
Don't We Like Them Illegal?

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Art by Andrea Matsuoka

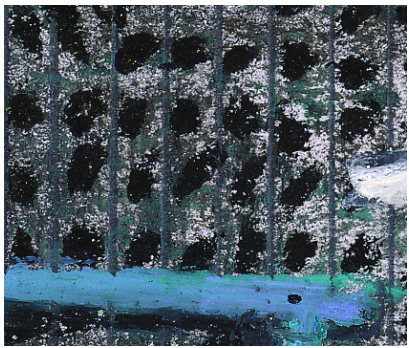
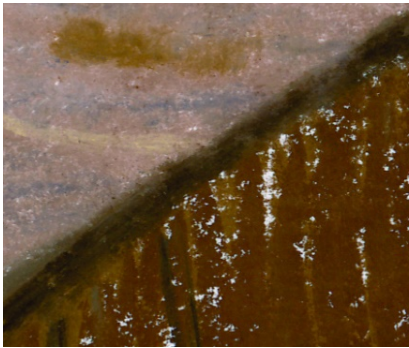
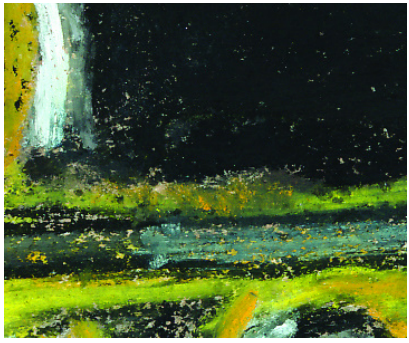
To celebrate Keith Aoki, the editors of the *UC Davis Law Review* invited participation in this special issue. Keith would not likely agree with all this Article says, but I write to honor his life and his work. Thank you for the privilege.

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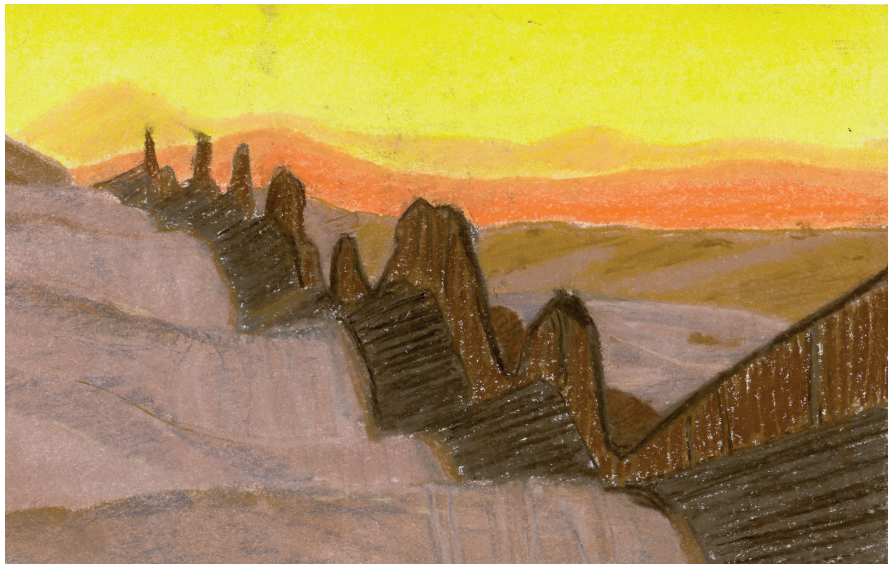
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INTRODUCTION

The thunderous clash over the problem of undocumented Mexicans continues. The Obama Administration believes we should make the border nearly impossible for undocumented Mexicans to cross, life in the United States at every moment vulnerable to immediate deportation, and amnesty perhaps available as part of “Comprehensive Immigration Reform.”¹ Obama’s critics include, among the more xenophobic, those who would make the border literally impossible for undocumented Mexicans to pass through and life in the U.S. literally impossible to survive and, among the more broad-minded, those who would greatly humanize the Obama Administration’s border and detention and deportation programs.²

¹ AARTI KOHLI ET AL., *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (showing that Border Patrol Agent numbers are at an all time high and stating that “[t]he United States will deport a record number of individuals this year, due in large part to rapidly expanding federal immigration programs that rely on local law enforcement”); see *Border Double-crossings*, L.A. TIMES, Apr. 2, 2011 (showing that immigration enforcement spending hit an all time high in 2011 and employer audits quadrupled under Obama); *Borderline Ridiculous: The Republican Presidential Candidates Get Immigration Wrong*, N.Y. TIMES, Sept. 17, 2011, at A20; *Sense, and Nonsense, on the Border*, WASH. POST, Dec. 14, 2011, at A22 (“The border today is more tightly sealed than at any point in decades.”); Robert Farley, *Obama Says Border Patrol Has Doubled the Number of Agents Since 2004*, POLITIFACT (May 10, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/may/10/barack-obama/obama-says-border-patrol-has-doubled-number-agents>. Obama has also continued the Bush policy of spending billions on fencing, agents, spy planes, and seismic sensors.

² See generally Keith Aoki & John Shuford, *Welcome to Amerizona — Immigrants Out!: Assessing “Dystopian Dreams” and “Useable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” Is an Idea Whose Time Has Come*, 38 *FORDHAM URB. L.J.* 1 (2010) (envisioning progressive U.S. immigration reform shaped by public, private, and civic assessments undertaken on a regional basis); *Immigration Hoopla; In Spite of Candidates’ Rhetoric, Reason May Yet Prevail on Immigration Issues*, HOUS. CHRON., Dec. 9, 2011, at B8 (discussing xenophobic rhetoric from 2012 Republican candidates, including a double fence along the entire border, complete with alligator-filled moat and electric charge). For criticisms of Obama’s policies, Ruben Navarrette, Jr. prefers the term “heartless,” see Ruben Navarrette, Jr., *Obama Takes Latino Votes for Granted*, NEWSDAY (Nov. 22, 2011), <http://www.newsday.com/news/navarrette-obama-takes-latinos-for-granted-1.3341146>. The *New York Times* calls for a more humane policy. See Editorial, *Resistance Grows: Massachusetts, New York and Illinois Reject the Obama Enforcement-Only Way*, N.Y. TIMES, June 8, 2011, at A22 (“As Mr. Obama has driven deportations to record levels, he has gotten no closer to fixing a failed system We welcome the votes of no-confidence in Secure Communities. The message is clear and growing louder: Mr. Obama and the homeland security secretary, Janet Napolitano, need to try something else. That something else is real immigration reform that combines a path to legality with

Even this fierce crossfire understates the conflict. People across all fronts debate whether the federal government's constitutional control over immigration ought to be plenary as traditionally understood. Some would permit states like Arizona and Alabama to act as they feel they must.³ Others defend the right of municipalities to declare themselves sanctuary cities.⁴ Still others insist we need undocumented Mexicans legalized through various legal channels, including guest worker programs, while others still recoil at the memory of a Bracero Program where the federal government never equipped itself to enforce the conditions of health and safety and the fair wages assured immigrant workers.⁵

necessary measures to secure our borders and deport real criminals who are here illegally.”); Michelle Fei, *More Double Punishment for Immigrants with Convictions*, NEW AM. MEDIA (Aug. 30, 2011), <http://newamericamedia.org/2011/08/more-double-punishment-for-immigrants-with-convictions.php>.

³ See, e.g., Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 463-82 (2008) (“[T]here is wide latitude for states and municipalities to act without being preempted, provided the statutes are drafted correctly.”); Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 28, 2010, at A31 (“But we already have plenty of federal immigration laws on the books, and the typical illegal alien is guilty of breaking many of them. What we need is for the executive branch to enforce the laws that we already have. Unfortunately, the Obama administration has scaled back work-site enforcement and otherwise shown it does not consider immigration laws to be a high priority. Is it any wonder the Arizona Legislature, at the front line of the immigration issue, sees things differently?”); Hans A. von Spakovsky, *Team Obama's Immigration Hypocrisy*, FOX NEWS, Dec. 13, 2011, <http://www.foxnews.com/opinion/2011/12/13/team-obamas-immigration-hypocrisy/> (“It's time for the Obama administration to stop suing states and start cooperating with them, encouraging them to help the federal government find, detain and deport illegal immigrants.”); George F. Will, *A Law Arizona Can Live With*, WASH. POST, Apr. 28, 2010, at A21 (“Arizona's law makes what is already a federal offense — being in the country illegally — a state offense. Some critics seem not to understand Arizona's right to assert concurrent jurisdiction.”).

⁴ See Michael Melia, *Mayor Seeks to Let Illegal Immigrants Vote*, TIME, Dec. 20, 2011, <http://www.time.com/time/nation/article/0,8599,2102887,00.html>; see, e.g., Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012) (mounting a constitutional defense of certain prominent sanctuary ordinances, especially through Tenth Amendment and Supremacy Clause analyses).

⁵ See, e.g., Timothy Egan, *Migrants from Sanity*, N.Y. TIMES, Oct. 20, 2011 (“The solution, some combination of path to citizenship with guest worker programs, should be within the grasp of the better political minds.”); Suzy Khimm, *Immigration Activists Slam Gingrich on “Red Card Solution”* WASH. POST BLOG (Nov. 23, 2011, 4:21 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/immigration-activists-gingrich-on-red-card-solution/2011/11/23/gIQAPeWKpN_blog.html; Alex Nowrasteh, *Iowa Compact: A Way Forward on Immigration?*, HUFFINGTON POST (Dec. 16, 2011), http://www.huffingtonpost.com/alex-nowrasteh/iowa-compact-a-way-forwar_b_1151105.html

Almost everyone, though, sees undocumented Mexicans as convincing proof that something is “broken” — in the U.S. and in Mexico. Even among those who do not routinely resort to gruesome treatment and hideous oratory, even among many immigrant-friendly advocates, the continuing presence and arrival of undocumented Mexicans illustrates how much both the U.S. and Mexico have lost control of their sovereignty.⁶ Both countries must establish afresh the capacity to define distinctive and stable national communities. That capacity includes — depends upon — exercising firm control over immigration and demonstrating complete fidelity to their own citizens, even if outsiders (including economic refugees) endure great hardship as a consequence.⁷

(discussing how conservatives in Utah, Iowa, and California are now proposing guest worker programs); Editorial, *The Other Jobs Crisis*, WALL ST. J. (Oct. 29, 2011), <http://online.wsj.com/article/SB10001424052970204618704576640921999958398.html> (“There’s a better way. At the state level, stop treating Mexican fruit pickers like alien invaders. In Congress, overhaul the guest worker program to widen avenues for legal immigration, drop calls for obligatory E-Verify and offer those in the country without papers a way to become legal.”).

⁶ For President Obama’s own labeling, see, for example, Barack Obama, Remarks at the American University School of International Service on Comprehensive Immigration Reform (July 1, 2010) available at <http://www.whitehouse.gov/the-pressoffice/remarks-president-comprehensive-immigration-reform>. For others, see Editorial, *An Incremental Change*, N.Y. TIMES, Nov. 18, 2011, at A20 (“In the summer, the Obama administration promised it would review its deportation policies . . . the review is a good idea, but its serious pitfalls are reminders of the rising costs of our national failure to fix a broken immigration system.”); Pablo Alvarado, Director, National Day Laborer Organizing Network, *NDLON Reaction to DHS Press Conference* (Oct. 6, 2010), http://altoarizona.com/documents/10.6.10_NDLON_Press_Release.pdf (“Broken immigration laws should not be multiplied.”); *Gutierrez to Unveil Immigration Reform While Enforcement Measures on the Rise*, RESTORE FAIRNESS (Dec. 14, 2009), <http://restorefairness.org/tag/congressman-luis-gutierrez/> (“It is an answer to too many years of pain — mothers separated from their children, workers exploited and undermined security at the border — all caused at the hands of a broken immigration system.”); Huma Khan & Kevin Dwyer, *Broken Borders: Will Immigration Reform Be Next?*, ABC NEWS (Mar. 19, 2010) (“Obama has pledged “unwavering commitment” to immigration reform, but he has yet to outline a specific proposal for fixing what both Republicans and Democrats call a broken system.”); *Raid in Washington State Sheds Light on Broken Immigration System*, MALDEF, http://www.maldef.org/truthinimmigration/raid_in_washington_02252009/index.html (last visited Dec. 21, 2011); Carol Rose, *Massachusetts Gov. Deval Patrick Walks the Walk on Community Policing and Immigration*, BOSTON.COM (June 4, 2011), http://boston.com/community/blogs/on_liberty/2011/06/governor_patrick_walks_the_wal.html (“In standing up against S-Comm, we are not saying that there should be no enforcement of immigration laws. But the current immigration system is broken on many levels, and S-Comm just adds to this massively failed enterprise.”).

⁷ Even in the cases through which the Supreme Court first established the plenary power doctrine (the severely limited judicial review of Congressional and

Seeing our current circumstances as “broken” reflects, I believe, the prevailing theory of undocumented Mexicans. The central hypothesis of the prevailing theory is that economic disparity between Mexico and the U.S. produces mass undocumented migration of unemployed and underemployed Mexicans in search of relatively well-paying jobs in the U.S.⁸ Through the callous ineptitude of political leaders and other elites, Mexico fails to provide for members of its own national community. Pushed out by their own country, Mexicans hope to survive, and perhaps thrive, by making their way north to the U.S. Attractive and generous, the U.S. cannot plausibly be expected to permit outsiders to undermine the well-being of its own citizens — and should not if it is to fulfill the moral obligations of a sovereign nation. Well-targeted and robustly enforced laws will entirely shut down or at least reduce to a bare minimum a human tragedy that Mexico ought to correct, as indeed it could if it only saw fit.

That the prevailing theory can prove deeply influential should hardly surprise. Theories permit us to notice some things and not others, to take seriously some claims and not others, to respect some constituencies and not others. That’s true of all theories — fancy fully elaborated ideas about how this or that works and largely inchoate hunches that guide us all in getting by day-to-day.⁹ Because theories

executive control over immigration), the analysis pivoted around the concept of national sovereignty. See *Chae Chan Ping v. United States*, 130 U.S. 581, 630 (1889).

⁸ See *infra* Part I.

⁹ For my own elaboration of this view of theory and problem solving, see generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004). For kindred expressions of the rebellious vision, see, for example, Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008); Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999); Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM. L.J. 1 (2007); Bill Ong Hing, *Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering*, 8 ASIAN PAC. AM. L.J. 246 (2002); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); Dale Minami, *Asian Law Caucus: Experiment in an Alternative*, 3 AMERASIA JOURNAL 28 (1975); Dale Minami, *Guerrilla War at UCLA: Political and Legal Dimensions of the Tenure Battle*, 16 AMERASIA 81 (1990); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); Ascanio Piomelli, *The*

generate our perceptions of reality, and because our perceptions of reality typically generate answers to fundamental political and legal questions, we often ferociously debate what ought to be our governing theory.¹⁰ That is as true when it comes to feeling and thinking about undocumented Mexicans as it is about any other central issue in our individual and collective lives.

I am among a small number of people who consider the prevailing theory of undocumented Mexicans wrong. By wrong, I mean it is both descriptively inaccurate and morally misleading. I believe at least some people grasped this in the early part of the twentieth century, perhaps in the late part of the nineteenth, and I certainly expected in the late 1970s that, along with me, more and more would comprehend this fundamental fact. But I was mistaken. I entirely underestimated to what degree the theory utterly normalized deep denial of how the U.S. and Mexico function as sovereigns and how, alone and together, the two nations have long deployed undocumented Mexicans in service of their individual and shared aims. As a result, the prevailing theory undermines our problem-solving capacity — our ability to diagnose, to analyze, to generate options, to make judgments.

Democratic Roots of Collaborative Lawyering, 12 CLINICAL L. REV. 541 (2006); Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467 (1999); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88); Lucie White, *Representing "The Real Deal,"* 45 U. MIAMI L. REV. 271 (1990–1991). For discussion of progressive law practice in the context of public defender work, see CMTY. JUSTICE INST., BRENNAN CTR. FOR JUSTICE, *TAKING PUBLIC DEFENSE TO THE STREETS*, available at http://www.brennancenter.org/page/-/d/download_file_34975.pdf; Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199 (1999); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2421–23 (1996); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306 (1998) (reviewing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997)).

¹⁰ In my earliest published account of human problem solving and its relations to professional lawyering and every stylized professional variation, I tried to stress this fundamental. See generally Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

In place of the prevailing theory, I would have us adopt a rival theory of undocumented Mexican migration. The rival theory perceives that, together, the U.S. and Mexico developed mass Mexican migration, using both legal and illegal systems, in order to respond to the needs and aspirations of their linked political economies. The U.S. has built its prosperity, while Mexico has managed its distress, using these transnational migration systems. At least since the 1880s, and almost always with Mexico's cooperation, the U.S. has flexibly employed a catalog of practices, policies, and justifications that range between two polar opposites: one absolutely protecting the sovereign nation against undocumented foreigners, and the other turning a blind eye toward what undocumented Mexicans have been overwhelmingly encouraged by both nations to do. In both nations, especially when benefitting the U.S., federal, state, and local officials have concertedly and productively promoted undocumented migration, even more than documented migration, all while routinely condemning the phenomenon and frequently punishing undocumented Mexicans, their families, and their communities.

What the rival theory detects in our history is *absolutely not* a Republican or Democratic thing. Or a U.S. or Mexico thing (despite the power disparity). Instead we behold a transnational phenomena, orchestrated by two sovereign nations, reflecting intersecting interests of diverse political parties and factions, though most of all expressing how both the U.S. and Mexico regard undocumented Mexican migration as pivotal to their mutual well-being. Through the rival theory, we can perhaps appreciate why leaders in both countries may feel they must disavow the very regime they so ably deploy. At any rate, we can see how the orchestration of the illegal and legal systems provides perhaps unprecedented flexibility to bold capitalist sovereigns aiming most of all to satisfy the needs of their elites and their documented citizens.

Through the rival theory, however, we can also discern how since 1993 this regime has been threatened as never before. In response to rising racist xenophobia, with the economy initially struggling and then sliding into the Great Recession, the Clinton, Bush, and Obama Administrations declared themselves *the* leaders in enforcing immigration law. They invested hugely in military-grade infrastructure, technology, and manpower, and especially under the new Department of Homeland Security and particularly through directives ordering states and local governments to facilitate federal enforcement efforts, they have policed the border and the fifty states in ways previously unimaginable.

Even if Democrats and Republicans inside the Beltway cared to move institutions and ideologies toward the more hands-off pole, it is no longer obvious that they can. Some states have asserted their own sovereign power over immigration, including at a minimum the right to enforce federal immigration law. Even if this challenge fails, it is difficult to scale back any war, including this undeclared war against undocumented immigrants. Many powerful interests (departments, organizations, personnel) have grown dependent and insistent upon its continuance. For the first time since 1848, the shared capacity of the U.S. and Mexico to do with undocumented Mexican immigrants whatever they would like whenever they want appears plausibly in doubt. The current predicament may defy the self-interest that has driven and found rewards through the flexibility of our undocumented and documented immigration systems. We in the U.S. — and therefore those in Mexico — find ourselves in an unfamiliar bind.

How exactly did we get here? I shall use the rival theory to have us all face our history, the nitty-gritty of everyday ideological life, what went on before 1848 and what has unfolded through 2012. Doing so, we will perceive a challenge both to the standard explanation for how mass undocumented migration begins and to the conventional wisdom about the moral obligation of sovereign nation-states. And we will unearth fundamental questions: Why shouldn't our mixed communities, straddling national borders and legal categories, demonstrate ingenuity, resourcefulness, perseverance even more than they reveal pathologies? And why shouldn't we adapt our institutions — public, private, civil — to the lives we in fact lead, to the lives both our governments entirely understand we have been encouraged to lead for over a century?

But such questions make most people feel exceedingly uneasy. Perhaps our anxiety, our dread, reveals that this rival theory holds up before us an uncomfortable mirror to our history. It apparently is tolerable to deal with a broken system but altogether different to confront ourselves. But why should the U.S. and Mexico get to avoid the unsettling glare of our shared traditions? If we have encouraged entanglements, we should not pretend otherwise. If we have invited expectations, we should not disavow our enticements. If we have benefitted from arrangements, we should not treat our gains as serendipitous windfalls. If we have been passive when we might have energetically resisted, we should acknowledge our compliance. If we have been indifferent when we might have cared, we should recognize that now is as good a time as any to modify our ways.

In undocumented Mexicans, both the U.S. and Mexico should recognize their joint creations. It is not just that both countries should

understand undocumented Mexicans as transnational people they have brought into being.¹¹ It is that these transnational people really do belong to communities on both side of the border. They are Angelenos and Arandenses, New Yorkers and *Nezas*. In both nations, we should appreciate undocumented Mexicans as people we work with, live with, and shoulder burdens with. We should see ourselves.

I. THE PREVAILING THEORY OF UNDOCUMENTED MEXICAN
MIGRATION

A. *Coming to Appreciate the Existence of a Prevailing Theory*

In the 1970s, I practiced in San Diego with three wonderful partners. I routinely represented undocumented Mexicans, in criminal and civil settings, and we collaborated with low-income, of color, and immigrant communities in various mobilizations. In the course of my work, I agreed to sort through with others the wisdom of a set of proposals offered by the Carter Administration in response to the problem of undocumented Mexican immigration.¹² Almost

¹¹ The term transnational may well have been made prominent through the justly famous essay by Randolph Bourne. See Randolph S. Bourne, *Trans-National America*, 118 ATL. MONTHLY 86 (1916), available at <http://www.theatlantic.com/magazine/archive/1916/07/trans-national-america/4838/>. By the early part of the twentieth century, and certainly in the 1970s, scholars and journalists understood Mexican migrants as transnational, and contemporary legal literature routinely invokes the expression. See, for example, Rachel F. Moran, *The Transnational School*, 9 UC DAVIS J. INT'L L. & POL'Y 64 (2003). For a sample of a now rapidly growing interdisciplinary scholarship exploring transnationalism from vying perspectives, see, for example, Ewa Morawska, *Immigrants, Transnationalism, and Ethnicization: A Comparison of This Great Wave and the Last*, in E PLURIBUS UNUM? CONTEMPORARY AND HISTORICAL PERSPECTIVES ON IMMIGRANT POLITICAL INCORPORATION 175-212 (Gary Gerstle & John H. Mollenkopf eds., 2001); EVA OSTERGAARD-NIELSEN, INTERNATIONAL MIGRATION AND SENDING COUNTRIES: PERCEPTION, POLICIES AND TRANSNATIONAL RELATIONS (2003).

¹² For sources that best reflect the Carter Administration's thinking, see SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (1981); PRESIDENT OF THE UNITED STATES, PRESIDENT'S MESSAGE TO CONGRESS PROPOSING ILLEGAL ALIEN LEGISLATION, H.R. Doc. No. 95-202, at 1 (1977). *Immigration and the National Interest* was commissioned by the Carter Administration and reported to the Reagan Administration. The views expressed in that report undoubtedly served as the basis, in part, of the Reagan Administration's later legislative package, and reiterated the views of the Carter administration. See *A Test for the Guests*, L.A. TIMES, May 27, 1981, at 4. These views were shared later by the Ford Administration. DOMESTIC COUNCIL COMM. ON ILLEGAL ALIENS, PRELIMINARY REPORT (1976) [hereinafter Domestic Council Report]. Congress also shared these views. See generally HOUSE COMM. ON THE JUDICIARY, 95TH CONG., ILLEGAL ALIENS: ANALYSIS AND BACKGROUND (Comm. Print 1977) [hereinafter ANALYSIS AND

immediately, I perceived empirical declarations made or presumed true by the Administration to be at odds with what I had learned working in and around the border and, before that, through my family and our extended kinship networks in East Los Angeles, Arizona, New Mexico, Tijuana, and the state of Jalisco.

That was not all that grabbed my attention. I found the actions taken by the Carter Administration to deal with the problems of undocumented Mexican migration and the claims made to justify these practices and policies in conflict with what I found minimally tolerable. At the border and at checkpoints, and in stops made by local law enforcement officials, vulgar racial profiling proved the norm. And in explanations offered in and out of the courtroom, facile rationalizations seemed to me transparently preposterous. Despite the diligent opposition of communities and lawyers (including, prominently, John J. Cleary and Charles M. Sevilla), these justifications became enshrined as constitutionally legitimate by the powers-that-be (including a few judges I respected). I was as flabbergasted as I was enraged.¹³

BACKGROUND]; SENATE COMM. ON THE JUDICIARY, 96TH CONG., U.S. IMMIGRATION LAW AND POLICY: 1952–1979, (Comm. Print 1979) [hereinafter IMMIGRATION LAW AND POLICY]. To glimpse the commentary offered in response, see generally Edwin P. Reubens, *Aliens, Jobs, and Immigration Policy*, 51 NAT'L AFF. 113 (1978).

¹³ Though published judicial opinions offer one limited view of the sanctimoniously racist nature of everyday life, some decisions from that era bear rereading. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (strip searches at the border permissible without either probable cause or a warrant); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (“[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself . . . , are reasonable simply by virtue of the fact that they occur at the border.”); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (sanctioning an Immigration and Naturalization Service (“INS”) factory sweep and the questioning of Latino workers by declaring actions beyond the reach of the Fourth Amendment and by veiling obvious racial dimensions); *United States v. Brignoni-Ponce* 422 U.S. 873 (1975) (sanctioning the use of race to justify intrusive investigation of roving patrols near the border). Only decades later did some criminal justice scholars focus their attention on the practices constitutionally immunized during these years. See Bernard Harcourt, *United States v. Brignoni-Ponce and United States v. Martinez-Fuerte: The Road to Racial Profiling*, in *CRIMINAL PROCEDURE STORIES* 315 (Carol Steiker ed., 2006); Randall Kennedy, *Race, Law, and Suspicion: Using Color as a Proxy for Dangerousness*, in *RACE, CRIME, AND THE LAW* 136-67 (1997). For a later call for “rebellious lawyering” to challenge these policies and practices, see, for example, Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010). For a very recent analyses of how race-driven law enforcement-related immigration cases remain largely ignored by conventional approaches to legal scholarship and criminal procedure courses, see Devon W. Carbado & Cheryl I. Harris, *Undocumented*

Upset with these events, I reminded myself that I had never formally studied the history of migration from Mexico to the U.S. I immersed myself in all that had been written — published and unpublished — to deepen my appreciation of historical patterns and contemporary dynamics. What I read strengthened my sense that a prevailing theory of undocumented Mexican migration did exist and did shape decades of earlier policies and practices and the Carter Administration's views and plans. Grasping this theory proved central to the rationality I found myself facing.

B. *The Prevailing Theory Undiluted*

Through the late nineteenth and entire twentieth centuries, and at least as robustly today, a prevailing theory about why large numbers of immigrants migrate to the U.S. pervades the rhetoric of a wide range of public and private actors. Borrowing from the formal degradation of the humanity of African slaves and Native peoples, the prevailing theory has been most prominently used as a framework to discuss, debate, and defend immigration policies and practices directed against Chinese, Japanese, and Mexican immigrants.¹⁴ Those most influential in shaping public policy, including presidential administrations, have formulated and addressed the problem of undocumented Mexicans through stories and arguments embodying the prevailing theory.

