398. See Farber & Sherry, supra note 1, at 839 n.159.
399. See Eskridge, Critique, supra note 228, at 385-86 (advocating narrative to "rectify stereotypical misconceptions . . . and . . . educate society" and "create[e] conditions of empathy and emotional connection").
D. A Recapitulation

Suffrage would be an invaluable (though highly improbable) tool to the noncitizen community, even if only on the state or local level. As an alternative, incremental steps must be taken to improve the political power of immigrants. More importantly, innovative strategies for change must be pursued to empower noncitizens and spur them to act politically.

Whatever the method, the untold stories of the noncitizen community, as well as disclosure of its very existence in cities across the nation, must be told. If not, the only stories that we will hear are those of the Vocal Minority who claim that "illegal aliens" are taking "American" jobs, sapping the limited financial resources of state and local governments, and preying upon the citizenry. It will be those images that fuel retrograde changes in immigration laws and policy.

V. CONCLUSION

Immigration may well become the civil rights issue of the twenty-first century in the United States. If that is so, one might wonder where this Article leaves us with respect to the political power of noncitizens and the opportunities for social change. The potential for future action is shaped by several forces.

New immigrants often are not popular among certain segments in the United States. This historically has been the case for previous "new" immigrants. The lack of popularity is more likely to remain with this group of new immigrants of today, however, because many are people of color who are physically unable to assimilate entirely into a white-dominated society. The persistence of nativism, with its undisputed influence on the political process, appears likely in the near future. This is not to suggest that a majority of the electorate accepts restrictionist views. Rather, it may well be that a well-organized minority that feels deeply about halting immigration has become increasingly involved in the political process and may successfully play (hopefully only for a time) on the fears of a nation frantically searching for answers.

Whether or not sanctioned by the law, undocumented noncitizens long have been part of the society. Lawful permanent residents are in this nation entirely consistent with its laws. Both noncitizen groups contribute economically and otherwise to the well-being of the nation. The question is how they will be treated under the immigration laws and by the agencies enforcing those laws. Barred from the voting booth, noncitizens cannot check the abuses of the immigration bureaucracy. This helps explain the continued and consistent criticism of INS policies and practices. Congress, without a strong noncitizen constituency and pressured by a restrictionist lobby representing a minority of voters, frequently may have little incentive to protect the noncitizen and may gain much politically by punishing them. For similar reasons, it lacks the motive to intervene to override the anti-immigrant decisions of the Supreme Court, even when inconsistent with the desires of the majority. Congress instead often has every reason to appease a restrictionist minority by acting in an anti-immigrant manner, knowing that the Vocal Minority cares about the issue while aware that the Silent Majority and noncitizens in all likelihood will remain silent.

Even if immune from sympathy to human devastation, it should be intellectually troubling that the checks-and-balances system that the framers sought to create through the elaborate Constitutional architecture fails to monitor the conduct of the immigration bureaucracy and judicial interpretation of the immigration laws. Continued INS abuses alone demonstrate the weakness of the dynamic in the immigration realm. The lack of overrides in important substantive immigration areas is more of the same.

What will ensure serious consideration of the numerous rational reform proposals that have fallen on deaf ears? Extending the franchise to noncitizens, or at least to lawful permanent residents, might improve matters by creating the theoretical possibility of political accountability. Such a far-reaching proposal, however, for a variety of reasons is highly unlikely in the short term. Litigation has offered some benefits to some noncitizens on some issues. However, despite sustained

402. See supra text accompanying notes 362-65 (noting proposals for reform of agency structure).
successful litigation, unlawful conduct continues unabated. That alone suggests the need for deeper reform.\footnote{403}

Noncitizens, as other disempowered groups are doing, must articulate, envision, and adopt innovative strategies for social change. Political mobilization and organization that empowers noncitizens offers the only meaningful opportunity for change. Ingenious strategies have been developed for other subordinated groups and must be experimented with by noncitizens. The obstacles to the development of such strategies is formidable. Noncitizens, particularly the undocumented, deeply fear governmental authority and the power that it wields, especially the power to deport them to their native country if their presence in this nation comes to light. They expose themselves to great risks if they become visible and try to wrestle control of their lives from the powers that be. But more of the same—e.g., fear, abuse, helplessness, exploitation—will continue if strategic changes are not forthcoming.

