ARTICLE

IN DEMOCRACY'S SHADOW: FENCES, RAIDS, AND THE PRODUCTION OF MIGRANT ILLEGALITY

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ABSTRACT

Why is the United States building a border fence and raiding workplaces? How has it come to harbor 12 million people without legal status? This article proposes that we can understand these phenomena as the product of a legal culture which privileges the desires and perspective of the citizenry over nearly every other value. Accordingly, government is structured so that it approaches immigration in a way that flatters this democratic epistemology, instead of acting on a judicious, effective and humane policy perspective. Put into practice, this emphasis means that immigration regulation is an exercise in symbolic action that harms "illegal" migrants. We see the effects of this majoritarian architecture in the construction of the border fence, which the Congressional Research Service has acknowledged does little to control illegal immigration, but succeeds in increasing the rate of migrant border deaths. Nevertheless, the fence prevails as policy because it confirms and assuages the polity's fear of racial invasion; that it does little to prevent undocumented migration means that the economy can continue to exploit migrants' labor.

This article also considers how the United States engages in these kinds of actions and still maintains its outward image as “liberty enlightening the world.”

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Part II illustrates how the adoption of antidiscrimination provisions in immigration law were intended to preserve this enlightenment image, but had the practical effect of facilitating the employment of unauthorized migrants, leading the polity to demand visible action, which in turn produced stigmatizing employer raids. Finally, the Article explores the way in which courts maintain the narrative of the United States as an open-armed refuge, while managing the radical potential of the Fourteenth Amendment’s birthright citizenship provision. All these political and legal forces combine, then, to produce the 12 million stigmatized “illegal” migrants who live and work in democracy’s shadow.
We must meet flagrant disregard for our laws and the integrity of our borders with all the power and purpose of a great nation... Our national security is being challenged. It is time we take control of access to our own, sovereign territory.

—Bob Graham, June 4, 1987

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed, to me:
I lift my lamp beside the golden door.

—Emma Lazarus, The New Colossus

INTRODUCTION

The American immigration regime is surreal. Twelve million human beings live out their lives in the United States—own property, raise children, pay taxes—in the absence of formal legal status.1 This “illegal”2 population has burgeoned over the past fifteen years, even as the state’s enforcement apparatus has grown more punitive, increasingly taking on the harsh character of our criminal justice system. The evening news televises snippets of immigration raids which demonstrate, by design or in effect, the state’s renewed enforcement zeal by parading brown-skinned workers—handcuffed, shamed, disciplined—out in public, or, more precisely, into the faceless gaze of the media, creating in this combination a kind of new-age chain-gang whose symbolism conflates immigration status, criminality, and race in equal measure.3

Still more striking, the Department of Homeland Security (DHS), at Congress’s emphatic insistence, is directing the construction of a super-fence on America’s southern border with Mexico. The border fence is not a


2. Part of the project of this article is to expose the way in which the “illegal” label is used to stigmatize migrants and authorize appalling state behavior against this group. To expose the manufactured quality of this status, I believe it is necessary to use the term “illegal” in this piece (rather than the preferred undocumented migrants, or unauthorized migrants) with some frequency. I place it in quotation marks to make clear to the reader that illegal, in this context, does stigmatizing work.

3. A significant amount of news media coverage of these raids is archived and continually updated on the website www.youtube.com. A search for “immigration raid” turns up hundreds of videos. See, e.g., http://www.youtube.com/results?search_query=immigration+raids&search_type=&aq=0&o q=immigration+raid (last visited Nov. 7, 2008).
comprehensive barrier, but there is little (or no disclosed) administrative logic to the fence’s border coverage. And yet a kind of rationale may be discernable: the fence contains large gaps for a golf resort on the Rio Grande, as well as for other riparian retreats of the well-to-do. Such insistent inadequacy to the task of preventing unauthorized border crossing means that the fence is primarily a symbol to the citizenry, our southern neighbor, and the world, that America is resolved to stem the tide of those who “invade” our labor markets. While that symbolism may assuage the domestic audience for a time, it is powerless to stop the forty percent of “illegal” denizens who enter the United States legally and simply overstay their visas. Moreover, the government knows that the fence is ill-conceived. State-authored reports show, and experts agree, that the project is a classic white elephant: it is expensive, breachable, and its most dramatic effect is to shift migration pathways to dangerous areas where migrants are more likely to die en route to the United States. Over time, then, as the emptiness of the fence’s intended symbolism reveals itself, Congress’s attempt at border closure may come to mean something else entirely.

But before we delve too deeply into the broader significance of fences and raids, all this poorly targeted governmental action begs a more basic question: how did we arrive here? How did a nation so deeply committed to the rule of law pursue a set of policies that has facilitated the expansion of the population situated outside law’s rule—even after an enormous amnesty in 1986—to twelve million people? How has a country that identifies itself as the triumphal product of immigration come to treat migrants who live and work in the United States as criminals, and then too, as poorly as it treats any other kind of


7. David Martin, a former general counsel at the INS, concedes that border enforcement is not only symbolic but is deliberately designed to assuage the concerns of the influential business lobby that wants to continue hiring undocumented workers for its own monetary interest. I would add that the economic power of the lobby is reinforced by our generally laissez-faire, anti-statist culture. See David Martin, Eight Myths About Immigration Enforcement, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 525 (2007). Martin explains further: “border measures . . . step on almost no influential toes. Border crackdowns are therefore used to demonstrate enforcement seriousness, alienating few and placating many.” Id. at 553.

8. CRS REPORT, supra note 6, at 40.
This article proposes that we can understand this discordant reality as the symptom of the state's effort to preserve, in a transnational age, the core American legal sensibility which Justice Cardozo famously crystallized in the phrase "ordered liberty." How does ordered liberty produce the disorder of "illegal" immigration? At its most basic level, ordered liberty strongly privileges the democratic will; accordingly, American political and legal institutions do not approach problems from a policy-sciences perspective, but rather in a way that flatters the desires of the demos. In the immigration context the operation of this democratic epistemology causes the government to blind itself to law's role in the production of the "illegal" migrant and craft "solutions" that avoid burdening the polity and conform to its conception of the problem. The contemporary results of these processes are fences (confirming the social idea that illegal migration is a problem of racial invasion), raids (affirming migrant work as a species of theft), and twelve-million "illegal" human beings (reflecting the imposition of criminal and racial stigma). The "illegal" migrant, then, exists in democracy's shadow, the stigmatized and suppressed construction of our peculiar legal institutions. Conveniently for the United States' economy, migrants toiling in that shadow become a dehumanized labor input that works, but can credibly demand nothing of the state in return.

Because Cardozo's ordered liberty is conceptually opaque, Part I illuminates the specific contours and excavates the origins of ordered liberty in the United States. The DHS's experience tightening our national borders will illustrate how ordered liberty operates on the ground level, where the power of the state manifests itself tangibly in the lives of its citizens and denizens.

Part II argues that in constructing immigration law, Congress grapples with the brand of ordered liberty described in Part I, while also taking account of the higher register meanings of this conflicted concept. In particular, where the administrative branch simply follows the democratic will as filtered through Congress, the legislature believes itself to also have a responsibility to preserve (in form if not in substance) a liberty that is outward looking and universal: the notion of America as a refuge and a beacon of good governance.

Part III focuses on the courts and their role in constructing and maintaining a narrative of ordered liberty in immigration that effaces the significant compromises involved in their management of the birthright citizenship.


provision of the Constitution, as well as other antidiscrimination policies that are products of the Fourteenth Amendment.

Finally, I situate the rise of the "illegal" migrant (in numbers and as a cause of democratic anxiety) in the broader decline of American exceptionalism, i.e., the identification of the United States as the repository and emblem of the world's (or at least, the West's) hope for enlightened governance. We witness this impoverishment as we consider immigration law's interactions with the multiple arms of government; in each instance we see government operate as if empty gestures of liberty constitute the real thing. This hollowing-out of America's aspiration renders the "illegal" migrant both less dissonant with our idealized conception of the rule of law, and more poignant; she becomes the latest evidence that the promise of liberty is not a teleology.

I. DEMOCRACY'S EXECUTOR: ORDERED LIBERTY MEETS THE ADMINISTRATIVE STATE

Russell Pearce, a state representative from Mesa, Arizona, was the driving force behind the recent passage of perhaps the most Draconian legislation in America aimed at punishing "illegal" immigrants, those who harbor them, and those who employ them.11 A former police officer, Representative Pearce is a "law and order" Republican in the classic mold: "I believe in the rule of law, always have. I've always believed in the rule of law. We're a nation of laws."12 In his view, "illegal" immigrants are an affront to the law; they are criminals,13 and "[i]nvaders... They're invaders on the [sic] American sovereignty and it can't be tolerated."14 His zeal for law has its origins in his religious belief: Representative Pearce is a Mormon and adheres strictly to the church's command to obey and respect the law,15 And though by his own reckoning he has accomplished much in the name of order, he understands that the legal system itself works against the order he wishes to enact by granting citizenship to any child born in the United States. Pearce wants to change this jus soli rule by challenging the interpretation of the Fourteenth Amendment which sustains it.16

We could read Pearce's initiative (and those of many other localities)17 as

12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
an assertion of order precipitated by the absence of effective federal policy in a
legal area over which the federal government claims to have plenary authority.
Such an analysis would conclude that Pearce’s actions follow naturally from
ineffectual federal enforcement efforts: if the federal government cannot or will
not ensure compliance with the law, localities will. But that would
misinterpret Pearce’s crusade: his opportunity was not the consequence of a
federal government in absentia, but the specific and intended result of federal
enforcement action in San Diego, California, where the DHS had spent
hundreds of millions of dollars building a fence and hiring officers to harden a
segment of the border which previously sustained a very high rate of “illegal”
migration. 18 The “success” of the project in San Diego, 19 then, precipitated
Arizona’s current immigration “crisis.” The pool of workers priced out of being
smuggled through San Diego, 20 or too afraid of getting caught crossing there,
migrated to the more treacherous crossing at the Arizona border. 21 Rep.
Pearce’s ascendancy in Arizona, then, is better understood as a sign of federal
administrative action without comprehensive, coordinated and expert—i.e.,
platonically administrative—thought. This strange approach to policymaking is
the current manifestation of the systemic and deeply-rooted American
degradation of administrative authority and power; that is, of the desirability of
rule through the policy sciences or, more basically, through the idea of
expertise.
America never wanted an administrative state, and so we have always
structured, funded, and run it as a grudging necessity 22 under nearly constant
assault by the other branches of government, ever since its brief ascendancy
during the New Deal. We can trace the genealogy of this uniquely obsequious

18. See Douglas S. Massey et al., Beyond Smoke and Mirrors: Mexican
Immigration in an Era of Economic Integration 106 (2002).
19. See supra note 6. The CRS Report on the effectiveness of this project does not
provide a definitive verdict on the San Diego fence, because the metric used to measure
illegal crossings, apprehension rates, are poor. Even so, apprehensions dropped precipitously
in San Diego and rose 351 percent along the Arizona-Sonora border, where the San Diego
fence diverted migrant traffic. Wayne A. Cornelius, Death at the Border: Efficacy and
Unintended Consequences of U.S. Immigration Control Policy, 27 POPULATION & DEV. REV.
661 (2001). Despite these decidedly ambiguous effects, William Veal, Chief Patrol Agent
for the San Diego Border Patrol Sector, pronounced the San Diego fence a success.
Enforcement Initiatives Against Drug Smuggling in Southern California, Hearing Before the
Committee on Government Reform, 107th Cong. 11 (2001) (statement of William T. Veal,
Chief Patrol Agent, San Diego Border Patrol).
20. The CRS Report also notes that smuggling continues to occur on the San Diego
border, but that its location has moved below ground. “Numerous” tunnels have been dug
since the fence went up. One tunnel was “nearly a kilometer long and was built from
reinforced concrete—evidence of a rather sophisticated smuggling operation.” CRS REPORT
supra note 6, at 41.
21. Id.
22. See Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case
state all the way back to the colonial period when order was simple to define and maintain without law\textsuperscript{23} and where liberty from the state’s coercive touch was correspondingly expansive. Ordered liberty, then, has evolved to contain the administrative state, but those foundational legal values have shaped it into a peculiar form. This section will lay out a basic genealogy of ordered liberty and examine how those origins determine the administration of our borders in the twenty-first century.

A. Ordered Liberty: Origins

In \textit{Palko v. Connecticut}, Justice Cardozo used “ordered liberty” to oracular effect.\textsuperscript{24} The concept’s opacity was its strength; its know-it-when-you-see-it obviousness effaced the judge’s role in constructing, rather than divining, what specific rights were or were not essential parts of our constitutional order. This rhetorical inscrutability was particularly useful given the grimness of the opinion’s substantive effect: by leaving the Constitution’s double jeopardy protections out of the “very essence of a scheme of ordered liberty”\textsuperscript{25} Justice Cardozo and his brethren sent Mr. Palko to his death. I mention this outcome because I intend for this dark genesis to haunt ordered liberty even as I use Cardozo’s coinage to opposite effect; by illuminating its origins and contours this section helps us comprehend how ordered liberty helps produce the schizophrenia of our immigration law.

To begin in earnest, then, ordered liberty is about “the rule of law,” and like Arizona’s Representative Pearce, Americans believe unequivocally in the rule of law. Ours is a nation with a legal culture\textsuperscript{26} that is distinct in the degree to which law pervades our broader consciousness and identity.\textsuperscript{27} But this social

\textsuperscript{23} See ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). This seminal book includes a study of how order is maintained without recourse to state regulation in contemporary Shasta County, California. It can also be profitably viewed as an analysis of an area of the country that is a kind of time-capsule of the frontier mentality that originated on the east coast during the colonial period and migrated as the boundary of “civilization” moved westward over the centuries.

\textsuperscript{24} 302 U.S. 319, 325 (1937).

\textsuperscript{25} Id.

\textsuperscript{26} Friedman defines legal culture as “attitudes, values, and opinions held in society, with regard to law, the legal system, and its various parts.” LAWRENCE M. FRIEDMAN, LAW AND SOCIETY: AN INTRODUCTION 76 (1977). Legal culture is fundamental because “it is the legal culture which determines when, why and where people use law, legal institutions, or legal process.” Id. To that rationale I would add, that legal culture, particularly in a democracy, also defines the terms and conditions for the enactment of formal law and its subsequent administration.

\textsuperscript{27} See HELLE PORSDAM, LEGALLY SPEAKING: CONTEMPORARY AMERICAN CULTURE AND THE LAW 2 (1999) (arguing that the law constitutes Americans by shaping “not only people’s everyday lives, but also their consciousness or mentality, their way of thinking about and formulating, social, political moral and cultural issues”). See also DAVID GARLAND, CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 1
conception of law is not the law of due process, habeas corpus, or reasonable doubt; this is law simply as the means for the production of order and authorizing the force of the state. The populace perceives the "rule of law" in the maintenance of order.28

This coarse epistemology of order and the conflation of law and identity trace their origins to the colonial period. Law runs deep through American culture. The specter of John Winthrop's grand colonial experiment on the shores of the Massachusetts Bay Colony, his "city on a hill," is with us today, and it was always as much a creature of law as of religion;29 its combination of lawfulness and godliness laid the groundwork for the Founders—whom we still worship30—to enact a "higher law" in the earthly realm, elevating the status of formal law in American culture.31 Reflecting this high station, "law-abidingness," more than piety, became a central marker of virtue during this early period.32 A trace of this status marker remains in the way Americans continue to reflexively identify themselves as law-abiding citizens.

Indeed, the American relationship to law and the order it provides is so intimate and fervent that, despite the formal secularization of American law, scholars frequently rely on religious metaphors to describe it: American legal culture is a "faith community" or a "covenanting community" centered around the Constitution,33 the rule of law is America's "civil religion," and so on.34 The use of these metaphors expresses the formal identity between our constitutional legal structure and Judeo-Christian theology. Though scholarly characterizations of the law may emphasize this congruence, the law itself struggles to repress its theological origins. This effort reveals itself in conflicts about the placement of religious symbols, like the Old Testament's Ten Commandments, in courts of law.35 While such disputes are structured as arguments about the scope and meaning of the Establishment Clause,36 the danger of placing the Ten Commandments in a courtroom is not that such an

(2001) (describing in sociological detail the contours of our current law and order culture).

28. Id. at 13.
30. A search of published law review articles in the last year reveals that "founders" appears thousands upon thousands of times in the scholarly literature. In itself, this kind of scholarly focus may be considered worship. I need not elaborate the scores of books that are continually published which seek to clarify reframe or contextualize the founders' beliefs and understanding of the Constitution. These are all, in a sense, devotional acts of worship.
31. VETTERLI BRYNER, supra note 29, at 104-105.
32. Id.
35. See, e.g., McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).
36. Id.
act will lead to the formal establishment of a state religion, but rather that it makes explicit what is always implicit in American adjudication: our laws and legal culture are descendants of Judeo-Christian theology; their trespass therefore always contains the taint of sacrilege.

The law’s very need to repress these origins betrays its Christian perspective. Just as monotheism allows for only one law-giver, a single deity to order the lives of men, so the law demands a similar monopoly of knowledge. For a legal system that justifies its power based in part on the age and origin of its written demands, the Ten Commandments is an immediate and destabilizing threat to its authority. After all, these “commandments” are also laws, ones well known to the populace, and with an ancient and storied past.