The prevailing theory views undocumented immigration in stylishly straight terms. It sees “illegal immigration” as a social “problem,” emphasizing the threatening impact of undocumented immigrants, especially undocumented Mexicans, on the economic, ecological, and cultural well-being of United States citizens. Drawing heavily upon classical “push-pull” theory¹⁵ and presupposing rationally maximizing

Criminal Procedure, 58 UCLA L. REV. 1543, 1547-48 (2011).

¹⁴ For an important contribution to the examination of African slaves as forced immigrants, see Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999); Rhonda V. Magee, *Slavery as Immigration? 44 U.S.F. L. REV. 273* (2009). For a valuable account of state and local government regulation of immigration, including the immigration of African free and slave labor, until 1875, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1865-73 (1993) (describing pre-1875 sub-federal immigration regulation of immigration). For an argument that we ought understand the intimate relationship between Black history and immigration history in the United States, see ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 54-55 (2d ed. 2002) (lamenting both the artificial divide between Black history and immigration history and the widespread refusal to interpret slave trade as a form of migration).

¹⁵ The sources available in the 1970s revealing the prevailing theory included

individuals, the prevailing theory stresses the economic disparity between the U.S. and Mexico as the “but-for” causal explanation for massive undocumented migration. It blames the Mexican government for failing to care for and control its own while it paints the U.S. as the unwitting and blameless recipient of emigration fueled by its success in enhancing its own domestic well-being.¹⁶ The prevailing theory presumes, fortunately, that well-targeted and vigorously enforced laws can control, and ultimately solve, the undocumented immigration problem.

C. *Suspicious About the Prevailing Theory*

Policymakers committed to the prevailing theory have enacted a series of policies and practices that seem, in terms of their own declared aims, to have failed and perhaps even to have backfired. For at least the last one hundred years, programs supposedly aimed at controlling migration have consistently resulted in the continuation and enhancement of undocumented and documented migration. To take only one relatively recent example, the Immigration Reform and Control Act (“IRCA”) of 1986 enacted employer sanctions for the first time in the name of securing the nation’s borders. Yet apparent policy defects (overly generous employer defense provisions) in the law, coupled with planned under-enforcement, meant that undocumented immigrants could just as easily enter the U.S. labor supply after the law as before it.¹⁷

It is tempting to explain the ostensible failure of border and interior enforcement aimed at curtailing undocumented migration as

these prominent examples: David D. North & Marion F. Houstoun, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* (Mar. 1976) (on file with Shields Library, U.C. Davis); IMMIGRANTS — AND IMMIGRANTS: PERSPECTIVES ON MEXICAN LABOR MIGRATION TO THE UNITED STATES (Arthur F. Corwin ed., 1978); and PAUL R. EHRLICH, LOY BILDERBACK & ANNE H. EHRLICH, *THE GOLDEN DOOR: IMMIGRATION MIGRATION, MEXICO, AND THE UNITED STATES* (1979). Many trace push-pull theory to the nineteenth-century British geographer Edward G. Ravenstein. Edward G. Ravenstein, *The Laws of Migration*, 52 J. ROYAL STAT. SOC’Y 241-301 (1889).

¹⁶ Rhetoric in 2012 imitates ways of talking about undocumented Mexicans in earlier eras, including this sample from the 1970s: “They want it and we’ve got it: jobs, prosperity, the *Ladies’ Home Journal-Playboy* life-style. As a result we are being invaded by a horde of illegal immigrants from Mexico.” EHRLICH ET AL., *supra* note 15, at vii; see also U.S. DOMESTIC COUNCIL COMM. ON ILLEGAL ALIENS, PRELIMINARY REPORT 42 (1976).

¹⁷ See Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC’Y REV. 1041, 1056-64 (1990). For an overarching exploration of related maneuvering, see generally PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* (Peter J. Katzenstein, ed., 2d ed. 2009).

unintentionally poor or short-sighted policymaking. After all, policymakers are not perfect; they devise, as best they can, solutions to problems, and sometimes the laws do not work as expected. Still, the routine and predictable failure of immigration enforcement policies and practices suggests an altogether divergent explanation. Some influential policymakers use the prevailing theory more as a rhetorical framework to talk about what to do than as a theory guiding their efforts to design effective policies. Many policymakers, including exclusionists and anti-immigrant ideologues, doubtlessly believe in the prevailing theory and the immediate need to stop illegal migration entirely. Others likely regard these true-believers as misguided, however, and perhaps even naïve.

Policymakers who speak in prevailing theory rhetoric include at least some who do so only because that is the sort of talk many citizens in the U.S. want to hear (they might say, for example, “We can dramatically reduce illegal immigration by building a bigger and electrified fence, one that stretches out into the ocean”). These leaders — and their staffers — know that, at any given time, many in the U.S. are wary of undocumented Mexicans and want to believe their leaders are doing something about the “problem.” Policymakers appease through policies and practices that seem to abide by the prevailing theory’s assumptions.

In reality, though, these leaders and their staffers do not regard themselves as actually trying to solve the immigration problem as defined by the prevailing theory. They are, if only half-consciously, acting on a different understanding of the circumstances, one that does not presuppose that such a problem exists: the U.S. always needs undocumented Mexican immigrants and somehow must keep them in plentiful supply, an outstanding order Mexican officials and elites are only too happy to fill, helping manage economic, social, and political pressures within their own nation.

II. A RIVAL THEORY OF UNDOCUMENTED MEXICAN MIGRATION

A. *Developing a Rival Theory and Appreciating the Allegiance to the Prevailing Theory*

What I studied deepened my sense that the prevailing theory of undocumented Mexican migration — what shaped the Carter Administration’s views and decades of earlier policies — appeared incurably flawed. And from deep within my analysis of recorded history and daily 1970s border life I pieced together a rival theory. I routinely used that theory in the everyday problem solving at the heart

of lawyering and, in time, in trying more comprehensively to persuade others to see undocumented Mexican migration in ways that wholeheartedly aimed to topple what I then labeled the “Informed Consensus.”¹⁸

I should have realized, during the 1970s and 1980s, the deep pull of the prevailing theory not because of how the Border Patrol could make any Chicano or Mexicano feel vulnerable traveling to and from Tijuana and up from San Diego through San Clemente to L.A., and not because of how the County and City of San Diego officials would offer absurdly shallow reasons for the most insidious behavior, and not at all because of the rise of self-promoting pundits who abandoned the traditional Republicanism of Navy-dominated San Diego for rabidly anti-undocumented Mexican immigrant Right Wing chatter.

I should have appreciated the profound appeal of the prevailing theory of undocumented Mexicans when good and decent people mouthed utterly unexamined platitudes in response to the Carter Administration’s reform proposals and the cases that were then working their way up to the Supreme Court. They would speak, often in frustrated terms, about “having to do something to solve the problem.” And they would never inspect whether their own formulation of the problem — well, the one they borrowed from the public realm — matched the lives they were leading or the truths they could see around them. These good and decent people reminded me of how the world’s best thinkers about thinking routinely emphasized that we rarely scrutinize our “representation” of a problem, even when we appreciate solutions almost automatically follow our framing of a situation.¹⁹

¹⁸ See Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 674 (1981).

¹⁹ See e.g., Herbert Simon et al., *Decision Making and Problem Solving, Report of the Research Briefing Panel on Decision Making and Problem Solving*, in RESEARCH BRIEFINGS 1986 at 29 (1986), available at http://www.nap.edu/openbook.php?record_id=911&page=17 (“The very first steps in the problem-solving process are the least understood. What brings (and should bring) problems to the head of the agenda? And when a problem is identified, how can it be represented in a way that facilitates its solution?”) Certainly Herbert Simon deserves special mention among thinkers about thinking, as do wonderfully resourceful researchers of his generation and of the next, including Allen Newell, Jerome Bruner, George Pólya, Robert Oppenheimer, George Millier, Allan Minsky, Daniel Kahneman, and Amos Tversky. For only a sample of Simon’s massive contributions, some with Allen Newell, see generally ALLEN NEWELL & HERBERT A. SIMON, *HUMAN PROBLEM SOLVING* (1972); Herbert A. Simon, *The Structure of Ill Structured Problems*, in 4 ARTIFICIAL INTELLIGENCE 181 (1973); Herbert A. Simon, *Theories of Bounded Rationality*, in DECISION AND ORGANIZATION (C.B. McGuire & Roy Radner eds., 1972); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (4th

I tried to coax these good and decent people to entertain different interpretations, but our conversations would almost inevitably circle back to where we started. Their interpretation proved manageable and mine disorderly. Worse still, the solutions to the interpretations I asked them to consider did not seem at all obvious; they certainly did not fit within any familiar “solution categories.” Never mind that the lives led by these good and decent people — with and around undocumented Mexicans — did not fit the prevailing theory’s stock stories and arguments. They had already internalized, even if they could not explicitly describe, how the law routinely and selectively filters and ignores and distorts their everyday existence. That is what the law does, presumably has to do.²⁰ Why should things be any different when it came to undocumented Mexicans?

ed. 1997) (1947). For other superb scholarship, see G. POLYA, *HOW TO SOLVE IT — A NEW ASPECT OF MATHEMATICAL METHOD* (1945); JEROME S. BRUNER, JACQUELINE J. GOODNOW & GEORGE A. AUSTIN, *A STUDY OF THINKING* (1956); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 *PSYCHOL. REV.* 81 (1956); Marvin Minsky, *A Framework for Representing Knowledge*, in *THE PSYCHOLOGY OF COMPUTER VISION* 211 (Patrick Henry Winston ed., 1975). In the last decade, large numbers of scholars, including many in law, have built upon these insights. See, e.g., *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* (Gerd Gigerenzer & Reinhard Selten eds., 2001); *HEURISTICS AND THE LAW* (Gerd Gigerenzer & Christoph Engel eds., 2006). In recent years, some in lawyering and law have contributed to what Jerry Kang, the gifted leader of this interdisciplinary scholarly network, has coined the school of “behavioral realism” — asking law to account for more accurate models of human cognition and behavior. See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 *UCLA L. REV.* 465, 490 (2010). For sophisticated examples of related scholarship, often called “behavioral law and economics,” that traces its roots to Herbert Simon’s pathbreaking insights, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 *VAND. L. REV.* 1499 (1998). For a reflection of my efforts, beginning in the 1970s, to develop a theory of lawyering — and ultimately a vision of rebellious lawyering — pivoting around problem solving, see GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Gerald P. López, *Lay Lawyering*, 32 *UCLA L. REV.* 1 (1984). For important work by legal scholars who were among the earliest to draw upon this vast problem solving and cognitive literature, and whose considerable contributions too frequently go unnoticed or at least uncited in contemporary publications, see, for example, ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 *UCLA L. REV.* 273 (1989).

²⁰ For explorations of this conversion, see, for example, KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of*

Anyway, I failed to change minds. And these succeeding decades demonstrate, if anything, that the prevailing theory took even stronger hold of public consciousness than I experienced in the 1970s and 1980s. It is not at all that I believe I alone take in the world through a theory like my rival. A cross-section of actors in the U.S. and Mexico long ago internalized something like this rival theory. Consider trade associations, chambers of commerce, private employers, and the elected and appointed officials who collaborate with them or operate on their behalf.

Yet others remain altogether unable or unwilling to recognize what the rival theory uncovers. I mean to include not just some policymakers and everyday citizens but diligent scholars and journalists too. Perhaps they cannot grasp that the U.S. — much less the U.S. and Mexico — would invent and reinvent such mystifying systems. Perhaps they cannot fathom that sovereigns create coercive bargaining power — inevitably favoring some over others — through the seemingly impartial background ground rules that shape and define legal regimes.²¹ Without knowing with confidence the role of any such explanations, I remain convinced of the importance of trying to persuade people to appreciate alternatives to the prevailing theory.

In the late 1970s, I aimed deliberately to develop a theory from the ground up. Today I provide a revitalized version of this rival theory precisely to emphasize how we might all alternatively interpret what we claim to know from history and current circumstances. The rival theory dares us *not* to notice occurrences and patterns the prevailing theory either ignores or regards as only marginally relevant. It challenges us to recognize that we elect what we believe to be empirically accurate and morally defensible, we opt to immerse ourselves in one or another theory of undocumented Mexican migration, and we pick what we catch sight of and what we overlook.

Disputes: Naming, Blaming, Claiming, 15 *LAW & SOC'Y REV.* 631 (1980–1981); Gerald P. Lopez, *The Work We Know So Little About*, 42 *STAN. L. REV.* 1 (1989); Stephen C. Yeazell, *Convention, Fiction, and Law*, 13 *NEW LITERARY HIST.* 89 (1982).

²¹ For superb legal scholarship developing and exploring such insights about legal systems, see the still far-too-neglected scholarship of Wesley Hohfeld and Robert Hale and the too-often-ignored work by Duncan Kennedy and Joseph Singer. See Duncan Kennedy, *The Stakes of Law: Or Hale and Foucault!*, 15 *LEGAL STUD. FORUM* 4 (1991); Joseph William Singer, *Legal Realism Now*, 40 *CALIF. L. REV.* 465 (1988); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975; see, e.g., Robert Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 *COLUM. L. REV.* 149 (1935); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

B. The Rival Theory Undiluted

The same undocumented Mexican migration defined as a problem in the prevailing theory is understood through the rival theory in a fundamentally different way: Up until very recently, and for a least a century, the solution to the problem of undocumented Mexican immigrants has always been, initially, and perhaps drastically, reducing the numbers and, then, in dribs-and-drabs, increasing them, followed in due course by dramatically enlarging the undocumented and documented population. At some point this solution leads once more to demands to address the growing problem, demands that ultimately prove too politically perilous to ignore, leading political leaders and elites to respond with the solution implemented the last time around. And so forth, with a straight face, without scare quotes around “problem” or “solution.” To be able to exercise such extraordinary flexibility, time and again, the U.S. and Mexico have managed two immigration systems. One is documented (“legal”) and the other undocumented (“illegal”). And together they comprise complementary and overlapping domains of one overarching regime.

Sovereigns operate their legal regimes — and the U.S and Mexico run their legal and illegal immigration systems — through prohibitions and permissions. Prohibitions and permissions establish the framework of ground rules through which law processes disputes, influences behavior, and distributes power. Prohibitions are by far the easier to spot and to experience as law. When the U.S. enacts laws making it illegal to enter and to remain without authorization, most everyone interprets these prohibitions as lawmakers having acted. If indeed lawmakers get very busy creating prohibitions, we perceive law (and government) as playing a bigger role in our lives than before. Still, the number of prohibitions — in any period or over time — does not make legal regimes more or less central to disputes, behavior, or distribution.

Permissions prove far more elusive to pick out and to comprehend. The U.S. could prohibit employers from hiring undocumented immigrants, landlords from renting to them, and grocers from selling them food, but instead it decides to permit (“legally privilege” by not prohibiting) these relationships and transactions and huge numbers of others like them. Lawmakers appear to be doing nothing when they resist demands to prohibit these relationships and transactions, and many experience law as having nothing to do with these results. Savvy participants in — and astute observers of — the legal regime know better, however. These permissions are not inadvertent gaps but choices by lawmakers to let employers, landlords, and grocers — and,

not coincidentally, undocumented immigrants — do what they must in order for illegal and legal migration to serve the mutual needs of the U.S. and Mexico. The law is no less involved when it creates ground rules of permission rather than of prohibition.

With perception counting at least as much as reality, the U.S. and Mexico combine prohibitions and permissions in order to accomplish whatever they most want while appearing to have played either no active role or a hugely central role in the outcome. When aiming to increase undocumented Mexican laborers, the U.S. typically emphasizes prohibitions and diverts attention away from permissions, including the *de facto* sorts signaled through conscious under-enforcement. When aiming to put a stop to all undocumented Mexican migration, the U.S. makes theatrical productions of the prohibitions being enforced, of apprehensions at the border and raids, sweeps, and mass deportations inland. Mexico plays its role in this drama, emphasizing efforts to improve its own economy, to dissuade illegal emigration, and to protect Mexican citizens in the U.S., all while steering clear of its failure both to enact many prohibitions and to enforce those few on the books.

To say the U.S. and Mexico have operated two compatible systems is not to say the systems reflect equal power. Mexico aims every bit as vigorously, even as treacherously, as the U.S. to satisfy its self-interest. Yet the U.S. has always been the vastly more powerful partner and Mexico the accommodating junior associate. They work together because, in many instances, each can satisfy at least some of the other's needs and aspirations. Both nations appreciate the range of choices made available by the documented and undocumented systems. Through various imaginative permutations of stock practices, policies, and rhetorical justifications, as perceived needs and aspirations shift over time, the two countries plan as best they can and improvise as they must.

In creating and controlling the two immigration systems, the U.S. and Mexico do not operate as unitary nation-states. As national communities, both the U.S. and Mexico are unions. The federal governments possess primary constitutional power to formulate practices, policies, and rhetorical justifications in the name of immigration. But state and local governments in both countries have significantly influenced documented and undocumented immigration, at times because they assert themselves when the federal government does not, at times because they share formal power at the request of the federal government, and at other times because they do what they want, occasionally with the federal government consciously averting its gaze.

Shared influence sometimes leads to struggles over constitutional power. Going perhaps to the heart of the matter, state and local governments may decide to interfere with federally granted permissions. They can enact laws prohibiting hiring, housing, and feeding undocumented immigrants, pushing the U.S. to reassert that, constitutionally, only the federal government can choose how best to govern immigration, how best to mix prohibitions and permissions. The federal government almost always wins these showdowns, certainly since 1875 when nearly absolute deference to federal power over immigration became linked to the very idea of sovereignty. Still, the public insistence that state and local government should have a role in granting and revoking permissions makes prominent — and far more controversial — the ground rules of permission that citizens far more typically do not regard as law or as related to the social realities they see around them.

Even the intricacies of federalism understate the complexity within each nation. Within every level of government, elected and appointed officials routinely pursue inconsistent practices, policies, and rhetorical justifications. For example, some protest failures of enforcement, obliging federal officials to explain the logistical difficulties and the legitimate concerns for the civil rights of documented citizens, all while sidestepping the significance of under-enforcement in fulfilling the aims of both the U.S. and Mexico. These explanations do not always satisfy those leading these disputes, but more often than not they lead enough diverse constituencies to back off and leave matters as they are. Contradiction and pretense might well be described as typical of both countries, in their internal dynamics and in dealing with one another.

Dealing with thousands of such permutations could prove overwhelming for sovereigns. Fortunately, the legal and illegal systems provide a catalog of stock practices, policies, and justifications — a menu of available options — for anticipating and responding to diverse circumstances. Within any historical moment, and up close, the options as employed can appear ad hoc, a mishmash of political tradeoffs, contradictory and self-defeating, as indeed to some degree they almost always are, and often by design. Still, from a distance and over time, the options can be seen as oscillating between two paired polar opposites. Near one end we find a set of pre-scripted practices, policies, and rhetorical justifications for “once and for all” excluding and removing all undocumented Mexicans. Tacking back in the direction of the other pole, we see a cluster of pre-scripted practices, policies, and rhetorical justifications for admitting some documented Mexicans and for overlooking the often much larger numbers of

undocumented immigrants already living in the U.S. or migrating (often making their way back) from Mexico. As a matter of ideological orientation (not theoretical inevitability or fixed political slant), the field of operation is heavily tilted toward the pole that excludes, detects, and deports undocumented Mexicans from the U.S. After all, in the U.S. and in Mexico only a tiny percentage of the population speak of open borders or a multi-national union of free-traveling citizens. And those who do are most often regarded — no matter their credentials — as speaking “off-the-wall,” certainly not to be taken seriously in grown-up deliberations. By contrast, not just in 2012, but through much U.S. and Mexican history, many speak — with supreme self-confidence and cool detachment — about permanently putting a stop to all undocumented immigrants, about easing out documented immigrants (perhaps because they have outlived their usefulness, perhaps because they should never have been recruited in the first instance), and, especially in light of undocumented Mexican immigration, about how the Citizenship Clause of the Fourteenth Amendment of the U.S. Constitution can and should be interpreted to deny citizenship to any child born in the U.S. unless one of its parents was a citizen or a lawful permanent resident.

Inescapably, standard practices, policies, and rhetorical justifications reflect the thoroughly racial nature of the two systems. With immediate precedents in the treatment of and thinking about Chinese and Japanese laborers, with even deeper roots in the forced immigration from Africa of Black slaves and the mandated movement of Native peoples within the U.S., the stocks of stories and arguments used to praise and vilify undocumented and documented Mexicans have always revealed racist convictions. Of course Mexico is itself pervaded by profoundly racial and racist ideologies. Even so, Mexican immigrants know they are in the U.S. in part by experiencing how others racially perceive them.

That is true at the border, of course. But it is every bit as true throughout U.S. And it is true for U.S. citizens of Mexican descent, including those whose families have been in the U.S. for generations. Acquaintances, friendships, and romantic entanglements experience the power of these categorizations even and perhaps especially as post-racial “color-blindness” ostensibly reigns. And for centuries the jobs undocumented and documented Mexicans work have routinely been regarded as “Mexican jobs,” just as some of those occupations and economic sectors were once regarded as “Filipino,” “Japanese,” “Chinese,” and “Negro.” But racial categorizations hardly end with institutional routines and everyday idioms. The same racial profiling otherwise openly condemned and carefully managed in political and

legal thought is regarded as self-evidently necessary — and constitutionally sanctioned — when trying to discern which Mexican-looking men, women, and children just might be in the U.S. without authorization.

The paired poles that structure the oscillating stocks of practices, policies, and rhetorical justifications contain opposing explanations of undocumented migration and contrasting moral assessments. In the prevailing theory of undocumented immigration, “but for” economic disparity undocumented Mexican migration would never have occurred or continued. The natural allure of the U.S. reflects economic advantages, political freedoms, and physical accessibility, and poor individual Mexicans cannot help but feel pushed out by their own inferior country and pulled in by possibilities immediately across the northern border.

But a competing explanation of undocumented migration challenges this orderly chronicle. This rival offers an explanation that aims accurately to distill historical forces: where there is substantial economic disparity between two adjoining countries and the potential destination country promotes, *de jure and de facto*, access to its substantially superior minimal wage, and the potential sending country accommodates this movement, that promotion and accommodation encourage migrant households, and everyone else reasonably to rely on the continuing possibility of migration, employment, and residence until a competitive economic alternative is made available.

In the moral assessment that has long reigned supreme, the U.S. and Mexico assert — as all sovereign nations can and should — the right to admit or exclude as a necessary extension of the right to form distinctive and stable communities. After all, access to the national community is a right presumptively shared only and always by those who are fully legal citizens. Sovereign nations should do what they must, especially in difficult economic times, for those who are full members of their national community. With documented immigrants, the U.S. can impose harsh conditions always open to even harsher amendments. And with undocumented immigrants, the U.S. can repel and expel however it sees fit. If the deals made available to both documented and undocumented Mexicans are typically one-sided, unconscionable by conventional standards, they are utterly natural to and defensible as expressions of sovereignty.

Deeper still, though hardly fully developed, much less widespread, lies a competing vision of moral responsibility. In this view, messy reality matters hugely to ethical obligations. Undocumented Mexicans in the U.S. have been integral parts of work crews and child or elderly

care arrangements, kinship networks and families, neighborhoods and communities. They have shouldered burdens and shared living spaces that tie them to others in the U.S. even as they remain connected to their communities in Mexico. They function in fact as would-be citizens, even when the legal system will hear no such thing. In this way of imagining moral obligation, the U.S. must treat undocumented Mexicans with equal respect, not just as humans but as working and responsible members of the very national community we seek to create and sustain. It is not possible to have persons live, work, and participate in our lives without creating in them a sense of entitlement to some benefits of community membership and a moral obligation based on their reasonable expectations. No matter how strongly our formal laws deny it, our conduct creates the obligation.

It is important to realize that both poles — and every point between them — contain both opposing explanations of undocumented migration and the contrasting moral assessments associated with each explanation. At one pole, to be sure, the prevailing theory utterly dominates thinking and exchanges. And, perhaps in some other era, the opposing paired pole will reflect the authority of the rival theory, complete with the competing vision of moral responsibility. Anyway, this ideological imbalance should not divert our attention from the crucial structural feature. At the poles, and at any point between them, and at every point in time, both stocks of practices, policies, and justifications exist, even if one appears almost entirely to have disappeared. The vanquished lies waiting to surface again in yet another fight, across a kitchen table or in legislative halls or before some court. Like all polarities in diverse forms of rhetoric, the stories and arguments hang around to be deployed by someone who can imagine how to make them intelligible again, plausible, perhaps compelling.

It is every bit as important to realize that the U.S.' and Mexico's largely tacit and incredibly robust systems of undocumented and documented migration have always presupposed a rough equality between the U.S.' power to exclude, detect, and deport and its power to attract, admit, and overlook. Of course we have typically enacted practices and policies that appear to be exclusionary, and certainly we have talked up the exclusionary effects of our approaches. But those same practices and policies have often purposely been constructed and carried out in ways that, at the same time, encourage and overlook undocumented migration. They permit at least as much as they prohibit. In the U.S., in particular, we have always relied upon our ability — through the federal government's sovereign plenary control

over immigration — to change our minds and do whatever we want whenever we want, depending on what suits or benefits us.

But today this presumed capacity to change our minds appears threatened as perhaps never before. So effective and unified have the Obama, Bush, and Clinton Administrations been in their unprecedented development of the exclusion, detection, and deportation power, they may well have permanently undermined our capacity to attract, admit, and turn a blind eye. Their dramatic enhancement of federal and state infrastructure, federal and state and local personnel, and a nationalized network of combat-grade electronic surveillance technology make it difficult and perhaps impossible to back off and begin the cyclical move back toward the opposite pole, as we once so readily could. To make matters even more convoluted, some states argue they should play their own sovereign role in enforcing federal prohibitions and denying federal permissions, putting constitutionally at risk the plenary federal power pivotal to the illegal and legal systems of migration. Perhaps this revolt will fall short. Even so, the power to exclude now nearly matches the extreme rhetoric and, as modern wars demonstrate, this and future administrations may find it nearly impossible (procedurally, politically, economically) to reverse course.