The facts, the stories, and the truth about noncitizens will hopefully come to light. Then, the electorate will know how noncitizens live and will learn how the economy depends on their continued exploitation. They will learn of the lives of the exploited and the difficulty and sadness of their daily toils. These are the stories that must gain common currency to wake up a sleeping public that finds the subject of the Immigration and Nationality Act, the Immigration and Naturalization Service, the Border Patrol, and the Executive Office for Immigration Review to be at most of vague interest. Until that is changed, noncitizens, a significant part of the national community, will continue to be Los Olvidados, The Forgotten. Although this strategy for change may fail,\footnote{404} and may be

\footnote{403. This is not to suggest that attempts at incremental change should be abandoned. At least with respect to asylum decisionmaking by the INS, such reform has wrought some improvement. See, e.g., NATIONAL ASYLUM STUDY PROJECT, AN INTERIM ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 2 (1992) (concluding that there had been an overall improvement in INS asylum decisions as a result of initial implementation of Asylum Officer program in July 1990, although noting some lingering problems). Some changes might be simple in nature, such as institutionalizing avenues for input of the groups most significantly affected by INS and EOIR decisions. See Schuck & Wang, supra note 44, at 178 ("The patterns of impact litigation against the INS also suggest a need for the agency to solicit outside advice from advocacy groups before developing and implementing new programs."). Others are more fundamental. See Johnson, supra note 16 (suggesting that courts engage in "hard look" review of agency asylum decisions).}

\footnote{404. See Richard Delgado & Jean Stefancic, Images of the Outsider in Ameri-}
doomed from the outset by its underlying optimism, if not na-
ivete, we will never know unless we try. 405

APPENDIX 406

   Provision: INA § 212(d)(7)
   Winner: Government
   Losers: Union and Noncitizen Members
   Overridden: No
   Note: This case is included in Table 1 (supra page 1200).

   Provision: INA § 405(a)
   Winner: Noncitizen
   Loser: Government
   come interpretations placed on” § 405 by Menasche and two lower court decisions reaching similar conclusions (In re Naturaliza-
   tion of Wolff, 270 F.2d 422 (3d Cir.), cert. denied, 362 U.S. 928 (1960), and Medalion v. United States, 279 F.2d 162 (2d Cir. 1960)) because
   “such interpretations are contrary to the intent of Congress clearly indicated in the” INA. H.R. REP. No. 1086, 87th Cong., 1st Sess., reprinted
   Ultimate Winner: Government

405. See Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 HARV. L. REV. 985, 993 (1990) (“Al-
though theoretical deconstruction is important, the ultimate goal of critical theory
should be the reconstruction of community from the debris of theoretical
deconstruction . . . .”).

406. The methodology used in compiling this Appendix is described supra note 242.

**Provision:** INA §§ 318, 405(a), 405(b)

**Winner:** Government

**Loser:** Noncitizen

**Overridden:** No


**Provision:** INA § 242(b)

**Winner:** Noncitizen

**Loser:** Government

**Overridden:** Yes. Pub. L. No. 87-301, § 5, 75 Stat. 649, 651-53 (1961). *Reason Offered for Override:* To halt delays in deportation and exclusion by "judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose" of delay, particularly by "subversives, gangsters, immoral [sic], or narcotics peddlers." H.R. REP. No. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2950, 2967. The override was supported by the administration. *See id.* at 2968-70.

**Ultimate Winner:** Government

**Note:** In Brownell v. Rubinstein, 346 U.S. 929 (1954) (per curiam), a lower court conclusion to the same effect as *Shaughnessy v. Pedreiro* was affirmed by an equally divided Court.


**Provision:** INA §§ 241(a)(11), 241(d), 242(b)

**Winner:** Government

**Loser:** Noncitizen

**Overridden:** No


**Provision:** INA §§ 235(a), 340(a)

**Winner:** Citizen

**Loser:** Government

**Overridden:** No


**Provision:** INA § 340(a)

**Winner:** Citizen

**Loser:** Government

**Overridden:** No
   *Provision:* INA §§ 244(a)(5), 244(c)
   *Winner:* Government
   *Loser:* Noncitizen
   *Overridden:* No

   *Provision:* INA § 236(c)
   *Winner:* Noncitizen
   *Loser:* Government
   *Overridden:* Yes. Pub. L. No. 87-301, 85, 75 Stat. 649, 651-53 (1961). *Reason Offered for Override:* To halt delays in deportation and exclusion by "judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose" of delay, particularly by "subversives, gangsters, immoral [sic], or narcotics peddlers." H.R. REP. No. 1086, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.C.C.A.N. 2950, 2967. The override was supported by the administration. *See id.* at 2968-70.
   *Ultimate Winner:* Government

    *Provision:* INA § 242(d)
    *Winner:* Noncitizen
    *Loser:* Government
    *Overridden:* No