This basic conflation of religious and legal orders in the colonial period made crafting a working legal system challenging: “The identification of disorder with sin . . . made it difficult for legislators and ministers to distinguish carefully between major and minor infractions.”37 “Law” requires fine distinctions, order (in the American theo-legal view) means binaries—saint/sinner, heaven/hell, lawful/criminal, right/wrong, us/them, insider/outsider, I/other, citizen/alien. By now, the law has adopted most of the requisite gradations, but our Manichean disposition remains,38 continuing to color how We the People39 evaluate the efficacy of law’s rule. This religious residue has left law-breaking as an offense not simply of law qua law, but of law that stands in for biblical pronouncements. In the social or democratic view, then, any kind of legal infraction becomes indistinguishable from that which merits—even demands—the imposition of criminal stigma.

We see the continued salience of this conflation of orders when Rep. Pearce locates part of his zeal for law in his Mormon religion.40 We see its implications for immigration law in the social conversion of an administrative infraction—overstaying a visa, crossing a border, working—into a de facto criminal act worthy of moral and legal opprobrium.41 Indeed, simply naming immigrants “illegal” appears to demand a swift and punitive state response. The depth of this intolerance for legal deviance partially illuminates the hysteria surrounding the “illegal” migrant, and the way in which her expulsion has been fashioned into a crusade, or perhaps, more aptly, a reconquista.42

39. See Bruce A. Ackerman, We the People (2000). Ackerman uses the capitalized phrase “We the People” to signify the collective will of the American polity; I use the phrase similarly.
41. See Whitman, supra note 38, at 201.
42. The criminal association that emerges with the state’s decision to regulate migration in this particular way bleeds into other perceptions even in the face of social
Beyond this yearning for order and reverence for law, Americans also have an abiding expectation that they will enjoy "liberty." This liberty is not libertine (or at least did not take on that meaning until the social upheavals of the 1960's). At its core this liberty began as the product of our revolutionary rupture, whose justification rested on the construction of self-determination as a source of legal authority. But the implications of American self-determination were not limited to theories of statecraft: because the revolution was rooted in the legitimacy of democratic self-determination, the break from England also shifted the site of legal authority and power—sovereignty—from the state to the individual. This popular sovereignty was radical, and the theory's wide distribution of sovereignty to each citizen still informs the identity-construction of every American. The "self" in America was transfigured; beginning as a subject of a king and emerging as a king himself, a kind of demi-sovereign by virtue of citizenship.

The intractability of this reorientation in the United States explains to some degree why the decidedly elitist, republican constitutional structure of the founders has moved inexorably towards increasing levels of direct democracy. This vector tracks not only over time, but also over geographic distance, as the American empire moved away from its roots, from east to west. Compared to the former English colonies, the America from the Rockies to the Pacific is quite radically democratic. Indeed, the striking influence of referenda in these newer states may best represent the death of the republican ideal of the founding.

We witness the tangible consequences of this hyper-democratic approach in the contrast between the political implications of court-promulgated gay marriage in Winthrop's Massachusetts and in that thoroughly modern creature, California. In Massachusetts, the "anti-democratic" ruling granting gay couples the ability to wed met initially with fierce resistance from the populace. But the Commonwealth's constitutional amendment process was structured in a complex and time-consuming manner that had the effect of dissipating electoral passions. California, by stark contrast, allows those passions immediate,  

science evidence that immigrant cultures do not import criminality. See Eyal Press, Do Immigrants Make Us Safer?, N.Y. TIMES MAG., Dec. 3, 2006, at 20. Press reports that despite public perception that large-scale immigration increases crime, sociological studies show that immigrants commit substantially less crime than Americans of the same social or economic class. Troublingly, second generation immigrants are more likely to commit crimes than their parents, and third generation more still. The findings of generational drift from the behavioral patterns of their parents suggests that discrimination and a loss of optimism lead subsequent generations to engage in assimilation to the behavioral patterns of other victimized inner-city youths. The conventional wisdom, then, is precisely backwards, it is not immigrants who bring criminal culture with them, but something endemic in American culture to which immigrants assimilate once they are here.

44. The Massachusetts Constitution requires an amendment to receive various levels of legislative support at two consecutive annual constitutional conventions (joint sessions of
powerful, and direct expression. The passage of Proposition 8, which overturned the Court’s gay marriage decision by amending the California Constitution highlights how a populist constitutional structure threatens minority interests. 45

While the referendum is the political expression of the American West’s notion of liberty, the roots of that value may lie in the landscape itself. Seemingly untrammeled, 46 the virgin, big-sky wilderness of the West was a place where Americans could reiterate the frontier mentality of the founding settlers, but under a government and constitutional order where they were never subjects, but instead demi-sovereigns. The federal government made this landscape of liberty real by pursuing land use polices such as homesteading, 47 which served to give Americans who wanted it the physical and legal manifestation of liberty’s promise in acres of land, a dominion of one’s own. But that liberty came, of course, with a cost that was suppressed in the narrative of manifest destiny. The terra virginis which constituted individual liberty for American citizens was taken from Native Americans and later Spanish colonial landholders either by force, or through treaties that were either cleverly drafted or blatantly ignored. 48

Demi-sovereignty also implies a jurisdiction over one’s own person which the state cannot abrogate, a personal, individual border which government cannot cross. We see this metaphysical boundary being drawn in the Supreme

Massachusetts’ two legislative bodies, the General Court and the Senate), after the amendment passes those hurdles, the amendment is sent to the ballot for voter approval. The number of legislative votes required for the amendment to reach the final stage of voter approval varies based on the origin of the amendment; if it originates in the legislature, the amendment requires a majority of legislative votes over the two sessions. If brought by petition (i.e., by citizens) it only requires 25% of the legislature to approve it over two sessions. See Raphael Lewis, Reilly OK’s 2008 Initiative on Ban of Gay Marriage, THE BOSTON GLOBE, Sep. 8, 2005, at A1.

45. See In re Marriage Cases, 43 Cal. 4th 757 (Cal. 2008) (overturning two statutes that limited marriages in California to couples of opposite sex). The decision sparked Proposition 8, an initiative that passed in the November 2008 election. The proposition overruled the Court’s decision by amending the California State Constitution. For civil society groups pro and contra “Prop 8,” see www.protectmarriage.com and http://www.noonprop8.com/.

46. Of course, the representation of America as an untrammeled and virgin land represses the empirical reality that the North American continent was populated and altered by Native Americans for millennia prior to Western conquest. The construction of these people as nomadic or uncivilized was also a crucial part of this narrative project.


Court’s jurisprudence on the right to privacy.\(^{49}\) That these new barriers to governmental action have been located in the Bill of Rights underscores the continuity between the origins of liberty and its contemporary construction. Thus, demi-sovereignty at its inception constructed a degree of personal inviolability that the \textit{Griswold} line\(^{50}\) of Supreme Court jurisprudence expands and affirms. As I will discuss later, these individual boundaries complicate and undermine the attempt to tighten America’s international borders.

In this way, the notion of popular sovereignty that began as an aspirational symbol of American liberty (after all, much of the population at the time was either enslaved or disenfranchised) has, over time, been reified, radicalized and institutionalized through legal processes. And though the so-called “me” generation may be the latest incarnation of this liberty of demi-sovereignty, De Tocqueville detected its cultural implications much earlier:

The people reign in the American political world as the Deity does in the universe. They are the cause and the aim of all things; everything comes from them, and everything is absorbed in them.\(^{51}\)

Nonetheless, American liberty is more than personal sovereignty. The official iconography of liberty in the United States presents the concept in a different light. This liberty is the endogenized \textit{liberté} of the enlightenment; it is universalist, even cosmopolitan, in its outlook, expressing the notion that America represents the territorial realization of these philosophical movements. We see this liberty in the eponymous, French-bequeathed statue whose given name is “Liberty Enlightening the World.” The mythology of the American flag equates that symbol with liberty in manifold ways, and the ritual of the Pledge of Allegiance constantly reinscribes this meaning (“one nation, under God, indivisible, with liberty and justice for all”). But such symbols, particularly the flag, have also come to contain meanings that are quite ambiguous and at odds with the dominant mythology. Our past and current imperial expansions have been premised on bringing the “blessings” of liberty to other shores, but the reality of those encounters has undermined the intended symbolism of the flag. There is more to unpack here, but for now we will bracket this cosmopolitan liberty and explore it in more depth in parts II and III.

With this nuanced understanding of liberty, and an appreciation of how socio-legal order was maintained in the absence of a strong administrative

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\(^{49}\) Beginning with \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), the Supreme Court constructed a right to privacy (particularly in the area of reproductive regulation) that rendered the body of the citizen a border which the government could trespass (i.e., regulate) only with some difficulty or not at all. The \textit{Griswold} line of cases, in this author’s view, includes \textit{Eisenstadt v. Baird}, 405 U.S. 478 (1972), \textit{Roe v. Wade}, 410 U.S. 113 (1973), and most recently, \textit{Lawrence v. Texas}, 539 U.S. 558 (2003).

\(^{50}\) Griswold v. Connecticut, 381 U.S. 479 (1965).

\(^{51}\) \textit{ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA: VOLUME ONE} 72-75 (Vintage Books 1945) (1835).
presence, we can begin to comprehend the problem presented by the attempt to regulate a nation of demi-sovereigns, each of whom has inviolable rights attached to his or her person and, to a lesser extent, his or her personal property. Even without an institutional account of the battle between the courts and the administrative state, it makes a good deal of cultural sense that the rise of the American bureaucracy was a long-deferred addition to law’s empire. Moreover, these cultural beliefs explain the persistence of the meme that resists administrative encroachment, an idea which has animated much of the last thirty years of political discourse, providing the raw materials for the Republican Party’s ascendancy.

These attitudes, however, have done little in the end to halt the growth of the administrative state which, devoid of its own sovereignty and authority, might be thought of as a mindless behemoth, all “sound and fury, signifying nothing,” (or at least not very much) apart from that inscrutable force, the democratic will.

B. America’s Peculiar Administrative State

The United States is no longer de Tocqueville’s idyll. With the scope and complexity of contemporary problems, the order that Americans demand cannot be produced without an administrative state. And though we have erected the requisite bureaucracy, our commitment to liberty has shaped its architecture in important ways. That liberty, located in the limited authority of government and ensured through the maintenance of individual rights and the power of popular sovereignty, stands opposed to the expansion of law’s dominion through the growth of the administrative state. This conflict was one which F.D.R. appreciated enough to sell the New Deal (and the administrative agencies and regulations it would require) to citizens, Congress, and the courts within the existing rights framework. According to Roosevelt’s logic, the New Deal did not represent the expansion of government authority, but the enablement of a new set of positive rights for every American. This reframing allowed Roosevelt’s innovative policies to move forward without altering the formal relationship between government and citizen.

While this deft salesmanship ushered in a slew of new agencies during the Great Depression, it also affirmed the existing ideology that stood opposed to these agencies’ very existence. The New Deal, then, was not a shift that heralded the adoption of the kind of autonomous, Weberian, juris-generative


administrative state that exists in France and Germany.\textsuperscript{54} Instead, our bureaucracy remains beholden to democratic will in innumerable ways.

In the main, democratic control of the administrative\textsuperscript{55} makes itself felt through requirements that administrative rule-making be subject to public scrutiny, presidential control of the administrative, and frequently, stringent congressional oversight. Moreover, the renewal of the bureaucracy with each presidential administration has the dual effect of ensuring democratic control and causing a significant degree of organizational disruption, undermining the administrative’s potential for creating institutional autonomy. The dominant socio-legal narrative of the unaccountable bureaucrat reflects the cultural anxieties we have already discussed, but in doing so it also works to obscure the democratic bona fides of many administrators. Our democratically-elected president appoints the management of every agency,\textsuperscript{56} and these represent more than cabinet positions and agency heads: literally thousands of bureaucratic employees are political appointees.\textsuperscript{57} This institutionalized popular control, coupled with the cultural work of the blundering bureaucrat, prevents the administrative state from creating its own sovereign will, ensuring that sovereignty remains diffusely lodged in every citizen. Despite arguments to the contrary, then, a devolution of sovereignty to the administrative did not occur with the “New Deal’s realignment of legal icons.”\textsuperscript{58}

And not for lack of effort. James Landis, prominent New Dealer and seminal American scholar of administrative law, praised the virtues of an autonomous administrative state, and even perceived a significant amount of bureaucratic independence in the agencies of the early New Deal. In his lectures, Landis mythologized the independent public-spirited bureaucrat by claiming that:

one of the ablest administrators that I know . . . never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding he sought his own solutions.\textsuperscript{59}

Such a statement was designed to tweak the anxieties of Congress and the

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\textsuperscript{54} See Whitman, supra note 38, at 199-201.

\textsuperscript{55} When I use the term “the administrative,” I mean to make a distinction between the administrative branch as the United States conceives of it, and the theoretical conception of the administrative as a more autonomous governmental entity that is a kind of knowledge trust for efficient execution of governmental objectives. James Landis uses the term administrative in this way in his seminal collection of lectures in administrative law. See James M. Landis, The Administrative Process (1938).


\textsuperscript{57} Id. at app. 1.

\textsuperscript{58} Mashaw, supra note 22, at 314.

\textsuperscript{59} Landis, supra note 53, at 54.
courts in the 1930's, but the larger project of Landis' lectures, collected in 1938 into *The Administrative Process*, was to assuage entrenched and empowered branches of government that they had nothing to fear from such impressionistic readings of legislative mandates; that administrative autonomy and our constitutional order were compatible. Or, still more radically, that a larger degree of administrative autonomy might better effectuate the democratic will that put an agency's mission into motion.

The latter position took concrete form in Landis' proposal to adopt a doctrine from England (dating to Henry VIII and quite obviously chosen for its facial link to our own legal traditions) that would have allowed an agency to modify provisions of "legislation insofar as it may appear to be necessary to bring the scheme of regulation into effective operation."\(^6\) Consistent with New Deal disdain for a judiciary which blocked reform after reform, Landis indicated that "under existing decisions," his proposal would appear to be "judicially condemned." Implicit here is that such condemnation is normatively wrong, yet another example of obstinate courts thwarting the democratic will that catapulted Roosevelt into office. Landis appears not to appreciate how his prescription would radically alter the idea of sovereignty that severed us from England in the eighteenth century. Because the reform Landis proposed—allowing agencies to rewrite legislation—would have formally reversed the traditional flow of American legal authority (i.e., from the people to its representatives and functionaries) it "could not occur because it is neither compatible with the ideology of democracy nor the ideology of adjudicatory justice."\(^6\) It is, in our terms, incompatible with liberty, the value Roosevelt's positive rights rhetoric was attempting to preserve. To be sure, this impossibility does nothing to negate the validity of Landis' contention that such a reversal actually better serves the democratic interest, but it does show how Landis misapprehended the New Deal as moment which altered the foundation of American democracy.

And so, with this kind of advocacy, Landis' lectures betray a scholar's faith in the power of reason over culture that history proved to be misplaced. Landis overestimated, as most revolutionaries do, the durability and significance of his historical moment. The democratic will manifest in F.D.R.'s ascent came to represent a desire for a state that did more for its citizens, but it did not intend or, in the end, effectuate a shift in the status of the people's authority within the political system. Returning to Roosevelt's positive rights (freedom from fear, freedom from want, etc.), we see how these constructions simply expand the scope of democratic accountability to include citizens' personal and economic needs. That the government has more responsibility here, does not imply that it has more independent authority: *plus ça change...*\(^6\) Even in this desperate

60. *Id.* at 52.
62. Short for the common French expression, *plus ça change, plus c'est la meme*
period in American history where, more than at any other time, basic assumptions about the role of government were challenged in the public discourse (where socialists and anarchists enjoyed a significant degree of cultural currency) a devolution in power to the administrative did not occur. If anything, the New Deal only strengthened the power of the ideology of democratic accountability, i.e. of liberty.

We also witness the durability of liberty in the rise of a number of intellectual movements which sought to undercut Keynesian economics, justify the limited autonomy of the administrative state, and even advocate for that state’s curtailment in the decades after the New Deal. This body of knowledge strove to show how industries captured entire agencies, provided fodder for the perception that bureaucracies are generally incompetent, or questioned the public-spiritedness of the civil service. Synthesized into theories (public choice, etc.), this knowledge rendered Landis’s faith in munificent, statute-ignoring, public-spirited bureaucrats a particularly destructive species of naïveté. And the political effect of this new knowledge—intended or not—was profoundly conservative. If Landis was wrong, the only alternative to an autonomous administrative state was more democratic supervision or control, and thus this sustained scholarly critique has provided the intellectual heft to return political power to where it began, or really, never left.

With this rooted and reinscribed monopoly on sovereign authority, democratic will checks the independence of the administrative state. Where entrenched and independent European bureaucracies act as bulwarks against swings in the democratic mood, or even work to form or direct the opinions of its citizens, the American bureaucracy is under constant assault by new and shifting legislative mandates, and has little independent say in political discourse. Indeed, the notion that the American bureaucracy might work to persuade or shape a broader political debate is laughable, yet this is precisely what occurs across the pond. The strange result is that the central idea and purpose of bureaucracy—to provide the state with expertise and apolitical judgment in the execution of its legal order and political goals—is consistently

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65. See generally WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (articulating the theory that agencies fundamentally seek to maximize their own budgets, not solve problems in the most efficient way).
66. STIGLER, supra note 64.
67. See WHITMAN, supra note 37, at 199-201.
68. Id.
undermined because bureaucracy is too permeated by politics to serve this purpose in a meaningful way. Bureaucracy, then, becomes simply another means for executing the power of a relatively unfiltered popular will—of realizing the people's vision of order in a modern age.