III. HISTORY SEEN THROUGH THIS RIVAL THEORY

Mindful of the rival theory, what can we now see in the history of migration between Mexico and the U.S.? We can make out a great deal obscured through the prevailing theory. It should hardly be surprising, though, that our choices about how to absorb what has happened vary. We might well choose to experience how it all came to be, as if in one fell swoop, seemingly fated and staggeringly ruthless, even as we recognize striking reversals of practices and policies and their supporting justifications. Consider one possibility: Strongly influenced by the political economy of the U.S. and Mexico, propelled by what some call a “culture of migration” long prominent in both countries,²²

²² Evidence of what might be labeled a “culture of migration” can be found in the U.S. and Mexico. For a sample of the work of those ethnographic scholars whose unpublished and published analyses first shaped my views in the 1970s, see, for example, RICHARD MINES, *DEVELOPING A COMMUNITY TRADITION OF MIGRATION TO THE UNITED STATES: A FIELD STUDY IN RURAL ZACATECAS, MEXICO, AND CALIFORNIA SETTLEMENT AREAS*, MONOGRAPH PROGRAM IN U.S.-MEXICAN STUDIES, UNIVERSITY OF CALIFORNIA, SAN DIEGO (1981); Roger Rouse, *Making Sense of Settlement: Class Transformation, Cultural Struggle, and Transnationalism Among Mexican Migrants in the United States*, 645 *ANNALS N.Y. ACAD. SCI.* 25 (1992); Raymond E. Wiest, *Wage-Labor*

and triggered and reinforced by actively orchestrated recruitment by the U.S. and calculatedly conscious acquiescence by Mexico, diverse and strong and flexible networks of undocumented and documented migration have developed and thrived, facilitating for the longest time mainly poor Mexican men coming and going, and now permitting far more poor Mexican women and children to take off, too, from increasingly diverse parts of Mexico,²³ men and women and children now crossing the border most often without formal authorization in imaginatively new and tragically often dangerous ways,²⁴ heading for dependable destinations as well as unproven places to secure paying work,²⁵ finding jobs essential to the survival of households and

Migration and the Household in a Mexican Town, 29 J. ANTHROPOLOGICAL RES. 108 (1973). Kindred themes can be discerned in the classic work of earlier scholars still. See, e.g., MANUEL GAMIO, *MEXICAN IMMIGRATION TO THE UNITED STATES* (1930); PAUL S. TAYLOR, *A SPANISH-MEXICAN PEASANT COMMUNITY: ARANDAS IN JALISCO, MEXICO* (1933); PAUL S. TAYLOR, *AN AMERICAN-MEXICAN FRONTIER* (1934). To my knowledge, the first effort qualitatively to document a culture of migration using representative survey data from Zacatecas (capital city), Jerez (middle-sized town), and some 24 smaller rural communities can be found in the scholarship of Kandel and Massey. See generally William Kandel & Douglas S. Massey, *The Culture of Mexican Migration: A Theoretical and Empirical Analysis*, 80 SOC. FORCES 981 (2002). In recent years, some have resurrected interest in and sustained study of these dynamics from the Mexican perspective and, more generally, the emigrant vantage point. See, e.g., DAVID FITZGERALD, *A NATION OF EMIGRANTS: HOW MEXICO MANAGES ITS MIGRATION* (2009); Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006).

²³ Important scholarship now focuses on gender, on women and children joining the migration process, and on the diversification of origins. See, e.g., Luin P. Goldring, *Gendered Memory: Constructions of Rurality Among Mexican Transnational Migrants*, in *CREATING THE COUNTRYSIDE: THE POLITICS OF RURAL AND ENVIRONMENTAL DISCOURSE* 303 (E. Melanie DuPuis & Peter Vandergeest eds., 1996); JACQUELINE MARIA HAGAN, *DECIDING TO BE LEGAL: A MAYA COMMUNITY IN HOUSTON* (1994); Marcela Cerrutti & Douglas S. Massey, *On the Auspices of Female Migration from Mexico to the United States*, 38 DEMOGRAPHY 187 (2001); Jennifer S. Hirsh, *En el Norte la Mujer Manda: Gender, Generation, and Geography in a Mexican Transnational Community*, 42 AM. BEHAV. SCI. 1332 (1999); Emilio A. Parrado, Chenoa A. Flippen & Chris McQuiston, *Migration and Relationship Power Among Mexican Women*, 42 DEMOGRAPHY 347 (2005); Alison Elizabeth Lee, *Economic Crisis and the Incorporation of New Migrant Sending Areas in Mexico: The Case of Zapotitlán Salinas, Puebla* (U.C.S.D. Ctr. for Comp. Immigr. Studies, Working Paper No. 136, 2006), available at <http://www.ccis-ucsd.org/PUBLICATIONS/Alison%20Lee%20Working%20Paper%20Finished.pdf>.

²⁴ See, e.g., JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY* (2002); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 UC DAVIS J. INT'L L. & POL'Y 121 (2001).

²⁵ See, e.g., *NEW DESTINATIONS: MEXICAN IMMIGRATION IN THE UNITED STATES* (Victor Zúñiga & Rubén Hernández-León eds., 2005); Tanya Broder, *Immigrant Eligibility for Public Benefits*, in *IMMIGRATION & NATIONALITY LAW HANDBOOK* 759 (2005-06); Memorandum from the Off. of Medicaid Mgmt., *Revisions to Documentation Guide*

communities and to the welfare of local, state, and national economies in both the U.S. and Mexico,²⁶ staying these days in the U.S. far longer than in earlier decades before typically circling back, and, most often, again facing the absence of a credible economic alternative, usually heading off once more *al norte* as so many have done across generations, living as transnational citizens, no matter how demanding and perilous, formally condemned by *de jure* proclamations and sustained by informal customs acts, embraced by some, incorporated by most, and attacked by still others.

If 160-plus years of history in one cascading sentence divulges particular truths, it masks important details of our shared history. Yet the relevant particulars can be difficult to spot and convoluted to plot. More importantly, perhaps, they can be tedious to absorb. Even a highly compressed account still must deal with overlapping legal and illegal systems, with contradictory practices and policies pursued simultaneously by federal, state, and local governments in both the U.S. and Mexico, with over a century's mix of world and civil wars, of recessions and a depression, and ideological disputes and reversals. Such intricacies (even putting aside important differences between

Immigrant Eligibility for Health Coverage in New York State (Feb. 10, 2004) (on file with author). For other descriptions and analyses of the new migration patterns, see generally RANDY CAPPS ET AL., *THE NEW NEIGHBORS: A USER'S GUIDE TO DATA ON IMMIGRANTS IN U.S. COMMUNITIES* (2003), available at <http://www.eric.ed.gov/PDFS/ED480907.pdf>; CON. BUDGET OFF., *A DESCRIPTION OF THE IMMIGRANT POPULATION* (2004), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/60xx/doc6019/11-23-immigrant.pdf>.

²⁶ See, e.g., Mary J. Fischer & Marta Tienda, *Redrawing Spatial Color Lines: Hispanic Metropolitan Dispersal, Segregation, and Economic Opportunity*, in *HISPANICS AND THE FUTURE OF AMERICA* 100 (Marta Tienda & Faith Mitchell eds., 2006) (discussing ways in which Latinos have consolidated their national presence through unprecedented geographic dispersal across the U.S.); William Kandel & Emilio A. Parrado, *Restructuring of the US Meat Processing Industry and New Hispanic Migrant Destinations*, 31 *POPULATION & DEV. REV.* 447 (2005) (exploring the relationship between changes within meat processing industry and employment of growing number of Latino immigrants); Martha Tienda & Rebeca Raijman, *Promoting Hispanic Immigrant Entrepreneurship in Chicago*, 9 *J. DEVELOPMENTAL ENTREPRENEURSHIP* 1 (2003) (studying evolution of Latino immigrant entrepreneurship in Chicago during the 1980s and 1990s); JEFFREY PASSEL, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* (2011), available at <http://www.pewhispanic.org/files/reports/61.pdf> (offering statistical analysis of the size and demographical profile of unauthorized immigrants in the U.S.). For an example of the growing literature on economic (and other) contributions to the U.S. and Mexico, see generally Margarita Mooney, *Migrants' Social Ties in the U.S. and Investment in Mexico*, 81 *SOC. FORCES* 1147 (2003); MANUEL OROZCO, *THE REMITTANCE MARKETPLACE: PRICES, POLICY AND FINANCIAL INSTITUTIONS* (2004), available at <http://www.pewhispanic.org/files/reports/28.pdf>.

states within the U.S. and Mexico) make it easy to get lost, to get bored, to give up trying to understand. That seems especially likely when the prevailing theory offers a neat explanation for undocumented Mexican migration, with stock descriptions and moral assessments, with off-the-rack ways to fix “what’s broken.”

Nothing can guarantee a willingness to plod through dense and strange historical specifics seen through the rival theory. We should remind ourselves, however, that real people lie behind the conflicting statutes, regulations, and ordinances, behind the utterly routine failures of enforcement and the brutally effective horrors of round-ups and sweeps and raids. We can see them in undocumented and documented Mexicans. In those on both sides of the border with whom undocumented Mexicans work and live. In those who orchestrate the transnational regime, at once openly celebrating the power “once and for all” to stop undocumented Mexican migration and, at the same time, imaginatively deploying the capacity for including undocumented Mexicans in everyday life.

If we look hard enough at those who fill these various roles, we will see not just people like us but ourselves. We are a part of the institutions and the communities and the countries managing and living with two systems of migration. We are affected by and responsible for undocumented Mexican immigrants. Both the U.S. and Mexico would look far different today were it not for over a century of undocumented and documented migration, and our contemporary communities (not just our economies) depend upon the very people regarded as themselves the “problem.” We produce the history revealed through the rival theory; we are not just bystanders as the prevailing theory would portray most of us.

A. *A New Border to Disregard and a New Racism to Face*

In the 1846–1848 War, the U.S. crushed Mexico, took possession of the new Southwest (including ultimately the states of California, Arizona, Texas, New Mexico, Nevada, Colorado, and Utah), and established a new 2,000-plus mile boundary between itself and its defeated southern neighbor.²⁷ Yet for nearly eight decades following

²⁷ For diverse perspectives of these events, see, for example, ALBERT CAMARILLO, *CHICANOS IN A CHANGING SOCIETY: FROM MEXICAN PUEBLOS TO AMERICAN BARRIOS IN SANTA BARBARA AND SOUTHERN CALIFORNIA, 1848–1939* (1979); LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007); ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1987); DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986* (1987). For depictions of California before conquest by the United States, see *CONTESTED EDEN: CALIFORNIA BEFORE THE GOLD RUSH* (Ramón A.

the 1849 Treaty of Guadalupe Hidalgo, the new border remained almost entirely unmarked, and people in both countries almost completely unmindful of the sovereign boundary.²⁸ Obliviousness to the new border did not reflect, as many once maintained, that the borders of the U.S. were legally open or that there was no such thing as an illegal alien.²⁹ It is true, before 1875, that the federal government had not yet unabashedly asserted sovereign plenary power over immigration or enacted reasonably comprehensive immigration laws. But state and local governments actively regulated the entry and presence of foreigners and inhabitants of others states.³⁰ The federal government typically respected these laws and even provided support through statutes and diplomatic efforts for states' laws aiming to quarantine contagious entrants, to exclude paupers and convicts, and to restrict entrance of free Blacks.³¹ While states proved incapable of enforcing all these laws with the effectiveness they appeared to desire, the restrictions typically withstood constitutional scrutiny, likely deterred some immigrants, and certainly led to severe difficulties for some migrants, particularly free Blacks and those accused of contagion.³²

Inattention to the new border between the U.S. and Mexico was now and then disrupted. During the Civil War, Brownsville and Matamoros gained prominence as a way around the Union's naval blockade of the

Gutiérrez & Richard J. Orsi eds., 1998); DAVID J. LANGUM, *LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821–1846* (1987).

²⁸ For important treatments of the Treaty of Guadalupe Hidalgo, see, for example, CAMARILLO, *supra* note 27; RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT* (1990); GÓMEZ, *supra* note 27; MONTEJANO, *supra* note 27; Josefina Zoraida Vázquez, *The Significance in Mexican History of the Treaty of Guadalupe Hidalgo*, in *THE TREATY OF GUADALUPE HIDALGO, 1848: PAPERS OF THE SESUICENTENNIAL SYMPOSIUM, 1848–1998*, at 81 (John Porter Bloom ed., 1999).

²⁹ For only one prominent example, see PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 92, 95-96 (1985) (before 1866, and the passage of the Fourteenth Amendment to the Constitution, “[t]he nation maintained a policy of completely open borders,” and “[t]he question of the citizenship status of the native-born children of illegal aliens never arose for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter.”).

³⁰ See Neuman, *supra* note 14, at 1865-73 (identifying and explaining categories state regulation addressed pre-1875). For a compatible analysis of the role played by states in immigration, see STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 180-83, 189-90* (1987).

³¹ Neuman, *supra* note 14, at 1883.

³² *Id.* at 1884-1901.

Confederacy.³³ And in 1894 the U.S. created two border inspection points mainly to guard against the illegal entry of Chinese.³⁴ All the more remarkable that for decades obviousness proved the rule. For most people, the border did not matter — did not even exist. And both nations had begun to appreciate the complex possibilities offered by illegal and legal immigration. Only in 1924 did the U.S. create the Border Patrol; even then, lawmakers knew full well the 450 new officers could offer only limited surveillance.³⁵ Most in the U.S. and Mexico continued to regard the territory as one region, living in a shared political and social domain, approved in fact by both nations.³⁶

The U.S. and Mexico shared more than an open border. Both had absorbed the views of the imperial powers from whom they had declared independence.³⁷ In more polite vocabulary, the U.S.' and Mexico's elites drew a line between the sorts of people who could be self-governing and those who did not have what it took to govern

³³ See JOHN M. HART, *REVOLUTIONARY MEXICO: THE COMING AND PROCESS OF THE MEXICAN REVOLUTION* 138 (1987).

³⁴ For explorations of these events and their significance, see, for example, DARRELL H. SMITH & H. GUY HERRING, *THE BUREAU OF IMMIGRATION: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 7 (1924); WILLIAM T. TONEY, *A DESCRIPTIVE STUDY OF THE CONTROL OF ILLEGAL MEXICAN MIGRATION IN THE SOUTHWESTERN U.S.* 58-59 (1977).

³⁵ For a recent history of the Border Patrol, see, for example, KELLY LYTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* (2010). And for other depictions of the years surrounding the formation of the Border Patrol, see CLIFFORD ALAN PERKINS, *BORDER PATROL: WITH THE U.S. IMMIGRATION SERVICE ON THE MEXICAN BOUNDARY 1910-54* (1978); JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 118 (2000). In 2003, the U.S. Border Patrol became the Office of Border Patrol, part of U.S. Customs and Border Protection, a component of the newly created Department of Homeland Security. *Border Patrol History*, CBP.Gov, http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/history.xml (last visited Jan. 31, 2012).

³⁶ See generally PAUL S. TAYLOR, *AN AMERICAN-MEXICAN FRONTIER: NUECES COUNTY, TEXAS* (1934); Charles H. Hufford, *The Social and Economic Effects of the Mexican Migration into Texas* 6 (1925) (unpublished thesis, Howard Payne College) (on file with Shields Library, U.C. Davis) (quoting JAY S. STOWELL, *THE NEAR SIDE OF THE MEXICAN QUESTION* (1924)).

³⁷ For splendid explorations, see, for example, GÓMEZ, *supra* note 27; THOMAS R. HIETALA, *MANIFEST DESIGN: ANXIOUS AGGRANDIZEMENT IN LATE JACKSONIAN AMERICA* (1985); REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981); FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION* (1963); GEORGE J. SÁNCHEZ, *BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE, AND IDENTITY IN CHICANO LOS ANGELES, 1900-1945* (1995); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT* (1995). For an influential classic, see AMÉRICO PAREDES, "WITH HIS PISTOL IN HIS HAND": A BORDER BALLAD AND ITS HERO (1958).

themselves. In more thoroughly candid terms, both countries imposed formal racial hierarchies and informal racist practices familiar to colonial powers: Anyone not white — Blacks, Indians, mestizo Mexicans, Asians, most obviously — was inferior and ought to be in fact treated as inferior.³⁸

Every nation's racism differs, however. And the U.S.' brand covered every Mexican. Debates raged over whether Mexicans were more like Indians or like African slaves. Life in each territory developed its own special flavor, with Texas perhaps more like the South and New Mexico perhaps its own special case.³⁹ Even when declaring Mexicans legally "white" or "equal," people across the U.S. regarded them as yet another inferior group to be segregated, degraded, and managed.⁴⁰

³⁸ For valuable insights, see, for example, MARTHA MENCHACA, *RECOVERING HISTORY, CONSTRUCTING RACE: THE INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS* (2001). For related analyses by legal scholars, see, for example, Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259 (1997); Guadalupe T. Luna, "Agricultural Underdogs" and *International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9 (1996).

³⁹ For among the very best modern histories of the Southwest, see generally MARIO T. GARCÍA, *DESERT IMMIGRANTS: THE MEXICANS OF EL PASO, 1880–1920* (1981); RAMÓN A. GUTIÉRREZ, *WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500–1846* (1991); MONTEJANO, *supra* note 27; SÁNCHEZ, *supra* note 37; Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 UCLA CHICANO-LATINO L. REV. 9 (2005); Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC'Y. REV. 1129 (2000); Laura E. Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395 (2002). For a blossoming literature about Mexicans immigrants in other parts of the U.S. — including the deep South, even in the early years of mass migration — see, for example, GABRIELA F. ARREDONDO, *MEXICAN CHICAGO: RACE, IDENTITY, AND NATION, 1916-39* (2008); ANITA GONZÁLEZ, *JAROCHO'S SOUL: CULTURAL IDENTITY AND AFRO-MEXICAN DANCE* (2004); DAVID GUITÉRREZ, *NATION AND MIGRATION: PAST AND FUTURE* 270 (2008); Julie M. Weise, *Mexican Nationalisms, Southern Racisms: Mexicans and Mexican Americans in the U.S. South, 1908–1939*, 60 AM. Q. 749 (2008).

⁴⁰ For explorations of vulgarities and subtleties alike, particularly the crazy complexities of what I call "passing legally as white," and "passing socially as white," see, for example, IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) [hereinafter *WHITE BY LAW*]; MIRANDÉ, *supra* note 27; Ariela J. Gross, "The Caucasian Cloak": *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007); Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in *RACE LAW STORIES* 273 (Rachel F. Moran & Devon W. Carbado eds., 2008). For an important essay examining the racial dimension of de jure and de facto naturalization in the U.S., see Devon W. Carbado, *Racial Naturalization*, 57 AM.

Mexicans were mongrels, genetically and cultural below standard, capable of providing labor unworthy of any deeper regard.⁴¹

At the same time, and perhaps partly in reply to these race dynamics, many Mexicans continued to regard the southwestern U.S. as Mexico's. Or at least they regarded them as Mexican. And that perception — and, for some, that aspiration — proved surprisingly enduring. At least through the 1940s, maps studied by Mexican children sometimes stated “territory temporarily in the hands of the United States.”⁴² And, even today, some Chicano activists render the Southwest United States as part of Aztlán — the community of “Greater Mexico.”⁴³ When it comes to racial boundaries and sovereign

Q. 633 (2005).

⁴¹ For revealing accounts, see, for example, ARNOLDO DE LEÓN, *THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821–1900* (1983); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964); ABRAHAM HOFFMAN, *UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929–1939* (1974). For related analyses of all Latinas and Latinos in the U.S., see, for example, *BORDERLESS BORDERS: U.S. LATINOS, LATIN AMERICANS, AND THE PARADOX OF INTERDEPENDENCE* (Frank Bonilla, Edwin Meléndez, Rebecca Morales & María de los Angeles Torres eds., 1998); *BORICUAS: INFLUENTIAL PUERTO RICAN WRITINGS — AN ANTHOLOGY* (Roberto Santiago ed., 1995); *THE COLUMBIA HISTORY OF LATINOS IN THE UNITED STATES SINCE 1960* (David G. Gutiérrez ed., 2004); *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 1998); *LATINOS REMAKING AMERICA* (Marcelo M. Suárez-Orozco & Mariela M. Páez eds., 2002); PEDRO A. MALAVET, *AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2004); ANA MENÉNDEZ, *IN CUBA I WAS A GERMAN SHEPHERD* (2001); CECILIA MENJÍVAR, *FRAGMENTED TIES: SALVADORAN IMMIGRANT NETWORKS IN AMERICA* (2000); MIGUEL PIÑERO, *LA BODEGA SOLD DREAMS* (1980); RENATO ROSALDO, *PRAYER TO SPIDER WOMAN / REZO A LA MUJER ARAÑA* (2003); Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420 (2004); Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).

⁴² See, e.g., CAREY MCWILLIAMS, *NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES* 103 (1949) (a pathbreaking account of Mexican and Mexican American history through 1945).

⁴³ The term “Greater Mexico” traces its origins to Americo Paredes, the much-honored scholar and activist. See, e.g., Richard R. Flores et al., *In Memoriam: Americo Paredes*, Univ. of Tex. (Jan. 5, 2001), <http://www.utexas.edu/faculty/council/2000-2001/memorials/Paredes/paredes.html> (“Paredes was dedicated to the proposition that cultures are not contained within historically contingent things that we call nation-states. And — expanding this idea of border-crossings as early as the mid-1950s — he believed that scholarly disciplinary activity in the realm of culture must continually be integrative to produce one encompassing and fluid portrait in which history, anthropology, folklore, literature, and cultural geography become as one.”) For contrasting accounts of Mexican history, see generally JOHN R. CHÁVEZ, *THE LOST LAND: THE CHICANO IMAGE OF THE SOUTHWEST* (1984); JUAN GÓMEZ-QUINONES, *ROOTS OF CHICANO POLITICS, 1600–1940* (1994); *LAND AND POLITICS IN THE VALLEY OF MEXICO: A TWO-THOUSAND-YEAR PERSPECTIVE* (H. R. Harvey ed., 1991); OAKAH L. JONES, JR., *LOS*

borders, particularly between the U.S. and Mexico, brute facts and imagined futures seem persistently to intermingle. And they drive interpretations of everything from daily interactions to founding constitutions.⁴⁴

B. Recruitment of Cheap Labor and Degradation of the Recruited People

In the prevailing theory, the stock tale of the mass migration to the U.S. in the nineteenth century focuses on the incredibly difficult circumstances faced by the people of Europe and Asia. Conditions in various countries indeed were harsh and dangerous. Yet remarkably resourceful recruitment proved an even more central force in explaining why immigrants (mainly men, the targeted population) traveled thousands of miles to support households and kinship networks. Astonishingly effective mobilization — not spontaneously combusting “push/pull” — brought millions of immigrants to the grandly ambitious new nation.

The U.S. imaginatively promoted the long-distance mass movement of the workers it needed. Already by the middle of the nineteenth century, the federal government, individual states, and private industry in the U.S. played active and effective roles in recruiting cheap labor from western Europe and China. This collective capacity should come as no surprise, particularly since state and federal lawmakers had been actively involved in the slave trade.⁴⁵ Much of the time, the federal government did not have to officially recruit in Europe and China and only to create space through procedures such as authorizing employers to pay the passage and bind the service of migrants.⁴⁶ Individual states and private employers took care of the

PAISANOS: SPANISH SETTLERS ON THE NORTHERN FRONTIER OF NEW SPAIN (1979); DOUGLAS MONROY, *THROWN AMONG STRANGERS: THE MAKING OF MEXICAN CULTURE IN FRONTIER CALIFORNIA* (1990). For varied illustrations of the vast Chicana and Chicano literature, see, for example, GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (3d ed. 2007); JOSÉ ANTONIO BURCIAGA, *SPILLING THE BEANS: LOTERÍA CHICANA* (1995); CHICANA LESBIANS: *THE GIRLS OUR MOTHERS WARNED US ABOUT* (Carla Trujillo ed., 1991); *THE LATINO/A CONDITION*, *supra* note 41; ALFREDO MIRANDÉ & EVANGELINA ENRÍQUEZ, *LA CHICANA: THE MEXICAN-AMERICAN WOMAN* (1981); Luna, *supra* note 38; Johnson, *supra* note 38.

⁴⁴ For my own wholeheartedly race-conscious, East L.A. interpretation of the Constitution and the constitutional bicentennial in the U.S., see Gerald P. López, *The Idea of a Constitution in the Chicano Tradition*, 37 J. LEGAL EDUC. 162 (1987).

⁴⁵ For one account of the activity of state governments and the support of the sovereign, see for example, Neuman, *supra* note 14, at 1878-80.

⁴⁶ John Higham, *The Politics of Immigration Restriction*, 1 IMMIGR. & NAT'LITY L. REV. 1, 5 (1975).

rest of the job. So vigorous had competition for cheap immigrant labor become by the 1870s that most states and some cities employed promotional agents who, in turn, offered diverse enticements to help private employers find, transport, and employ cheap labor.⁴⁷ Formidable recruitment networks galvanized the movement of the globe's workers.

Recruited immigrants discovered, though, that most in the U.S. refused to treat them as fully human. "Nativists" in the U.S. regarded waves of immigrants as inferior, unworthy of "equal citizenship" at the heart of the Constitution.⁴⁸ And organized labor regarded immigrants as impossible to organize — the product of temperament, heredity, or both — and undeserving of the same basic honor and esteem they sought for themselves.⁴⁹ Fueled by views that relentlessly denigrated African slaves and indigenous nations, many European immigrant groups met sternly racist reception.

These groups ultimately became regarded as "white," though the process proved tortuous, and most often entailed embracing the very racism that they themselves experienced. Each immigrant group faced distinctive challenges — Jewish-, Italian-, Polish-, Greek-, Irish-Americans.⁵⁰ The influences of nativists, the labor movement, and

⁴⁷ For samples of the vast literature describing these overall dynamics, see generally LEONARD DINNERSTEIN & DAVIS M. REIMERS, *ETHNIC AMERICANS: A HISTORY OF IMMIGRATION* (1975); OSCAR HANDLIN, *BOSTON'S IMMIGRANTS: A STUDY IN ACCULTURATION* (1959).

⁴⁸ For the classic treatment of "equal citizenship," see KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (4th ed. 1989). Within a enormous literature on "nativists," see, for example, JOHN HIGHAM, *STRANGERS IN THE LAND* (1963); William R. Kenny, *Nativism in the Southern Mining Region of California*, 12 J. WEST 126 (1973).

⁴⁹ For important accounts, see, for example, PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 258 (1964); GERALD ROSENBLUM, *IMMIGRANT WORKERS: THEIR IMPACT ON AMERICAN LABOR RADICALISM* (1973).

⁵⁰ See, e.g., ARE ITALIANS WHITE?: HOW RACE IS MADE IN AMERICA (Jennifer Guglielmo & Salvatore Salerno eds., 2003) (exploring complexities of how most accurately to describe Italians as a race over the decades); KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998) (offering description and analysis of how Jews became white after World War II, as they moved away from immigrant and low-wage labor status); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995) (traces how the Irish in the U.S. moved from among the racially oppressed to among the racial oppressors); MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998) (investigating how diverse European immigrants became white through historical fabrications that intensified racial divides in the U.S. and persist to this day); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE* (2005) (describing how groups regarded as white today originally occupied as immigrants a confused and more degraded racial status).

ultimately New Deal reforms all mattered hugely to the transformations. So did the presence of one or more new immigrant groups (not to mention Indians and Blacks — and Mexicans both before and after they became immigrants) to target as inferior, as something other than “white,” as something beneath those humans to whom the national community owes equality — as a tangible everyday fact and not just as an abstract founding principle.

C. *Whipsawing the Chinese — A Playbook for the Future*

Few Asians had migrated to the U.S. up to the early 1800s. The U.S. imposed no restrictions; China, Japan, and Korea, however, opposed emigration, made open recruiting dangerous, and executed emigrants upon their return. Yet these obstacles did not deter or dissuade the U.S. Determined recruiters already had targeted Asia as one front for its ever-expanding efforts to lure new cheap labor to service its imagined destiny.⁵¹

By the 1840s, recruitment by federal, state, and local officials and private industry in the U.S. pursued, in particular, Chinese men (particularly in more heavily populated Guangdong and Fujian provinces) to fill pivotal labor needs in railroad construction, domestic work, and laundry. The collaborative campaign paid off when the weakened Qing dynasty proved unable to control its own borders, much less enforce its prohibition on emigration: Daring Chinese immigrants came by the thousands to the U.S., to work whatever jobs they could get to help their families and villages deal with rice shortages and wars and internal rebellions.⁵²

⁵¹ For this sketch, I rely upon Bill Ong Hing’s ambitious and sophisticated account in *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993), and on my own 1981 work (López, *supra* note 18). For important scholarship that taught me much in the 1970s, see, for example, GUNTHER BARTH, *BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850–1870* (1964); PING CHIU, *CHINESE LABOR IN CALIFORNIA, 1850–1880: AN ECONOMIC STUDY* 16 (1963); MARY COOLIDGE, *CHINESE IMMIGRATION* 17 (1909); ROSE H. LEE, *THE CHINESE IN THE UNITED STATES OF AMERICA* (1960); STUART MILLER, *THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785–1882* (1969); ELMER SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 12 (1939); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971); BETTY LEE SUNG, *MOUNTAIN OF GOLD: THE STORY OF THE CHINESE IN AMERICA* (1967); WILLIAM L. TUNG, *THE CHINESE IN AMERICA 1820–1973, A CHRONOLOGY & FACT BOOK* 1, 7 (1974); Wen-Hsien Chen, *Chinese Under Both Exclusion and Immigration Laws* 22 (June 1940) (unpublished Ph.D. dissertation, University of Chicago) (on file with U.C. Berkeley Library).