    *Provision:* INA §§ 405(a), 241(a)(1), 241(a)(4), 241(d)
    *Winner:* Government
    *Loser:* Noncitizen
    *Overridden:* No

    *Provision:* INA §§ 241(a)(11), 241(d), 405(a)
    *Winner:* Government
    *Loser:* Noncitizen
    *Overridden:* No

    *Provision:* INA § 244(a)
    *Winner:* Noncitizen
Provision: INA § 252(c)
Winner: Government
Loser: Noncitizen
Overridden: No

Provision: INA § 340(a)
Winner: Citizen
Loser: Government
Overridden: No

16. Leng May Ma v. Barber, 357 U.S. 185 (1958)
Provision: INA § 243(h)
Winner: Government
Loser: Noncitizen
Overridden: No

17. Rogers v. Quan, 357 U.S. 193 (1958)
Provision: INA §§ 243(h), 237(a)
Winner: Government
Loser: Noncitizen
Overridden: No
Note: Provision amended. Section 243(h) was amended as described in the entry for Leng May Ma (No. 16, supra). The conference report explaining the amendment does not mention Rogers.

Provision: INA § 242(a)
Winner: Government
Loser: Noncitizen
Overridden: No
Provision: INA § 340(a)
Winner: Citizen
Loser: Government
Overridden: No

Provision: INA § 340(a)
Winner: Government
Loser: Citizen
Overridden: No

Provision: INA §§ 360(b), 360(c)
Winner: Citizen
Loser: Government
Overridden: No

Provision: INA § 349(a)(10)
Winner: Citizen
Loser: Government
Overridden: No
Note: Provision repealed, Pub. L. No. 94-412, § 501(a)(2), 90 Stat. 1255, 1258 (1976). Reason for Repeal: The Court found that the provision was unconstitutional.

Provision: INA § 101(a)(13)
Winner: Noncitizen
Loser: Government
Overridden: No
Note: Congress overrode the lower court decision in this case dealing with the exclusion of a gay man, an issue that was not addressed by the Supreme Court. See supra note 204.

Provision: INA § 241(a)(6)(C)
Winner: Noncitizen
Loser: Government
Overridden: No

25. Foti v. INS, 375 U.S. 217 (1963)
Provision: INA § 106(a)
Winner: Noncitizen
Loser: Government
Overridden: No
Note: In a somewhat similar case, the Court in a one-paragraph per curiam opinion relied on the fact that the United States and the noncitizen both requested reversal and reversed the court of appeals' conclusion that it lacked jurisdiction to review denial of a motion to reopen deportation proceedings. See Giova v. Rosenberg, 379 U.S. 18 (1964) (per curiam), rev'g 308 F.2d 347 (9th Cir. 1962) (per curiam). Because of the extraordinary circumstances, Giova was not included as a separate entry.

Provision: INA §§ 241(a)(4), 340(a)
Winner: Noncitizen
Loser: Government
Overridden: No

27. Mrvica v. Esperdy, 376 U.S. 560 (1964)
Provision: INA § 249
Winner: Government
Loser: Noncitizen
Overridden: No

28. Schneider v. Rusk, 377 U.S. 163 (1964)
Provision: INA § 352(a)(1)
Winner: Citizen
Loser: Government
Overridden: No

Provision: INA § 241(f)
Winner: Noncitizen
Loser: Government
Overridden: Yes. Pub. L. No. 97-116, § 8, 95 Stat. 1611, 1616 (1981). Reason Offered for Override: To clarify inconsistent interpretations of § 241(f); the acting INS Commissioner and the Department of

**Ultimate Winner:** Government


*Provision:* INA §§ 106(a)(4), 242(b)(4)

*Winner:* Noncitizen

*Loser:* Government

*Overridden:* No


*Provision:* INA § 215(b)

*Winner:* Citizen

*Loser:* Government

*Overridden:* No

**Note:** The Court, in a companion case, Travis v. United States, 385 U.S. 491 (1967), issued a decision reversing a lower court decision based on its reasoning in *Laub.*

32. Berenyi v. District Director, 385 U.S. 630 (1967)

*Provision:* INA §§ 101(f), 316(a)

*Winner:* Government

*Loser:* Noncitizen

*Overridden:* No


*Provision:* INA § 212(a)(4)

*Winner:* Government

*Loser:* Noncitizen

Ultimate Winner: Noncitizens

34. Cheng Fan Kwok v. INS, 392 U.S. 206 (1968)
Provision: INA § 106(a)
Winner: Government
Loser: Noncitizen
Overridden: No
Note: In the Supreme Court, the INS sided with the noncitizen on the jurisdiction question. See 392 U.S. at 210. Nonetheless, the Supreme Court held that the court of appeals lacked jurisdiction to hear the noncitizen’s petition for review and affirmed dismissal of the petition for review. The noncitizen thus did not prevail.