I should not overstate the case, however. The effects of the administrative's American emasculation are less pronounced for the most specialized and technical agencies, where Congress and the citizenry more clearly understand the need for expertise (i.e. the financial sector, the energy department, etc.). But if the arguments behind the flurry of local ordinances purporting to regulate immigration, as well as long-established local militias guarding the border, are to be believed, immigration is not an area in which the citizenry comprehends the need for delegation or specialized knowledge. In the view of the demos, the problem of "illegal" immigration can be solved and order maintained through more and harsher enforcement. Unsurprisingly, given our extended discussion, the people's perspective (not so far off from that of Representative Pearce's), is the one that has carried the day.

Yet liberty complicates immigration matters still further. From a strictly administrative perspective (that is, from the point of view that values an efficient, comprehensive approach to a generalized policy goal), the most effective way to curtail the employment of unauthorized migrants is to implement national ID cards linked to a comprehensive database accessible to every employer. But this solution is ideologically suspect and requires the distribution of regulatory burdens across the entire population, meaning that the coercive touch of the state will run up against liberty, here, the individualized demi-sovereignty that chafes at any breach of a citizen's personal dominion, any trespass of that meta-physical border. And, just as with Landis's proposed importation of English administrative tradition, the existence of that demi-sovereignty may make the ideal reform impossible (it has clearly prevented reform from occurring in the past). The result of a previous effort to challenge these individual and inviolable borders is instructive. The Auto Safety Administration has over the years engaged in a strikingly quixotic effort to fulfill its congressional mandate to "push" safety technology in passenger cars. The agency's project met immediate, constant, and intense resistance of the

69. Fair Immigration Reform Movement, supra note 17.
70. By "most effective" solution, I do not mean to imply that this is the best normative fix to unauthorized migration; as I discuss in Part II, such solutions have problematic effects on illegal migrants. I only mean to emphasize that from a strictly administrative perspective, if one wishes to maintain an in-group/out-group dichotomy in employment, national ID cards are the ideal method. Martin's strong support for electronic verification of identification reflects these administrative values. See David Martin, Eight Myths About Immigration Enforcement, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525 (2007).
71. See CHERYL SHANKS, IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY 222 (2001) (arguing that passing legislation mandating national identity cards in 1986 "was impossible because of privacy concerns").
kind that I have described as the structural effects of liberty on the administrative (mainly problems in the courts). Those structural barriers thwarted nearly every "push" technology which the agency attempted to force. But in one of the very few cases where the agency managed to overcome the institutional obstacles and push interlock technology (which would not allow the driver of a car to start the engine until seatbelts were fastened), We the People, individual sovereigns—not subjects—let out a deafening roar:

The interlock . . . survived judicial review. But it did not survive long in the marketplace. Attached first in the fall of 1973 to model year 1974 vehicles, the interlock generated a quantity of hate mail to the Ninety-Third Congress reminiscent of the outcry following Richard Nixon's removal of Archibald Cox as Special Prosecutor during the Watergate investigation. By August, 1974, Congress repealed the interlock requirement, forbade its readoption, and attached a legislative veto to any reassurance of FMVSS 208. In the process, congressmen competed vigorously with each other to express the appropriate level of moral outrage at NHTSA's invasion of motorists' personal liberty. The agency was vilified as "big brother" and characterized as "un-American" its interlock requirement was ridiculed as "asinine," a "nightmare."

This debacle perfectly illustrates the way in which liberty-derived popular sovereignty permeates and structures the American administrative state. It also shows how demi-sovereignty translates into a touchiness about administrative coercion, even when the state is clearly acting in the people's best interest (for the most part, we do not wish to be saved from ourselves). In this way, cultural and ideological obstacles to administration create structural obstacles (here, court supervision of agency policymaking). Even when structural obstacles are cleared, cultural obstacles may still nullify administrative policies. That the interlock device would have saved many lives by ensuring a significant increase in seatbelt usage, is beside the point. As absurd as it seems outside our cultural context, forcing people to wear seatbelts in the way the interlock device did violates the sacred sovereignty that the American legislature must respect or pay the price at the polls.

Within the context of automobile safety, Mashaw takes the normative position that a higher level of roadside fatalities is simply the cost of our constitutional order: "any loss of effectiveness in substantive policy is thus but a small cost to pay in the crucial project of maintaining our constitutional order.

72. See generally Mashaw, supra note 22.
73. Id. at 298-299 (emphasis added).
74. This phenomenon is not entirely unique to the United States. In Britain, similar regulations are decried as evidence of the "nanny state." See, e.g., Andrew Billen, Can You Regulate Psychotherapy?, THE TIMES, LONDON, July 15, 2008, at 4 (using the term "nanny state" pejoratively to decry regulators attempts to standardize certain interactions between psychotherapists and their patients).
structure.”  His position is quite defensible, because Americans themselves are the ones who are injured or killed in the service of maintaining our theory of sovereignty. The cost distribution in immigration regulation, however, is quite different. As in the founding of the colonies and westward expansion, the cost of the construction and maintenance of our liberty is borne by those marked as outside the polity, or (as we will discuss in part III), in the case of child citizens born to foreign parents, those who are formally included, but weak and vulnerable. In most other nations that cost would not be worth any analytical effort, but because America's liberty values possess the dual quality of the domestic ideas we have already discussed in great detail, as well as the outward-looking, cosmopolitan project to be treated with care later, the United States must confront or efface this cost in some way in order to maintain its self-representation as liberty enlightening the world.

C. Order v. Liberty: Policing the Border

While the administrative state may be structured in a way that allows space for liberty, its over-arching purpose remains to create and sustain order. The spread of Latino migrants from traditional immigration strongholds (many of which are also sanctuary cities) to towns all across the United States has lead to popular protest as citizens perceive the presence of immigrants, who speak a foreign language and look different from themselves, as signs of disorder: symptoms of a government that does not have immigration under control. At the same time, the polity has read the terrorist attacks of September 11, 2001, as having exposed the vulnerabilities of our openness towards the world. And the government has translated these twin anxieties into numerous policies, one of which is to tighten the United States' borders with Mexico and Canada.

Those borders have very different histories. The Canadian border has remained relatively open through the twentieth century, while the southern

75. Mashaw, supra note 21 at 305.
76. The self-designation of some cities as sanctuaries for unauthorized migrants is the other side of local communities taking action on immigration policies. The city of New Haven, Connecticut has gone as far as to issue city identity cards which, the city hopes, will allow unauthorized immigrants to open bank accounts. See City ID Plan Approved, NEW HAVEN INDEPENDENT, Jun. 5, 2007, available at http://newhavenindependent.org/archives/2007/06/city_id_plan_ap.php. Some immigration experts argue, however, that sanctuary cities are mostly gestural. See, e.g., Deborah Horan, Probes of Legal Status a No-No? Immigration Would Become Non-Issue Under Evanston Law, CHICAGO TRIBUNE, Jan. 11, 2008 (quoting David Abraham arguing that sanctuary laws are symbolic and mostly affirm the status quo).
77. See generally Mary De Ming Fan, The Immigration-Terrorism Illusory Correlation and Heuristic Mistake, 10 HARV. LATINO L. REV. 33 (2007) (chronicling the way in which congressional leaders have inaccurately linked terrorism with immigration).
border with Mexico began to harden with the rise of immigration restrictionism and the negative racialization of Mexican immigrants after the war between Mexico and the United States. 79 These divergent social constructions of the border have, in the contemporary setting, lead to distinct strategies for closure. On the Canadian border, where citizens on either side had moved back and forth with relative ease for decades (in many cases without documentation) the DHS has begun requiring proof of identity and citizenship status, with the goal of eventually requiring all crossers to show passports to enter the U.S. 80

The Mexican border, on the other hand, has been slated for a much more literal closure. The experiment in border fencing that began in San Diego as a way to reduce the rate of unauthorized migration (to mixed results), 81 is now being applied at other junctures in Texas and Arizona. Justification for the fencing has expanded as well: previously thought of as a means of restricting the movement of unauthorized immigrants (and certain illicit merchandise) current fencing projects are taking advantage of a more recent source of social anxiety and being marketed as a barrier for terrorists as well as potential undocumented laborers, two categories which were formerly distinct. 82

Despite different closure strategies, both border projects have met with notable resistance from Americans who live in the affected zones. And though the democratic will that set these projects into motion has for the most part prevailed, we can see the conflicts between order and liberty that produce the stigmatized "illegal" migrant in the structure and rhetoric of these battles between private citizens and the administrative state.

D. (B)order Fence: The Making of a Barrier

The notion of building fencing on the border between Mexico and the United States gained traction in the last wave of comprehensive immigration reform passed by Congress in 1996. As part of the Illegal Immigration Reform and Immigrant Responsibility Act’s (IIRIRA) overhaul of immigration law, Congress mandated that the INS construct additional fencing near San Diego on the “14 miles of the international land border of the United States, starting at the Pacific Ocean,” 83 a popular site of unauthorized labor migration, and where of its own accord, the INS erected a fence in 1990. 84 To wit, the act formalized the INS’s authority to construct barriers on other segments of the border if it so

79. Id.
80. See Vermont Town’s Way of Life Fades as Border Tightens (NPR radio broadcast Jan. 15, 2008).
81. See CRS REPORT, supra note 6 at 1-2, 32-40.
82. Fan, supra note 77.
84. CRS REPORT, supra note 6, at 3.
chose. Additionally, Congress allowed the INS discretion to waive the Endangered Species Act and the National Environmental Policy Act in the event that such waivers were necessary to complete the requisite fencing. Despite this authority, the INS chose to comply with these environmental laws in the San Diego corridor.\footnote{Id. at 6.}

Nearly a decade later, as concerns about undocumented immigration began to grow, and as further barrier construction in San Diego stalled in the face of California’s stringent environmental regulations, the Real ID Act\footnote{See Real ID Act of 2005, 8 U.S.C. § 1778 (2006).} expanded the now DHS’s waiver provision by giving the head of the DHS the authority to bypass “all legal requirements” deemed necessary to ensure the construction of the “security” barriers.\footnote{Id.}

Despite this broad delegation of authority to construct border barriers, the DHS chose not to build more fencing. The border fence only migrated outside of San Diego with the passage of the Secure Fence Act in 2006, which explicitly directed the DHS to build fences on five precisely-identified stretches of the southern border (seventy miles of wall on the Arizona-Mexico border).\footnote{See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified as amended in scattered sections of 8 U.S.C.) § 3.}

A year later, Congress changed course by passing legislation withdrawing the mandate which specified where the fencing should be erected, instead instructing the DHS to build 700 miles of fencing somewhere on the southern border.\footnote{See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, Div E, § 564.} Congress also promulgated a firm timeline for construction, demanding that 370 miles be built by the close of 2008.\footnote{Id.} Additionally, the same law that set this ambitious deadline for the construction of more than half of the mandated fencing also contained a clause instructing the DHS to consider alternatives to physical fencing and requiring it to “consult” with local governments, Indian tribes, and owners of private property, among others living near the fencing.

In this meandering and even mutually contradictory set of congressional commands, we can appreciate with some precision how order and liberty have both structured the institutional interaction between Congress and the administrative and then, too, how those values have shaped contemporary policymaking. Landis (our touchstone for the platonic, autonomous administrative state) would have been mostly pleased by Congress’ initial 1996
decision to give the INS the authority to build border barriers without mandating that it do so. Under this regime, border fencing represented one tool that the INS might utilize—or not—to achieve its over-arching purpose of managing immigration; had the INS determined that fencing were necessary, it would have lobbied the proper congressional authorities for the funds to build it.\textsuperscript{91}

Of course, Landis would have been dismayed by Congress' sudden about face. Moving abruptly from a model of total policymaking deference to one that denies entirely the power and importance of administrative expertise violates his New Deal concept that the administrative can make America a better, more just, and more hospitable place for all of its denizens. And had Congress stopped legislating on the issue in 2006 (when it passed the game-changing Secure Fence Act), this episode might have served as the perfect emblem of how America has wholesale rejected the Weberian model in favor of policymaking that is entirely reactive to the tides of popular will and the limited knowledge of congressmen and senators. But that is not what happened, and the muddled blend of order and liberty manifest in the administrative state is both far more interesting and much more complicated than an easy rejection of Landis' good-governance utopia.

Putting its actions aside for a moment, I should note that Congress is relatively self-aware about the limitations of its institutional expertise. During the floor debates preceding the passage of the Secure Fence Act, Representative Chris Van Hollen, along with several others,\textsuperscript{92} expressed support for the principle of a fence but characterized the act as a "typical example of congressional overreaching and micromanagement."\textsuperscript{93} Van Hollen went on to elaborate succinctly both the purpose of an administrative state and the problem with congressional action that trammels it:

> We are neither engineers nor construction managers nor do we know the best alignment of such a fence. We should simply direct the experts to construct a fence that accomplishes the objective of preventing illegal immigration and allow it to be built in the most cost-effective manner.\textsuperscript{94}

The punch line? Van Hollen voted in favor of the bill.\textsuperscript{95} As all who have spent any time with a psychologist surely know, self-awareness is no match

\begin{footnotes}
\item[91] Landis, supra note 53, at 58-61.
\item[94] Id.
\end{footnotes}
against deeply-rooted behaviors.\footnote{See generally Mary D. Fan, \textit{Fantasy and Fetishes as Gap-Fillers When Deterrence and Death Mitigation Fall Short in Border Regulation}, 42 \textit{LAW \\& SOC'Y REV.} (forthcoming 2008) (on file with author). Fan uses Lacanian theory to understand why fence building and death mitigation techniques (water coolers) persist at the local level when the individuals who take up these strategies are aware of their ineffectiveness.} Congress constantly overreaches, to use Van Hollen's language, because We the People are sovereign and demand that our representatives do something about the problems of the day. The Secure Fence Act, if nothing else, telegraphed congressional concern to constituents. For the same reasons Congress can pass such legislation, it has the structural and legal power to make such gestures with impunity; indeed, it must provide them.

Notice also that Van Hollen's statement, for all its candor, does not even entertain the idea that Congress might want to continue to do what it has done for years, i.e., let the experts decide whether it makes sense to build a fence at all. That possibility has been dismissed out of hand, revealing the limited currency that such robust policy-making delegation enjoys on Capitol Hill. And yet for all the seeming incongruity between Van Hollen's self-awareness and his vote for the act, his position was, in the end, a shrewd and politically reconcilable position. The amendments to the bill appear to have kept the project alive and even expedited it, while also addressing Van Hollen's concerns on a number of fronts.\footnote{Pub. L. No. 110-161, \textit{supra} note 89.}

The amended bill only specified the minimum amount of fencing to be built; the placement of the barriers was left to the DHS' expertise. Additionally, the DHS was required to consider alternatives to fencing (returning some of the originally vested policymaking authority back to the agency) and also to consult with the local communities impacted by the project, signifying to those negatively affected by the bill that their government listens to them. The latter was surely a boon to a Congress concerned that its image might be tarnished by a local backlash against the fence.

But from the perspective of the DHS, is the amended bill really any better? Does it allow for the agency to use the full array of its administrative expertise? Has Congress actually ceded any policymaking authority? The DHS's response to the legislation indicates that the amendments to the Secure Fence Act only make gestures in the direction of administrative knowledge, Congress still holds all the cards. Despite possessing the technical authority to alter the border fence plan (either by erecting something other than a physical barrier, or by adjusting the placement of the fencing) the DHS has adopted Congress's original, mandated plan whole hog.\footnote{\textit{NEDDERMAN ET AL.}, \textit{supra} note 4, at 8.}

Further, what choice does the DHS really have? Remember, the amendments did more than merely address Representative Van Hollen's complaints about congressional micromanagement, they also put a strict
timeline on fence construction. Staring down an aggressive deadline hardly facilitates the institutional reflection needed to make any real use of the DHS’s delegated authority. Moreover, Congress has made it abundantly clear since it passed the Real ID act (expanding the DHS’s authority to waive laws in the name of the fence) that no matter what it says, Congress ultimately wants a fence on the southern border that looks like a fence. Furthermore, the DHS has no institutional incentive to fight uphill in order to change Congress’s original vision, particularly when the legislature could easily alter the Secure Fence Act yet again if Congress proved dissatisfied with the DHS’s judgment and execution. Indeed, far from fighting Congress, the DHS appears to be doing everything in its power to meet the legislature’s arbitrary deadline.

While Landis appreciated that “whether or not the administrative is organized along independent lines, its dependence on other departments of government is very great,”\(^9\) he could hardly have imagined the degree to which the administrative state remains obsequious to the demands of its legislative and executive masters. We can understand the depth and dexterity of this denigration in the fence amendment’s inclusion of so-called consultation provisions, which provide:

In general, in carrying out this section, the Secretary of Homeland Security shall consult with the secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed . . .\(^{100}\)

Here we see different strands of liberty linked together in a mutually reinforcing way that undermines the administrative. A desire to provide voice\(^{101}\) for the relatively small number of demi-sovereigns affected by the fence plainly motivated these provisions. This voice, however, will fall (by the terms of the rest of the legislation) largely on deaf ears, as the DHS must conduct this consultation knowing full well that it has very little power to alter the plans for the fence and faces an enormous amount of pressure to complete over half in less than a year. In this way, visions of liberty as demi-sovereignty and the primacy of democratic will combine to redirect significant localized democratic anger at the DHS, as the proxy for the state’s coercive touch. And still worse for the DHS, and as we shall see in more detail, Congress’ gesture

\(^9\) LANDIS, supra note 53, at 60.