⁵² Over the past several decades, extraordinarily sophisticated scholarship emerged deepening and sharpening our understanding of Asian migration to the U.S.

Even when measured by the “you’re not white like us” ugliness aimed at European immigrants in the late eighteenth and nineteenth centuries, Chinese immigrants faced distinctively evil and insidious experiences. Upon arrival, and already in frenzied forms by the 1840s, Chinese faced the pervasive racial hatred familiar to Mexicans, and before them, to Indians and Blacks. Instantaneously, Congress heard demands for restrictive federal immigration laws from nativists and organized labor alike. And state and local officials responded to kindred pressures by asserting firm control over Chinese immigrant life: Chinese immigrants had to pay a special foreign miners’ tax in California; to deal with “anti-coolie” clubs, boycotts of Chinese-made goods, and to fend off mob attacks.⁵³

This vicious racism was not because recruited immigrants somehow had failed in their designated work roles. Indeed, the Chinese satisfied the grandest ambitions of recruitment strategists, triggering envy in nativist labor. Chinese immigrants helped complete — on time — the Transcontinental Railroad, and they played important roles in mining, farming, dry cleaning, and other industries. They served successfully as servants, cooks, and washers. They drew praise for their diligence and for their readiness to work for low wages. They were regarded as less loud-mouthed and more reliable than most other workers. And their admirers included employers and officials on the West Coast and plantation owners in the deep South.⁵⁴

Nor did racist practices and policies result from the failure of Chinese immigrants to fight back. Chinese in the U.S. knew they did not *look* white, and they knew they did not *act* white. They failed the conventional tests for “passing” — phenotype and performance

See, e.g., LUCY M. COHEN, *CHINESE IN THE POST-CIVIL WAR SOUTH: A PEOPLE WITHOUT A HISTORY* (1984); BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (2003) [hereinafter *DEFINING AMERICA*]; BILL ONG HING, *THE STATE OF ASIAN PACIFIC AMERICA: REFRAMING THE IMMIGRATION DEBATE* (Bill Ong Hing & Ronald Lee eds., 1996) [hereinafter *ASIAN PACIFIC AMERICA*]; BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* (1997) [hereinafter *TO BE AN AMERICAN*]; CHARLES J. McCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* (1989).

⁵³ For examples of literature specifying these and many other events, see, for example, SANDMEYER, *supra* note 51, at 41-43; SAXTON, *supra* note 51, at 73-75; TAKAKI, *supra* note 51, at 81-82.

⁵⁴ For a sampling of the literature documenting how, especially beginning during Reconstruction, southern farmers turned to Chinese labor, see generally COHEN, *supra* note 52; JAMES W. LOEWEN, *THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE* (2d ed. 1988).

measures imposed by diverse social and cultural and legal arbiters.⁵⁵ Largely unable and unwilling to pass, Chinese immigrants asserted extraordinary integrity. Not only men but the relatively tiny numbers of Chinese women joined in asserting pride in and protection around being Chinese in these new lands. They helped meet and welcome new arrivals; they arranged new jobs and access to credit. They fought off riots and degradation, staunchly relying upon one another and upon their non-Chinese friends and allies in communities concentrated in the West (particularly in California) but spread out across the nation (in large part to New York).⁵⁶

Forces more welcoming of Chinese in the U.S. — or at least desirous of more Chinese immigrant workers — appeared perhaps to have overcome the racial ugliness. In the 1868 Burlingame Treaty, the Chinese formally acknowledged the right of its people to migrate, and the U.S. celebrated Chinese immigration as an enhancement of its own trade, commerce, and wealth. In even more exalted terms, some spoke of the “special destiny” linking the U.S., the muscular new nation, with China, the revered ancient civilization. Mutual respect seemed at least plausible, if not deeply rooted in both sovereign nations. And this respect suggested the federal government in the U.S. would stand strong against the national frenzy stirred up principally by organized labor and nativists in the West (particularly Oregon and California) and East (particularly New York).⁵⁷

But the 1868 Burlingame Treaty proved more a perplexingly momentary tribute to a world that might have been than a reflection of what ever had been true. In addition to private violence and municipal and state laws, new federal laws aimed to closely manage Chinese immigrants and Chinese emigrants. In 1870, Congress extended the right to naturalize to aliens of African descent and denied Chinese the

⁵⁵ For examples of among the best recent work in legal scholarship, see ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008); ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* (2000).

⁵⁶ For a sample of the literature focusing upon how Chinese immigrants — women and men — held their own during these almost unimaginably grueling years, see SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* (1991); Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943* (Sucheng Chan ed., 1991). For kindred history thrust forward, see HELEN ZIA, *ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE* (2000).

⁵⁷ See HING, *supra* note 51, at 22. For a sample of the “anti-Oriental” agitation that drove labor’s animosity in New York and in Congress, see, for example, AMERICAN FED’N OF LABOR, *SOME REASONS FOR CHINESE EXCLUSIONS: MEAT VS. RICE, AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM, WHICH SHALL SURVIVE?* (1902).

same right. Lawmakers insisted on this “national origin” limitation because of the “undesirable qualities” of the Chinese.⁵⁸ In 1875, Congress passed the Page Law aimed at the immigration of Chinese women, who were presumed “lewd” and headed directly into prostitution.⁵⁹ Through fanatical enforcement, the federal law effectively barred Chinese women immigrants for decades, profoundly effecting for the next decades Chinese family and community development in the U.S.⁶⁰

The Chinese — and not other immigrants — had become the primary target of racial-driven xenophobia. Despite a serious recession in the U.S. between 1873 and 1877, members of the national community now saw little reason to discriminate against the same European foreigners they earlier had targeted as “non-white.” Meanwhile, if anything, racial animosity aimed at the Chinese had deepened and worsened, though that hardly seemed possible. Public polls administered by states demonstrated absurdly one-side opposition to Chinese immigration (in California, 150,000 opposed and 900 favored); legal holidays came into being precisely to accommodate huge anti-Chinese demonstrations; and anti-Chinese petitions from states, churches, and civic groups flooded Congress.⁶¹

In reaction to this rabidly racist populism, Congress enacted the 1882 Chinese Exclusion Act.⁶² The Act barred laborers for ten years and counted women as laborers (except for spouses of American-born Chinese and merchants). At least as pivotally, in what became known as “*The Chinese Exclusion Case*,” the Supreme Court legitimated all such federal action, declaring federal power over immigration to be “plenary.”⁶³ The Court did not turn to particular textual provisions of the Constitution but relied instead upon the view of sovereignty ascendant in international circles: A sovereign nation must possess the power to define its national community, to admit and exclude as it

⁵⁸ Naturalization Act of 1870, ch. 254, 16 Stat. 256.

⁵⁹ Act of March 3, 1875, ch. 141, 18 Stat. 477.

⁶⁰ See HING, *supra* note 51, at 24, 44-48.

⁶¹ See HING, *supra* note 51, at 22-24.

⁶² See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 126, 22 Stat. 58.

⁶³ See *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889). For the Supreme Court opinion denying application of Chinese for naturalization, see *In re Ah Yup*, 1 F. Cas. 223, 224-25 (C.C.D. Cal. 1878). For one more contemporary analysis of relevant line of opinions, see Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157-63 (1996).

saw fit.⁶⁴ To make room for this sovereign right, the Court virtually immunized from constitutional challenge policies of the federal government, whether arising from the executive or legislative branch.⁶⁵ Yet even these sweeping Sinophobic victories did not satisfy nativists. Over the next years, through clever laws and treaties and varied justifications, pro-white labor nativists succeeded in gaining in 1904 an indefinite ban on Chinese immigration, dramatically limiting the growth of Chinese families, formally confining many Chinese immigrants to Chinatowns.⁶⁶ While forced segregation may well have helped Chinese fend off the attacks of Sinophobes, compulsory separation told Chinese they were regarded as permanently unworthy

⁶⁴ In international law, the view had been described as “the undoubted right to determine who shall compose its members.” WHEATON’S INTERNATIONAL LAW DIGEST § 206 (1856). In international circles and among many academics and public intellectuals, sovereignty regarded in this way is routinely labeled “Westphalian.” The adjective traces its roots to the 1648 Peace of Westphalia through which European countries are regarded as having agreed to supreme sovereign power and territorial integrity. Much as this principle can be treated as self-evident, a large literature explores the normative status of this vision, its internal contradictions and external challenges, and even whether Westphalia stood for the principle later enunciated. For only a limited sample of this provocative literature, see JEAN BODIN, *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH* (Julian H. Franklin, ed. & trans.) (1992); JOHN N. FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS 1414–1625* (1923); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (1985). For one legal scholar’s view of the evolution of immigration law in the U.S., see generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 7 (1992) (contrasting the trivial growth of constitutional immigration law with rich development of constitutional protections for aliens in conflicts outside the federal government’s plenary control over immigration).

⁶⁵ Consider language that blended the particulars of anti-Chinese perceptions with the unchallengeable capacity to exercise the sovereign right to exclude:

Whatever modifications have since been made to [existing treaties] have been caused by a well-founded apprehension — from the experience of years — that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.

Chinese Exclusion Case, 130 U.S. at 593-95.

⁶⁶ For just one of many important examinations of these actions, see Keith Aoki, “Foreign-ness” & Asian American Identities: *Yellowface*, *World War I Propaganda*, and *Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1 (1996).

of citizenship. Ingenuity permitted Chinese immigrants to carry forward — even as they felt shunned by the national community. But the deep rationalization by most in the U.S. of this formal legal arrangement lasted for decades. And only during World War II would the U.S. even consider lifting this ban on its new ally, and only in 1965 would the varied prohibitions of a century be transformed.⁶⁷

It is tempting to regard the U.S.' treatment of Chinese as simply the extension to yet another group of the utterly familiar: the ideology of race reached out to include, to denigrate thoroughly, a new group. In this way of seeing events, what the U.S. did to the Chinese traces back to the nation's approach to Indians and Blacks and Mexicans. Grand proclamations of equality for all crashed head on with virulent declarations of the inherent inferiority of non-white peoples. Chinese men and women and families experienced physical and emotional brutalities, sanctioned by federal, state, and local law, and routinely practiced by many, perhaps most, in the U.S.⁶⁸

All that is true. But it would be a terrible mistake to treat this interpretation as the full story or perhaps even the most important revelation. The nation's approach to the Chinese signaled a new era. Shaped by what they already had tried out and learned in recruiting everyone from African Slaves to European groups, the U.S. already thought deeply in terms of shaping a self-serving relationship with immigrants. But recruitment of the Chinese imposed challenges and presented opportunities that resulted in great insights. The U.S. already realized the federal government could often create space where state and local governments and private industry would shoulder the burden of immigration through unrestricted channels and unguarded borders. In responding to particularly hostile racism of nativists and organized labor toward Chinese, the federal government came to understand the extraordinary power of elaborate national immigration law, offering up evolving mixes of prohibitions and permissions, asserting sovereignty to buttress its claim to plenary power.⁶⁹

Elected officials and policy makers explicitly limited which Chinese could come, what they could do, and how they could live. Then they banned any more Chinese from coming, while controlling all the more

⁶⁷ See HING, *supra* note 51, at 80-88.

⁶⁸ See TAKAKI, *supra* note 52, at 100-03. For a valuably particularized analysis of the often unappreciated relationship between the U.S. approach to Blacks and Chinese, see Neuman, *supra* note 14, at 1872-73.

⁶⁹ Among the many agreements Bill Ong Hing and I have about immigration history and immigration politics is a deep appreciation of this brute fact. See, e.g., HING, *supra* note 51; López, *supra* note 19.

severely — viciously — their presence here in the U.S. They justified every restriction, ban, and reversal of policy — and every racist insult to Chinese women, men, and families — as necessary to the protection of both citizens and national sovereignty itself. And federal officials, in both legislative and executive branches, won from the Supreme Court utter deference in dealing with immigration matters. The U.S. must be able to do whatever it must do to serve the interests of its citizens, even if at a moment's notice, no matter how racially defined the actions, no matter how inconsistent with views embodied in earlier laws. Whipsawing the Chinese was regarded as pivotal to serving the national good and the very idea of nationhood.

Through the mingling of acceptance and rejection, we can perceive that these policies, and practices, and their justifications already came in paired polar opposites. It was not that, at one end, there was admission and no rejection and, at the other, rejection and no admission. It was that opposing polar views proved to be embedded (“nested”) in every position taken — in every position imaginable.⁷⁰ To be sure, in the most Sinophobic atmospheres, the very idea of acceptance came to be perceived as not just unpersuasive, and not just

⁷⁰ For the best depictions and analyses of this phenomenon in law, carefully study the work of Duncan Kennedy and Jack Balkin. See, e.g., J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986) (proposing that and illustrating how arguments people make to advance legal doctrine share a common structure, replicated across bodies of doctrine and at successive levels of complexity); J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (illuminating how deconstruction permits a reinterpretation of law's logic of similarities and differences, permitting user and observer to see “nested oppositions,” oppositions that involve a relation of dependence, similarity, and containment between the opposed concepts); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 15 (1983) (“[Law students] learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713 (1976) (“My assertion is that the arguments lawyers use are relatively few in number and highly stereotyped, although they are applied in an infinite diversity of factual situations.”). In my own work, and in the work of others, these polarities are cast in story/argument pairs rather than in policy maxims or argument bites — a distinction I regard as important to accurately portraying how problem solving works in everyday persuasion and in stylized legal analysis. See, e.g., *Lay Lawyering*, *supra* note 10 (offering a theory of lawyering as problem solving, tracing its origins to the use of stock stories and arguments by all humans to categorize and deal with everyday circumstances). The origins of such theories — this sociology of problem solving, persuasion, analysis — can be traced to many sources, including Llewellyn, Hohfeld, Levi-Strauss, Saussure, Piaget, and (I would insist) everyday performers of problem solving going back to the days before Aristotle. For an idiosyncratic and valuable history of relevant sources of “the semiotics of legal argument,” see DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* 127 (2008).

vaguely implausible, but even perhaps unintelligible. That may well be the definition of the complete dominance of an ideology — to render incomprehensible otherwise lucid visions and stories and arguments.⁷¹

But at no point in time did the practices and justifications for acceptance of Chinese entirely disappear. They simply receded from view, pushed down by a legal and social circumstance that treated them as stupidly irrational or unduly sympathetic. But the stories and arguments in favor of Chinese immigrants as citizens survived, awaiting the right time and place to be resurrected, by Chinese themselves and by diverse allies, to be put into play in informal and formal skirmishes. That these paired polar views — and all the exotically hybrid mutations — coexisted can be seen in the record of popular opinion, legislative debate, and judicial proceedings. In any event, at least some in the U.S. had come to appreciate in their experience with the Chinese the stunning malleability of always having available stocks of justifications for whatever they cared to do.

And, at a deeply powerful cognitive and emotional level, the imaginatively strategic use of immigration and immigration law deepened and sharpened the prevailing theory and its hold on the citizenry. Through the prevailing theory, those in the U.S. came to “see” as utterly legitimate, legally and morally, doing whatever the nation pleased, however much actions and justifications breezily bounced between admission and expulsion, paired polar opposites, both always available to dictate and justify actions, however damaging to immigrants and their families and communities. The practical possibilities were endless, particularly in the face of shifting perceptions of the needs of the documented citizenry. Through immigration, in the name of sovereignty, duplicity toward Chinese immigrants and others like them became its own form of national sincerity. Powerful immigration law — regarded as the exception to constitutional scrutiny and perhaps even “beyond law” — signaled the very existence of the sovereign the U.S. dared to be.⁷²

⁷¹ Ideological dominance of this sort leads to labeling stories and arguments “off the wall,” a derogatory slam, but one that reflects, at a deeper level, conventional acceptability and not soundness or past or future appeal. See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005) (explaining how social movements help shape the contours of constitutional reasoning, moving claims from being “off the wall” to being central examples of constitutional common sense).

⁷² In this sense, at least, the U.S.’ action anticipated the pungent, controversial, and often even shunned views of Carl Schmitt. See SCHMITT, *supra* note 64 (advancing a theory where predictable conflict ethically requires those in power to make an exception and violate the constitution in order to save the nation’s way of life and, in

D. Courting and Turning on the Japanese

Compliance by employers with this unfolding ugliness toward the Chinese reflected an appreciation that already attention had been focused in earnest on Japan as a source of cheap labor and on the possibility of increasing as needed the numbers of Mexican workers. With the help of federal, state, and local governments, industries insistent upon the need for more cheap workers had established alternatives and back-up labor supplies, to be utilized strategically in response to and in anticipation of changed circumstances, all with a new-found awareness of the power of immigration law to do whatever proved necessary.⁷³

Between 1860 and 1880, when nearly 200,000 Chinese laborers came to the U.S., the Japanese authorized only 335 emigrants. Though recruiters would have preferred far more, they treated Japan's powerful Meiji government with precisely the respect they never afforded the crumbling Qing dynasty in China.⁷⁴ And they and government officials tactfully negotiated, hoping to convince Japan that the U.S. would treat Japanese immigrants with dignity appropriate to Japan's status in the international community.

In 1884, with growing interest in foreign nations, the Japanese government yielded to internal pressures and passed the country's first modern emigration law, allowing government-sponsored contract laborers to travel to Hawaii and to other parts of the U.S., particularly California. They did so highly conscious of the whipsawing of Chinese laborers and China. And with the full involvement of the Meiji government, Japanese immigrants trained — formally trained — to adapt to life in the U.S.⁷⁵ They prepared and expected to avoid entirely the reactions generated by the (poorer and not-at-all-prepared) Chinese.

Hawaiian sugar plantations did appreciatively greet Japanese laborers. And in California, gracious receptions included praise for Japanese refinement and culture, for the men meeting the needs of

such situations, no fully defensible principles rule out war to the death).

⁷³ For among the few who seemed to have noticed, see SAXTON, *supra* note 52, at 178. See also Arthur Corwin & Lawrence Cardoso, *Vamos al Norte: Causes of Mass Migration to the United States*, in IMMIGRANTS — AND IMMIGRANTS, *supra* note 15, at 38, 46.

⁷⁴ See ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG, FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 34 (2001). For an account by one of the best historians of Japan, see MARIUS B. JANSEN, *THE MAKING OF MODERN JAPAN* (2000).

⁷⁵ For only one account, see PAUL SPICKARD, *JAPANESE AMERICANS: THE FORMATION AND TRANSFORMATIONS OF AN ETHNIC GROUP* 27 (1996).

important industry, and for the estimable families they brought with them. In 1894, Japan and the U.S. asserted again their mutual commitment to open travel, promising one another's citizens "liberty to enter, travel, and reside" in the receiving country.⁷⁶ Already, though, resentment had grown, in Hawaii and certainly on the mainland. And even before the turn of the century, competition with White farm labor in California generated familiar nativist labor animosity.⁷⁷

In Japanese immigrants, however, racist xenophobes faced a group entirely better able to fend off organized attacks and put-downs that had undermined Chinese immigrant life. More financially independent, better schooled in the ways of the U.S., and literate, Japanese agricultural workers regarded themselves as the equals of anyone in the world, including citizens of the U.S. They had chosen to pursue economic alternatives, and they regarded efforts to constrain them — to formally and informally relegate them to secondary status — as absurd. They aimed at becoming independent farmers and expected to outshine white Americans at their chosen vocation.⁷⁸

But there was no winning with nativist white workers. If Chinese had been accused of unacceptable timidity, Japanese immigrants now endured resentment for their prideful determination. Californians joined East coast nativists in forming the Asiatic Exclusion League. Membership in this national organization considerably coincided with links to local associations like the Anti-Jap Laundry League and the Anti-Japanese League of Alameda County. Familiar physical violence now targeted the Japanese, and the frequency and hideousness of the attacks escalated after the Great Earthquake of 1906. Exclusion surfaced as a major legal and political question, with pressures from across the country palpable.⁷⁹

The U.S. had come to appreciate, however, that Japan was a world force, with growing and proven military might and with healthy consumer markets ripe for U.S. products. The U.S. eventually restricted Japanese immigrants, but through means calculatedly more delicate than bald assertion of power through the Chinese Exclusion

⁷⁶ See ROY HIDEMICHI AKAGI, *JAPAN'S FOREIGN RELATIONS 1524–1936* at 435 (1936).

⁷⁷ See ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 9 (2d ed. 1977).

⁷⁸ For among the best accounts, see *id.* at 23. For among the best scholarship illuminating Japan and Japanese emigrants during these years, see YUJI ICHIOKA, *THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885–1924* (1988); JANSEN, *supra* note 74.

⁷⁹ See Keith Aoki, *No Right to Own?: The Early Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 48-50 (1998).

Act of 1882. With at least an intuitive appreciation of the expansive power of the executive branch over immigration, President Roosevelt himself negotiated an informal agreement with Japan, the Gentlemen's Agreement reached in 1907 and 1908.⁸⁰ In this agreement, the Japanese government voluntarily would stop issuing travel documents to laborers and, in turn, Japanese wives and children could reunite with their husbands and fathers in the U.S. Japan proudly refused to accept vulgar formal restrictions and the U.S. government, if not the nativist Whites, acknowledged the importance of not offending a powerful nation.⁸¹

Nothing entirely stops racists, however. Nativists grew immensely jealous of Japanese immigrants' success in agriculture — particularly the use of alternative and productive techniques not yet adopted by Whites. Unable to move the federal government, nativists in 1913 convinced the California legislature to pass the Alien Land Law, which other states subsequently emulated. The law cleverly provided that “[a]ll aliens eligible to citizenship may acquire, possess, enjoy, transmit and inherit real property or any interest therein.” Since the Naturalization Act of 1870 denied all Asians the right to become citizens, Japanese (who already had unsuccessfully challenged the naturalization preclusion) could not own property.⁸² Without relinquishing the claim to plenary power over immigration, and keenly aware of replacement sources of cheap labor, the federal government acquiesced in sub-federal governments' efforts (especially through prohibitions of federal permissions) to make life exceedingly difficult for the no-longer-needed Japanese.

No strategy — no way of being — would have worked for the Japanese. In the effort to be perceived as blending in with citizens and qualifying as citizenship-worthy migrants, Japanese had tried concertedly to distinguish themselves from early Chinese immigrants. “Ethnic disidentification” failed miserably, however, as perhaps anyone appreciative of the rival theory already would have confidently predicted.⁸³ In justifying internment, and particularly the differences

⁸⁰ For a detailed exploration of the executive branch power over immigration, see Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (highlighting and exploring origins of power of executive branch over immigration).

⁸¹ See Aoki, *supra* note 79, at 48-50.

⁸² *Id.* at 50-72 (providing a detailed analysis of these unfolding events — and how they set the stage for internment).

⁸³ The term “ethnic disidentification” is used in the fine analysis provided by YAMAMOTO ET. AL, *supra* note 74, at 9, and those authors broadly borrow, in turn, from the work of YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS*

in the treatment of Japanese compared to Italians and Germans, Earl Warren, then attorney general of California, observed: “We believe that when we are dealing with the Caucasian race we have methods that will test the loyalty of them But when we deal with the Japanese we are in an entirely different field and cannot form any opinion that we believe to be sound.”⁸⁴

There proved to be no bottom to this twisted logic. In briefs filed on behalf of the federal government arguing the constitutionality of the internment orders, lawyers argued that the appalling legal and social discrimination aimed for decades at Japanese immigrants was itself compelling evidence of predictable disloyalty.⁸⁵ In this way of thinking, every subordinated immigrant group ought to have been a security risk. The amicus curiae brief of the Japanese American Citizen’s League argued as much.⁸⁶ Yet there was no winning before the Supreme Court, any more than there was winning before the executive branch or before the majority of U.S. citizens. The whipsawing of Japanese immigrants emanated from a theory of sovereignty — and of a legal regime — that would ethically permit, perhaps require, absolutely anything toward “exceptional” people and during “exceptional” periods.⁸⁷

E. Mexicans

With the exclusion of the Chinese, and while recruited Japanese filled the immediate void, widespread and long-distance Mexican migration began. Between 1880 and 1900, Mexican migration proved relatively small in absolute numbers. But the patterns proved different from earlier migration and foreshadowed the mass migration (documented and undocumented) that would soon follow.

Hugely aided by the completion of an extraordinary railroad network, the central plateau and the northern plateau of Mexico,

AND IDENTITIES (1992).

⁸⁴ See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 176 (2004).

⁸⁵ See YAMAMOTO ET. AL, *supra* note 74, at 7 (describing the prominence of this argument in the government brief in *United States v. Hirabayashi*, 321 U.S. 81 (1943) defending internment). For an excellent depiction and analysis of how the government altered, suppressed, and fabricated evidence to justify internment, and for how the Dale Minami-led legal team represented Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui in “The *Coram Nobis* Cases” that successfully challenged the underlying evidentiary basis for their respective criminal convictions and the internment itself, see *id.* at 277-387.

⁸⁶ *Id.* at 7 (describing response of Japanese American Citizen’s League).

⁸⁷ See SCHMITT, *supra* note 64, at 6-7.

densely populated and poor, for the first time became sources of recruits.⁸⁸ Evidence of active recruitment (including then contemporary accounts of the sophistication and secrecy of recruitment networks) confirms that the U.S. concentrated on Mexico initially as an alternative and then as a principal source of a steady supply of cheap male labor. And, in response, Mexicans began to seek employment throughout the southwestern U.S. and such places as Kansas City and Chicago and parts of Indiana, Ohio, and Michigan.⁸⁹

In a variation of an earlier strategic maneuver, the federal government of the U.S. played a role that mingled *de jure* assertiveness and *de facto* submissiveness. In 1882 Congress, reacting to labor-protectionist demands, imposed a head tax of fifty cents on each immigrant entering the country and barred admission to any person

⁸⁸ Railroad development in Mexico perhaps better served U.S. interests than Mexico's economic unification. Passenger service from Mexico City to El Paso, Texas began in 1884. The Mexican Central Railway ran from Mexico City to Ciudad Juarez (across the border from El Paso) passing through the states of Mexico — Hidalgo, Querétaro, Guanajuato, Jalisco, Aguascalientes, Zacatecas, Coahuila, Durango, and Chihuahua — and connected at El Paso with such U.S. lines as the Atchison, Topeka and Santa Fe, Texas and Pacific, and Southern Pacific. John C. Elac, *The Employment of Mexican Workers in U.S. Agriculture, 1900–1960* (1961) (unpublished Ph.D. dissertation, UCLA Department of Economics) (on file with UCLA Research Library). Passenger service provided access to the central plateau of Mexico for recruiting agents and outreach campaigns and for recruited labor to interested labor sectors (mining, railroad, agriculture, and more) — a transportation network to combine with diverse other networks at the heart of the process. *Id.* at 474-75. See generally LAWRENCE A. CARDOSO, *MEXICAN EMIGRATION TO THE UNITED STATES, 1897–1931, SOCIO-ECONOMIC PATTERNS* 13-17 (1980) (describing relationship between infrastructure and migration).