Provision: INA §§ 252(b), 242(b)
Winner: Government
Loser: Noncitizen
Overridden: No

Provision: INA § 301(b)
Winner: Government
Loser: Citizen
Overridden: No

Provision: INA § 203(a)(7)
Winner: Government
Loser: Noncitizen
Overridden: No

Provision: INA § 315
Winner: Noncitizen
Loser: Government
Overridden: No

Provision: INA §§ 402(a), 101(a)(13)
Winner: Noncitizen
Loser: Government
Overridden: No
Note: Without mention of the decision in the legislative history (including committee hearings), the Immigration Reform and Control Act of 1986 amended the statutory provision at issue in Campos-Serrano to offer greater specificity about the type of fraudulent documents that may serve as the basis of criminal penalties. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 103, 100 Stat. 3359, 3380 (1986). Because Congress does not appear to have consciously responded to the Supreme Court's decision, it is not classified as an override. See supra note 243 (defining override).

Provision: INA §§ 212(a)(28), 212(d)
Winners: Government
Loser: Noncitizen
Overridden: No
41. Almeida-Sanchez v. United States, 413 U.S. 266 (1973)
   Provision: INA § 287(a)(3)
   Winners: Government and Noncitizens
   Losers: Labor Union
   Overridden: No

   Provision: INA § 101(a)(27)(B)
   Winner: Noncitizen and Government
   Loser: Noncitizen and Government
   Overridden: No
   Note: The judgment below was affirmed in part, reversed in part.

43. Reid v. INS, 420 U.S. 619 (1975)
   Provision: INA §§ 241(f), 241(a)(2)
   Winner: Government
   Loser: Noncitizen
   Ultimate Winner: Government

44. United States v. Brignoni-Ponce, 422 U.S. 873 (1975)
   Provision: INA §§ 287(a)(1), 287(a)(3)
   Winner: Citizen
   Loser: Government
   Overridden: No
   Note: Although the decision is opaque on this point, an apparent citizen unlawfully attempted to bring noncitizens into the country.

**Provision:** No specific provision. Court addressed the scope of INA for purposes of federal preemption

**Winners:** Migrant Farmworkers, State Government

**Losers:** Farm Labor Contractors, Noncitizens

**Overridden:** No

**Note:** Migrant farmworkers based a claim on a state law barring employment of undocumented labor. The Court found that the Immigration and Nationality Act did not preempt the state law. State government was the indirect beneficiary (because the decision offered greater power to legislate in the immigration realm) and noncitizens were indirect losers (because the Court upheld a state law barring their employment). The precise holding of the decisions is no longer good law because IRCA, which makes it unlawful to employ undocumented persons, expressly preempts state laws on the subject. See INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (1988). IRCA’s legislative history apparently does not mention *De Canas*.

46. INS v. Bagamasbad, 429 U.S. 24 (1976) (per curiam)

**Provision:** INA § 245

**Winner:** Government

**Loser:** Noncitizen

**Overridden:** No

47. Fiallo v. Bell, 430 U.S. 787 (1977)

**Provision:** INA §§ 101(b)(1), 101(b)(2)

**Winner:** Government

**Loser:** Noncitizen

**Overridden:** No

Provision: INA § 106(a)(5)(B)
Winner: Person Claiming to Be Citizen
Loser: Government
Overridden: No
Note: The INS claimed that Agosto was a noncitizen. For purposes of Table 2, supra page 1202, this case was classified as one between a citizen and the government.

Provision: INA §§ 349(a)(2), 349(c)
Winner: Government
Loser: Citizen
Overridden: No
Note: The government obtained reversal on the issue of the proper burden of proof in establishing loss of citizenship but the Court held for the citizen on an element necessary to lose citizenship. By successfully obtaining reversal and remand of an adverse court of appeals decision, the government was the primary beneficiary.

Provision: INA § 340(a)
Winner: Government
Loser: Citizen
Overridden: No

Provision: INA § 244(a)(1)
Winner: Government
Loser: Noncitizen
Overridden: No
Note: The decision in part focused on the discretion of Attorney General under the regulation pertaining to a motion to reopen deportation proceedings so that the noncitizen could apply for relief under INA.

Provision: INA § 101(a)(15)(g)(iv), Scope of INA for Purposes of Federal Preemption
Winner: Noncitizens
Loser: State University
Overridden: No
Note: The Court earlier decided related issues in Elkins v. Moreno, 435 U.S. 647 (1978). To avoid overcounting, Elkins is not included as a separate decision interpreting or applying the INA.