\(^{101}\) Albert Hirschman describes “voice” in this context as the notion that a citizen would petition for grievance as a way of bringing about change to state policy. See ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY 16, 30 (1970). The consultation amendment, cited note 100 supra, provides a space for voice. But, as we shall see in the next subsection, this space is strictly delimited and is best described as hollow or gestural.
provided fodder for landowner lawsuits.\textsuperscript{102} The consultation clause, for all its emptiness, had enough substance to hook the DHS in court, delaying the taking of the land necessary to build the fence, and even preventing it from setting foot on the land for surveying.

In this way, we can see that Congress's dominance over the administrative state is so complete that the legislature can feign policymaking delegation while actually ensuring the administrative branch's subservience to the democratic will. Democratic desires, however misguided, take precedence over administrative judgment.

E. A Legal Challenge to the Border Fence

These demands for order have succeeded for the most part in erecting a border fence. But Congress's decision to require the DHS to consult with various border constituencies effectively created a space for protest by burdened demi-sovereigns, leading to a public airing of some of the logical frailties of border policy and delaying the DHS's implementation of its congressional directive. But like the supposed delegation of policymaking authority to the DHS in the latest amendments, this protest space was ultimately gestural because the requirement for consultation did not promise any change of course.

Still, we can see again in the legal challenge to the border fence how the privileging of Congressional authority by the courts, in accordance with our Constitutional structure, makes the DHS the object of attack in landowner lawsuits, not Congress. Only later when the conflict moves to the international arena with the filing of a brief with the Inter-American Commission for Human Rights, is there a frontal challenge to Congressional authority.\textsuperscript{103} But even then, the arguments made to the commission elide the fence's most troubling problems—the increase in deaths at the border, the way in which it feeds racial stereotypes—framing the issue as a violation of landowners' international human right to "property." By privileging landowners' demi-sovereignty in this way, the international suit, like the domestic one, reinscribes the primacy of individual rights, and in doing so the lawsuit unwittingly affirms the cultural basis for democratic dominance that led to the border fence's construction in the first instance. Nowhere in these challenges is there an argument which locates the problem of the fence in the anti-administrative character of the American legal regime, and nowhere is there a frontal elaboration of the harms inflicted by the fence on Central and South Americans—"Mexicans"—inside

\textsuperscript{102} See generally Suzanne Gamboa, Border Fence Deadline for Landowners Passes, \textit{Associated Press}, Jan. 10, 2008 (describing how 102 landowners have decided to pursue legal action against the condemnation of their land for purposes of the border fence).

\textsuperscript{103} See generally \textit{The Working Group on Human Rights and the Border Wall}, \textit{supra} note 4.
and outside the border. These issues remain—where they must if ordered liberty is to be preserved—entirely outside of formal legal discourse.

F. Dr. Tamez Takes On the DHS

The most vociferous plaintiff challenging the border fence is Dr. Eloisa Tamez, a U.S. citizen of Spanish and Native American descent, who traces her family estate all the way back to a grant from the King of Spain in the amount of 12,000 acres. Today only three of those acres remain in the family, and they are slated for survey by the DHS. Consistent with its legal obligations, the DHS sent notice to Dr. Tamez asking her to accede to the survey and the temporary governmental possession of her property the survey requires. Dr. Tamez refused, and after a series of discussions (which might or might not constitute “consultations”) and several unreturned phone calls, the DHS brought a condemnation action against her seeking the right to occupy her property for 180 days.

Dr. Tamez is defending herself against the condemnation action and has also filed an affirmative complaint against Secretary Chertoff and the DHS; she is receiving legal assistance from the Center for Human Rights and Constitutional Law, as well as the South Texas Civil Rights Project. In fighting the condemnation proceedings, Tamez’s attorneys are pursuing a strategy that, for the most part, attacks the DHS for failing to adequately comply with its congressional mandate to consult with property owners prior to condemnation, and also for not fully considering the alternatives to the border fence. Dr. Tamez’s lawsuits, then, exist only in the gestural legal space that Congress created with the most recent amendments discussed supra. But in that space, her attorneys struggle to persuade the district court that these gestures must be treated substantively. And in that effort we see how these limited and mandatory modes of argument sustain the fiction that Congress’s words contain a deducible purpose that reflect some form of logical—even administrative—intent.

In a defensive brief (and with more than a hint of desperation) Tamez’s

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attorneys’ argued that “these amendments have real meaning or Congress would not have wasted its time yet again amending the IRIRRA and the Secure Fence Act of 2006” (emphasis added). In her offensive case, Tamez asked the court to give shape to the vague consultation requirement and was unwittingly ironic: “Without some ascertainable standards, defendants’ pre-condemnation statutory obligations toward landowners would be reduced to empty formalities.” “Empty formalities,” of course, are precisely what Congress is peddling here.

Tamez’s relentless discursive focus on the DHS’s compliance with congressional mandates is typical of legal challenges directed at administrative agencies. But the typicality of the strategy here provides little guarantee of ultimate success—the prevention of a taking—because Tamez is only seeking procedural remedies or, in constitutional parlance, due process. Indeed, Dr. Tamez’s suits are plainly quixotic. And for all her attorney’s efforts to make substance out of formalities, Tamez’s entire defense strategy rests on arguing that the DHS did not follow mandatory procedure; that it failed to offer an adequate price for the temporary possession of her land, and that the agency failed to “consult” with her over the appropriateness of the use of her land for purposes of building a fence. None of this would ultimately alter the border fence’s placement.

Even so, at first Tamez prevailed in the most formal sense. On April 10, 2008 the District court ordered the DHS to inform her:

(1) when and how the United States will access the property; (2) the steps necessary to ensure than the landowner’s or occupiers’ property will not be unreasonably damaged or that the unavoidable damage is minimized; and (3) the steps [the DHS] will take to minimize the impact on the environment, culture, commerce and quality of life for the lands and for the defendant.

But such procedures were not insuperable for the DHS; it complied with the court’s order and the court, in turn, allowed condemnation proceedings against Tamez’s property to move forward.

Both of Dr. Tamez’s cases are also affirmatively challenging the DHS’ selection of her property over the property of “wealthy and politically well connected property owners” living nearby, arguing that this choice violates equal protection because it “effectively treats similarly situated individuals

110. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss at 31, Tamez v. Chertoff, No. 1:08-CV-00055 (S.D. Tex. filed Feb. 6, 2008).
112. Id. at 33.
The problem with this argument is not that it lacks truth in some extra-legal sense, but that the proposed basis for differentiation (essentially social and economic class) is not suspect under our Constitutional jurisprudence. Consequently, Congress and/or the DHS will only have to offer a rational basis for the choice to condemn Tamez's land and not the River Bend Resort and Country Club. The rational basis test is notoriously toothless; Congress need only invent, or the courts divine, some kind of logic to justify a distinction ex post. This author can think of numerous, quite rational bases for the discrimination: the highly profitable use of the resort land meant that the market value of the taking made placing fencing at the resort prohibitively expensive for the government; the loss of jobs at the resort due to fencing would be devastating to the local economy; the constant traffic on the resort's golf course during the day and the presence of watchmen at night make the resort an unpopular crossing for "illegal" migrants; etc. None of these reasons make the discrimination "just," but a philosophical vision of justice is not something that the legal system regularly provides.

While Dr. Tamez and her legal team pursue an appeal to the Fifth Circuit, a group of professors, attorneys, and students calling themselves the Working Group on Human Rights and the Border Wall have taken the fight to the international level by filing extensive briefing papers with the Inter-American Commission on Human Rights. The Working Group took full advantage of the more generous reasoning permitted by the Inter-American Commission, submitting as exhibits numerous public government reports that show how experts within the U.S. government believe that a border fence will do little to stem the influx of undocumented immigrants. The group also submitted a detailed statistical analysis illustrating the border fence's disparate impact on ethnic minorities and citizens further down the economic ladder.

Yet in the final analysis, the Working Group has framed arguments about the inadvisability of a policy implemented by a democratic society as violating border denizens' human right to property. In doing so the Group has merely shifted the same rights-based arguments aired in the United States District

113. Id.
117. NEDDERMAN ET AL., supra note 4, at 2-3.
Court to a different venue. And just as with the domestic legal challenge, there is little chance that this line of reasoning will lead to anything other than certain easily-remedied procedural encumbrances. In many ways all the group is asking for as a remedy is for the government to provide a public rational basis for the policy.\textsuperscript{118}

To be sure, the briefing effectively gives expression to more substantive arguments against the border wall that were elided in the domestic courts; the group even uses Congress's flip-flopping on the Secure Fence Act (demanding certain border sections, then giving the DHS discretion, etc.) to imply that its policymaking does not deserve a presumption of authority because the changes it made in quick succession "undermine the legitimacy of the border fence project by demonstrating the arbitrary nature of the Congressional decision-making process itself."\textsuperscript{119} But as a matter of legal theory—even international legal theory—this line of reasoning is strikingly radical. For the Commission to adopt such a rationale would undermine the very idea implicit in the current corpus of international law that democracy represents the highest form of political expression. Such an argument is plainly off-limits in an American domestic court, but what the authors perhaps do not realize is that the same rights-based framework that gives rise to their international suit, and gives primacy to individual demi-sovereigns against any state in the world, is the same system that must privilege the legitimate collection of the will of those demi-sovereigns as the highest manifestation of self-rule. Despite the validity, then, of the Group's reading of the legislative history that led to the border fence, the institution where it presents this argument must reject such reasoning in order to maintain its own internal, logical integrity.

The congruence, though, between Tamez's case in domestic court and in the international arena is not accidental; the origins of the international human rights regime are distinctly American.\textsuperscript{120} And, as in the domestic sphere, this story might be different if the Group was not conceding, as it must, the basic point that the right to property it asserts is very limited because "the U.S. government has the right to subordinate the use of private property for reasons of public utility and social interest."\textsuperscript{121} As it stands, however, this international briefing (as well as the briefings in \textit{Tamez}) attack and subjugate the administrative while reinscribing the primacy and unimpeachability of

\textsuperscript{118} \textit{Id. at 2.}

\textsuperscript{119} \textit{Id. at 8.}

\textsuperscript{120} See generally \textsc{Elizabeth Borgwardt, A New Deal For The World: America's Vision For Human Rights} (2005) (chronicling how American values shaped the international human rights regime); Deborah M. Weissman, \textit{The Human Rights Dilemma: Rethinking the Humanitarian Project}, 35 \textsc{Colum. Hum. Rts. L. Rev.} 259 (2004) (using historical and contemporary examples of the colonial purposes or effects of the human rights regime to suggest that human rights advocates and policy makers should be more attuned to the effects of power differentials in shaping humanitarian law).

\textsuperscript{121} \textsc{Nedderman et al., supra} note 4, at 7.
democratic authority, and leave out as uncognizable the deeper rights she has to the land (due to her Amerindian and Spanish heritage). Put plainly, the structure of the suits only reinforces the existing power relationships that lead to Tamez's problem in the first instance.

Strangely, were the fence executed and envisioned solely by the DHS—that is, with administrative not legislative judgment—all of these arguments would carry significant weight in domestic courts (and, I imagine, in international venues as well). This defensible focus by courts on a policy's source rather than its objective advisability (after all, courts are not experts on the merits of every public policy) underscores the basic need and purpose of strong independent agencies: to formulate sensible, comprehensive public policy.

The greater irony here is that the fence does incur grave harms, none of which were visible (except at the farthest periphery of the briefings) because they are not legally cognizable, domestically or internationally. The most tangible and devastating damage the fence has wrought is the more than doubling of the annual rate of migrant deaths along the southern border from 200 to 472, as migration pathways shifted from relatively safe urban areas to more dangerous rural terrain.\(^2\) Though the Congressional Research Service has labeled this increase an "unintended consequence"\(^3\) of the border fence at San Diego (like the "collateral damage" of the war in Iraq), the lack of "intent" seems both dubious and irrelevant, particularly because the fence's explicit purpose, its stated administrative functionality, was to move migrant pathways to more treacherous areas.\(^4\) We can only assume that plans for more fencing in urban areas will lead to more deaths. In this way, the cultural refusal to focus on effective (ID cards)—rather than symbolic—interior enforcement, while pursuing a policy which builds barriers, means that crossing the border means nearly as much financially as it ever did (because undocumented immigrants can still find work), but is now more dangerous than ever.

A more diffuse and abstract (though equally troubling) harm occurs because of the way in which the fence reinforces the negative racialization of all Latina/os—including citizens—as "wetbacks," and of any "Mexican" as illegal and criminal. Indeed, the fence derives its political effect, its ordered imaginary, from tapping into these negative social constructions. The very act of building a fence is proof to the populace that its fear of invasion under cover of night by brown-skinned hordes has a strong basis in fact.

We can see, then, in the story of the border fence, how our legal system reconciles order and liberty in such a way that immigration deaths, racial stigma, and the construction of the "illegal" migrant emerge as the costs of that

\(^{122}\) CRS REPORT, supra note 6, at 40.

\(^{123}\) Id.

reconciliation. This dead-weight loss, if you will, is sustained, even though it is at odds with the image of universalist liberty, because legal language is never permitted to frontally express what is truly wrong with the fence: the way in which it creates the semblance of order by re-enacting the acts of conquest and empire that gave painful rise to the border in the first instance. That sordid and suppressed history will now reside in the negative, the shadow of America’s border fence, shifting with the cyclical movements of the hot southern sun.

G. Capture by Citizenship or the Internalization of Majoritarian Values Among the Marginalized

By elaborating this critical analysis of the border fence I do not wish to imply that any of this could occur in any other way. Quite the opposite: I intend to show how very path-dependant and largely predictable these outcomes are, strange as they may seem. We have already discussed in some depth the way in which order and liberty have been institutionalized in our governmental structure. The legal interactions between the legislature, the courts, and the administrative state reflect these values. And while I have made the case that these institutional structures stem from cultural values held by, located in and transmitted to individual Americans, we might better understand the intransigence of these values by trying to comprehend the motivations behind Dr. Tamez’s persistent pursuit of her civil action.

Dr. Tamez embodies the negative of the triumphal Mayflower-to-Manifest-Destiny U.S. history we all learned in grade school. In her briefs, the mention of her Amerindian-Spanish racial composition serves no cognizable legal purpose, but stands in as an oblique reminder of those who were trampled over to create the nation of liberty, order, and law now inhabited by American citizens. That her family has been able to hold on to any of its estate at all reflects a remarkable tenacity, as the American colonial (and later imperial) project was premised both on the dislocation of Amerindians, and the dispossession of Spanish-colonial landowners. The value of Dr. Tamez’s three-acre plot plainly transcends the monetary: it is the terrestrial symbol of family perseverance, signifying her family’s ability to remain despite shifting geo-political constructions of the border. Dr. Tamez herself clearly views the land as an invaluable and inalienable part of her identity. In an affidavit she submitted in defense of her property, she says:

It would be difficult, if not impossible, to place a monetary value on the intrusion and possible significant alteration of my property sought by the government, especially given that my family has owned this land for hundreds of years and the state of the land as is reflects and embodies my family history.126

125. Luna, supra note 48.
126. Tamez Declaration, Exhibit C to Defendant’s Opposition to Motion For
Yet Dr. Tamez, for all her otherness, is formally included in the American body politic. She is not only using the formal benefits of citizenship to fight the taking of her property; she has also internalized a respect for the mechanisms of the legal system; it, too, is a part of her identity. Speaking of the suit, Dr. Tamez told a reporter with NPR: "We are not about breaking the law. We’re not going to commit a crime. If the judge says they’re [the DHS] coming in, we cannot go against what the court orders. But I’m going to stand fast what is my [sic] American given right, and that is to protect my property."\textsuperscript{127}

Dr. Tamez’s allegiance to the legal corpus shows that, for all its supposed diminishment in value, citizenship exerts a strong pull upon her. Even though the government and the polity it reflects have used and continue to use the racial difference of Dr. Tamez and others as an implicit means of justifying the disparate treatment meted out to people living on the northern and southern borders, her status as a U.S. citizen has led her to internalize its values. Even in this interview, completely unconfined by the limitations of legal argumentation, she locates her right to her property within an American legal structure: “I’m going to stand fast to my \textit{American} given right,” she says, even though she plainly has more ancient—though legally uncognizable—rights to the property stemming from her Amerindian and Spanish origins. This internally unrecognized legal/cultural capture, coupled with the dramatic institutional limits discussed earlier, is a large part of how our country resists radical change. Those that would most disturb normative assumptions about the legal system have been entranced or effectively captured by it. It is no wonder, then, that ordered liberty is so durable.