⁸⁹ For some early observations about direct and indirect recruitment, see GEORGE O. COALSON, *THE DEVELOPMENT OF THE MIGRATORY FARM LABOR SYSTEM IN TEXAS: 1900–1954*, 22 (1977); MARK REISLER, *BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900–1940* (1976); TAYLOR, *supra* note 36, at 102; LAMAR B. JONES, *MEXICAN-AMERICAN LABOR PROBLEMS IN TEXAS* 3 (Jan. 1965) (unpublished Ph.D. dissertation, University of Texas) (on file with Shields Library, U.C. Davis). Direct evidence of recruitment cited by these studies ranges from oral testimony, TAYLOR, *supra* note 36, at 102 (citing the recollection of what Taylor describes as a “reliable citizen of the lower Rio Grande Valley”), to early studies of Texas by graduate students, COALSON, *supra* note 89, at 22 (citing A.B. Cox, *The Economic History of Texas During the Period of the Reconstruction* (1914) (unpublished thesis, University of Texas) (on file with author)). Some perceived as dangerous open recruiting in Mexico for employment in the U.S., and such recruiting through advertisements became formally illegal in the U.S. in 1891. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084. For later evidence of recruitment already in high gear by the turn of the century and doubtlessly drawing upon earlier years of efforts, see in particular Victor S. Clark, *Mexican Labor in the United States*, in 78 BULL. OF U.S. BUREAU OF LABOR 466 (1908), reprinted in *THE MEXICAN AMERICAN* (E. Cortes ed., 1974).

likely to become a public charge.⁹⁰ The Act left border inspection to state agencies, however. They largely ignored the new law, signaling an awareness of and approval of recruitment, and nurturing something like a “don't worry-formal-laws-don't-mean-what-they-say” attitude among those involved in the immigration process.⁹¹

The Mexican federal government noticed this targeted recruitment and worried about the effects of emigration. Would migration of Mexicans undermine the sought-after cohesion of the new and sprawling nation? Would it create labor shortages in Mexico? Would the predictable degradation of Mexican workers in the U.S. dishonor Mexico itself? Even in formulating these questions, the concerns of Mexican elites did not typically extend beyond their own self interests.⁹² Even if they did, Mexico lacked the capacity to effectively enforce federal policies, especially in areas distant from Mexico City, even with the development of railroads.⁹³

Besides, much emigration and immigration decision-making historically had been left to states and municipal governments in Mexico. That was true in the U.S. too, in ways often overlooked. But the Mexican federal government claimed it possessed, perhaps, only the power to dissuade, not to prohibit emigration. Some interpret the 1857 Constitution as permitting administrative restrictions on the freedom to travel within and the freedom to exit Mexico and wonder exactly why the otherwise imperious federal Mexican government so readily acknowledged limited formal power.⁹⁴ In any event, for Mexico even genuine upset proved difficult at best to translate into effective practices.

Knowing the limits on Mexico's power, the U.S. understood its own capacity to do almost exactly as it pleased. In 1885 and 1887 the federal government added contract labor laws that prohibited anyone from prepaying an immigrant's transportation to the U.S. in return for

⁹⁰ Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (repealed 1966).

⁹¹ See generally HIGHAM, *supra* note 48, at 43-44 (describing role of under-enforcement and unenforcement to perception of actual legal regime).

⁹² It would be obtuse not to draw this inference about Mexican elites from a wide variety of literatures, including, to offer one recent influential account. DAVID FITZGERALD, *STATE AND IMMIGRATION: A CENTURY OF EMIGRATION POLICY IN MEXICO* (2005) (exploring emigration from the Mexican perspective). For a sample of other prominent accounts of Mexico, Mexican emigration, and Mexico's relationship to the U.S., see CARDOSO, *supra* note 88; GILBERT G. GONZÁLEZ, *MEXICAN CONSULS AND LABOR ORGANIZING: IMPERIAL POLITICS IN THE AMERICAN SOUTHWEST* (1999).

⁹³ See FITZGERALD, *supra* note 92, at 40-43.

⁹⁴ *Id.* at 40-41 (inviting attention to interpretations of constitution contradicting officials' declarations).

a promise to provide service and, in 1888, passed another amendment providing for deportation within one year of any laborer found to have entered in violation.⁹⁵ These federal provisions appeared to restrict immigration, momentarily placating domestic labor. Yet the contract labor laws contained a number of exemptions, including one for foreigners temporarily residing (and, as it happens, working) in the U.S.⁹⁶ This exemption, coupled with exceedingly lax enforcement and only occasional complaints by Mexican officials, gutted the ban ostensibly provided by Congress.⁹⁷

Officials routinely designed laws to appear to respond to domestic labor and nativist demands, but on the ground routinely looked the other way so industry could continue to meet its need for cheap immigrant labor. The federal, state, and local government-supported recruitment of cheap migrant workers appeared increasingly crucial to, and intimately intertwined with, the manifest destiny of an astonishingly muscular country. And few seemed to notice just how many — from poor Mexican households to diverse industries and communities on both sides of the border — already were becoming dependent upon a system that operated largely parallel to and was only partly influenced by the formal legal system. Except those, of course, who already perceived two compatible migration systems valuable precisely because they could be orchestrated together to do whatever the U.S. needed, even if Mexico disagreed, which it most often did not.

1. Entrenching Undocumented and Documented Mexican Migration

If migration patterns from Mexico to the U.S. had not already been institutionalized, events from the turn of the century to the very beginning of 1930s certainly deepened attachments and expanded the numbers involved. Demand for industrial and agricultural labor increased. And the ready supply decreased as Japanese became the

⁹⁵ Act of Feb. 23, 1887, ch. 220, 24 Stat. 414 (repealed 1922); Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 (repealed 1952).

⁹⁶ Each immigrant carried the burden of establishing that he had not specifically contracted for a job and that he was nonetheless not likely to become a public charge. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565; Act of Feb. 23, 1887, ch. 164, 23 Stat. 332 (repealed 1952); Act of Feb. 26, 1885; *see also* H. COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., *ILLEGAL ALIENS: ANALYSIS AND BACKGROUND* 46 (Comm. Print 1977) [hereinafter *ANALYSIS AND BACKGROUND*].

⁹⁷ For one report of official Mexican complaints for the occasional efforts to enforce the new laws, see Corwin & Cardoso, *supra* note 73, at 36 n.17.

target of repulsive forces kindred to those that already had excluded the Chinese. In anticipation of the Gentlemen's Agreement of 1907, through which Japan ultimately agreed to issue no more passports to workers wishing to come to the U.S., recruitment in Mexico and southern and eastern Europe greatly intensified, all the product of exquisite coordination by those who fully understood how the legal and illegal systems worked together, mingling prohibitions and permissions, through stock practices, policies, and rhetorical justifications.⁹⁸

Poor households within such central plateau states as Zacatecas, San Luis Potosí, Michoacán, Guanajuato, and Jalisco — the targets of campaigns since the 1880s — proved especially responsive to the creative and coercive practices of recruiters. With the spread of poverty and unrest surrounding the Mexican Revolution, a largely rural Mexican population faced the treacherous transition from agrarian to industrial economy.⁹⁹ Lured by tales of riches reminiscent of tall stories used in earlier decades to recruit Chinese, scrambling through networks already developed and now growing in capacity, male heads of households would travel the railroad to jobs in the U.S., often borrowing in advance from recruiters and employers, “hooked” (*engachado*) until earnings permitted retirement of the debt.¹⁰⁰

Mexico offered contradictory signals to its recruited laborers. Efforts to dissuade emigration increased, especially targeting laborers who did not contract with the U.S. Still, not wanting to antagonize its powerful northern neighbor, Mexico would not try physically to block exit. And there was evidence that Mexican railroads subsidized the travel of

⁹⁸ For telling analyses of forces aimed at Japanese, see ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 31-45 (2d ed. 1977); HING, *supra* note 51, at 26-30, 53-60.

⁹⁹ For accounts of Mexican history from the late 1900s through the early twentieth century (the *Porfiriato* through the Revolution to the post-revolution industrial regime), see, for example, HECTOR AGUILAR CAMÍN & LORENZO MEYER, *IN THE SHADOW OF THE MEXICAN REVOLUTION: CONTEMPORARY MEXICAN HISTORY, 1910-1989* (1993); STEPHEN H. HABER, *INDUSTRY AND UNDERDEVELOPMENT: THE INDUSTRIALIZATION OF MEXICO, 1890-1940* (1989); JOHN M. HART, *REVOLUTIONARY MEXICO: THE COMING AND PROCESS OF THE MEXICAN REVOLUTION* (1987); MICHAEL C. MEYER & WILLIAM L. SHERMAN, *THE COURSE OF MEXICAN HISTORY* (4th ed. 1991).

¹⁰⁰ For a pointed account of recruitment aims and methods of *engachadores*, see CARDOSO, *supra* note 88, at 14-17, 28-29. Perhaps the earliest scholarly description of how the “intimate and powerful” alliance between smugglers and contractors accommodated the already significant undocumented migration of Mexicans can be found in GAMIO, *supra* note 22, at 9-12. For the lyrics of *Los Inmigrantes (Los Enganchados)*, a song written by “a poor Mexican to spread the word about the American system,” see *id.* at 84-86.

unemployed Mexicans traveling north looking for work, often crossing the open border in violation of the policy of Mexico's Secretary of the Interior. Not only did different branches of Mexico's federal government override one another's efforts, but state and municipal governments continued to do whatever they felt necessary to deal with unfolding difficulties. They denied exit permits, and increased what exit fees they could charge. But, like the federal government, state and local governments complained far more than they did anything else. Indeed, they seemed already to perceive certain advantages for relieving economic pressures and certainly informally accepted the reality of the phenomena.¹⁰¹

Growingly appreciative of what Mexicans could provide, without notable resistance from Mexico, employers in the U.S. and their friends in and outside Congress protected the availability of this precious resource, even in the face of ferociously anti-immigrant sentiments once again articulated principally by Nativists and organized labor. To enable Mexican migrants to come unhindered by formal legal restrictions principally enacted to target southern and eastern Europeans during and after World War I, the "Ninth Proviso" waived the head tax and literacy requirement of the 1917 Immigration Act. Often described in accounts of Mexican migration as the first such manipulation of laws to outmaneuver those hoping entirely to restrict migration to the U.S.,¹⁰² the waiver exercised through the Ninth Proviso in fact paralleled the earlier de jure loophole in the 1885 Contract Labor Law that accommodated recruitment beginning in the 1880s. Through this waiver, recruiters continued to expand the overlapping networks through which employers in the U.S. sought and employed male laborers from Mexico, which Congress adeptly had left unrestricted by numerical limitations, available to serve evolving demand.

The recruitment networks and practices employed in Mexico through the first three decades of the twentieth century extended what had been commenced by the mid-1800s and already had taken hold by the 1880s. Chinese and Japanese jobs now simply became typed as "Mexican jobs" — a racial ("racialized") category that existed before

¹⁰¹ For a range of scholars expressing such views, see, for example, Arthur F. Corwin, *Mexican Policy and Ambivalence Toward Labor Emigration to the United States*, in *IMMIGRANTS — AND IMMIGRANTS*, *supra* note 15; JOHN MARTÍNEZ, *MEXICAN EMIGRATION TO THE U.S., 1910–1930* (1957).

¹⁰² In these accounts of how law shaped migration patterns, perhaps the most prominently featured legal analysis during the 1970s and 1980s was the work of Gilberto Cárdenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 *CHICANO L. REV.* 66-70 (1975).

the 1849 Treaty of Guadalupe Hidalgo.¹⁰³ Yet, as Mexicans came in significantly greater numbers, many in the U.S. perhaps for the first time began openly to appreciate that those living on the other side of the 2,000-mile southern border might well provide nearly the perfect answer to economic aspirations without — to their minds — triggering the Constitution's lofty aspirations. Certainly those controlling the de facto and de jure coordination of documented and undocumented migration, and probably many more across the U.S., regarded Mexicans as temporarily and occasionally useful but utterly unworthy of full membership in the national community.¹⁰⁴

Mexicans occupied a special place in the often conflicting ideologies of political economy and political community. Reports and studies and journalistic accounts routinely portrayed Mexican immigrants, as assembled in the trenchant observations of Victor S. Clark, as “not socially or industrially ambitious, like European and Asiatic immigrants”;¹⁰⁵ they “can't do white man's work”¹⁰⁶ and thus “compete

¹⁰³ Perhaps the most concise exploration of the convergence of racial, cultural, and economic beliefs can be found in REISLER, *supra* note 89, at 137-44. Shared widely, the views could be found in documented statements of everyone from everyday folks (Reisler quotes a south Texas farmer describing the agricultural work as “very hot and the climatic conditions are only such that Mexicans and niggers can stand it”) and Congressmen (Rep. Carlos Bee of Texas conjectured that the Mexican was particularly suited by “the providence of God [for] the burdensome task of bending his back to picking the cotton and the burdensome task of grubbing the fields.”). *Id.* at 138-39. Some strands of contemporary scholarship use “racialization” to describe familiar historical phenomena like “Mexican jobs,” a practice initiated in the influential and laudable work of Howard Winant and Michael Omi. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s* 2 (2d ed. 1994). For examples of current scholarship labeling and examining the racialization of employment sectors and roles, see Lisa Catanzarite, *Brown Collar Jobs: Occupational Segregation and Earnings of Recent-Immigrant Latinos*, 43 *SOC. PERSP.* 45, 46 (2000); Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown Collar Occupations*, 29 *WORK & OCCUPATIONS* 300, 301 (2002); Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 2009 *U. CHI. LEGAL F.* 345 (2009).

¹⁰⁴ For illustrations of the attitudes toward Mexicans in the United States (in geographically particular idioms), see then roughly contemporary accounts such as William Albig, *Opinions Concerning Unskilled Mexican Immigrants*, 15 *SOC. & SOC. RES.* 62 (1930); Emory S. Bogardus, *The Mexican Immigrant*, 11 *J. APPLIED SOC.* 470 (1927); Emory S. Bogardus, *The Mexican Immigrant and Segregation*, 36 *AM. J. SOC.* 74 (1930); Glenn E. Hoover, *Our Mexican Immigrants*, 8 *FOREIGN AFF.* 99 (1929); William Leonard, *Where Both Bullets and Ballots Are Dangerous*, 37 *SURVEY* 86 (1916); Mark Reisler, *Always the Laborer, Never the Citizen: Anglo Perceptions of the Mexican Immigrant During the 1920s*, 45 *PAC. HIST. REV.* 231 (1976); James L. Slayden, *The Mexican Immigrant: Some Observations on Mexican Immigration*, 93 *ANNALS AM. ACAD. POL. & SOC. SCI.* 121 (1921).

¹⁰⁵ Clark, *supra* note 89, at 512.

little, if at all, with . . . ‘white labor.’”¹⁰⁷ Unlike southern Blacks, Mexicans “[were] not permanent, [did] not acquire land . . . but remain[ed] nomadic and outside of American civilization.”¹⁰⁸ Even when the Treaty of Guadalupe Hidalgo begrudgingly extended U.S. citizenship to over 100,000 Mexican nationals living in the newly acquired territories, not all that much changed, except perhaps in what decades later would become the state of New Mexico. Mexicans and Mexican immigrants were viewed as genetically and culturally inferior, unsuited for citizenship some legally claimed, valuable precisely for the capacity to work in difficult and dangerous conditions. Mexicans seemed almost too good to be true: workers whom those in the U.S. need never treat as fully human.¹⁰⁹

Such derogatory regard often found expression through fears about the health risks presented by living and working among biologically vulnerable and culturally dirty Mexicans. In Los Angeles, for example, Mexicans had long been segregated — residentially, educationally, socially. Public health officials, though, provided a particularly insidious version of this treatment. Their formal charge and their routine practices declared that the health of Mexican mattered only insofar as members of the proper body politic might end up endangered. Health officials blamed Mexicans for influenza and tuberculosis, quarantined areas where they lived, forced them into segregated (and underfinanced and inferior) health facilities. Evidence reveals just how much concern focused not on the well-being of Mexicans but on avoiding any unnecessary contact with a people temporarily present to fill menial jobs and yet otherwise unsafe and unclean.¹¹⁰

¹⁰⁶ *Id.* at 511.

¹⁰⁷ *Id.* at 466.

¹⁰⁸ *Id.* at 485.

¹⁰⁹ Of the many available analyses, all should read Laura Gómez’s illuminating account, rich about New Mexico in particular. LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 1, 83-85 (2007). For a relevant discussion of whiteness by law, see, for example, *WHITE BY LAW*, *supra* note 40.

¹¹⁰ For important work illuminating policies and practices aimed at Mexican and Pilipinos, see Emily K. Abel, “*Only the Best Class of Immigration*”: *Public Health Policy Toward Mexicans and Filipinos in Los Angeles, 1910–1940*, 94 *AM. J. PUB. HEALTH* 932, 932-35 (2004). Abel’s later work proves every bit as rewarding. See, e.g., EMILY K. ABEL, *TUBERCULOSIS AND THE POLITICS OF EXCLUSION — A HISTORY OF PUBLIC HEALTH AND MIGRATION TO LOS ANGELES* (2007). For another important contribution to understanding how Los Angeles received, regarded, and treated immigrants, see, for example, NATALIA MOLINA, *FIT TO BE CITIZENS? PUBLIC HEALTH AND RACE IN LOS ANGELES, 1879–1939* (2006).

Yet Mexicans still came to work. Caught within major upheavals in both Mexico and the U.S., actively recruited to what was fast becoming a tradition of wage-labor migration, and actively permitted to emigrate (over only minor and ineffective objections) by their own home country, Mexicans traveled to the U.S. as part of their households' (and often communities') efforts to survive, through transnational living if necessary. During the first three decades of the twentieth century, significant numbers of Mexicans made their way to the U.S. in order to contribute to household maintenance in profoundly uncertain times. The migration of documented Mexicans in the first three decades reveal just how vigorously the phenomena had been fostered: roughly 49,000 wage-labor migrants came between 1900 and 1910; 200,000 more between 1910 and 1920; and approaching 500,000 in the 1920s¹¹¹ What had begun as an alternative to other pools of cheap labor may already have become a culture of permanent temporary workers.

2. The Structure of the Two Systems Exposed

Events leading up to and following the October 1929 crash exposed the structure of the arrangement between Mexican migrant workers and the U.S. and Mexico. Pressures from Nativists and organized labor led to the repatriation of roughly 100,000 migrant Mexicans in the early 1920s,¹¹² but the Ninth Proviso permitted government and employers to outwit those who aimed to exclude all Mexicans and permanently close the Mexican border. The Great Depression heightened the search for a scapegoat, however. And Mexicans, blamed at once for taking jobs and living off government support,

¹¹¹ For the source of the numbers entering the U.S. from Mexico between 1900 and 1910, see Cardenas, *supra* note 102, at 68-70, 90-92. Because evidence for these years proves understandably debatable, it can be important to recognize the variation offered by scholars. For sources of numbers between 1910-1920, compare *id.* (estimating 173,600) with Mexican Migration 52 (T. Weaver & R. Downing, eds. 1976) (unpublished manuscript prepared for Bureau of Ethnic Res., Dep't of Anthropology, University of Arizona, Tucson, Arizona)(estimating 219,004). For another highly regarded source of numbers during these early years, see generally LEO GREBLER, MEXICAN IMMIGRATION TO THE UNITED STATES: THE RECORD AND ITS IMPLICATIONS 65 (1965); WAYNE CORNELIUS, MEXICAN MIGRATION TO THE UNITED STATES: CAUSES, CONSEQUENCES, AND U.S. RESPONSES 1-18 (1978). For then-contemporary accounts of the social turmoil that, in the eyes of those living in the U.S., drove Mexicans from their Mexican homes to the north of the border, see, for example, J.B. Gwin, *Making Friends of Invaders*, 37 SURVEY 621 (1916-17); John Murray, *Behind the Drums of Revolution*, 37 SURVEY 237 (1916-17).

¹¹² Lawrence A. Cardoso, *La Repatriación de Braceros en la Época de Obregon, 1920-1923*, in 26 HISTORIA MEXICANA 576, 576, 581 (1977).

proved as worthy a target as any.¹¹³ Providing politicians symbolic cover, and fed by a national crusade that insisted that for every Mexican repatriated a good job would open up for a worthy American, federal and state governments orchestrated, with the fanatical support of Mexican haters, the expulsion of perhaps 450,000 Mexicans.¹¹⁴ The move toward the exclusionary pole of the two systems proved fast and brutal, in terms of practices and policies and justifications offered in support. In Ernesto Galarza's distinctive voice, "When we want you, we'll call you; when we don't — git."¹¹⁵

Some regard the 1920s — and especially the passage of the 1924 Johnson-Reed Act by the U.S. Congress — as a pivotal and perhaps unique period. During these years, goes this telling of history, racial hierarchy was formally codified into immigration law and "illegal alien" took shape as a category.¹¹⁶ That hierarchy punished non-whites, particularly, Asians who could not naturalize or emigrate and, of course, Mexicans who presented a "race problem." Yet as much as

¹¹³ See HOFFMAN, *supra* note 41, at 38-41.

¹¹⁴ For accounts of the repatriation campaigns, see, for example, ABRAM J. JAFFE, RUTH M. CULLEN & THOMAS BOSWELL, *THE CHANGING DEMOGRAPHY OF SPANISH AMERICANS* 121 (1980); HOFFMAN, *supra* note 41; Abraham Hoffman, *Stimulus to Repatriation: The 1931 Federal Deportation Drive and the Los Angeles Mexican Community*, 42 PAC. HIST. REV. 205 (1973); Carey McWilliams, *Getting Rid of the Mexican*, 28 AM. MERCURY 322 (1933). From 1928 until well into the 1930s, the *Saturday Evening Post* published "a steady diet of nativist rhetoric and served as the chief vehicle for anti-Mexican propaganda." Raymond Mohl & Neil Betten, *Discrimination and Repatriation: Mexican Life in Gary*, in *FORGING A COMMUNITY* 161, 170 (James B. Lane & Edward J. Escobar eds., 1987). The Mexican-American Study project Advance Report stated that:

Local Agencies . . . used a variety of methods to rid themselves of 'Mexicans': persuasion, coaxing, incentive, and unauthorized coercion [T]he withholding or stoppage of relief payments and welfare services was used effectively when necessary; and people were often rounded up by local agencies to fill carloads of human cargo [L]ittle if any time was spent on determining whether the methods infringed upon the rights of citizens.

GREBLER, *supra* note 111, at 26 (quoting Leo Grebler, *MEXICAN-AMERICAN STUDY PROJECT ADVANCE REPORT NO. 2* (1965), available at <http://www.eric.ed.gov/PDFS/ED015798.pdf>). But, Hoffman draws contrary conclusions. See Abraham Hoffman, *Mexican Repatriation During the Great Depression: A Reappraisal*, in *IMMIGRANTS — AND IMMIGRANTS*, *supra* note 15, at 225.

¹¹⁵ Ernesto Galarza, *Without Benefit of Lobby*, 66 SURVEY 181, 181 (1931).

¹¹⁶ Of recent work, the most influential among legal scholars would seem to be the illuminating account of Mae Ngai. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 131-32 (2004). Before Ngai, others too had focused on this period, separably and in relation to past and future events. See, e.g., ROBERT DIVINE, *AMERICAN IMMIGRATION POLICY, 1924-1952* (1957).

“scientific” racial distinctions were brazenly celebrated in the Immigration Act of 1924 and served to justify massive deportations of undocumented and documented Mexicans alike, these actions seem far less a break from the past and far more a sadly unsurprising — even predictable — extension of what already had taken hold decades earlier.

Official racial judgments and the brutal racist removals illustrated a range of policies and justifications previously familiar to federal, state, and local governments in the U.S. In dealing with Japanese, Chinese, South Asians, Filipinos, Mexicans, Black Africans, and Native Americans, the national community experimented with and began to master such strategies and techniques. Mexicans presented a “race problem” in the days before and after the Treaty of Guadalupe Hidalgo. And racial hierarchies of formal and informal content dominated judicial, legislative, and popular rhetoric for decades, centuries even. Indeed, formal social orders and mass removals — all explicitly racially classified — already were regarded as necessary and natural expressions of a great sovereign nation. Prominent officials in Mexico did regard the mass emigration to the U.S. and the mass repatriation back to Mexico as disastrous. Scholars and journalists lamented the bleeding of Mexican labor to gringo advantage (“bleeding Mexico white”), particularly during a period of prideful nationalization.¹¹⁷

But centralized efforts by Mexico’s federal government to dissuade emigration conflicted directly with state and municipal encouragement as a means of dealing with social and economic ruptures, particularly in historically important sending regions (Jalisco, Zacatecas, Michoacan). The forced return of nearly half a million Mexican migrants, in turn, created economic and political turmoil. Federal plans to locate returning *paisanos* to targeted areas in Mexico immediately gave way to reverse migration to places of origin. The U.S. did not at all seriously consider the impact of forced repatriation on Mexico, and Mexico could not possibly sensibly embrace workers it already depended upon to live transnational lives. Complex interdependence — through legal and illegal systems — already defined the realities of both nations and of the Mexican immigrants connecting these communities.

But these years proved as revealing as they were deeply ugly, even if the operative policies and practices were less singular than some believe. Certainly this cycle demonstrated, once again, the nimbleness

¹¹⁷ Alfonso Fabila, *El Dilemma de la Emigración de Obreros y Campesinos Mexicano*, in *MIGRACION MEXICO-ESTADOS UNIDOS ANOS VEINTE* (Jorge Durand ed., 1991).

of U.S. employers and their allies. Employers witnessed the forced removal of nearly a half million Mexicans knowing they would turn to desperately poor White farmers from Oklahoma, Arkansas, and Texas to fill available jobs. And they did, in terribly harsh circumstances, for nearly a decade. When the approach of World War II boosted the economy, most poor Whites moved on to better paying industrial jobs.¹¹⁸ Shrewdly employing the authority of the Ninth Proviso, and apparently feeling no moral qualms and little resistance from Mexico, the federal government officially allowed employers to renew recruitment of Mexican labor. With the first requests for workers originating mainly from sugar beet, cotton, and vegetable growers, and with diverse networks readily mobilized, Mexicans again began filling “Mexican jobs.”¹¹⁹

Not satisfied with this arrangement, agricultural powers in the U.S. convinced the Roosevelt Administration of the need for a more expansive temporary program to bring Mexicans to meet demand for cheap labor. Mexico proved a willing partner. Despite the advent of a three-decade economic boom that would come to be called the “Mexican economic miracle” (1940–1970), Mexico still could not produce enough jobs to employ the large numbers of rural poor in desperate need of work.¹²⁰ And these realities made monitored emigration an element of a new national vision. In 1942, through the extensive executive branch powers over immigration, the countries negotiated a treaty, the Bracero Program, to admit temporary Mexican

¹¹⁸ RICHARD CRAIG, *THE BRACERO PROGRAM* 36-37 (1971); McWILLIAMS, *supra* note 42, at 155.