Provision: INA §§ 235(a), 235(b)
Winner: Government
Loser: Noncitizen
Overridden: No
Note: This decision posed a difficult classification problem because the Court held that a lawful permanent resident in exclusion proceedings was entitled to due process, an important gain for certain noncitizens as a group. However, the Court reversed the court of appeals holding in favor of the noncitizen that the INS lacked the authority to proceed in exclusion, rather than deportation, proceedings. Consequently, although the individual noncitizen party to the case lost, noncitizens as a group to some extent gained.

Provision: INA § 244(c)(2)
Winners: Noncitizen and executive branch
Loser: Congress
Overridden: No
Note: Provision repealed. See Pub. L. No. 100-525, § 2(q)(1), 102 Stat. 2609, 2613 (1988). Reason for Repeal: The Court found that the provision was unconstitutional.

Provision: INA § 244(a)(1)
Winner: Government
Loser: Noncitizen

Ultimate Winner: Noncitizen
Provision: INA § 243(h)
Winner: Government
Loser: Noncitizen
Overridden: No

57. INS v. Rios-Pineda, 471 U.S. 444 (1985)
Provision: INA § 244(a)(1)
Winner: Government
Loser: Noncitizen
Overridden: No
Note: The decision in part focused on the discretion of the Attorney General under the regulation pertaining to a motion to reopen deportation proceedings so that the noncitizen could apply for relief under INA.

Provision: INA § 212(d)(5)(A)
Winner: Government
Loser: Noncitizens
Overridden: No

Provision: INA § 244(a)(1)
Winner: Government
Loser: Noncitizen
Overridden: No

60. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)
Provision: INA §§ 243(h), 208(a), 101(a)(42)(A)
Winner: Noncitizen
Loser: Government
Overridden: No
Note: Senator Kennedy, a few days after the Supreme Court decided the case, praised the decision on the floor of the Senate as consistent with the "intent of Congress" in enacting the Refugee Act of 1980. See 133 CONG. REC. S3038 (daily ed. Mar. 11, 1987).

Provision: INA § 276
Winner: Noncitizen
Loser: Government
Overridden: No
Provision: INA §§ 243(h), 1101(a)(42), 208
Winner: Government
Loser: Noncitizen
Overridden: No
Note: The decision in part focused on the discretion of the Attorney General under the regulation pertaining to a motion to reopen deportation proceedings so that the noncitizen could apply for relief under INA.

Provision: INA §§ 340(a), 316(a), 101(f)(6)
Winner: Citizen
Loser: Government
Overridden: No

64. INS v. Pangilinan, 486 U.S. 875 (1988)
Provision: INA § 310
Winner: Government
Loser: Noncitizens
Overridden: No
Note: The case focused primarily on noncitizen entitlement to relief under the Nationality Act of 1940. In authorizing federal courts to order the Attorney General to accept new amnesty applications under the Immigration Reform and Control Act, Congress recognized that the lower courts had split on whether the reasoning of Pangilinan, which involved different statutory provisions, barred the federal courts from doing so. See H.R. REP. NO. 723(I) (1990), 101st Cong., 2d Sess. 50, reprinted in 1990 U.S.C.C.A.N. 6710, 6730.

Without apparent mention of Pangilinan, Congress amended the INA to allow Philippine veterans who performed honorably in World War II to become naturalized citizens, which the Court's interpretation of prior law had denied them. See Immigration Act of 1990, § 407(b)(5) (amending 8 U.S.C. § 329).

Provision: INA § 210(e)
Winner: Noncitizens
Loser: Government
Overridden: No
   Provision: INA § 242(a)
   Winner: Government
   Loser: Noncitizens
   Overridden: No
   Note: The case in part focused on the validity of a regulation promulgated under INA § 242(a).

   Provision: INA §§ 208(a), 243
   Winner: Government
   Loser: Noncitizen
   Overridden: No
   Note: The case in part focused on the discretion of the Attorney General under the regulation pertaining to a motion to reopen deportation proceedings so that the noncitizen could apply for relief under INA.

   Provision: INA § 101(a)(42)
   Winner: Government
   Loser: Noncitizen
   Overridden: No

   Provision: INA § 242(a)(1)
   Winner: Government
   Loser: Noncitizens
   Overridden: No
   Note: The case in part focused on the validity of a regulation promulgated pursuant to INA § 242(a).

    Provision: INA § 245A
    Winner: Government
    Loser: Noncitizens
    Overridden: No

    Provision: INA § 243(h)(1)
    Winner: Government
    Loser: Noncitizens
    Overridden: No