In this way, while granting citizenship to those with origins outside the mainstream certainly gives those individuals privileges of protest—however empty—it also tends to limit whatever cultural destabilization a person like Dr. Tamez might perform. The disambiguation, however, does not run in the opposite direction. The government calls everyone born in the United States a citizen, but that does nothing to prevent it from treating citizens of different social, economic, and racial backgrounds differently. We can see the tangible effects of this differential treatment in the differing social and political constructions of the northern and southern border, and we will see them more plainly in Part III when we engage with jurisprudence that seeks to articulate the extent of the rights owed to \textit{jus soli} American citizens born to “illegal” parents. Indeed, the state’s simultaneous ability to include people legally, but maintain cultural difference is a central feature of how the United States has met the challenge posed by marginalized Americans demanding inclusion in the body politic.\textsuperscript{128}

\textsuperscript{127} \textit{Day to Day, supra} note 104.
\textsuperscript{128} \textit{Cf.} Derrick A. Bell, Jr., Comment, \textit{Brown v. Board of Education and the Interest-
H. The Work of Criminality in the Antidiscrimination Era

The differential meaning of citizenship for white Americans, people of color, and women was in the past, of course, a more formal component of our legal order. But after the civil rights movement, the law effaced the formal aspects of this unequal treatment in favor of race, and later, gender neutrality. This facial neutrality, though, did not erase the process by which social, cultural, or economic difference was maintained in the private sphere. And given the achingly democratic nature of governance in the U.S., these legal changes could not actually erase unequal treatment of citizens by the state; formally repressed distinctions emerged in the law under other guises. In particular, contemporary law (and the social reality it reflects) uses the stigma of the criminal and its attachment to a specific racial category as a strategy to limit socially disfavored groups' claims on social, economic, and political resources.

This strategy is particularly effective because the power of the criminal stigma harkens back to the religious origins of the American state, and because state action that degrades the criminal is perceived as the production of order. These attitudes are internalized by all citizens. We detect the social importance of law-abidingness and fear of the criminal when Dr. Tamez insists to NPR that her lawsuit against the DHS is consonant with her law-abidingness: "We are not about breaking the law. We’re not going to commit a crime." Moreover, it is particularly important for individuals stigmatized in other ways to emphasize this trait in order to signal legal belonging precisely because outward appearance or surname mark one as existing outside the dominant social order. But the real strength of the criminal stigma is that the fear of the criminal transcends social categories. This fear is palpable even among the overwhelmingly white denizens of the northern border who have experienced the increase in administrative inspection of the border as criminal treatment. Indeed, these residents' inexperience with feeling like outsiders makes them even more touchy than the marginalized about administrative inspection.

As a result, even though the hardening of the Canadian border is much less dramatic than what is happening in the South, northern border denizens are still quite upset about the changes. The agency’s recent requirement that American citizens present passports or birth certificates at the border is the subject of constant complaint because these minimally invasive administrative procedures


129. See generally KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006) (advancing the concept of “covering” as a way of understanding the need of marginalized groups to normalize their outward behavior to conform to the dominant culture’s social and behavioral expectations. One simple example is the practice of homosexual men and women being “out” in the workplace, but refraining from discussing their love lives to the extent straights do for fear of seeming too different, too gay).
are seen by local citizens (whom are overwhelmingly white) as plainly and intolerably coercive. Emblematically, a resident of a sleepy Vermont town on the Canadian border believes that the new regulations at border crossings are degrading because they make him feel like a criminal; specifically, border agents conducting occasional trunk inspections, asking more stringent questions, and requiring identity documents make him feel that the government "treats us just as if we were convicts every time we crossed." Another town resident questions what would happen were he to forget the required papers in Canada. Surely, he believes, the answer cannot be that border agents would not let him into the United States: "They can't exclude me from my country. They can give me a hard time, but they can't exclude me." In addition to the fear that comes with the proximity to "criminal" treatment there is also a sense in these anecdotes that a citizen's status as "law-abiding" and therefore harmless is inherent and easily readable, much like the Calvinist concept of the elect. Regulatory burdens which seek to confirm these "intrinsic" qualities are seen in turn, as coercive and degrading: law-abiding citizens are being treated "like convicts." As we know, Dr. Tamez shares this view of the criminal. When she says to the NPR reporter "we are not about breaking the law. We're not going to commit a crime" (emphasis added), she utilizes the phrase "we are not about" to signal that her essential nature is not that of "law breaker."

There is also something else at work in the new identity requirements. The umbrage that these Vermonters display at this slight increase in coercion reflects a loss of privilege. I cannot confirm, but nevertheless imagine, that the situation for people of color crossing the border before the recent changes was significantly different from that described by the interviewed Vermonters. Thus, in the past, discriminatory enforcement was cloaked as administrative discretion, but as antidiscrimination norms have hardened, that kind of discretion came to be seen as dangerous—in practical terms this means the broader distribution of a regime of administrative inspection—that is, more regulation and coercion more consistently applied, at least at the border. Racial profiling continues on, but the flagrant and formally sanctioned quality of it must give way. In the reactions of both Dr. Tamez and these quintessential insiders from Vermont to the idea of being seen as criminal, we can begin to understand what a powerful tool of subjugation branding groups of immigrants "illegal" is. As formal non-discrimination norms become more deeply entrenched, the importance of the criminal in the maintenance of the insider/outside dichotomy, i.e., in the construction of representations of

130. Derby Line, the town discussed here, is 96.78% white. CENSUS 2000, DERBY LINE, VT, DEMOGRAPHIC PROFILE, available at http://factfinder.census.gov/home/saff/main.html?_lang=en (enter 05830 in city/town, county, or zip; then follow hyperlink labeled "GO").
131. Vermont Town, supra note 80.
132. Id.
133. Id.
order—becomes ever greater.

In this tightening of the northern border, then, we perceive the double effects of the shift in the location of racial discrimination from the formal law to the social body, which allows discrimination to enter the law in oblique ways; we witness both the maintenance of sociological and legal difference in the distinct closure strategies of the Canadian and Mexican borders, and the progress of formal equality in the more stringent requirements for whites passing into and out of Canada. The former phenomenon signals the substantive emptiness of formal antidiscrimination; the latter represents the partial loss of the presumption of legal inclusion traditionally granted to whites.

We began this inquiry aiming to comprehend how the United States could simultaneously maintain its identity as a haven for immigrants while treating “illegal” immigrants increasingly harshly, devoting significantly larger legal and financial resources to “resolving” the immigration problem, and yet still harbor twelve million immigrants who have no formal right to live in the United States. The denigration of the administrative in favor of the legislature—the popular will—means that American immigration law cannot be read as an attempt to control immigration in the most technically rational, parsimonious (i.e., the most administrative) way. Rather, the cultural rejection of administrative expertise and judgment, coupled with the need to flatter popular conceptions of liberty and order, mean that immigration regulation becomes a semiotic, rather than a substantive exercise. To argue that our immigration regime operates on a symbolic level, however, is not to say that it causes only metaphysical harm. In the case of immigration regulation these signs and symbols mark or effect real bodies, flesh, and blood. Millions of the stigmatized remain in the U.S. and millions more have been deported.

Moreover, navigating America’s semiotic seas is no simple task. In doing so, Congress must both sate the electorate and adhere to the formalities of an elaborate legal regime, whose symbology has only grown more complex. The legal realignment that followed the civil rights movement effectively deemed the formal imposition of certain signs by the state out of bounds. This relatively recent development poses a special problem for immigration regulation because regulating America’s racial composition has been an explicit

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134. See generally THURMAN ARNOLD, SYMBOLS OF GOVERNMENT (1937). Arnold, one of the founding legal realists, would consider this kind of enforcement behavior as the only possible kind. He argues that the law and the social sciences are essentially disciplines without substance, and that most human activity is symbolic: “Almost all human conduct is symbolic. Almost all institutional habits are symbolic. The symbols are everywhere inconsistent. Society is generally more interested in standing on the sidelines and watching itself go by in a whole series of different uniforms than it is in practical objectives.” ARNOLD at 17.

135. NGAI, supra note 78, at 258-260.

Congressional goal since the dawn of immigration restriction. In turn, the maintenance of cultural and racial homogeneity came to inform the people’s perception of ordered immigration. Disordered immigration was precisely the immigration of disfavored groups. Now that discrimination is forbidden, how can the state effectively signal the order that Americans have come to expect?

In the statements made by Dr. Tamez and the Vermonters on the Canadian border seeking to distance themselves from the perceived taint of criminality, we see why the imposition of a criminal stigma on disfavored groups of migrants might compose part of a successful government ordering strategy. The fear of the criminal is informed by the reality that, in the United States, those branded “criminal” live under the rule of a different state. Far from obsequious, this state is coercive, violent and draconian. The criminalization of simply unlawful (as opposed to socially destructive) behavior and corresponding comfort with merciless punishment are consistent with rule of law in the American tradition. Moreover, because the culture views the stigma of criminality as indelible, it is de facto just as immutable a characteristic as race. Correspondingly, just as one’s status as “law-abiding” leads citizens to perceive state efforts to confirm that status as coercive and degrading, if one is marked “criminal,” an enormous amount of degradation is permissible because the criminal has effectively been stripped of her demi-sovereignty. The execution of that degradation through harsh punishment confirms and enforces the criminal’s lower status.

These cultural attitudes are further institutionalized. Our bedrock fear of centralized state power and our correspondingly non-autonomous bureaucratic state means that popular sovereignty translates quite directly into state policy. In turn, because the popular conception of criminal justice is retributive and degrading, the United States imposes and enforces some of the harshest punishments in the Western world. And even in due process areas where we lead the world, like criminal procedure, our extensive process norms (which are less by the need to preserve racial homogeneity, and more by the need to protect the ideal of the male-dominated household from the concept of “pauper labor” spread by increased immigration).

See SHANKS, supra note 71, at 55-95 (analyzing the conflation of racial and intellectual distinctions that were proffered to support differing quotas for Southern, Eastern and Northern Europeans).

See WHITMAN, supra note 38, Introduction.

Both, of course, are powerful social constructs that become even more powerful denigratory markers when deployed together. For a legal treatment of the way recent social science documenting implicit bias has illuminated our understanding of the process by which such stereotypes are confirmed and grow, see Jerry Kang, Trojan Horses of Race, 11 HARV. L. REV. 1489 (2005).


See WHITMAN, supra note 38, at 3 (discussing how harsh American criminal punishment stands in contrast to the trend in continental Europe).
generally bypassed through plea-bargaining) primarily reinforce the abjection of people deemed criminal because the "fairness" of the process leading to one's conviction proves that the degradation heaped upon the criminal was appropriate and deserved.

The socio-legal utility of the progressive criminalization of immigration law that dramatically increased with the comprehensive immigration reform bill passed in 1986 is manifold.142 For a Congress that must show its constituents that it is maintaining order by limiting America's openness to the world but can no longer use race as a formal criterion to signal that order, marking immigrants criminal accomplishes a number of goals. First, it relocates the blame for immigration disorder from Congress to the "illegal" immigrant. If the immigrant who resides in the United States is a "criminal," then she bears the agency (or in colloquial terms, the personal responsibility) for her actions—after all, she broke the law. The fact that the United States essentially condoned the act, and in many ways benefited from it, loses much of its persuasive power because of the construction of the immigrant's inherent and indelible criminality. Second, marking people with criminal status allows a state that has professed a commitment to cosmopolitan human rights to limit its obligations to a large group of outsiders. Since an "illegal" immigrant's criminality supercedes her humanity the state need not feel shame at denying such immigrants certain benefits accorded to American citizens, like labor protections. Finally, the taint of criminality silences this group of immigrants forcing them to hide at the margins of society, rendering them a maximally pliable labor force. During economic booms, their fear of enforcement facilitates third-world labor standards within the world's most industrialized nation, allowing the economy to grow at a higher rate than it otherwise might. During economic downturns when their labor is less needed, enforcement can rise without any cognizable legal problem; the immigrants are "criminals."143 That the majority of the criminalized group also happens to be distinct racially offers a degree of continuity between the new regime and the old, while also reinforcing the power of the criminal stigma because it gains visual currency. In this way, immigration which once primarily signified the first step on the road to the American dream has come to also contain the taint of the criminal.144

But the criminalization strategy also has its institutional pitfalls. In

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142. See Ngai, supra note 78, at 266 (arguing that border policies during the 1990s spurred a "stunning militarization" of the border); Fan, supra note 77. See also Jennifer M. Chacón, Unsecured Borders, Immigration Restrictions, Crime Control and National Security, 39 CONN. L. REV. 1827 (2007) (examining the problems posed by the conflation of the national security narrative with immigration law enforcement).

143. See Shanks, supra note 71, at 239.

144. See Whitman, supra note 38, at 3. See also Teresa A. Miller, Citizenship and Severity: Recent Immigration Reforms and the New Penology, 17. GEO. IMMIGR. L.J. 611 (2003) (noting the increasing criminalization of immigration law).
conforming to the legally permitted symbolic arrangement, Congress has also ratcheted up its responsibility to enforce the law. Moreover, the increasingly non-white composition of immigrants in the last three decades means that the public is more likely to perceive disorder even in legal immigration, as it must become accustomed to speaking to people with accents who look different than themselves, speak foreign languages, and have different values. Adding the idea that some of these aliens are "criminals" who are not entitled to be in the United States to this cultural disruption only heightens the social anxiety surrounding the influx of all migrants, legal and "illegal." The current popular backlash surrounding "illegal" immigration is correspondingly framed in terms of the intolerability of America harboring a criminal population, but this characterization masks deeper and unspeakable anxieties, like the basic and longstanding fear of racial and cultural miscegenation.

Given that liberty, felt here in numerous ways but principally through administrative weakness, is an insurmountable obstacle to the creation of order in a substantively race-neutral way, the semblance of order must be constructed by other means. The formal focus on criminality, which society then does the work of associating with race, allows the state to create the spectacle of order while preserving ordered liberty without significant alteration for citizens who are legally and culturally empowered.

II. DEMOCRACY’S TEMPLE: ORDERED LIBERTY IN THE LEGISLATURE

Congress, then, finds itself grappling with the implications of a criminalization strategy whose origins we can trace back nearly a century but whose legislative crystallization occurred more recently in 1986 with the passage of the Immigration Reform and Control Act ("IRCA"). The Act is notable in a number of respects. It was the first to promulgate the notion that interior immigration enforcement had to occur at the employer level, imposing criminal sanctions on employers who knowingly hired immigrants lacking legal status. In adopting this ordering strategy, however, Congress also made room for the kind of demi-sovereign liberty we have already discussed in detail. New employees may have been required to present documents to employers to prove their eligibility to work in the United States, but there would be no national ID card that all citizens would have to procure and present. Yet in IRCA and in the debates which preceded its passage we see a Congress struggling to balance and reconcile ordered liberty on a higher plane; attempting to create law which continues to sustain our outward image as the embodiment of universal values, and to create a nation of immigrants—a nation of the world—that is also a

145. See infra Part II.
146. See generally NGAI, supra note 78.
nation with a stable conception of its own Westphalian sovereignty. One commentator put the challenge in these terms:

Immigration is a problem because nearly all peoples believe in nationalism and wish to maintain the integrity of national ideologies and institutions. We believe this in the U.S. too, but not for narrow, nationalistic, selfish purposes only, but also because we believe that our nation has become a symbol of the possibilities of freedom and the potentiality for justice. The existence of our nation as a nation is tied to the realization of high goals for all of humanity. Our nationalism is not inconsistent with internationalism.\(^{148}\)

As lofty as this statement is, and as accurately as it reflects Congress’ construction of its task, it also showcases how the basic idea of national cultural and territorial continuity, a selfish staple of realist international political theory, is transubstantiated through American rhetoric into a sign of our nation’s international generosity and self-sacrifice. Repressed in this account, of course, is the cost and the violence of nationalist compromise which we have already begun to discuss, as well as the way in which that call to self-preservation tends to stifle whatever radical potential the Constitution contains.

A. America as Enlightenment

Even if this universalist rhetoric obscures the basic political motivation for immigration policy, the desire to cast changed policy in a familiar rhetorical mold is an effective strategy, particularly given that for much of its history, the United States was a credible beacon of the enlightenment in a world hostile to democracy. Here Locke’s social contract emerged from theory into a living idea to be nurtured and sustained. As a consequence, the U.S. legal structure is in theoretical terms radically universal; specifically, it contains the possibility that any human being could, through circumstance of fate (\textit{jus soil} citizenship, asylum), personal efforts, or invitation, become a part of the American legal community. But this open-armed embrace is, as a practical matter, terrifically unstable because a contractual theory of the nation places no formal limits on national membership.\(^{149}\) Moreover America’s universalist nationalism is also slippery because it always contained conditions (slavery, female oppression) that rendered the enlightenment portrayal manifestly untrue. Despite the radical rhetoric of the founding texts, American nationalism was always and continues

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to be premised on the assumption that the empowered constituents of the national body would share a language (English), a race (Anglo-Saxon), a gender (male), a religion (Christianity), and a culture of enterprise (the Protestant work ethic). For all the pride in our enlightened constitutional order, the inability of the populace to deduce precisely whether America's success had more to do with racial/cultural or legal continuity created a bias for the status quo in both areas. These caveats, then, exist in an exquisite tension with the universalism of our national ideal, ever-threatening to enter the foreground and mar the picturesque view.

The civil rights movement was primarily focused on making the promise of these constitutive words real by erasing the formal caveats to the universalist vision. Thus, the primary achievement of this period was the codification and institutionalization of nondiscrimination. And for our purposes it is important to note that the political support for this textual shift was earned primarily by making African-Americans' second-class citizenship visible to the entire social body through the new medium of television. The success of this strategy underscores the importance of visual stimulus in shaping our beliefs about the constituents of the polity, as well as our conception of what We the People actually means. In 1965 the Hart-Cellar Act affirmed the power of the visual by endogenizing non-discrimination principles into immigration law by significantly diversifying the races and national origins of American immigrants. But the Act's simultaneous abandonment of the long-standing policy of unlimited Western Hemisphere immigration ensured the hardening of the social and legal association of criminality with the "Mexican." In IRCA, we can see that Congress continued to take this non-discriminatory vision seriously, but we can also perceive how certain compromises, even in the name of those civil-rights-era values, may have pre-figured their own impoverishment in future cycles of immigration reform. It seems that once criminality was injected into the idea of immigration and reacted with social ideas about race, its stigma spread; the fusion of that criminality with terrorism in the post 9/11 period exemplifies this process. Criminality, then, threatens to overwhelm the universalist vision of immigration entirely and in doing so render America's claim to international exceptionalism—a beacon of light—still less credible within and outside domestic legal culture.