¹¹⁹ See generally FRED H. SCHMIDT, *AFTER THE BRACERO: AN INQUIRY INTO THE PROBLEMS OF FARM LABOR RECRUITMENT* (1964); Paul S. Taylor, *Migratory Agricultural Workers on the Pacific Coast*, 3 *AM. SOC. REV.* 225 (1938).

¹²⁰ See generally ROGER D. HANSEN, *THE POLITICS OF MEXICAN DEVELOPMENT* 41 (1971) (analyzing the political economy of Mexico, especially focusing on influence of its wealthy northern neighbor); *HISTORIA DE LA REVOLUCIÓN MEXICANA, 1934–1940* (Luis González y González ed., 1981). In the 1970s, in trying to delve into this and related periods, I benefitted from the then unpublished work of various scholars, not least Manuel García y Griego. For samples of García and Griego’s work, see Manuel García y Griego, *The Importation of Mexican Contract Laborers to the United States, 1942–1964: Antecedents, Operation, and Legacy*, in *THE BORDER THAT JOINS: MEXICAN MIGRANTS AND U.S. RESPONSIBILITY* 49-98 (Peter G. Brown & Henry Shue eds., 1983); Manuel García y Griego & Fernando S. Alanís Enciso, *The Illusion of Return: Exiliados Mexicanos in the United States during the Great Depression, 1929–1934* (presented at 24th International Congress of the Latin American Studies Association (Mar. 27-29, 2003)). For an informative account of roles played by the Roosevelt and Truman Administrations role in this bi-national agreement, and their presumptions that they possessed inherent power to establish guest worker programs, see Cox & Rodriguez, *supra* note 80, at 485-491.

farmworkers as needed by the U.S.¹²¹ Unlike previously sanctioned recruitment efforts, and at the insistence of a Mexican government mindful of the viciousness of the 1930s repatriation campaigns,¹²² the Program provided quality and quantity standards (transportation, wages, working and living conditions) for the federal government to enforce as it recruited and employed workers then disseminated through subcontracts to private employers.¹²³

Between late 1947 and 1951, the temporary worker program continued, the Ninth Proviso again presumably providing necessary legal authority, though perhaps the Truman Administration was also asserting inherent Presidential authority over immigration policy.¹²⁴ In any event, private employers and Mexican workers contracted directly with one another, absent the regulations of the Bracero Program and with the federal government abandoning any quality-enforcement role. With relatively unbridled authority, and with significant economic ambitions, employers enhanced recruitment from Mexico's interior, occasionally legalized undocumented already in the U.S., and generally ran affairs as they saw fit.¹²⁵ While neither the Mexican nor the U.S. government wholly approved of these years, they reaped benefits they would not reject (growing remittances, for Mexico; expanding pools of cheap labor, for the U.S.).¹²⁶ Denunciations in the

¹²¹ Agreement Respecting the Temporary Migration of Mexican Agricultural Workers, U.S.-Mex., Aug. 4, 1942, 56 Stat. 1759.

¹²² IMMIGRATION LAW AND POLICY, *supra* note 12, at 27; *see, e.g.*, S. REP. NO. 1515 (1950) (describing the negotiations and provisions of the new program); ERASMO GAMBOA, MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942-1947 (1990) (analyzing the dynamics and flow of Bracero Program laborers to Pacific Northwest); *see also* CRAIG, *supra* note 118, at 40-42; GALARZA, *supra* note 41, at 48.

¹²³ The federal government, through its agency the Farm Security Administration, acted as the official employer, contracting directly with Mexico, subcontracting with individual employees in the U.S., and responsible for bracero grievances. CRAIG, *supra* note 118, at 43-44, 53.

¹²⁴ *Id.* at 53. Some scholars now claim they can find no documentary evidence demonstrating, as long reported, that the Ninth Proviso served as the legal authority for these years and instead imagine the Truman Administration assuming inherent executive authority over immigration. *See* Cox & Rodriguez, *supra* note 80, at 487-91 (highlighting and exploring origins of power of executive branch over immigration).

¹²⁵ A report issued by the President's Commission on Migratory Labor indicates that from 1947 to 1949, 74,600 Mexicans were recruited from the interior of Mexico and over 142,000 undocumented Mexicans already in the U.S. became legal when their employers transported them to the border and contracted with them there. JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 47-48 (1971).

¹²⁶ Mexico's discontent proved less powerful than its desire to rationalize the undocumented migration that already had begun and its appreciation of the role

U.S. for systematic failures to supervise the flow, wage rates, and working conditions almost entirely focused on the adverse consequences for domestic labor.¹²⁷

With disparate national interests converging, it can hardly be regarded as surprising that, in 1951, Public Law 78 authorized the recruitment and employment of temporary Mexican workers by the U.S.¹²⁸ In short order, the U.S. and Mexico reached a new international agreement. Mimicking elements of the 1942 deal, the new accord claimed to regulate and protect the interests of all concerned, ostensibly substituting for the unsupervised program maintained since 1947 under the authority of the Ninth Proviso or the inherent power of the executive branch. This agreement, with modest changes, formally authorized and defined the terms of the Bracero Program until its termination in 1964.¹²⁹

Few programs have ever so well served economic interests in the U.S. Mexican braceros, in the view of knowledgeable insiders, supplied a "captive labor force . . . unnatural in our free competitive economy."¹³⁰ Men (recall, following the targeted recruitment of early decades, Public Law 78 limited admission to adult males) were available to employers without the posting of a bond and with an exemption from social security and income tax withholding provisions. During the program's twenty-two years, perhaps five million braceros worked Mexican jobs, without imposing the burden of having to be treated as human, much less as equals.¹³¹

That the Bracero Program failed miserably to control the travel, employment, and living conditions of recruited Mexican migrants may

remittances already played in the Mexican economy. See U.S. DEPT. OF LABOR, THE ADMISSION OF ALIENS INTO THE UNITED STATES: TEMPORARY EMPLOYMENT, in H. COMM. ON THE JUDICIARY, SUBCOMM. NO. 1, 88TH CONG., STUDY OF POPULATION AND IMMIGRATION PROBLEMS 36 (Comm. Print 1963); CRAIG, *supra* note 118, at 58-60.

¹²⁷ PRESIDENT'S COMM'N ON MIGRATORY LABOR, REPORT ON MIGRATORY LABOR IN AMERICAN AGRICULTURE 59, 64-65 (1951).

¹²⁸ Pub. L. No. 78, 65 Stat. 119 (1951) (amending Agriculture Act of 1949); CRAIG, *supra* note 118, at 72-74.

¹²⁹ See CRAIG, *supra* note 118, at 72-81.

¹³⁰ See SCHMIDT, *supra* note 119, at 15 (quoting Robert C. Goodwin, Administrator of the Bureau of Employment Security).

¹³¹ For diverse treatment of these issues, see, for example, HENRY P. ANDERSON, THE BRACERO PROGRAM IN CALIFORNIA (1976); GALARZA, *supra* note 41, at 183-98; NAT'L ADVISORY COMM. LAB., REPORT ON FARM LABOR 36-38 (1959) [hereinafter REPORT ON FARM LABOR]; Nan Elizabeth Woodruff, *Pick or Fight: The Emergency Farm Labor Program in the Arkansas and Mississippi Deltas During World War II*, 64 AGRIC. HIST. 74 (1990). More recent scholarship continues to discover insightful themes and provocative details. See, e.g., NGAI, *supra* note 116, at 174.

only have enhanced its value to the U.S. Shameless disdain for Mexicans ultimately would provoke some disapproval, including by the Catholic Church. After all, as some began to emphasize, the U.S. never even equipped itself to enforce the promises explicitly made to ensure decent and humane treatment.¹³² But brazen failure to honor commitments — to braceros, to citizenry in the U.S., to the Mexican government — contributed to the rapid rise of undocumented Mexican migration. And appreciation grew, on both sides of the border, that illegal migration already had become a system related to and yet separable from whatever happened to be the *de jure* system of the moment.¹³³

If great growth of undocumented Mexican migration during the Bracero Program initially seems implausible, pause to recall the extraordinary growth of undocumented Mexican migration during the explosion of legal migration between 1900 and 1930. Pause, too, to consider the relationship between the two systems and the cultivated advantages of illegality.¹³⁴ By employing unauthorized workers, employers could entirely avoid the \$25 bond required for each documented worker, the \$15 contracting fee imposed by the U.S. government, the minimum employment period, fixed wages, and other safeguards in principle demanded by law.¹³⁵ Lax as enforcement of the Bracero Program provisions had been, why be at all subject to legal prohibitions?

Effectively sanctioning employers for employing undocumented workers certainly would have helped — perhaps appreciably helped — to discourage undocumented entry. But avoiding that deterrent — continue to permit employers to hire workers of their choosing — already had become central to the illegal and legal systems of Mexican migration. When an amendment to the Immigration and Nationality Act of 1952 proposed imposing criminal penalties for the employment of undocumented aliens, opponents easily prevailed. To ensure

¹³² Edward R. Murrow's *Harvest of Shame* (CBS television broadcast Nov. 25 1960) perhaps most prominently illustrates the resentment. See generally ANDREAS, *supra* note 17 (exploring the complex power dynamics governing border); KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992) (analyzing failures to fulfill formal promises central to agreements and treaties).

¹³³ Some recognized this emerging pattern early. A 1949 article observing the mindful failure to stem the wetback tide ended: "We have deliberately brought about the situation." Hart Stilwell, *The Wetback Tide*, COMMON GROUND, June 1949, at 3, 7. See also Otey M. Scruggs, *The United States, Mexico, and the Wetbacks, 1942-1947*, 30 PAC. HIST. REV. 149, 163 (1961).

¹³⁴ See GAMIO, *supra* note 22, at 9-12.

¹³⁵ GREBLER, *supra* note 114, at 32; see also GALARZA, *supra* note 41, at 85.

protection of employers, however, they added explicit immunity to the final Congressional legislation: “[F]or the purposes of this section, employment [including the usual and normal practices incident to employment] shall not be deemed to constitute harboring.”¹³⁶

Some prominent observers certainly took note of the political plot. Following the defeat of the proposed employer sanctions, the *New York Times* observed:

It is remarkable how some of the same Senators and Representatives who are all for enacting the most rigid barriers against immigration from Southern Europe suffer from a sudden blindness when it comes to protecting the southern border of the United States. This peculiar weakness is most noticeable among members from Texas and the Southwest, where the wetbacks happen to be principally employed.¹³⁷

Meanwhile, systematic and animated recruitment almost inevitably would reactivate old patterns, inside and outside the formal Bracero Program. Like employers in the U.S., households in Mexico understood the deliberate fuzziness between legal and illegal immigration; indeed, they appreciated the related and yet separable spheres that defined *de facto* and *de jure* migrant work. Since the early 1880s, and especially since the first two decades of the twentieth century, households had earned and remitted money more through illegal than legal migration. And recruitment for the Bracero Program engaged diverse and evolving networks providing the resources to do whatever circumstances demanded in order to maintain families, extended households, and communities.

Reactions to the growing numbers of undocumented workers proved brutal, even by the standards of the U.S. In 1954, and through an aggressive campaign begun a decade earlier, Operation Wetback rounded up and deported over 1,000,000 Mexicans.¹³⁸ Faced with this frenzy, employers made extensive use of workers under the Bracero Program. Federal government data reveal that, after remaining constant at about 200,000 from 1951 to 1953, the number of braceros

¹³⁶ Act of Mar. 20, 1952, Pub. L. No. 283, 66 Stat. 26.

¹³⁷ Editorial, *Wetback Problem*, N.Y. TIMES, Nov. 28, 1952, at 24 (quoted in Scruggs, *supra* note 133).

¹³⁸ For an enlightening account of the ten year campaign and its culmination, see Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 W. HIST. Q. 421 (2006). For an earlier valuable analysis, see JOHN MCBRIDE, *VANISHING BRACERO: VALLEY REVOLUTION* (1963).

admitted increased by 105,000 during 1954 (the year of Operation Wetback), increased by another 100,000 in 1955, and leveled off at about 450,000 for the years 1956 through 1959.¹³⁹ Some wanted to believe that the rise in the number of braceros from 1954 to 1959 signaled growing confidence in the “economic and political feasibility” of the program.¹⁴⁰ What appears more likely is employers understood that, until the mood shifted, as they fully expected it would, the Bracero Program was the only way to go.

Operation Wetback seemed only to reinforce harsh criticism of the Bracero Program. Nativists demanded that the border keep out unwanted immigrants. Organized labor argued that braceros depressed wages and working conditions.¹⁴¹ And, civil rights activists scrutinized immigration laws for racist assumptions and aspirations. They saw the Bracero Program as exploitative of migrants and discriminatory against documented Mexicans and Mexican Americans (Chicanas and Chicanos).¹⁴² In the face of this assault, the program’s durability testifies to the political bond between employers (particularly in southwestern agriculture) and congressional leaders. Always impressively resilient, the alliance showed its remarkable flexibility, especially in the final decade of the embattled program.

Ever self-assured, particularly when the Bracero Program appeared almost certainly to die at the end of 1964, employers and congressional allies audaciously pressed in 1963 for the importation of Mexicans as H-2 (temporary alien) workers under the provisions of the Immigration and Nationality Act of 1952.¹⁴³ They figured they would revive “temporary” and “discretionary” foreign labor programs available as early as the 1880s and as recently as 1947 through 1951. Against long odds, facing an opposition led by Cabinet officials (including the Secretary of Labor), the alliance’s scheme failed.¹⁴⁴ But the renunciation of formal legal flexibility only emphasized that, from the expiration of the Bracero Program until some unknown time in the future, labor would have to come through the illegal system. No

¹³⁹ See IMMIGRATION LAW AND POLICY, *supra* note 12, at 40 tbl.3.

¹⁴⁰ See, e.g., GALARZA, *supra* note 41, at 70.

¹⁴¹ For an account of the one-to-one displacement theory then dominant and of the more sophisticated version that later pervaded the prevailing theory/Informed Consensus, see López, *supra* note 18, at 631-35.

¹⁴² See GALARZA, *supra* note 41, at 183-98, 212-13; REPORT ON FARM LABOR, *supra* note 131, at 36-38. For a recent exploration of the civil rights dimensions of these years, see generally Hernández, *supra* note 138.

¹⁴³ See Ellis W. Hawley, *The Politics of the Mexican Labor Issue, 1950–1965*, 40 AGRIC. HIST. 157, 158 (1966).

¹⁴⁴ See CRAIG, *supra* note 118, at 150-57.

matter the obstacles, the capacity to attract, admit, and overlook would find a way through one system or the other.

The much heralded 1965 immigration reform may well have ensured the continuation and growth of undocumented Mexican migration. Desirous of being perceived as the “egalitarian champion of the ‘free world,’” Congress ended the 1920s system that favored Western European immigrants and established an open system based on family reunification and equality between countries of origin.¹⁴⁵ The changes led to significant (and largely unanticipated) shifts in legal migration.¹⁴⁶ But the new regime severely reduced to 120,000 the number of immigrant visas available to Mexico and the Western Hemisphere, leading immediately to a huge and growing backlog.¹⁴⁷ And the egalitarian system made no room for — did not acknowledge and did not legally accommodate — the massive undocumented migration of Mexican labor that had already become an essential feature of U.S. and Mexican life and, not coincidentally, again avoided enacting employer sanctions.¹⁴⁸

¹⁴⁵ See HING, *supra* note 52, at 78. For an early appraisal of these changes and the efforts of the Truman, Eisenhower, and Kennedy Administrations to overturn the national quota regime, see generally Thomas J. Scully, *Is the Door Open Again? A Survey of Our New Immigration Law*, 13 UCLA L. REV. 227 (1966).

¹⁴⁶ In particular, the laws unleashed social forces cruelly controlled and never much understood in Asian Pacific America. For the first systematic analysis of this phenomenon, see generally HING, *supra* note 52. For examples of what has now become a rich interdisciplinary literature, see, for example, CHAN, *supra* note 56; TAKAKI, *supra* note 52.

¹⁴⁷ For a recent summation of this effect, see Bill Ong Hing, *Like It or Not, Arizona’s SB 1070 Is About Racial Profiling*, HUFFINGTON POST (Apr. 27, 2012, 2:25 P.M.), http://www.huffingtonpost.com/bill-ong-hing/arizona-immigration-law_b_1457435.html (“While the rest of the world enjoyed an expansion of numerical limitations after 1965, Mexico and the Western Hemisphere were suddenly faced with severe numerical limitations. The Western Hemisphere was allotted a total of 120,000 immigrant visas each year. By 1976, the process resulted in a severe backlog of approximately three years and a waiting list with nearly 300,000 names. As the immigration of Mexicans became the focus of more debate, Congress enacted legislation in 1976 further curtailing Mexican migration. The law imposed a preference system on Mexico and the Western Hemisphere along with a 20,000 visa per country numerical limitation. Thus, Mexico’s annual visa usage rate, which had been about 40,000, was virtually cut in half overnight.”). Years after the passage the 1965 law, scholarly analyses began to emphasize the limits and exclusions as much as the far more recognized progressive elements of the legislation. See, e.g., NGAI, *supra* note 84, at 258-64.

¹⁴⁸ For a summary of delaying and avoiding the imposition of employer sanctions through the mid-1970s, see Richard Avila & James Romo, Comment, *The Undocumented Worker: The Controversy Takes a New Turn*, 3 CHICANO L. REV. 164, 164 n.1 (1976).

Propelled by powerful forces knowingly activated in the nineteenth century and consciously cultivated over the decades, an estimated twenty-eight million undocumented Mexicans entered the U.S. between 1965 and 1986.¹⁴⁹ Most routinely cycled back and forth, maintaining transnational households through overlapping networks that provided information and connections about crossing the border, finding work, coping, avoiding detection, and, critically, sending money back home. With about 23.4 million departing during this same period, and with perhaps six million staying (some eighty percent unauthorized), undocumented migration operated for these twenty-one years as an illegal system parallel to post-1965 immigration law.¹⁵⁰

IV. RECENT HISTORY SEEN THROUGH THIS RIVAL THEORY

A. *The Passage of the Immigration Reform and Control Act and the Coming of the North American Free Trade Agreement*

That so many undocumented Mexicans cycled back and forth as part of transnational households — living through what some scholars have called a “de facto guest-worker program” — does not mean travel proved always easy and safe.¹⁵¹ From 1965 to 1986, the federal government increased the number of Border Patrol officers from 1,500 to 3,700 and the number of annual apprehensions rose from 55,000 to 1.7 million. Vitriolic opponents of undocumented Mexicans regarded with measured skepticism the large numbers of apprehended migrants. Meanwhile, a ritual of sorts developed where those apprehended agreed to “voluntary departure” only to attempt to make their way back into the U.S.¹⁵²

¹⁴⁹ This estimate is drawn from data provided by Douglas S. Massey and Audrey Singer, who estimate that 36.5 million undocumented Mexicans entered between 1965 and 1990. See Douglas S. Massey & Audrey Singer, *New Estimates of Undocumented Mexican Migration and the Probability of Apprehension*, 32 *DEMOGRAPHY* 203, 209 (1995).

¹⁵⁰ DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 41-47 (2002).

¹⁵¹ *Id.* at 45.

¹⁵² For analyses of the practices and politics at work, many of which I witnessed first hand and challenged, see, for example, LEO R. CHAVEZ, *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* (1992); Josiah McC. Heyman, *Putting Power in the Anthropology of Bureaucracy: The Immigration and Naturalization Service at the Mexico-United States Border*, 36 *CURRENT ANTHROPOLOGY* 261 (1995). For estimates of the likelihood of making it safely across the border, see generally Thomas J. Espenshade, *Undocumented Migration to the United States: Evidence from a Repeated*

And, when the early 1980s triggered anxiety in U.S. citizens over their own economic well-being, undocumented Mexicans again became more visible. Calls for a solution to the problem of undocumented Mexican migration resurfaced. In framing the situation, President Ronald Reagan declared that the U.S. had “lost control” of its borders to an “invasion” of illegal migrants.¹⁵³ In 1986, after repeated Congressional failures, predictably precipitated by the standard line-up of conflicting interests, and with the support of the Reagan Administration, Senator Alan Simpson and Representative Peter Rodino stunningly pushed through the Immigration Reform and Control Act (“IRCA”), enacted in the name of “securing our borders,” with something for virtually every vying constituency (amnesty, employer sanctions, enhancement of border patrol),¹⁵⁴ IRCA offered a path to citizenship to those undocumented immigrants who could prove uninterrupted stay in the U.S. from 1982, imposed sanctions on employers for the hiring of undocumented Mexicans, and increased the funding for the Border Patrol.¹⁵⁵

Trials Model, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCES OF THE 1980s (Frank D. Bean, Barry Edmonston & Jeffrey S. Passel eds., 1990).

¹⁵³ Jorge Durand, Douglas S. Massey & Emilio A. Parrado, *The New Era of Mexican Migration to the United States*, 86 J. AM. HIST. 518, 521 (1999).

¹⁵⁴ For a revealing account, see, for example, MASSEY, DURAND & MALONE, *supra* note 150.

¹⁵⁵ IRCA immediately provoked considerable scholarly literature, especially riveted on migration patterns. See, e.g., TRACY ANN GOODIS, A LAYMAN’S GUIDE TO THE 1986 U.S. IMMIGRATION REFORM (1986) (describing in accessible terms the provisions of the law); Wayne A. Cornelius, *Impacts of the 1986 U.S. Immigration Law on Emigration from Rural Mexican Sending Communities*, 15 POPULATION & DEV. REV. 689 (1989) (assessing effect of IRCA on options perceived and decisions made by rural Mexicans); Wayne A. Cornelius, *Labor Migration to the United States: Development Outcomes and Alternatives in Mexican Sending Communities*, in REGIONAL AND SECTORAL DEVELOPMENT IN MEXICO AS ALTERNATIVES TO MIGRATION 91 (Serio Diaz-Briquets & Sidney Weintraub eds., 1991) (analyzing impact of development strategies on the migration decisions of Mexicans); Katharine M. Donato, Jorge Durand & Douglas S. Massey, *Changing Conditions in the U.S. Labor Market: Effects of the Immigration Reform and Control Act of 1986*, 11 POPULATION RES. & POL’Y REV. 93 (1992) (examining the actual as compared to the projected impact of IRCA on U.S. labor market); Katharine M. Donato, Jorge Durand & Douglas S. Massey, *Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act*, 29 DEMOGRAPHY 139 (1992) (determining the deterrent effect, if any, of IRCA on Mexican migration to the U.S.); Jorge Durand & Douglas S. Massey, *Mexican Migration to the United States: A Critical Review*, 27 LATIN AM. RES. REV. 3 (1992) (synthesizing diverse scholarly literatures that comment on the numbers of Mexican immigrants to the U.S., the amount of their remittances to Mexico, and the experiences of various sending communities); Douglas S. Massey, Luin Goldring & Jorge Durand, *Continuities in*

On the other side of the border, President Carlos Salinas de Gortari regarded relatively open markets as the wise alternative to import substitution strategies that for decades had dominated the Mexican political economy.¹⁵⁶ In 1988, Mexico approached the U.S. and Canada to create a continent-wide free trade zone through what was to become, in 1994, the North American Free Trade Agreement (“NAFTA”).¹⁵⁷ Free market advocates in the Reagan and Bush Administrations had long advocated such an arrangement and welcomed the invitation to negotiate, sign, and implement NAFTA. Despite opposition from isolationists, environmentalists, and unions, and later with the enthusiastic endorsement of President Clinton, the U.S. and Mexico opened their common border to businesses, tourists, scientific exchanges, commercial traffic — virtually everything but Mexican migrants. Mexico, according to NAFTA’s promoters, could now “export goods and not people.”

But, if anything, the celebrated passage of IRCA and much-heralded advent of NAFTA only enhanced the flow of undocumented Mexican

Transnational Migration: An Analysis of Nineteen Mexican Communities, 99 AM. J. SOC. 1492 (1994) (assessing experiences of various Mexican sending communities through a common analytical framework); Michael J. White, Frank D. Bean & Thomas J. Espenshade, *The U.S. 1986 Immigration Reform and Control Act and Undocumented Migration to the United States*, 9 POPULATION RES. & POL’Y REV. 93 (1990). Two decades later, one strand of immigration law scholars focused renewed attention on both the existence of an illegal immigration system and, from the vantage point of information theory, the advantages an illegal system provides a sovereign in screening for documented status and for citizenship. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 845 (2007) (“Our theoretical framework suggests a different way of understanding the illegal immigration system. That system can be seen as a de facto ex post screening system operated under the guise of an ex ante system.”).

¹⁵⁶ See, e.g., MIGUEL ÁNGEL CENTENO, *DEMOCRACY WITHIN REASON: TECHNOCRATIC REVOLUTION IN MEXICO* (1994); *DEMOCRACY IN LATIN AMERICA: PATTERNS AND CYCLES* (Roderic A. Camp ed., 1996).

¹⁵⁷ Literature on NAFTA has grown considerably, with pointed and comprehensive analyses of the impact on migration, including work by among the very best immigration scholars. See, e.g., BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* (2010) (analytically linking NAFTA, international political economy, and undocumented Mexican migration in the assessment of ethical options); WILLIAM A. ORME, JR., *UNDERSTANDING NAFTA: MEXICO, FREE TRADE, AND THE NEW NORTH AMERICA* (1996) (describing NAFTA’s role in North American economy, particularly emphasizing role of and impact on Mexico); Wayne A. Cornelius & Philip L. Martin, *The Uncertain Connection: Free Trade and Rural Mexican Migration to the United States*, 27 INT’L MIGRATION REV. 484 (1993) (arguing that it is easy, and perhaps mistaken, to overestimate additional migration from rural Mexico imposed by NAFTA-related restructuring in Mexico); Durand et al., *supra* note 153 (examining impact of IRCA, NAFTA, and other federal policies on Mexican migration to the U.S.).

migration.¹⁵⁸ Both had been described as means to combat undocumented migration. But, at the de jure and de facto levels, both instead contributed to the protection of the status quo flow of undocumented migrants. IRCA's employer sanctions, the centerpiece of the legislation's interior enforcement regime, included by design defenses that were easy for employers to successfully assert. Combined with chronic under-enforcement, precious few employers endured sanctions — or, for that matter, even fretted about them. For its part, NAFTA impoverished Mexican farmers. They could not compete with multinationals subsidized by the U.S. And they frequently faced ruination unless they appreciated and acted upon the extraordinary economic incentives to migrate illegally to the U.S.¹⁵⁹

The advocates of the passage of IRCA and the coming of NAFTA declared, in the rhetoric of the prevailing theory, that multiple apprehensions at the border would discourage individual migrants; that employer sanctions would undermine employment prospects in the U.S.; that criminal deportation would deter return-migration; that free trade would create significant numbers of new jobs in Mexico; that collectively these influences, in turn, would work together to deter overall migration from Mexico.

Through the lens of the rival theory, however, we see events unfolding far differently. Even more entrenched and sophisticated illegal and legal systems — combinations of prohibitions and permissions, patterns of exceptions to and under-enforcement of prohibitions, all secured by the federal government's plenary power — would continue to openly accommodate and vigorously encourage low-income Mexican households to survive in precisely the ways they had come to rely upon. This effect is exactly what the best strategists in the U.S. and Mexico would have confidently predicted, particularly in the face of NAFTA's predictable impact on the Mexican economy.¹⁶⁰

B. California's Proposition 187 — Its Ripple Effects

In 1993, California continued to face a difficult recession and, with record low approval ratings during his first term, Governor Pete Wilson confronted a stiff 1994 re-election campaign against Kathleen

¹⁵⁸ See HING, *supra* note 157, at 9.

¹⁵⁹ See HING, *supra* note 157, at 5.

¹⁶⁰ See Durand et al., *supra* note 153, at 520 (“For millions of Mexicans, economic restructuring under the neoliberal regime of President Salinas brought joblessness, hardship, neglect, and growing economic marginalization.”).

Brown, his Democratic opponent.¹⁶¹ Wilson chose to blame undocumented Mexicans for the state's difficulties. He urged state prohibitions against providing services to undocumented immigrants, and he sought federal reimbursement for services that had rendered by the state for incarcerating, educating, and providing medical care. As part of his all-out blitz, he urged any and all regulatory and enforcement measures that would persuade undocumented immigrants to self-deport.¹⁶²

Meanwhile, in November 1993, a group of California citizens wrote a proposed law they initially called the "Save our State" initiative.¹⁶³ With considerable support, they qualified the law as a ballot measure. Proposition 187 aimed, comprehensively, to ban diverse state agencies from rendering services to undocumented immigrants — including education, health care, public benefits.¹⁶⁴ Declaring that the people of California had a right to the protection of their government from any person entering the country illegally, Proposition 187 prohibited many of the very permissions the federal government had long chosen to afford those who interacted with unauthorized immigrants.

On November 8, 1994, Governor Wilson defeated Kathleen Brown, and Proposition 187 passed overwhelmingly.¹⁶⁵ A robustly represented coalition of immigrants, elected officials, and civil rights organizations successfully enjoined the newly passed initiative as an unconstitutional effort by California to enact its own immigration law — preempted by federal plenary power.¹⁶⁶ In the order that brought litigation over California's Proposition 187 to a close, District Court Judge Marianna Pfaelzer declared that "[t]he State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal

¹⁶¹ For one distinctive analysis on which I draw for this account, see ROBIN DALE JACOBSON, *THE NEW NATIVISM: PROPOSITION 187 AND THE DEBATE OVER IMMIGRATION* (2008).

¹⁶² *Id.* at xvi-xvii. For a helpful analysis of the rhetorical strategies employed in debates over Proposition 187, see KENT A. ONO & JOHN M. SLOOP, *RHETORIC, IMMIGRATION, AND CALIFORNIA'S PROPOSITION 187* (2002).

¹⁶³ See JACOBSON, *supra* note 161, at xiii ("In November 1993, ten people in California, including former agents of the U.S. Immigration and Naturalization Service, a mayor, and a state representative, wrote the Save Our State Initiative.").

¹⁶⁴ For the ballot text of Proposition 187, which warrants a careful read, see CALIFORNIA BALLOT PAMPHLET, NOV. 8, 1994 GENERAL ELECTION 50-55 (1994), available at http://library.uchastings.edu/ballot_pdf/1994g.pdf.

¹⁶⁵ Philip Martin, *Proposition 187 in California*, 29 INT'L MIGRATION REV. 255, 255 (1995).

¹⁶⁶ See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

immigration laws.” In so ruling, she confirmed the fundamental federal exclusivity principle expressed in the Supreme Court’s unequivocal proclamations that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,”¹⁶⁷ and that exclusive federal control over immigration “has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”¹⁶⁸

Yet this legal defeat conceals the extraordinary influence of the Save Our State authors and supporters. Tapping a long history of racist nativism, they stirred up a populist fury. Scholars immediately recalled the social rage and rationalizations propelling Chinese exclusion, Japanese internment, and even the National Socialist propaganda in 1930s Germany.¹⁶⁹ Of course proponents of Proposition 187 received valuable financial and rhetorical support (including from the national Federation for American Immigration Reform (“FAIR”)) and organizational help generating volunteers (including from Stop the Out of Control Problems of Immigration Today (“STOPIT”)).¹⁷⁰ Nevertheless, the factions fervently backing Proposition 187 produced in California and exported to other states hysteria over immigration, particularly over undocumented Mexicans, that already by 1996 was described as having “become one of the great discontents of our civilization.”¹⁷¹

Federal officials, not least presidents, felt the extraordinary pressures generated by this orchestrated frenzy. Bill Clinton had urged Californians to reject Proposition 187 and to allow the federal

¹⁶⁷ *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

¹⁶⁸ *Galvan v. Press*, 347 U.S. 522, 531 (1954). For an analysis that shapes my representation of the orthodoxy of Judge Pfaelzer’s ruling and Supreme Court precedent, see Christina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

¹⁶⁹ For a valuable set of original essays illuminating these themes, see IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) [hereinafter IMMIGRANTS OUT!].

¹⁷⁰ See JACOBSON, *supra* note 161, at xvii-xviii. Jacobson relies upon the superb work done by Jean Stefancic. See also Jean Stefancic, *Funding the Nativist Agenda*, in IMMIGRANTS OUT!, *supra* note 169, at 119. For a related and illuminating depiction of how think tanks and foundations have promoted the conservative revolution through an analysis of issues such as Proposition 187, IQ/race and eugenics, affirmative action, welfare reform, tort reform, and campus multiculturalism, see JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA (1996).

¹⁷¹ See Marcelo M. Suárez-Orozco, *California Dreaming: Proposition 187 and the Cultural Psychology of Racial and Ethnic Exclusion*, 27 ANTHROPOLOGY & EDUC. Q. 151, 152 (1996).

government to keep working on the problem of undocumented migration.¹⁷² The California delegation to Congress took Clinton at his word and, animated rather than dispirited by their judicial defeat, immediately began lobbying for federal laws that addressed their ambitions.¹⁷³ Because Democratic political advisors had interpreted the extraordinary support for Proposition 187 to mean, most of all, that President Clinton could not risk appearing soft on illegal immigration, the Administration embraced the obligation to attack undocumented Mexican migration and undocumented Mexicans.¹⁷⁴

At least as importantly, the authors and supporters of Proposition 187 had resurrected across the nation an awareness that state and local governments could act against undocumented immigration. In particular, Proposition 187 had surfaced the various implicit permissions that, in part, governed the federal government's complex approach to immigration. Making these permissions explicit made them far more controversial.¹⁷⁵ Proposition 187 provided a roadmap for what other states might do in the future in dealing with their own undocumented immigrant problem — and some like New Jersey, Florida, and New York almost immediately acted.¹⁷⁶ In light of California's experience, the policies, practices, and justifications potentially available to local and state governments appeared both more visibly available to consider and, with the ideological temperament perhaps shifting, more plausibly constitutional to

¹⁷² See Martin, *supra* note 165, at 258.

¹⁷³ For an account of the resilience and impact of the California delegation, see Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1633-34 (1997).

¹⁷⁴ Wayne A. Cornelius, *Controlling "Unwanted" Immigration: Lessons from the United States, 1993-2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 777-78 (2005).

¹⁷⁵ Perhaps this visibility — this now unavoidable controversy — explains President Clinton's assurances to the California electorate and everyone else listening: "[I]t is not wrong for you [Californians] to want to reduce illegal immigration. And it is not wrong for you to say it is a national responsibility to deal with immigration." See Martin, *supra* note 165, at 258. Clinton said that "the federal government should do more to help to stop illegal immigration and to help California bear the costs of the illegal immigrants who are there . . ." Clinton promised that the federal government would do more to "help California, and other states, deal with incarceration, health and education costs of illegal immigration." See *id.*

¹⁷⁶ Within months, states (including Florida, New Jersey, New York) had sued the federal government for reimbursements; state and local governments had generated laws inspired by Proposition 187; and anti-undocumented Mexican hysteria had begun to spread. See Jeffrey R. Margolis, *Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187*, 26 U. MIAMI INTER-AM. L. REV. 363, 365 (1994-95).

undertake.¹⁷⁷ Principally targeting undocumented Mexicans, a new state sovereignty movement had emerged.

V. ENDANGERING THE SYSTEMS

A. Clinton and Bush

In his January 24, 1995 State of the Union Address, speaking to the first Republican-controlled Congress since 1954, aiming at once to restrain the state sovereignty movement and to respond to growing hysteria, President Clinton unequivocally signaled to the nation his views about — and his plans to attack — the illegal alien problem:

All Americans, not only in the States most heavily affected but in every place in this country, are rightly disturbed by the large numbers of illegal aliens entering our country. The jobs they hold might otherwise be held by citizens or legal immigrants. The public services they use impose burdens on our taxpayers. That's why our administration has moved aggressively to secure our borders more by hiring a record number of new border guards, by deporting twice as many criminal aliens as ever before, by cracking down on illegal hiring, by barring welfare benefits to illegal aliens. In the budget I will present to you, we will try to do more to speed the deportation of illegal aliens who are arrested for crimes, to better identify illegal aliens in the workplace as recommended by the commission headed by former Congresswoman Barbara Jordan. We are a nation of immigrants. But we are also a nation of laws. It is wrong and ultimately self-defeating for a nation of immigrants to permit the kind of abuse of our immigration laws we have seen in recent years, and we must do more to stop it.¹⁷⁸

¹⁷⁷ For a prominent illustration of the profoundly anti-immigrant (and particularly anti-undocumented Mexican) ideology already prominently evident, see PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995). For a review both appreciative and critical, see Peter H. Schuck, *Alien Ruminations*, 105 *YALE L.J.* 1963 (1996) (book review).

¹⁷⁸ For the complete text of President Clinton's address, see AMERICAN PRESIDENCY PROJECT, ADDRESS BEFORE A JOINT SESSION OF THE CONGRESS ON THE STATE OF THE UNION (Jan. 24, 1995), <http://www.presidency.ucsb.edu/ws/index.php?pid=51634#axzz1tSYuzKkc>. For a then-contemporary analysis criticizing President Clinton for relying in his 1995 State of the Union Address on "superficial but politically powerful clichés (i.e., undocumented immigrants take jobs away from citizens, burden public services, or are criminals in need of

Certainly anxious for electoral reasons to preempt criticism by Republican opponents and those angry at lawlessness at the border, and apparently persuaded by the prevailing theory, President Clinton embraced a “prevention through deterrence” strategy and poured unprecedented dollars into the border enforcement.¹⁷⁹ With these expenditures, and exercising Executive Branch authority over immigration, the Border Patrol shifted its focus from interior enforcement — apprehending entrants after they had already crossed the border — to border enforcement, aiming to raise the likelihood of apprehension at the main areas of entry and to deter border crossing attempts.¹⁸⁰

In earlier decades, such public commitments did not mean nearly as much as a president might suggest, and perhaps not all that much by any standard. For generations, the on-the-ground ability of the executive branch to exclude and deport undocumented immigrants never came remotely close to matching the absolutist rhetoric of xenophobes or even the robust promises of electorally savvy executives. But by the time Bill Clinton took office in 1992, the potential to enforce immigration law had begun to approach the capacity necessary to root out and put a stop to illegal migration. The Clinton Administration could invest in military-grade infrastructure, technology, and manpower. President Clinton possessed the power to generate numbers (apprehensions, detainees, deportations) previously regarded as fanciful.

As part of the new prevention through deterrence model, the Border Patrol launched Operation Hold-the-Line in El Paso in 1993; Operation Gatekeeper in San Diego in 1994; Operation Safeguard in central Arizona in 1995; and Operation Rio Grande in south Texas in

deportation)” and, in the process, only deepening and furthering the irrationality of the national debate, see Suárez-Orozco, *supra* note 171, at 154.

¹⁷⁹ See, e.g., NEVINS, *supra* note 24. Christopher Edley, Jr., the Dean of UC Berkeley School of Law, was then involved in the formation of the Clinton administration policy, and testified at a public hearing that the administration decided to “put as much money into the INS as they could plausibly absorb.” See Cornelius, *supra* note 174, at 79 n.7.

¹⁸⁰ See, e.g., Cox & Rodríguez, *supra* note 124. For other articles recognizing, during this period, the breadth of executive power, see, for example, Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 740 (1997) (describing the executive branch’s power over and responsibility for immigration enforcement); Marc L. Miller, *Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration*, 51 EMORY L.J. 963, 972 (2002) (observing executive branch authority over immigration cases).

1997.¹⁸¹ Deploying agents to the border, building more and higher and stronger fencing¹⁸² and employing technological tools such as stadium lighting, ground sensors and infra-red cameras, the Border Patrol “militarized” the border¹⁸³ and hoped, in the words of Doris Meissner, former Immigration and Naturalization Service Commissioner, that “geography would do the rest.”¹⁸⁴ In undisguised terms, President Clinton’s prevention through deterrence was designed to harness unprecedented manpower and technology to funnel would-be border crossers — mainly members of longstanding undocumented transnational Mexican households — to far more difficult and dangerous terrain, discouraging border crossing overall.

Then, as no small tribute to the unrelenting California delegation and to mounting antipathy toward undocumented Mexicans, President Clinton enthusiastically signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.¹⁸⁵ The Act strengthened the Clinton Administration’s border buildup by authorizing funds for fencing at the San Diego border, for still more sophisticated technology, and for increased numbers of Border Patrol agents; it enhanced, through the creation of 287(g) Program, interior surveillance by providing for federal and state cooperation in the enforcement of federal immigration law.¹⁸⁶ On top of intensifying border and interior resources, the legislation expanded the grounds of removability, cut noncitizens off from a range of public benefits,

¹⁸¹ For analyses of these various operations, see, for example, AMNESTY INT’L, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN THE BORDER REGION WITH MEXICO (1998); TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978–1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME (1996).

¹⁸² BLAS NUNEZ-NETO & STEPHEN VINA, CONG. RESEARCH SERV., BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER (Sept. 21, 2006), *available at* http://www.usborderpatrol.com/borderissues_crs_092106.pdf.

¹⁸³ Far from rhetorical excess, use of the term “militarize” accurately portrays the Clinton Administration’s planning and aspirations. For an account of how the Administration commissioned Sandia National Laboratories, a federally supported military research facility, to recommend how to prevent and deter entry at the border through enhanced physical barriers, advanced electronic surveillance equipment, and specially trained personnel, see Wayne A. Cornelius, *Death at the Border: The Efficacy and Unintended Consequences of U.S. Immigration Control Policy, 1993–2000*, 27 POPULATION & DEV. REV. 661, 662 (2001).

¹⁸⁴ See Cornelius, *supra* note 183, at 779.

¹⁸⁵ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009.

¹⁸⁶ *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. DEP’T. OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Sept. 2, 2011), <http://www.ice.gov/news/library/factsheets/287g.htm>.

terminated judicial review of a wide variety of immigration-related agency decisions, and amplified penalties for immigration law violations — a cluster of provisions that the nation's best immigrant advocates fought against, challenged, and criticize to this day.¹⁸⁷ Finally, as part of ending “welfare as we know it,” the Clinton Administration barred undocumented migrants from nearly all social services.¹⁸⁸

Evidently putting faith in the prevailing theory, and surely aware of the need never to appear soft on undocumented immigrants, the George W. Bush Administration reinforced and extended each of the policies and practices initiated by President Clinton. In a July 2006 reversal of longstanding policy, for example, the Bush Administration announced children born in the U.S. to low-income undocumented immigrants would no longer be automatically entitled to health insurance through Medicaid but instead would qualify only if parents provide documents to prove child's citizenship.¹⁸⁹ Health practitioners almost universally denounced the change, and health law specialists regarded the requirement as a tortured reading, at best, of existing statutes and regulations, a contrived interpretation designed to force undocumented parents to risk apprehension.¹⁹⁰

President Bush continued Clinton's massive militarization of the border.¹⁹¹ His Administration sent large deployments of National

¹⁸⁷ For a small sample of the literature by these advocates, see generally Bill Ong Hing, *Detention to Deportation — Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS L. REV. 891 (2005); Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159 (1998); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010); Donald Kerwin & Charles Wheeler, *The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill*, 75 INTERPRETER RELEASES 1433 (1998); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

¹⁸⁸ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as 8 U.S.C. § 1601). A strain of the sizeable interdisciplinary literature analyzing the Clinton Administration reforms bears directly on immigrants. For some examples, see WENDY ZIMMERMAN & MICHAEL E. FIX, *DECLINING IMMIGRANT APPLICATIONS FOR MEDI-CAL AND WELFARE BENEFITS IN LOS ANGELES COUNTY* (1998); Marta Tienda, *Demography and the Social Contract*, 39 DEMOGRAPHY 587, 608 (2002).

¹⁸⁹ See Interim Final Rule, 71 Fed. Reg. 39214-39229 (July 12, 2006). This final interim federal regulation will amend 42 C.F.R. § 435 to require the more stringent citizenship documentation. Formalized in July but only more publicly announced in November 2006, the change of policy drew much attention. See also Robert Pear, *Medicaid Wants Citizenship Proof for Infant Care*, N.Y. TIMES, Nov. 3, 2006, at A1.

¹⁹⁰ Pear, *supra* note 189.

¹⁹¹ See Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral*

Guard troops (6,000 at the peak) to help build fences and assist Border Patrol agents under a program called “Operation Jump Start.”¹⁹² Even more notably, perhaps, President Bush supplemented the border deterrence strategy with increased interior enforcement. Following September 11, 2001, with anti-immigrant hysteria gripping the nation (the utterly familiar rhetoric about “things being out of control” and “broken” now super-charged by the fear of terrorists),¹⁹³ Bush consolidated the immigration and border enforcement agencies as Immigration and Customs Enforcement (“ICE”)¹⁹⁴ and moved them

Consequence of the Incorporation of Immigration Law into the Criminal Justice System, 54 HOW. L.J. 639, 644 (2011).

¹⁹² For the U.S. Department of Defense announcement of Operation Jump Start, see U.S. DEP’T OF DEFENSE, “*Operation Jump Start*” Puts 2,500 Guardsmen on Southern Border in June (June 6, 2006), <http://www.defense.gov/news/newsarticle.aspx?id=16109> (“‘The National Guard will support federal law enforcement agencies that have responsibilities for the security of our borders,’ Army Lt. Gen. H. Steven Blum said. ‘What we will be doing is bringing military skills, military equipment, military expertise and experience to assist at the request of the Department of Homeland Security.’”); see also Randal C. Archibold, *Obama to Send Up to 1,200 Troops to the Border*, N.Y. TIMES, May 25, 2010, at A1.

¹⁹³ Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 45-48 (2007). The genuine fear — and the super-charged rhetoric — led to the proliferation of anti-immigrant housing ordinances. FARMERS BRANCH, TEX., ORDINANCE 2892 (2006), available at <http://www.aclu.org/immigrants-rights/farmers-branch-texas-ordinance-no-2892> (framing the enactment with a connection to 9/11: “[I]n response to the widespread concern of future terrorist attacks following the events of September 11, 2001, landlords and property managers throughout the country have been developing new security procedures to protect their buildings and residents”); VALLEY PARK, MO., ORDINANCES 1708, 1715 & 1721 (2006), available at <http://www.aclu.org/immigrants-rights/anti-immigrant-ordinances-valley-park-mo> (the local Board of Aldermen found that “[i]llegal immigration leads to higher crime rates . . . contributes to other burdens on public services . . . diminishes our overall quality of life and provides concerns to the safety and security of the homeland”); HAZELTON, PA., ORDINANCE 2006-18 (2006), available at http://www.aclu.org/files/pdfs/immigrants/hazleton_secondordinance.pdf (stating that communities should be free from the threat of crime and of “the debilitating effects on their economic and social well being imposed by the influx of illegal aliens”); AVON PARK, FLA., ORDINANCE 08-06 (2006), available at <http://www.heraldtribune.com/assets/pdf/SH6957724.PDF> (conclusively asserting that “illegal immigration leads to higher crime rates . . . [and] destroys our neighborhoods and diminishes our overall quality of life”); see also Jill Esbenshade, *Division and Dislocation: Regulating Immigration Through Local Housing Ordinances*, IMMIGRATION POL’Y CTR. (Sept. 1, 2007), <http://www.immigrationpolicy.org/special-reports/division-and-dislocation-regulating-immigration-through-local-housing-ordinances>.

¹⁹⁴ See *ICE Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview/> (last visited Mar. 25, 2012). Other legacy INS functions became Department of Homeland Security bureaus, including the Customs and Border Patrol and the U.S. Immigration and Citizenship Services. See generally Homeland Security

under the authority of the newly created Department of Homeland Security.¹⁹⁵ Most innovatively, President Bush formally harnessed the resources of state and local governments by sharing sovereign power to enforce federal immigration law¹⁹⁶ and creating programs that provided for the use of state and local criminal law enforcement wherewithal in the federal effort to identify and deport undocumented immigrants.¹⁹⁷

Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (detailing the enormous reorganizations of functions and personnel within the new Department of Homeland Security).

¹⁹⁵ Homeland Security Act of 2002 § 100.

¹⁹⁶ After September 11, the Office of the Legal Council of the Department of Justice authored a legal opinion, signed by Jay S. Bybee, overturning an earlier opinion and declaring that states have the “inherent authority” as sovereigns to enforce immigration laws. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Attorney General John Ashcroft (Apr. 2, 2002), available at <http://www.scribd.com/doc/31610036/Jay-Bybee-Inherent-Authority-Immigration-Memo>. For the small number who noticed and condemned the Bybee Opinion and the “inherent authority” interpretation, see Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 966 (2004), describing Attorney General Ashcroft’s announcement as a reversal in position; Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817, 817-18 (2004), describing Attorney General Ashcroft’s position as a contradiction of prior OLC opinion; Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004), describing Attorney General Ashcroft’s announcement as legally incorrect. For a defense of the Bybee opinion authored by a Bush official prominent in the state sovereignty movement, see generally Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Policy to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2006) (arguing that states have inherent authority to enforce immigration laws, regardless of federal authorization). For related commentary, see Karla Mari McKanders, *Welcome to Hazelton! “Illegal Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It”*, 39 LOY. U. CHI. L.J. 1, 15 (2007). See also Laurel E. Boatright, Note, *“Clear eye for the State Guy”: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1636-67 (citing the Comprehensive Enforcement Act as evidence of federal government’s voluntary approach reassuring states and localities that they have congressional consent to assist with immigration enforcement); Alyssa Garcia Perez, Comment, *Texas Rangers Resurrected: Immigration Proposals After September 11th*, 8 SCHOLAR 277, 278-79 (2006) (citing George W. Bush, President of the United States, Address Before a Joint Session of the Congress on the State of the Union (Feb. 2, 2005), in 41 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Feb. 2005, at 127-28, available at <http://www.gpoaccess.gov/wcomp/v41no05.html>).

¹⁹⁷ For an elaboration of the ways the federal government responded at the Mexican Border to the attacks of September 11, see, for example, James A.R. Nafziger, *Immigration and Immigration Law After 9/11: Getting It Straight*, 37 DENV. J. INT’L L. & POL’Y 555, 556 (2009). The government launched “Operation Jump Start” in 2006,

Particularly given the Bush Administration's propaganda, the federal government appeared to be equipping the nation to capture the most dangerous illegal immigrants to immediately deport.¹⁹⁸ Through ICE's Agreement of Cooperation in Communities to Enhance Safety and Security ("ACCESS"),¹⁹⁹ programs like 287(g),²⁰⁰ Secure

which led to the deployment of 6,000 National Guard troops along the border. Faye Bowers, *On US-Mexico Border, Illegal Crossings Drop*, CHRISTIAN SCI. MONITOR (Feb. 15, 2007), <http://www.csmonitor.com/2007/0215/p01s02-ussc.html>. The Secure Fence Act of 2006 authorized the construction of a \$700 million, 670-mile fence or wall at the border. Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2639 (2006); Carl Hulse & Rachel L. Swarns, *Senate Passes Bill on Building Border Fence*, N.Y. TIMES, Sept. 30, 2006, at A10 (noting that Congress only authorized funding for 370 miles of the fence). In September 2008, the Bush Administration asked Congress for an additional \$400 million to complete the wall because of unanticipated fuel, steel, and labor costs. Eileen Sullivan, *Bush's Border Fence Costs Extra \$400 Million*, HOUS. CHRON., Sept. 10, 2008, at A9; see Robert Bach, *Transforming Border Security: Prevention First*, HOMELAND SEC. AFF. 1 (2005) (asserting that the events of 9/11 pushed a heightened effort to prevent border violations through both military and civilian law enforcement strategies); see also *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, PL 107-56, 115 Stat. 272 ("[T]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes" and providing enhanced surveillance, immigration policies, and policies for "protecting the border").

¹⁹⁸ *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Mar. 25, 2012) (claiming to "prioritize[] the removal of individuals who present the most significant threats to public safety . . ."); John Morton, Assistant Secretary of Immigration and Customs Enforcement, stressed the agency's new priorities to find and deport immigrants who have committed serious crimes (or "worst-of-the-worst"). John Morton, Memorandum, U.S. Immigration & Customs Enforcement (June 30, 2010), available at http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

¹⁹⁹ *ICE ACCESS*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/access> (last visited Mar. 25, 2012) (noting that through ACCESS programs, local and state police officers are used to enforce immigration law for purposes of locating and deporting "dangerous" criminals in order to maintain our national security and keep the country's neighborhoods safe).

²⁰⁰ IIRIRA, Pub. L. No. 104-208, § 287(g), 110 Stat. 3009-546 (1996), codified as Immigration and Nationality Act, 8 USC § 1357(g) (authorizing the federal government to enter into agreements with state and local law enforcement agencies, permitting officers to enforce immigration law); *Fact Sheet: Updated Facts on ICE's 287(g) Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g-reform.htm> (last visited Mar. 25, 2012) (showing that, currently, ICE has 287(g) agreements with 68 law enforcement agencies in 24 states). The 287(g) program has been receiving increasing support in funding: in 2007, the program received \$15.5 million in federal funds; in 2008, that amount increased to \$39 million; and in 2009, Congress provided \$54.1 million in federal funding. Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485, 501 (2010); U.S. GOV'T ACCOUNTABILITY

Communities,²⁰¹ and the Criminal Alien Program²⁰² transformed perceptions of Mexican immigrants from job-takers to violent criminals to violent job-taking criminals.²⁰³ Skepticism arose, however, about whether ICE was actually all that concerned with catching dangerous criminals.²⁰⁴ Section 287(g) did not grant police officers the

OFFICE, GAO 09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 7 (2009), available at <http://www.gao.gov/new.items/d09109.pdf>. By July 2009, DHS reported over 1,000 287(g) officers and credited 287(g) agreements with identifying more than 120,000 individuals suspected of being in the country illegally. Nicholas D. Michaud, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1094 (2010); Press Release, Dep't Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), available at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm; AZADEH SHASHAHANI, TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY 6 (2009), available at <http://www.aclu.org/immigrants-rights/terror-and-isolation-cobb-how-unchecked-police-power-under-287g-has-torn-families>.

²⁰¹ See generally *Secure Communities*, supra note 198 (noting that under Secure Communities, the fingerprints of anyone booked by participating law enforcement is checked for federal immigration violations).

²⁰² The Criminal Alien Program ("CAP") screens inmates and *arrestees* in prisons and jails, identifies deportable non-citizens, and places them into deportation proceedings. Beyond suspiciously long detainment periods, CAP has been criticized for having a negative impact on communities because it increases the community's fears of reporting crime to police, it is costly, and it may encourage racial profiling. Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGR. POL'Y CENTER, 7 (Feb. 2010), http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf.