B. Ordering Immigration in the Modern Era: Non-discrimination, Criminality, and Racism

For a nation that values order and perceives it as continuity with the past and the tight circumscription of criminality, the antidiscrimination principals adopted in the Hart-Cellar Act were quite a disjuncture. The Act ensured that

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150. Of course, the race-based advantages that accrue to whites in the current power structure are an even more important reason for the perpetuation of the unequal status quo.
the future face of the United States would be decidedly multi-racial, and that its
cultural character would come to contain traces of every nation in the world.
But that multi-hued future would also construct the face of the Mexican in a
strippingly denigrating fashion. For many decades Mexican migration had been
limited and criminalized via administrative methods, but the basic structural
principal of unlimited Western Hemisphere migration remained intact. The
1965 Act changed that relationship, but without unwinding the centuries-old
migrant labor pathways that begin in Mexico and run through the American
Southwest to California's Central Valley. With one stroke, then, the visible
diversification of American immigration law criminalized a particular race of
people without seeking to alter an ingrained economic and social reality.

That dramatic reduction in the number of legal slots allocated to Mexican
and other central and South American immigrants in turn begat a cycle of
criminalization, amnesty, (which only reinforces the criminal stigma, even as
it provides formal status) and criminalization that any future plan for
comprehensive immigration reform seems destined to reiterate. This replication
and magnification of criminality focuses itself nearly exclusively on the
“Mexican,” whom Ian Haney-Lopez accurately claims has become
synonymous with the “illegal.” As we have already discussed, the post-IRCA
militarization of the border (most recently reenacted with the Secure Fence
Act) reaffirms this criminal stigma by linking Mexican land migration to
visions of surreptitious invasion, or legal trespass. This drama represses the
statistical reality that 40% of “illegal” migrants entered the country legally and
simply overstayed their visas, and that almost half of unauthorized immigrants
are not, indeed, Mexican. In effect, the international diversification of
American quota slots was purchased with the “illegal” Mexican. And this was
not simply a question of numbers; the construction of the Mexican as illegal
allowed the demos to focus anti-immigrant animus on a single group, while the
government and the people could point to formally race-neutral legal

151. NGAI, supra note 78, at 69-71.
152. In addition to the Immigration Reform and Control Act, David Martin argues that
the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) and the
Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) were effectively targeted
amnesties. See Martin, supra note 7, at 525; see also Immigration Reform and Control Act,
Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C);
Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, §§
202-03, 111 Stat. 2160, 2193-2201, (codified as amended in scattered sections of 8, 40, 42
153. See JULIA GELATT, MIGRATION INFORMATION SOURCE, BUSH PUTS IMMIGRATION
154. See KARINA FORTUNY, RANDY CAPPS & JEFFREY S. PASSEL, THE CHARACTERISTICS
OF UNAUTHORIZED IMMIGRANTS IN CALIFORNIA, LOS ANGELES COUNTY, AND THE UNITED
immigration policies as evidence that America had banished its racialized past. But even as the association of the “Mexican” with illegality singles him out for special censure, the connection between race and criminality also negatively marks immigrants of any legal status who are non-white (or otherwise fail to comport with the normative vision of American-ness), because the construction of the Mexican conflates the basic concept of racial difference with immigrant criminality. In this way, the state constructs difference in order to preserve the idea of universalist liberty by limiting the number of people to whom domestic liberty will apply.

IRCA, for its part, did not ignore the issue of those who entered legally and overstayed. That Act expanded the scope of the criminalization strategy to cover employers who knowingly hired immigrants who do not have the legal right to work in the United States by requiring them to confirm that right by reviewing a set list of acceptable documents before allowing the prospective employee to begin work. Employers then became responsible for submitting signed affidavits verifying that they had followed the required procedures and that the employee, to the best of her knowledge, had the legal right to work in the United States. Employers could face criminal sanctions were they found to have violated the law.

Yet despite the formal equivalence of the criminalization of alien and employer, the utter lack of enforcement actions (until quite recently) against employers, coupled with their higher social and legal status as citizen-proprietors meant that the location of criminality remained entrenched in the Mexican. Additionally, the specific way in which employer verification was structured—to protect both demi-sovereignty and reflect antidiscrimination norms—made it quite easy for the employer to escape the law’s scienter requirement (knowingly hire), rendering the criminal sanctions mostly gestural. Apart from reiterating the established link between Mexicans and the criminal, employer sanctions also turned the workplace (which had formerly been the location where immigrants, through sweat and toil “earned” their social right to remain present in the United States) into the locus of criminal endeavor and fraud. Work went from a marker of belonging to a species of theft. Correspondingly, the ability to work in the United States became yet another demi-sovereign de facto property right belonging exclusively to citizens and legal aliens. Among other effects, this shift prefigured the symbolic and visual power of recent immigration raids, which unite and reveal the double stigma of race and criminality.

C. Antidiscrimination Law and the Production of Discrimination

In 1986, employer sanctions were viewed in the Senate as the ideal solution to the problem of conducting interior enforcement while avoiding the unseemly picture of state and federal agents grossly violating the nation’s hard-fought antidiscrimination principles. The alternatives for interior enforcement
were framed starkly as between adopting national ID cards (and thereby ushering in a culture of surveillance and administrative inspection whose burdens would inevitably fall disproportionately on racial minorities) or on restricting that surveillance and inspection to the place of employment (where it would be conducted by an individual who was not a representative of the state). Congress’s choice should, by now, fail to surprise. Employer sanctions had the familiar advantage of extricating Congress from taking the blame for a distasteful administrative task, while also narrowing the space in which inspection had to occur. Even so, by unpacking further the rationale behind employer sanctions and the specific way in which the employee verification requirements were structured, we can appreciate with nuance how the enforcement of antidiscrimination norms can, when viewed in the larger enforcement context, simply shift discrimination to different actors and more insidious and pervasive forms.

The vision of national ID cards was explicitly linked to race during the 1986 IRCA debates, when Senator George Mitchell responded to the suggestion of a national ID card system by comparing the proposal to apartheid: “we are contemplating a pass card system similar to that as exists in South Africa?" he asked. The extreme and self-apparent quality of Senator Mitchell’s analogy obscures the complex reasons why ID cards might end up causing discrimination. These narratives of discriminatory treatment only make sense with the understanding that the majority would not tolerate a regime of administrative inspection where all citizens might be regularly asked if one had the right to live in the United States; were everyone asked for identification at regular times, discrimination might not be much of a problem. But because such a state of affairs would be deemed to violate demi-sovereignty and viewed as intolerably coercive (remember the Vermonters who felt like convicts when asked to present ID’s at the northern border), national identification is highly likely to regulate only those people who look “foreign” or are otherwise already marginalized. As extreme as Senator Mitchell’s apartheid analogy was, it was more precise than we might have hoped. Given our cultural reality, the adoption of a national ID card could lead to direct state-sanctioned racial stigmatization of a large group of people.

But employer sanctions, along with the attendant documentation


155. SHANKS, supra note 71, at 222. The pass law system regulated South African black labor. All black South Africans were required to carry an identification book at all times, and the book specifically detailed the type of work black South Africans could engage in. During the South African protest movement, flouting the pass laws by burning passbooks became a prominent act of civil disobedience.

156. See Vermont Town, supra note 80.
requirements, did not excise discrimination from the polity. The particular way in which we have operationalized our commitment to non-discrimination in the current employer verification system significantly abets the employment of unauthorized aliens, which causes anger to build among the citizenry over time. The primacy of the democratic will and the weakness of the administrative (liberty) in our political system means that this anger will inevitably translate into increased enforcement action in the form of the racialized raids which I have mentioned (order). When enforcement action increases in this way, and when employers have no means of patrolling the difference between legal and "illegal" immigrants, they may resort to racial discrimination in hiring and firing as a superior proxy for status than the identity documents employees are required by law to present.

D. From Documentation to Discrimination.

Formally-neutral American law requires all employees to show proof of the ability to work in the country by filling out the DHS Form 1-9, which mandates that prospective employees present certain documents, but explicitly does not require a worker to provide a Social Security number. Many of the documents which "prove" work eligibility are either easily obtained or easily forged. Yet immigration regulations require an employer to accept any of the documents listed on the form, provided the document "reasonably appears on its face to be genuine." In this way, employers are encouraged to err on the side of authenticity, even in the instance that an employer is aware that some of the eligible documents are commonly forged in her region. This emphasis on facial validity is plainly designed to prevent employers from making more onerous work-authorization demands on racial minorities—to prevent the recreation of the South African pass laws on American soil. But because the institutional and legal commitment to non-discrimination is much stronger and consistent than our commitment to immigration enforcement against employers, an employer has much more to fear from antidiscrimination prosecution actions—most of the time, anyway—than it does in employing workers who actually do not have authorization to work in the United States.

159. DHS Form 1-9 provides a list of documents that meet work eligibility requirements. Employees may either present one federally issued document (passport, green card, DHS Work Authorization Card etc.), or two documents, one each from two separate lists. List B, as it is called, includes student ID, State or Canadian issued driver's licenses, and a Native American tribal document. List C includes a birth certificate, Social Security card, and a Native American tribal document.
160. Id.
161. Martin, supra note 7.
Indeed, the primacy of antidiscrimination within the sanctions regime is such that employers are reminded of antidiscrimination laws every time they fill out an I-9 form. To wit, the most prominent notice on the form is the text below:

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual’s national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents presented have a future expiration date may also constitute illegal discrimination.\textsuperscript{162}

When enforcement against employers is low they have little incentive to discriminate for the reasons discussed above. The calculus changes dramatically, however, when enforcement actions rise as the economy weakens and economically-pained Americans start noticing the (formerly invisible) others within their midst.\textsuperscript{163} At those points, the inability to distinguish legal from “illegal” immigrants through documentation will lead employers to the conclusion that race or another immutable characteristic is a more reliable indicator of legal status. Consequently, unauthorized immigrants who are white or fluent in English will escape heightened scrutiny, while all other immigrants, whether “legal” or unauthorized, will very likely be discriminated against.

Even in the case that the employer does not discriminate and decides to retain his multi-hued staff, a raid of his firm or that of other employers will ensure that race and criminality visibly re-emerge anyway because the entire logic of raids is racial. As enforcement tools, they are blunt instruments meant (when combined with the power of new media) to make an example out of employers and employees. For raids to succeed in this way they must be seen to confirm the populace’s racialized predispositions. Parading a handcuffed line of white immigrants for the cameras will be less effective at assuaging the populace’s desire for enforcement because whites are not negatively racialized.

And the employers? The raids might lead to more regulation of employers in the long run, but individual proprietors are unlikely to suffer much in the way of criminal penalties from the raids, assuming, of course, that the rest of their business practices are above board. Their Teflon status works both at the formal and social level. As long as the documents the employer was provided appear facially valid, he would face no legal liability. Socially he might face some recrimination, but his status as a proprietor and his implied and believable

\textsuperscript{162}. DHS Form I-9, \textit{supra} note 155.

\textsuperscript{163}. Immigration enforcement has occurred roughly in line with the economy’s fluctuations. Current history appears to be no different. As the economy began deflating in the last few years, enforcement, or at least the symbols thereof, has increased. \textit{See} SHANKS, \textit{supra} note 71, at 239.
public insistence that he was only trying to employ hard-working folks—regardless of race—and comply with the law, ensure that any status decline will be short-lived. Ironically, (or perhaps fittingly now that we have seen this process occur in so many areas) Congress’s decision to protect immigrants from discrimination by punishing those that benefited most from undocumented labor has only succeeded in harming legal and illegal immigrants by relocating and magnifying their criminal racialization.

When combined with Americans’ persistent need for the spectacle of order, IRCA’s antidiscrimination requirements illustrate how the attempt to legally excise discrimination from the relatively narrow sphere of employment confirms the utility of race discrimination in the social body, thereby expanding the space in which discrimination exists. Moreover, the raids that ensue from this combination of factors taint the workplace itself, which formerly and unambiguously represented a site of immigrant transformation from outsider to productive American. Finally, the racialization of immigrants in this way amplifies the effects of racial stereotypes because in our system of democratically accountable administration, public attitudes infiltrate every aspect of government policy. Even as the sight of brown immigrants being carted off to prison assuages the demos’ thirst for order, the execution of this vision confirms the public’s fears of being besieged by criminals and dependents. By giving life to this socially imagined racial invasion, this brand of interior enforcement demonstrates the utility—even the necessity—of a border fence. And as much as raids, border patrol plays into and entrenches the same racialized imaginary; erecting a fence reifies these fears by implying their validity and rationality.

Although the contours of this racial animus are difficult to describe, if it were possible to uncover Americans’ collective unconscious, the paradigmatic vision of “illegal” immigration would surely feature a Mexican woman, brown-skinned and mestiza, nine-months pregnant, crossing the Rio Grande under cover of night. Such an image captures the full scope of the terror bound up with “illegal” immigration: the sneaking nocturnal setting lends the tableau the requisite feeling of legal breach (of trespass onto sovereign property) while also emphasizing the defenselessness of the border, which is barely a “border” at all, just a river, like any other, that happens to mark a boundary. Crossing into America becomes child’s play, a hop, skip, and jump to the neighborhood welfare candy-land. That the immigrant herself is gendered as the “weaker sex” reinforces our sense that immigrants are dependent on us. That the woman is also literally burdened with a growing child represents the perpetual

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164. Mestizo/a literally means “mixed” in Spanish, and in this context refers to a group of mixed indigenous and European ancestry. Like all racial categories, this one is a social construction. The vast majority of Latinos have “mixed” roots, but display wildly divergent phenotypes. Nonetheless it is an operative category in Latin America, where populations tend to trace European roots fetishistically and systematically degrade those with phenotypes associated with “indigenous” features.
burden that We the People will bear once she and her pre-citizen fetus take residence in the United States. Her brown skin reflects our long-standing fear of cultural and genetic miscegenation.

Arguably, it is this conflation of criminal and racial fear in the face of federal enforcement action that is perceived to be inadequate, that has notoriously led local governments to pass anti-illegal-immigrant ordinances in small towns across the country. These governments believe themselves to be acting on the criminality that the stigma demands, and the growth in their Mexican populations has led them to perceive the emergence of criminality within their communities. The local outcry is also a product of migrants becoming more broadly distributed across the country. Areas new to immigration have little experience coping with diversity of any sort, and are reacting—consistent with the racialized model I've proposed—as if they were being overcome by “others.” These ordinances vary greatly; some fine local employers for hiring unauthorized immigrants; others punish landlords for housing them. Though small in scope, they have spread virally and turned thriving immigrant communities into ghost towns as documented and undocumented immigrants alike fled jurisdictions where they were suddenly unwelcome. State legislatures are also beginning to take action, proposing 1400 bills purporting to regulate immigration, and passing 200 of them. But for a Congress which set out to limit immigration and discrimination, the ordinances are alarming. Not only do they portend the same effects as the very apartheid-infected “pass card” system Congress intended to avoid (officers asking brown people for documents), but they also undermine the formal legal case for Congressional plenary authority over immigration matters, just as the

165. For a persuasive account of the racial construction of immigrants as uniformly “Mexican,” and how that construction helped enact California’s Proposition 187 (which denied certain public services to undocumented migrants), see IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 143 (1996).


168. See Rodriguez, supra note 167, at 614-16. The normative validity of the doctrine of plenary authority over immigration matters has been under attack for some time. See also Clare Huntington, The Constitutional Dimension of Immigration Federalism, 61 VAND. L. REV. 787 (2008) (asserting that the constitutional basis for federal plenary authority is misguided and that a statutory preemption legal framework is more normatively appropriate).
scholarly literature has begun constructing the knowledge to facilitate plenary authority's demise.\textsuperscript{170} Congress' institutional need to protect this formal authority may also explain the urgency of its recent enforcement actions: the audience for the spectacle has expanded from the people to the Courts.

E. Comprehensive Immigration Reform in 2008: Path-dependence or \textit{Tabula Rasa}? \textsuperscript{171}

Legislation, of course, is a dynamic source of law, and it is certainly possible that the specific outcomes described here will be remedied in the next attempt at comprehensive immigration reform. But it seems certain that no matter what shape the next reform bill takes, the racialized criminality lodged in immigration will only grow in prominence. Indeed, the effects of the criminal stigma arguably derailed the last attempt to pass reform with the Comprehensive Immigration Reform Act of 2007,\textsuperscript{171} precipitating in turn, the passage of the Secure Fence Act. Facial accounts of the 2006 debates emphasized that the stumbling block to reform was amnesty, but amnesty is merely the other side of the criminalization strategy. Because the spectacle of deporting twelve million aliens would erase entirely the status of America as the representation of universal values, some form of amnesty must occur; this was the bargain struck in 1986 and it will happen again. But as the criminal stigma attached to "illegal" immigrants has escalated in the two decades following the IRCA amnesty, the very idea of amnesty has become more difficult for the polity to tolerate.

This basic social aversion, though, is nothing new.\textsuperscript{172} In our culture criminality demands punishment and amnesty is viewed by the demos as a violation of the rule of law and an act that is singularly unjust.\textsuperscript{173} Given the strength of this attitude (which also reflects the indelibility of the stigma) amnesty cannot erase this mark on "illegal" migrants. Amnesty normalizes an alien's relationship to the state by transforming, with the wave of a wand, an "illegal" immigrant into a "legal" one; it does not supplant—indeed, it reinforces—the idea that she has committed a "crime." After all, the law can only commute an act that was actually a legal and moral wrong in the first instance. As Congressman William Frenzel put it, "[t]o say that we are solving the problem of illegal immigration by declaring "illegals" "legal" is the exact equivalent of curing poverty by declaring poor people rich."\textsuperscript{174} This residual

\textsuperscript{170} Id.


\textsuperscript{172} In Congressional debates preceding the 1986 immigration amnesty, Jesse Helms noted that amnesty was a problem because it "rewarded lawbreaking." \textit{See} 128 CONG. REC. 13 (daily ed. July 22, 1982) (statement of Sen. Jesse Helms).

\textsuperscript{173} \textbf{WHITMAN, supra} note 38, at 185-186.

\textsuperscript{174} 130 CONG. REC. 13 (daily ed. June 20, 1984) (statement of Rep. William
criminality still lingers in the cultural construction of these normalized immigrants, and so the populace objects strenuously to the idea that criminals are not being held to account by the law. And in light of our legal culture, we can see precisely why this objection is so vehement: the way in which amnesty reinforces criminality means that the state is acknowledging this group’s inherent moral unfitness. When one considers that in the context of an immigration amnesty “criminals” are being admitted into the body politic, it is easier to understand why this is a bitter pill for the public to swallow.

Just as criminalization succeeds in creating a semblance of order, it simultaneously makes enacting universal liberty more challenging. In the latest abortive attempt at comprehensive reform, the thought of admitting twelve million “criminals” into the polity proved too much for the populace to bear. In an effort to make amnesty appear punitive, Congress proposed that normalization of legal status involve fines and a lengthy wait, but even this shaming punishment—which actually harms the proto-citizens it affects—was not enough to overcome public opposition. The criminalization strategy is now firmly entrenched and impossible to dislodge. Until Congress manages a normalization, “illegal” migrants will suffer from both the social and legal marginalization that their stigma confers. And yet even in the comprehensive normalization proposals we see criminality magnified in the changes to the employment verification procedures whose original complexities I outlined in the last subsection.

These new proposed rules require employees to present various forms of photo-identification issued by the federal government (passport, green card, work authorization card) or by the fifty states and various territories (mainly driver’s licenses). Eventually, all such documents will be attached to an electronic database that employers will be able to scan (like a credit card) in order to confirm the document’s authenticity. The state ID cards, which in the past were blatantly forged and not particularly reliable evidence of legal status, have been transformed by the Real ID Act into de facto national identity cards. An amendment to the USA Patriot Act, Real ID essentially mandates that each state issue its own identity card that approximates the reliability of a U.S. Passport. Before issuing the licenses, states must verify the authenticity of the documents being presented to garner the license via electronic means and meet a variety of other requirements intended to strengthen the utility of these identity cards as proof of legal status.

Consistent with traditional federalism principles and Americans’ liberty

Frenzel).  
176. See id. at Title 6.A.  
interests, Real ID has garnered substantial criticism on a number of fronts. States have lodged protests and filed lawsuits against the legislation, portraying it as an unfunded mandate and protesting vehemently against its requirement that all the identification information associated with the IDs be accessible through a national database. Privacy advocates are upset because in its very conception, Real ID aims to do a clever end-run around cultural resistance to national identity cards by sustaining the fiction that as state-issued documents these cards pose none of the "big brother" problems presented by the federally-issued variety. The resistance has led to some substantial changes and very significant delays in the implementation of the requirements, but it seems that United States citizens will eventually have to procure and carry a very American national identity card, a requirement that is a ubiquitous part of life in most developed nations.

Whatever one's opinion of the normative advisability of Real ID, these

178. See generally, JOSEPH J. EATON, CARD CARRYING AMERICANS: PRIVACY, SECURITY AND THE NATIONAL ID CARD DEBATE (1986); Daniel J. Steinbock, National Identity Cards: Fourth and Fifth Amendment Issues, 56 FLA. L. REV. 697 (2004); SHANKS, supra note 71, at 222 (passing legislation mandating national identity cards "was impossible because of privacy concerns"). Because passing a national identity card is politically impossible, Congress passed what many consider to be a de facto national identity card in the Real ID Act. Among other requirements, the Act forces each state to issue drivers licenses that conform to federal standards, and requires each state to share personal information regarding its license holders with every other state. DHS has moved the deadline for full compliance from May 2008 to March 2014 in hopes of convincing skeptical states to go along with the federal mandate. See Press Release, Dep't of Homeland Sec., DHS Releases REAL ID Regulation (Jan. 11, 2008), available at http://www.dhs.gov/xnews/releases/pr_1200065427422.shtm. At least seventeen states have passed non-binding resolutions calling for the repeal of the Real ID Act. See New Rules on Licenses Pit States Against Feds, ASSOC. PRESS, Jan. 11, 2008. Utah's resolution describes how the implementation of the Real ID Act will result in the government being able to track its citizens without limitation and states that such a federal role is "in opposition to the Jeffersonian principles of individual liberty, free markets, and limited government." Resolution Opposing Real ID Act, State Of Utah, H.R. 2 (Ut. 2007), available at http://le.utah.gov/~2007/bills/hbillenr/hr0002.htm. The challenge to Real ID illustrates how very ingrained America's anti-statist disposition is. While the final denouncement of Real ID remains uncertain, one must marvel at the tremendous institutional limitations that face a federal government that wishes to enact a program that goes directly against the cultural grain. The culture prevents the federal government from passing an overtly federal identification card, so it uses the only other method at its disposal, state mandates. But then the states themselves can use their local power to either undercut the efficacy of the mandate or to lobby for the mandate's repeal. Given the delays in implementation, Democratic control of Congress, and an upcoming change in the White House, it remains to be seen whether Real ID is ever implemented in the manner initially conceived. See New Rules on Licenses Pit States Against Feds, ASSOC. PRESS, Jan. 11, 2008.

179. Supra note 178.

180. Id.

181. See supra note 178.
reforms promise to make the gesture of employer verification into a substantive administrative procedure. I have every confidence that, at least in the short run, implementation of these new procedures will make it more difficult for unauthorized immigrants to gain employment. In turn, that reality should prevent some of the racialized effects which accrued under the old regime because the insider/outsider dichotomy can be managed based on reliable documentation rather than race. Even so, document fraud will, of course, continue. Sophisticated brokers will create effective fake IDs that fool whatever e-verify system Congress ends up implementing. And these activities will be particularly widespread if, as former INS General Counsel David Martin predicts, Congress’s enforcement zeal wanes in the aftermath of reform and with an improving economic climate. Such complacency will lead Congress to fail to fund the program at levels sufficient to keep it at the technological “cutting edge.” But what this escalation in the security of documentation requirements will also mean is that undocumented immigrants who do procure high-tech fake documents will appear still more credibly criminal for engaging in the act of working in the United States, because the attendant fraud required to produce or procure these documents will at some point involve identity theft or computer-hacking. Citizens concerned and appalled by the fraud related to social security numbers and false birth certificates will only be more upset as sophisticated identity theft rises, when it becomes the only way to provide unauthorized immigrants with a means of working in the United States.

Even under the current regime the expansion of the criminalization strategy to include identity theft is under way. Federal prosecutors have begun bringing aggravated identity theft charges (which may involve time in prison) against unauthorized migrants as a way of forcing them to plead guilty to lesser immigration violations. One such migrant, Ignacio Carlos Flores-Figueroa, did not take the bargain and was sentenced to over six years in jail. Mr. Flores-Figueroa is challenging his sentence by arguing that the statute he was convicted under contains a scienter requirement and the Supreme Court has taken up his case in order to review this narrow statutory construction issue. But like Dr. Tamez’s battle contra the border fence, even a ruling in the appellant’s favor would simply erect a procedural hurdle for Flores-Figueroa’s prosecutors and for a Congress seeking to implement a get-tough approach to immigration enforcement. A victory for Flores-Figueroa, then, would do nothing to alter the basic dynamics of criminalization discussed here at length; his suit is merely another symptom of it.

182. See Martin, supra note 7, at 548.
Should a guest worker program be implemented alongside these new identity restrictions and increased penalties, sophisticated identity fraud will not be nearly as valuable, but in either case, the latest immigration amnesty will come with a steep cost to “Mexicans” now and in the future, who will either have a formal second-class status as guest workers or a de facto one when ID theft becomes the criminal prerequisite to working that attaches itself to the “illegal” migrant of the future; more than likely they will end up with both. Moreover, even though the changes in the proposed legislation appear to focus more attention on interior enforcement, which should reduce border crossings, Congressional debates on the failed bill reveal that “border security” is still the flagship enforcement strategy. Senator after senator, liberal or conservative, professed the solemn need for secure borders or, that is, a militarized border with Mexico. Thus, even as the administrative approach creeps into Congress’ symbolic regulation, it comes as an addendum to the semiotic, not as a substitute for it.

F. The Torch Fades: America’s National Normalization?

In 2006, the Senate debated an immigration reform bill that ultimately died in the House. In 2007, the bill was valiantly resuscitated only to perish again. The performance of America’s nobility in this legislative process appeared nearly indistinguishable from the rhetorical show of 1986: there was talk of bringing immigrants “out of the shadows” with amnesty, and America as “a beacon of hope and opportunity all around the world.” But the American spirit was also deployed to underscore the importance of the United State’s physical enclosure: the scientific triumph of putting a “man on the moon in nine years” was conflated with responding to “the terrorist attacks within three weeks,” and then used to cheer on the further militarization of our southern border. “Securing the border first is job one,” one Senator said. And though some form of this talk always occurred in debates about immigration beginning in the late nineteenth century, reflecting the challenge of

190. See SHANKS, supra note 71, at 212-22 (describing how the notion of eliminating an underclass was crucial to the decision to implement the IRCA reforms); see also GERALD NEUMAN, STRANGERS TO THE CONSTITUTION 183-87 (1996) (discussing how elimination of strict jure soli would contribute to the creation of a permanent underclass).
192. Id. at S4545 (statement of Sen. Dorgan).
193. Id. at S4577 (statement of Sen. Isakson).
194. Id.
195. Id. at S4583.
constructing ordered liberty in this area, the lofty rhetoric was more hollow in this iteration, and more reflexive than in 1986, in part because that bill and its inadequacies haunted the contemporary proceedings. Perhaps also, the overwhelming emphasis on physical enclosure and border surveillance in the debates was simply too much to reconcile with an outward vision of liberty. It was also more than all that. Even as the Senate was emphasizing America’s outward appeal, one notes that they were only addressing an internal audience. In this typical discursive insularity we can detect a broader shift.

What the Senators appeared not to realize in 2006 is that America was no longer the author of its own narrative. In the past when Europe was monarchical, or later a war-torn shambles and a hot-bed of fascism, the United States had a monopoly on enlightened governance, and its efforts to paper over its own contradictions did little to dent its symbolic hold on the world precisely because there was no alternative; America was a singular refuge. But as Europe rebuilt and committed itself to human dignity, and as it began to become a place of immigration through liberalized refugee policies and as a way of assuaging the guilt of colonialism, America became less exceptional and the world could start comparing the lofty ideals it espoused to the hard facts; modern media—al Jazeera—only makes this task easier to accomplish.¹⁹⁶

So Congress forges on, quixotically trying to manage the dual symbolism of liberty and order, but in substance, order is winning the day, with democratic desire swamping whatever nobility of purpose Congress might wish to maintain. The trajectory of criminality’s insinuation into immigration in the United States reflects this shift, and is consistent with the demos’ interpretation of other recent geopolitical phenomena. We the People’s desire to be the torch enlightening the world—if it ever had much of a reality—appears to have drastically diminished in the face of the perceived failure of that project in Iraq. The debacle there is particularly poignant because of the way in which the “gift” of democratic knowledge has been successfully transfigured by much of the rest of the world into a sign of imperialism and, worse-still, of imperial over-reaching and decline. The dislocation of the dominant imagining of the United States to a place outside its own borders seems to have left the land of perennial optimism and possibility world-weary, with citizens asking blankly “why do they hate us?”¹⁹⁷ when everything we stand for is so noble and good. This attitude reflects the strength of the glorious internal narrative on the

¹⁹⁶. I want to be clear that my analysis is not advancing the claim that Europe is some kind of utopia for immigrants. In some ways Europe is a superior place for migrants, and in other ways it is significantly worse. See generally Alexandra Starr, Europe Deals With Immigration, SLATE MAGAZINE, Oct. 17, 2008, available at http://www.slate.com/id/2201909/entry/0/. The point is only that as immigration has become a significant phenomenon in Europe, some of the most salient distinctions between the old and new worlds have begun to erode.

citizenry, and that same group's inability to see outside its own epistemology.

Thus the maintenance of the semiotics of the American universalist vision will continue, but grow more hollow. The substantive effects of maintaining this symbology—hyper-democracy, un-autonomous administrative agencies—ensure that our charming eighteenth century legal idiosyncrasies will remain, but the animating purpose of those oddities—to represent the pinnacle of enlightened governance—has withered away. America, with its stealth National ID card and its ever more restrictive and criminalized immigration policies is beginning to look more and more like the old world it rebelled against, replacing the oppression of monarchy with the tyranny of democracy.

III. DEMOCRACY'S ANTAGONIST?: ORDERED LIBERTY IN THE COURTS

The vision of universalist nationalism I described in Part II is most completely institutionalized in our legal system by the Fourteenth Amendment. Enacted post-bellum, once the Civil War had laid bare the absurdity and the human cost of the arresting contradiction between being a republic dedicated to formal equality and simultaneously denying the basic humanity of a large segment of the population, this amendment is the touchstone for the principle of non-discrimination. Significantly for this study, one of the primary ways in which the amendment sought to guarantee that future populations did not meet the same fate as African slaves was by setting out for the first time in the country's history a national basis for citizenship: "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."198 As with other Constitutional provisions, the text of the Fourteenth Amendment has been parsed and interpreted into a Byzantine complexity. But with the quoted portion of the amendment establishing jus soli, courts have consistently opted for the simplest, bright-line interpretation.199 This interpretation also grants citizenship most broadly and (most significantly for a political system as democratic as ours) in such a way that much of the power to regulate who is granted it out of the hands of the electorate.200 For its part, Congress has not challenged the courts to read the amendment in another way.

199. See Slaughter-House Cases, 83 U.S. 36, 72 (1872). The Slaughter-House Cases acknowledged that the Fourteenth Amendment would not be narrowly restricted to blacks, but would apply broadly to "Mexican peonage" and other racialized labor regimes. See also United States v. Wong Kim Ark, 169 U.S. 649 (1898); INS v. Rios-Pineda, 471 U.S. 444 (1985). In Plyler v. Doe, 457 U.S. 202, 212 (1982) the Court stated in dicta that illegal immigrants are "within the jurisdiction" of the states in which they reside, and added in a footnote that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."

200. Of course, the citizenry could always overturn the rule through constitutional amendment, but that process is notoriously difficult.
There is a long-standing normative debate over whether the broadest interpretation of the Fourteenth Amendment’s *jus soli* provision, which grants citizenship even to children born to parents in the country without authorization, is the proper one.201 Those who argue against the status quo claim that Congress properly has the power to restrict citizenship to offspring of parents lawfully in the country because citizenship in the United States, consistent with Locke’s contractarian theory, requires the consent of the polity. Whether one finds these arguments persuasive or not, the strict *jus soli* rule has legal force in our current regime. And yet, the persistence of the debate underscores how very radical this citizenship rule is. Even more striking, its basic premise has been adhered to even as that system has generated more citizens over time, as world population has boomed and international transport coupled with a relatively open visa policy has made the United States accessible and porous. In this permeable world, there is no more anti-administrative law than *jus soli*. It denies the potential to completely regulate the status of those who we allow into our borders. And for all the startling power of plenary authority, *jus soli* prevents Congress from fully occupying the field of immigration law.

The maintenance of strict *jus soli* citizenship, then, is the strongest symbolic commitment America makes to the universalist vision. The rule radically transforms the idea of citizenship from a parochial norm designed to maintain a pre-existing race of people into a cosmopolitan one. *Jus soli* signifies that America might be open to anyone who washed ashore. The symbolic contrast between *jus soli* and *jus sanguinis* (literally, citizenship by blood and the preferred citizenship method in most of the world) could not be more stark. Closed, clannish, and seemingly immutable, *jus sanguinis* aggressively affirms the centrality of biological lineage in national identity.

Yet, *jus soli*’s substantive effect on American immigration law may be more limited or contradictory than it may at first appear. As with other nondiscrimination provisions and seemingly transcendent Constitutional texts, the radical potentiality of *jus soli* interacts in complex ways with the whole of the American political system and the cultural attitudes of the demos; such processes import the sociological views of citizens, which tends to limit or regulate *jus soli*’s radical potential, making the difference in the symbolic power of *jus sanguinis* and *jus soli* more striking than the substantive policy.

In a nation committed to order and rife with racial bias, *jus soli* heightens anxieties about immigration precisely because allowing any group safe harbor

will result in the creation of a sustained, legally-empowered population of American citizens. The contemporary specter of this anxiety is the pregnant Mexican “wetback” discussed in Part II; it is also visible in the protracted public and scholarly engagement with the phenomenon that has been dubbed chain migration, where the \textit{jus soli} child is regarded as an “anchor baby.”

But such anxiety has been around for a long time; the entire history of immigration restriction is racialized and driven by the shadowy fear of a genetically and culturally miscegenating population. Congress marked Asians as inassimilable on explicitly racialized grounds; the Quota Acts privileged Northern European immigrants (English, German, etc.) over their “southern” counterparts (Italians, Greeks) not precisely because of race, but based on the construction of knowledge showing that southern Europeans had lower IQ scores than those hailing from traditional centers of American immigration; and the federal government interned Japanese-American citizens during World War II.

For all the increasing racial diversification of the body politic in the social sphere, there has been and remains a normative ideal of the true American, and she is not black, Hispanic, or Asian; he is white. Precisely because \textit{jus soli} sanctions the possibility that the progeny of one without historical ties to the United States or a claim to its racial heritage could become a citizen, the social view of the rule is that it constitutes an anachronistic, impractical, and unjust technicality. And while Americans may be more generous in their perception of the children of legal immigrants, the children of “illegals,” tainted by their parents’ criminality, are certainly not considered by much of society to be truly American.

Yet even as \textit{jus soli} abetted or catalyzed racialized immigration restriction, it also may have moderated the worst aspects of the racial animus that the restriction revealed. By denying the possibility that generation after generation of a particular group of people might remain entirely outside of the legal

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203. See generally Ngai, supra note 78; Shanks, supra note 71, at 55-95.; see also Neuman, supra note 190, at 34-42.

204. Ngai, supra note 78.

205. Even though Barack Obama has been elected President of the United States, this basic norm will likely remain well entrenched. A large measure of Obama’s success has to do with his perceived distance from “typical” black politicians. And even with that distance of temperament and style, Senator Obama has been exoticized, and his “patriotism” has been consistently questioned. Patriotism here functions as nothing other than the coded means of marking Senator Obama’s distance from the normative American racial ideal.
system\textsuperscript{206} \textit{jus soli} has managed to oppose the most degrading implications of immigrant racialization in the United States. The power of \textit{jus soli} in substance and symbolism, and in the face of a staggering amount of racial animus, is that all of the groups against whom the state formally discriminated now represent a significant part of the American polity. Indeed, the Census Bureau has recently projected that by 2042 the combined population of racial minorities will outnumber whites.\textsuperscript{207} \textit{jus soli} thus places a clear formal limit on the authority of the state to degrade people, and continues to function in this way for the population of unauthorized immigrants.

A. Managing \textit{Jus Soli}: Citizenship Without Substance

Even so, just as Congress has sought to maintain the image of the United States as a universal beacon of liberty while trying to limit the scope of that liberty in the name of order and national sovereignty, the courts have sought to regulate and soften the radical potential of the \textit{jus soli} requirement along with the rest of the Fourteenth Amendment, all the while attempting to retain its rhetorical and symbolic force.

But whereas the records of Congress's conflicted public arguments on an issue can serve to highlight the tensions between opposing policymaking and cultural priorities, judicial texts seek to efface those tensions in analytically creative ways. The courts are engaged in constructing legal opinions that rationalize the outcome of a particular case such that there appears to be an unbroken line between the holding and \textit{a priori} legal rules and norms. By effectively masking the policymaking function of the judicial opinion,\textsuperscript{208} the courts construct the American legal corpus in a way that maintains the fiction of America's adherence to a document over two centuries old while eliding the judge's role as regulator and author of the current body of American law. We can see this semiotic functionality in opinions like \textit{Plessy}\textsuperscript{209} which created legal and analytic knowledge that reconciled for a time American ideas about equality and the reality of racial segregation in the public school setting. \textit{Brown}, by contrast, refigured the same amendment and the same legal question to opposite effect, creating the knowledge that equality in public schools had to mean racial integration. In retrospect we see \textit{Plessy} as abominable and morally abhorrent, and it is, but both \textit{Brown} and \textit{Plessy} created legal knowledge that reflected and played a role in structuring a social reality; that is the work of the judicial opinion. And in this work we can also trace the democratic will. That

\begin{itemize}
  \item \textsuperscript{206} Neuman, supra note 190.
  \item \textsuperscript{207} Sam Roberts, \textit{A Generation Away, Minorities May Become the Majority in U.S.}, N.Y. TIMES, August 14, 2008, at A1.
  \item \textsuperscript{208} Mashaw, supra note 22, at 309 (discussing how courts mask their policymaking function, but arguing that the pretense does not deceive sophisticated regulatory players).
  \item \textsuperscript{209} Plessy v. Ferguson, 163 U.S. 537 (1896).
\end{itemize}
the courts are traditionally viewed as countermajoritarian reflects the success of the democratic will at structuring the way in which the courts are generally conceptualized, not their actual insulation from popular opinion. Particularly at the level of the Supreme Court, judges are always operating in the shadow of the democratic will, and in doing so, inevitably refract the attitudes of their current social reality.

In immigration law, the bounds of courts’ regulatory authority are more limited than in other spheres because of their own decision to give away much of that power to Congress. Recently there has been some attempt to take back a portion of that authority, but as we shall see in our discussion of Plyler (one such decision), the limits that the courts set tend to preserve and reaffirm the Congressional understanding, even as they appear to limit it. For the most part, then, Congress continues to have carte blanche in this field. A similar phenomenon is evident in the courts’ management of jus soli, where they have maintained that children of “illegal” migrants born in the United States are citizens while also seeking to limit the implications of that status. In particular, courts’ refusal to relate a jus soli citizen’s status back to other family members, including to a child’s parents, is striking. This failure to read citizenship as an expansive and substantive right has resulted in the so-called constructive deportation of numerous American citizens. There are, as with all legal issues, normative arguments on either side of constructive deportation which have found expression in the academy. But bracketing disagreement about the policy’s propriety, children who find themselves in positions like this learn that their United States citizenship has been stripped of much of its substantive meaning.

In the opinions that execute this devaluation, we can trace the way in which courts construct a legal reality to sustain the idea that a child-citizen’s constructive deportation is still compatible with the liberty ideals that America projects to itself and the world. One particularly revealing decision accomplishes this feat by imagining that the child’s fate represents her parents’ expression of personal choice, a liberal value also at the core of Christian ideas about free-will, our political conception of demi-sovereignty and our legal system’s conception of what justifies punishment. Using choice in this way, the court regulates the scope of jus soli even as it obscures the logic that led to the regulatory outcome, effectively adopting the position of the demos (which believes these children to be a lesser class of citizen) while maintaining the myth that citizenship is of equal value to all.

In Acosta v. Gaffney, Lina Acosta, a United States citizen by birth, brought suit conceding her parents’ deportability, but arguing that their

210. See Rodríguez, supra note 167.
deportation would "deny [Acosta] the right which she has as an American citizen to continue to reside in the United States." The Third Circuit disagreed, arguing that the child’s departure from the country had nothing to do with the state, but was instead a function of the choices made by her parents on her behalf. The court acknowledged the practical reality that the child citizen "must remain with her parents and go with them wherever they go" and stated that, even though the parents were leaving the country involuntarily, they had "decided" to take Lina with them to Colombia. The court even laid out the family’s alternatives: should the parents have wished for the child to remain in the U.S. they might have "decide[d] that it would be best for her to remain with foster parents, if such arrangements could be made."

As it constructed these possibilities, the court also acknowledged a child citizen’s legal right to remain in the United States but, through the alchemy of choice, found the need to consider it "purely theoretical . . . since the infant is incapable of exercising it." In this way, the court transformed Lina’s citizenship and its attendant rights into an abstraction without legal force, all the while eliding its role in constructing and constricting the scope of that citizenship. Finally, to emphasize that Lina would not be permanently ostracized, the opinion underscored the child’s ability to return to the United States when she reached the age of “discretion.” Acosta’s estrangement from the land of her citizenship is only temporary, then, her “return to Colombia . . . will merely postpone, but not bar, her residence in the United States if she should ultimately “choose” to live there.”

By imagining Lina Acosta’s future life in the United States, the court was able to repress the meaning of the time that Lina will spend outside the United States. Childhood is a formative period. By coming of age in Colombia, rather than the United States, Lina Acosta will be acculturated in a land with a different language, social mores, and public services. Even if she elects to return, then, she will do so as a cultural alien. If the court were to instead construct Lina’s citizenship as a species of property right, as Congress does when it limits the ability to work in the United States to citizens and legal aliens, the courts’ decision would plainly be a taking, as Lina is being permanently deprived of a quantifiable set of economic and social benefits. But under the court’s legal edifice, Lina Acosta is not being deprived by government of anything; she’s merely taking an eighteen-year sojourn to scenic South America.

As courts do not publish the subtext of their decisions, scholars can never know with any certainty what drives judicial decisions outside of their public

213. Id. at 1157.
214. Id.
215. Id. at 1158.
216. Id. at 1157.
217. Id. at 1158.
rationale. Yet the drivers of a decision like Acosta are relatively simple to theorize. Given the public attitudes regarding jus soli that we have already discussed, were the courts to rule that jus soli citizens born to "illegal" parents were entitled to stay in the United States in order to give substantive meaning to their citizenship, the decision would likely catalyze a dispute between the courts and Congress regarding the scope of jus soli and deepen American anxieties about the southern border. In this way a relatively exceptional individual—the jus soli citizen who is deported—could catalyze a frontal assault on the scope of jus soli itself. With the knowledge to overturn jus soli for the children of "illegal" aliens ready and waiting\textsuperscript{218} for the courts to apply, that battle might lead courts to retreat from the broad definition in order to prevent jus soli from being overturned entirely through a Constitutional amendment. This vision of political ramifications is accurate, even though, from a strictly administrative perspective, extending some status to Lina’s parents would do little to increase the incentive for unauthorized aliens to enter the United States. In this broader political context, then, the court might have viewed the deprivation of Lina Acosta’s rights as a small price to pay for the preservation of the entire system of citizenship that emerged after the Civil War.

Regardless, we may read Acosta as an example of the way in which the courts, which have standing and authority with the public and are institutionally designed to oppose the democratic will still end up bowing to the implied power of the people, and thus must not only regulate the internal coherence of the law, but the potential ramifications of the symbolic reception of a particular decision by citizens and their representatives in government as well. In this way, the liberty that created and sustains demi-sovereignty (authorizing the primacy of democratic power) erases the demi-sovereignty of some of its own stigmatized citizens.\textsuperscript{219} Thus, despite their formalized counter-majoritarian role, courts only end up with slightly more independence than the administrative agencies they help disempower.

B. Plyler: Empty or Substantive Liberty?

While Acosta on its own may appear a comprehensible if unpleasant political compromise, its effective disenfranchisement of a citizen becomes baffling when considered alongside the 1982 Supreme Court decision Plyler v. Doe,\textsuperscript{220} a class action lawsuit in which undocumented non-citizen children challenged a Texas law that would have either denied them an education in Texas public schools or forced them to pay tuition in order to attend. In overturning the Texas law as unconstitutional the Supreme Court held that the

\begin{itemize}
\item \textsuperscript{218} See generally Shuck & Smith, supra note 201.
\item \textsuperscript{219} See United States v. Carolene Prod., 304 U.S. 144, 153 n.4 (1938).
\item \textsuperscript{220} Plyler v. Doe, 457 U.S. 202, 213 (1983).
\end{itemize}
Fourteenth Amendment’s Equal Protection Clause applied to all persons present in the United States regardless of legal status, and that because of the unique stigma that denying basic education to undocumented children would impose, the Texas law violated equal protection.

Befitting a decision whose main purpose was to curtail an act of government aimed at the most vulnerable of populations, Plyler is full of the kind of grand pronouncements of Constitutional principles that help maintain the edifice of this nation as one dedicated to the principles of liberty and equal treatment. Emblematically, the court describes the potency of equal protection this way:

The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection. 221

The Court even framed the work of Plyler as extra-legal, an attempt to grasp beyond the strictures of formalism. It first constructed the harm that these children will face as an inherently social harm: the Court is protecting these children from the “stigma of illiteracy” which, without its efforts, would surely “mark them for the rest of their lives.” 222

But for all Plyler’s high purpose, the ruling was also remarkably narrow. It left open the possibility that a change in Congressional policy that directly addressed the question of the use of state services by undocumented children could reverse the decision. And indeed, various members of Congress took up this challenge in 1996 by proposing the so-called Gallegly Amendment223 to the IIRIRA. 224 The amendment did not pass, but its mere proposal underscores the tenuous degree of protection the court afforded to what it declared to be a guileless group of children deserving of Fourteenth Amendment protection. Moreover, in order to construct the innocence of undocumented children, the Court affirmed their parents’ fundamental guilt:

At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their parents have the ability to conform their conduct to societal norms, and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases can affect neither their

221. Id.
222. Id. at 223.
parents' conduct nor their own status.\textsuperscript{225}

Note particularly, that the Court reinscribed the criminality of "illegal" migrants by imagining their entry into the United States in the surreptitious trespassing sense that constructs the fears that motivate the border fence. That many migrants enter at government invitation, and overstays is elided in this rendering because while still "criminal," such regulatory breaches do not conform to the social construction of migrant's illegality. Notice too that in reiterating migrant criminality the Court also affirmed the power of the state to punish; rather ominously, it took the time to note that punishment for the act of migrating without the state's formal permission is "not limited to" deportation. The central logic of \textit{Plyler}, then, is consistent with the work of all of immigration law we have encountered thus far: to maintain the enlightened semiotic character of law in the nation's panoply of values, while ensuring that the scope of those values is limited and territorially bounded.

\textbf{C. Acosta and Plyler: From Antithesis to Synthesis?}

Taken together, \textit{Acosta} and \textit{Plyler} stand for the proposition that non-citizen children have a de facto\textsuperscript{226} right to a public education, while a citizen-child is not entitled to the substantive right to live in the United States where she might have received that same basic education the \textit{Plyler} court deemed so essential. As with so many other aspects of immigration law, these distinctions appear schizophrenic, but they underscore the way in which all branches of government believe and act on the notion that the only way to provide the liberty available in the sovereign territory of the United States is by formally excluding certain people from it; even if that exclusion does not effectively prevent people from migrating. Citizen status per se, then, is not outcome determinative, at least for the class of persons whose social citizenship is limited. Thus \textit{Acosta} was a case of exclusion management; by abandoning Acosta to the will of her parents, the court believed itself to be managing ordered liberty by refusing to provide an "incentive" to "illegal" immigration by relating-back the child's status. Yet when that same pejorative social standing targets children with a minimal socially-constructed relationship to the incentive structure governing "illegal" migration, the court is willing to assist in a limited way. \textit{Plyler}, then, becomes a decision not about order-management, but limited and convenient liberty enhancement. The Court could utilize \textit{Plyler} as an opportunity to confirm the law's commitment to liberty because providing free schooling has a much more obtuse relationship to the imagined incentive structure of "illegal" migration. In doing so the court can play its

\textsuperscript{225} Plyler, 457 U.S. at 220 (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

\textsuperscript{226} See generally id. The Court is very careful not to frame the schooling issue as a de jure right.
noble role\textsuperscript{227} as the defender of discreet and insular minorities, but in a very narrow way that affirms the court's institutional credibility by bowing ultimately to the supremacy of democratic authority and the knowledge that authority manufactures.

CONCLUSION

With this fragmentary deconstruction of immigration law I must conclude by emphasizing that the liberty which we began discussing, the liberty that means demi-sovereignty, individual rights, and democratic authority, has come more and more to overtake the possibility that our liberty touches those we mark as outside our geographic and social borders. Fundamentally, liberty enlightening the world implies a false teleology—a gradual move from nationalism and nativism to an America that embraces the richness of cosmopolitanism. The primacy of the demos within our political system has in the contemporary world become a significant obstacle to our embodiment of ever-developing enlightenment values. And so as reformers set out in the next few years to effect change in immigration law, they should understand that whatever compromise between order and liberty is eventually reached, the process will only affirm the dynamics I have already described, and that this increasingly means the strictest kind of order. This does not mean such a compromise is not worth embarking on from a normative perspective—millions of people stand to be granted legal status—but reformers must be sanguine about how much they can accomplish without some fundamental alteration in the American political structure. While it is essential to represent the rights of immigrants in the debate about comprehensive immigration reform and litigate for alien tort-liability against the DHS, and against some of the worst abuses of our democracy-driven immigration regime, we must simultaneously understand that all these paths to reform will ultimately uphold the sovereign will of the people. If what we desire is fundamental change, then we must imagine it, because it does not exist in—or cannot be given life by—the Constitution. And this only makes sense. The liberty that America constructed always had a heavy cost that legal scholars among others have consistently effaced. As contemporary scholars we must constantly struggle to expose that price, even as we simultaneously engage in normative debates whose terms seek to suppress it. By embarking on that discursive struggle, the strategies of Congress and the Courts to paper over such costs with lovely platitudes will ring as hollow to a domestic audience as they do to Lina Acosta, the dead migrants who perished en route to the golden door, and the "Mexican" who, even if he has legal citizenship, carries a social status that dramatically

\footnotetext{227. See generally John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980) (promoting a political process theory of judicial review that took its inspiration from Carolene Products’ footnote four).}
undercuts its value.