²⁰³ See Vazquez, supra note 191, at 644 ("As a direct consequence of the criminal justice system being used to enforce immigration law, Latinos as a group are being viewed as criminals, 'illegals,' individuals incapable of social assimilation, and instigators of social chaos."); Laura Prabucki, *ICE Cracks Down on the "Worst of the Worst" Criminal Illegal Immigrants*, FOX NEWS, (Sept. 28, 2011), <http://www.foxnews.com/politics/2011/09/28/ice-cracks-down-on-worst-worst-criminal-illegal-immigrants/> (noting that in 2011, ICE claimed that "[o]ut of an estimated 12 million illegal immigrants in the U.S., more than 500,000 are fugitive criminals . . . [that are] convicted or charged with serious crimes.>").

²⁰⁴ See Jennifer M. Chacón, *Unsecured Borders: Immigration Restriction, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007) (discussing the blurring lines between immigration, crime control, and national security). After all, ICE is attempting to meet arbitrary federal quotas on deportations. Alex Pareene, *Record Number of Deportations Still Not Enough for Anti-Immigration Zealots*, SALON (Oct. 19, 2011, 8:02 AM), http://www.salon.com/2011/10/19/record_number_of_deportations_still_not_enough_for_anti_immigration_zealots/singleton/. Operation Endgame (Endgame) became ICE's foundational blueprint for transposing the doctrine of expediency, from the war on terror to the war on immigration, at a proportionate quantitative scale and qualitative harshness. Endgame is a 10-year

authority to arrest undocumented immigrants suspected of crimes; they could already do that under state police power. Instead, “[t]he arrest powers delegated under the 287(g) program become useful precisely when an arrestee is *not* a ‘criminal illegal alien.’”²⁰⁵ Many ICE “criminal” detainees turned out not to be terrifying criminals but in fact people charged with only minor offenses or with no crime at all.²⁰⁶ ACCESS permitted ICE to exploit the strength of the criminal justice system to locate, detain, and remove aliens — particularly

master plan (2003–2012) for removing all deportable aliens from the U.S. — an estimated 12 million people. BUREAU OF IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., *ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012, DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND*, available at http://www.aclum.org/issues/ice_doc_gallery.php; Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. FOR SOC. JUST. 1, 10 (2008); Carol Rose & Christopher Ott, *Inhumane Raid Was Just One of Many*, BOS. GLOBE (Mar. 26, 2007), http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/03/26/inhumane_raid_was_just_one_of_many/. An interesting counter-perspective can be found in one recent study that found those localities with the highest increases in immigration from 1990–2000 actually experienced the largest decreases in violent crime. T. Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 SOC. SCI. Q. 531, 531–53 (2010). Additionally, a 2006 Migration Policy Institute report indicates that the rate of incarceration among foreign-born individuals is less than one quarter the rate for native-born citizens and yet another study found that first-generation immigrants were significantly less likely to commit violence than Americans with longer ties to the U.S. See Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION POL’Y INST. (June 1, 2006), <http://www.migrationinformation.org/usfocus/display.cfm?ID=403>; Robert Samuelson, *Open Doors Don’t Invite Criminals*, N.Y. TIMES (Mar. 11, 2006), http://www.wjh.harvard.edu/soc/faculty/sampson/articles/2006_NYT_OpenDoors.pdf.

²⁰⁵ Aarti Shahani & Judith Greene, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*, JUST. STRATEGIES, 1 (Feb. 2009), <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf>. ICE does not distinguish between classes of crimes, but rather defines anybody with any criminal conviction as a “criminal alien.” *Removal Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/immigration-enforcement/> (last visited Mar. 25, 2012).

²⁰⁶ “In Gaston, North Carolina, ninety-five percent of state charges filed against 287(g) arrestees were for misdemeanors — 60 percent were for traffic violations that were not DWIs.” Shahani & Greene, *supra* note 205, at 2; see also Lee Romney & Paloma Esquivel, *Noncriminals Swept Up in Federal Deportation Program*, L.A. TIMES, Apr. 25, 2011, at A1; Edward Sifuentes, *Escondido Woman Turned Over to Immigration After Domestic Violence Incident*, N. COUNTY TIMES, Oct. 19, 2011, http://www.nctimes.com/news/local/sdcounty/article_47f1a656-a55f-5206-9684-8f156115d9d7.html (last visited Mar. 26, 2012).

undocumented Mexican immigrants — vastly more efficiently than ever before.²⁰⁷

B. Taking Stock of Clinton and Bush

By 2008, a full year before President Obama took office and some twelve years after President Clinton's 1995 State of the Union address, the emerging effects of California's Proposition 187 could be readily identified, though less confidently assessed. The packaged anti-undocumented immigration strategies pursued by the Clinton and Bush Administrations appeared in 2004 to be failing. In the view of highly regarded scholars, there was no evidence in Mexican sending areas that unauthorized migration had been deterred; that would-be illegal entrants were discouraged even after multiple apprehensions by the Border Patrol; that the population of undocumented immigrants in the U.S. was shrinking.²⁰⁸ There was evidence, however, that illegal entries had been redistributed from historically significant areas to other areas along the southwestern border (including, prominently,

²⁰⁷ Shahani and Greene observed that "ICE did not prioritize regions heavily impacted by 'criminal illegal alien' activity. FBI and census data indicate that sixty-one percent of ICE-deputized localities had violent and property crime indices lower than the national average. Meanwhile, eighty-seven percent had a rate of Latino population growth higher than the national average." Shahani & Greene, *supra* note 205, at 6; see also Vazquez, *supra* note 191, at 642. For relatively recent legal scholarship aiming in various ways to illuminate how these two systems now overlap and reinforce one another's sanctions, see, for example, Chacón, *supra* note 204, at 1827 (exploring the origins and consequences of the blurred boundaries between immigration control, crime control, and national security, specifically as related to the removal of non-citizens); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (scrutinizing laws that impose criminal sanctions in criminal courts for immigration law violations); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 500 (2007) ("Much of the recent immigration enforcement-related activity at the federal, state, and local levels reflects . . . perceived associations of immigrants with criminals."); Teresa A. Miller, *Citizenship & Security: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 614 (2003) (explaining the "relationship between recent, harsh immigration reforms adopted both pre- and post-9/11 and the severity revolution within crime control that has been documented by crime scholars"); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) ("Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct.").

²⁰⁸ These findings combine the separate but compatible assessments of Wayne Cornelius and Douglas S. Massey, experienced and influential research scholars with access to perhaps the richest banks of immigration data in Mexico and the U.S. See Cornelius, *supra* note 183, at 781-90; DOUGLAS S. MASSEY, BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION 3-12 (2005), available at <http://www.freetrade.org/pubs/pas/tpa-029.pdf>.

the Tucson area of Arizona); that financial cost of illegal entry had quadrupled (with increasing use of and price charged by smugglers (*coyotes*)); that there had been a dramatic rise in the death of migrants attempting to cross the border; that there had been a sharp rise in anti-immigrant vigilante activity (notably, again, in Arizona).²⁰⁹

Some within the Clinton and Bush Administrations questioned their own line of attack,²¹⁰ and others declared that if “the United States had set out to design a dysfunctional immigration policy, it could hardly have done a better job.”²¹¹ Still, some evidence between 2005 and 2007 suggested that perhaps the strategies were beginning to pay off. From 2000 to 2005, approximately 850,000 new unauthorized immigrants entered each year. Then the average annual inflow began to drop — to approximately 550,000 per year from March 2005 to March 2007.²¹² Interpretations of this shift proved necessarily speculative, especially given the role of the U.S. recession. It was at least plausible, however, that the Clinton and Bush strategies were beginning to take effect, especially those enhancing interior enforcement. In any event, experts acknowledged that further investments in policies that might well be failing and even backfiring would likely prove politically compulsory in the face of anti-immigrant and especially anti-undocumented Mexican hysteria.²¹³

By 2008, with undocumented immigrants still its principal focus, the state sovereignty movement had spread across the U.S. An increasing number of state and local governments had enacted laws prohibiting employers, landlords, health care and social service providers from dealing with undocumented immigrants; they had authorized their law enforcement personnel to enforce federal immigration laws; they had countenanced vigilante groups taking law into their own hands.²¹⁴ In fact, in the 2007 state legislative sessions,

²⁰⁹ See Cornelius, *supra* note 183, at 781-90. For an example of other parallel accounts, see ANDREAS, *supra* note 17.

²¹⁰ Former INS General Counsel Alexander Aleinikoff acknowledged in 2001 that Operation Gatekeeper did not “deter the way we thought it would . . . [and] has become our Vietnam, mistakenly thinking that if we added just a little more [to the build up], then a little more, that we would get results.” Hing, *supra* note 24, at 161.

²¹¹ See Massey, *supra* note 183, at 12.

²¹² JEFFREY S. PASSEL & D'VERA COHN, U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE at iii (2010), available at <http://pewhispanic.org/files/reports/126.pdf>.

²¹³ See Cornelius, *supra* 181, 789-90.

²¹⁴ For an analysis of state laws and enforcement practices as of 2007, see Cristina Rodriguez, Muzaffar Chishti & Kimberly Nortman, *Testing The Limits: A Framework for Assessing the Legality of State and Local Immigration Measures*, MIGRATION POL'Y

“[f]or the first time ever, legislators in all fifty states introduced bills dealing with illegal immigration.”²¹⁵ If impelled by anti-immigrant hysteria, and if proudly espousing state sovereignty, many state and local governments already had begun to lean heavily on crusading lawyers (Kris Kobach, most conspicuously) who offered guidance on how to craft policies and practices that would withstand judicial scrutiny.²¹⁶

The state sovereignty movement had not only grown but gained considerable intellectual legitimacy. By 2008, an increasing number of scholars had taken a fresh look at the federal government's plenary power over immigration. Some continued to defend the much honored federal plenary power tradition, particularly in the face of their reading of anti-immigrant hysteria.²¹⁷ Others challenged existing doctrinal

INST. 2007, available at http://www.migrationpolicy.org/pubs/NCIIP_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf. For an analysis linking border patrol groups to white supremacists, see ANTI-DEFAMATION LEAGUE, BORDER DISPUTES: ARMED VIGILANTES IN ARIZONA (2003), <http://www.adl.org/extremism/arizona/arizonaborder.pdf>. And for the role of civilian militia groups Civil Homeland Defense, Ranch Rescue, and American Border Patrol, see generally STEPHEN R. VINA, ET AL., CONG. RES. SERV., RL 33353, CIVILIAN PATROLS ALONG THE BORDER: LEGAL AND POLICY ISSUES (2006), available at <http://www.fas.org/sgp/crs/homesec/RL33353.pdf>.

²¹⁵ See Kobach, *supra* note 4, at 459.

²¹⁶ For the role Kobach had played in state and local legislation through the end of 2007, see his own analysis of what states can and should do. *Id.* For just a small sample of how others depict Kobach and his role in the state sovereignty movement, see, for example, a report completed by the Southern Poverty Law Center, *The Communities: The Cost of Nativist Legislation*, <http://www.splcenter.org/get-informed/publications/when-mr-kobach-comes-to-town/the-communities-the-cost-of-nativist-legislat> (offering a critical view of Kobach's divisive role in a blog describing aims and methods to make state and local laws “air-tight”).

²¹⁷ For prominent scholarly analyses made in the wake of both Proposition 187 and the mushrooming hysteria expressed, in part, through state and local regulations, see Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1436-37 (1995) (“Local anti-foreign movements may have difficulty enlisting the national government in their crusades, in part because emotions are not running so high in other states at the moment, and in part because aliens have some virtual representation in Washington by means of the foreign affairs establishment”); Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, in 12 BENDER'S IMMIGRATION BULLETIN 901, 904-05 (2007) (arguing in favor of federal plenary power in order to secure stronger federal enforcement); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1102-15 (2004) (arguing against state and local law enforcement participation in immigration to avoid routine civil rights violations); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 558 (2001) (“[H]istorical accounts of most

interpretations, arguing for versions of “immigration federalism” requiring the federal government formally to share power with the states.²¹⁸ Perhaps most importantly, many scholars acknowledged that the history and the sources of federal plenary power proved more garbled than long portrayed by the great majority of judicial opinions and scholarly publications.²¹⁹ “Every state is a border state” rather rapidly had become something more than just a mantra of the state sovereignty movement.²²⁰

As if further proof were needed of the strength of anti-immigrant hysteria, already by 2008 President Bush’s ambitions to legislate a wide-ranging package of immigration reforms seemed effectively blunted. In its first term, the Bush Administration had engaged high-level officials within the Administration of Mexican President Vicente Fox; those talks (that included a legalization program and a temporary work visa proposal) were derailed by the terrorist attacks of September 11, 2001.²²¹ The Bush Administration tried repeatedly to restructure policies — in 2004 and in 2005, for example — but various congressional bills made little progress.²²² Perhaps more appreciative than ever before of the hysteria now deeply internalized by or at least pressuring both Republicans and Democrats, President Bush’s appraisal of 2007 accomplishments on the immigration front seemed, at once, earnestly directed at comprehensive immigration reform and reconciled to defeat.²²³

restrictionist federal legislation do not reveal frustrated states seeking an outlet for their anti-immigrant bias. History simply does not support reliance on ‘steam valve federalism’ as a reason to celebrate the claimed new state freedom to discriminate against immigrants.”).

²¹⁸ Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 363-64 (2003) (“divergent state policies could plausibly be regarded as creating laboratories of generosity toward immigrants”); Rodríguez, *supra* note 168 (recommending an approach to shared power over immigration); Peter H. Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 389 (2002) (taking immigration federalism to be credible and justified); Spiro, *supra* note 173, at 1635-36 (urging the historical and practical necessity of recognizing and adapting to shared power over immigration).

²¹⁹ Certainly Gerald Neuman’s work helps explain this enhanced recognition. See Neuman, *supra* note 14, at 1872-73.

²²⁰ See Kobach, *supra* note 4, at 459 (“It has been often said, but seldom demonstrated so clearly: every state is a border state now.”)

²²¹ See Massey, *supra* note 208, at 2-3.

²²² *Id.*

²²³ For only one example, see President George W. Bush, State of the Union Address (Jan. 28, 2008), http://www.washingtonpost.com/wp-srv/politics/documents/bush_sotu_2008.html. In a later interview with syndicated columnist Cal Thomas,

C. *Obama*

On the 2008 campaign trail, candidate Barack Obama trumpeted the importance of enacting comprehensive immigration reform. In describing undocumented immigrants, he spoke empathetically of the “12 million people in the shadows” who are “counting on us to rise above the fear and demagoguery, the pettiness and partisanship.”²²⁴ To be sure, he staked out centrist territory — familiar to President George W. Bush and, before him, to President Ronald Reagan — by insisting upon the absolute necessity of securing our borders and the wisdom of providing a path to citizenship for undocumented immigrants. Yet contrasting himself with a flip-flopping John McCain,²²⁵ he exclaimed “it’s time for a President who won’t walk away from something as important as comprehensive reform when it becomes politically unpopular.”²²⁶ He pledged to make passing comprehensive reform a “top priority in my first year as President — not just because we need to secure our borders and get control of who comes into our country. And not just because we have to crack down on employers abusing undocumented immigrants. But because we have to finally bring those 12 million people out of the shadows.”²²⁷

During his first year, President Obama did not make comprehensive immigration reform a top priority. Surely, too much can be made of this fact. In taking office on January 20, 2009, Obama inherited two wars, an economy shocked by severe recession, a financial system about to collapse, and a government deeply in debt. Making conditions even more difficult, rancorous deadlock had grown routine in Congress and, with the Tea Party now visible on the horizon, even more demagogic and dysfunctional years appeared likely. Especially with the masses reflexively and angrily condemning undocumented

President Bush said, “I probably, in retrospect, should have pushed immigration reform right after the 2004 election and not Social Security reform [I]f I had to do it again, I probably would have run the immigration policy first, as a part of a border security/guest worker/compassionate campaign.” See Kevin Johnson, *Food for Thought for the Obama Administration on Immigration Reform: Do Not Delay!*, IMMIGRATIONPROFBLOG (Jan. 10, 2009), <http://lawprofessors.typepad.com/immigration/2009/01/food-for-thought.html>.

²²⁴ For one example, see President Barack Obama, Remarks at the Congressional Hispanic Caucus Institute’s 33rd Annual Gala Awards (July 15, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/15/AR2008071501138.html>.

²²⁵ *Id.* (“Now, I know Senator McCain used to buck his party on immigration by fighting for comprehensive reform, and I admired him for it. But when he was running for his party’s nomination, he abandoned his courageous stance, and said that he wouldn’t even support his own legislation if it came up for a vote.”)

²²⁶ *Id.*

²²⁷ *Id.*

Mexicans for taking American jobs and draining federal and state services (and being responsible, well, for all that was wrong),²²⁸ comprehensive immigration reform might be best described as hostage to congressional politics.²²⁹

Doubt already had taken hold, however, about whether comprehensive immigration reform and the well-being of undocumented immigrants were of any significance to (much less a priority for) President Obama. Centrist political commentators argued that Obama did not care about immigration. The issue “has never really resonated with him in the way that health care reform resonated with him, education reform resonates with him.”²³⁰ True to middle-of-the-road politics, these observers applauded Obama for rejecting proposals offered by “crazy folks” both on the right wing aiming to deport twelve million people and on the left wing expecting “a non-conditional blanket amnesty.”²³¹ Still, these analysts joined others in worrying that Obama was more a weak-negotiating, uncaring man

²²⁸ Researchers sympathetic to immigrant crackdowns offered empirical analysis that fueled hysteria, including, for example, this 2007 work by ROBERT RECTOR & CHRISTINE KIM, HERITAGE FOUND., *THE FISCAL COST OF LOW-SKILL IMMIGRANTS TO THE U.S. TAXPAYERS 10*, available at <http://www.heritage.org/research/reports/2007/05/the-fiscal-cost-of-low-skill-immigrants-to-the-us-taxpayer> (arguing that the net fiscal cost imposed on all levels of government by illegal aliens was \$89.1 billion a year). Such empirical and theoretical contentions were routinely refuted by ideologically diverse scholars, including both libertarian, free-market champion David J. Theroux and the respected Jeffrey Passel. See Alexander T. Tabarrok & David J. Theroux, *Open Letter on Immigration*, INDEPENDENT INST. (June 19, 2006), <http://www.independent.org/newsroom/article.asp?id=1727>; see also Jeffrey Passel et al., *Undocumented Immigrants: Facts and Figures*, URBAN INST. (Jan. 12, 2004), available at http://www.urban.org/uploadedpdf/1000587_undoc_immigrants_facts.pdf (presenting findings showing nearly all undocumented men actively participating in the workforce (96%), not becoming economic siphons, and paying far more in taxes than taking in benefit). Despite questionable legitimacy, Rector’s findings were passed along as proven facts by others in the ant-immigration and state sovereign movements. See, e.g., Kris Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 460 (2008).

²²⁹ For a notable analysis of the pathologies now governing the U.S. federal government, see generally THOMAS E. MANN & NORMAN J. ORENSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012) (arguing that Congress, and the United States, face institutional collapse because of the pathologically destructive ideological behavior of Democrats and, especially, modern Republicans).

²³⁰ For an example of such views, see *Tell Me More: Reaction to Obama’s Immigration Speech* (NPR News radio broadcast July 2, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=128271574> (discussing Obama’s speech with Gaby Pachecho and Ruben Navarette).

²³¹ *Id.*

than a commanding, principled leader²³² and, by early 2010, had concluded that “the president hasn’t kept his promises . . . and keeps teasing the Latino community.”²³³

The Obama Administration did keep its campaign vow to strengthen U.S. border security, particularly focusing on undocumented immigrants from Mexico. To lead his team of enforcers, and to signal his great passion for stopping all illegal entries from Mexico, President Obama appointed Janet Napolitano as United States Secretary of Homeland Security. As Governor of Arizona, where anti-immigrant hysteria and the state sovereignty movement had already effectively united, Napolitano had openly condemned the federal government for threatening the safety of all Arizonans by failing to secure Arizona’s Mexican border.²³⁴ Fully appreciating the Executive Branch’s wide and largely unchallenged authority over immigration, President Obama and Secretary Napolitano enthusiastically embraced the heavily financed militarized approach inherited from Presidents Bush and Clinton.²³⁵ They aimed to, and succeeded, at deploying

²³² For perhaps the most illuminating analysis of President Obama, see RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY 2011* (exploring through race-conscious eyes the enigmatic nature of Obama’s views and actions).

²³³ See *Tell Me More: Reaction to Obama’s Immigration Speech*, *supra* note 230.

²³⁴ See Ben Arnoldy, *Arizona Governor Napolitano Tapped as New Homeland Security Chief*, CHRISTIAN SCI. MONITOR (Nov. 20, 2008), <http://www.csmonitor.com/USA/Politics/2008/1120/arizona-governor-napolitano-tapped-as-new-homeland-security-chief>. For a look back from today’s angle on Napolitano’s various roles, see Penny Star, *Flashback — Napolitano: AZ Sheriffs Need Help Because “Border is Lacking Operational Control,”* CNS NEWS (July 8, 2011), <http://cnsnews.com/news/article/flashback-napolitano-az-sheriffs-need-help-because-border-lacking-operational-control>. Particularly when examining the intersection of Napolitano’s political aspirations and her approach to militarization of immigration enforcement, keep in mind how the border and undocumented Mexicans have become central to political theater, a theme richly explored by Renato Rosaldo, a native Arizonan and internationally acclaimed cultural anthropologist and poet. See Renato Rosaldo, *Cultural Citizenship, Inequality, and Multiculturalism*, in *LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS* 27, 32 (William V. Flores & Rina Benmayor eds., 2004) (“The U.S.-Mexico border has become theater, and border theater has become social violence. Actual violence has become inseparable from symbolic ritual on the border — crossings, invasions, lines of defense, high-tech surveillance, and more.”).

²³⁵ On August 11, 2009, at the Border Security Conference, Secretary Janet Napolitano stated, “[O]ur approach is to view Southwest border security along with immigration — or enforcement of the immigration laws in the interior of the country — counter-narcotics enforcement and streamline citizenship processes together. These things are inextricably linked.” Secretary Janet Napolitano, at the Border Security Conference, Dept. of Homeland Sec. (Aug. 11, 2009), *available at* http://www.dhs.gov/ynews/speeches/sp_1250028863008.shtm.

“unprecedented levels of personnel, technology, and resources to the Southwest border” and significantly enhancing the number of “boots on the ground” (Border Patrol agents).²³⁶

Like Bush before him, President Obama supplemented heightened border security with intensified interior enforcement. In so doing, Obama adopted the “force multiplier” approach.²³⁷ The term, like so much else in the Clinton and Bush package of strategies, can be traced to the Department of Defense: a force multiplier is “[a] capability that, when added to and employed by a combat force, significantly increases the combat potential of that force and thus enhances the probability of successful mission accomplishment.”²³⁸ Translated into attacking illegal immigration, the approach expresses the common-sense notion that recruiting the assistance of state and local personnel can make the “difference between success and failure in enforcing the nation’s immigration laws generally.”²³⁹ What must have attracted Obama was exactly what originally must have proven irresistible to Bush: “The net that is cast daily by local law enforcement during routine encounters with members of the public is so immense,” observed Kris Kobach, prominent in both anti-immigrant and state sovereignty circles, “that it is inevitable illegal aliens will be identified.”²⁴⁰

The Obama Administration’s programmatic expansion of border and interior enforcement infuriated ardent immigrant advocates and troubled many others.²⁴¹ If the failure to enact comprehensive immigration reform could be blamed on Congress, the policies and practices of the Department of Homeland Security reflected President Obama’s own choices. As if to provoke immigrants and their advocates, the Obama Administration came across as merciless.

²³⁶ Coverage of Napolitano and the Department of Homeland Security visit, but this account comes from Napolitano herself. See, e.g., Janet Napolitano, *Meeting with Southwest Border Officials at the White House*, WHITEHOUSE.GOV (Nov. 16, 2011), <http://www.whitehouse.gov/blog/2011/11/16/meeting-southwest-border-officials-white-house> (describing roundtable discussion with federal, state, and local authorities).

²³⁷ See Kobach, *supra* note 196, at 181.

²³⁸ For the Department of Defense definition, see *DICTIONARY OF MILITARY AND ASSOCIATED TERMS*, DEP’T OF DEF. 126 (2010), available at http://www.dtic.mil/doctrine/new_pubs/jpl_02.pdf.

²³⁹ See Kobach, *supra* note 196, at 181.

²⁴⁰ *Id.*

²⁴¹ For one valuable location where such views have been gathered and archived, permitting readers to track perceptions of the Obama Administration and parts of the Bush Administration, see the IMMIGRATIONPROFBLOG, <http://lawprofessors.typepad.com/immigration/>.

Reports and representatives from the executive branch openly celebrated record-setting numbers of detentions and deportations and casually shrugged off blunders.²⁴² Some wondered if Janet Napolitano, John Morton, and Cecilia Muñoz recognized they were ripping apart families, kinship networks, work crews, neighborhoods, and international communities.²⁴³ To top it all off, dissembling about immigration enforcement became, for some in the Obama Administration, habitual. In first announcing that states could elect to opt in or opt out of Secure Communities and then declaring the program mandatory, ICE's "definition of participation changed five times" between August 2009 and August 2010.²⁴⁴ The Administration squandered goodwill, already perhaps in short supply.²⁴⁵

D. Arizona and Obama

The Obama Administration's record enforcement numbers did nothing to ease the concerns of anti-immigrant and state sovereignty forces. Leaders of this alliance insisted on zero-tolerance of illegals and

²⁴² The tendency is evident in reports issued annually by the Department of Homeland Security, including the Obama Administration's initial 2009 report. See ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2009, OFF. OF IMMIGR. STAT. 3-4 (Aug. 2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf (reporting enforcement actions by DHS).

²⁴³ Perhaps the most visible of the many interactions that fed this impression was the documentary *Lost in Detention*, especially perhaps the exchange with Cecilia Muñoz. *Frontline: Lost in Detention* (PBS television broadcast Oct. 18, 2011), available at <http://www.pbs.org/wgbh/pages/frontline/lost-in-detention/>. For an edited transcript of the interview with Muñoz, see Cecilia Muñoz: "Even Broken Laws Have to Be Enforced," FRONTLINE (Oct. 18, 2011, 7:53 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/cecilia-MuñozMuñoz-even-broken-laws-have-to-be-enforced/>. For reports by Human Rights Watch and National Council de la Raza identifying and assessing the damage to families and especially children, see HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY (2007), available at <http://www.hrw.org/en/reports/2007/07/16/forced-apart-0>; RANDY CAPPES ET AL., THE URBAN INST., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN, (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

²⁴⁴ See OFF. OF INSPECTOR GEN., DEPT'T OF HOMELAND SEC., COMMUNICATION REGARDING PARTICIPATION IN SECURE COMMUNITIES 9 (March 2012), available at http://www.nmirr.org/~nnirrrorg/drupal/sites/default/files/oig_12-66_mar12-communications.pdf (evaluating, at the request of Representative Zoe Lofgren (California), the intentionality of false and misleading statements made by ICE during the implementation of Secure Communities).

²⁴⁵ For an exploration of the opt-out controversy, see RESTORING COMMUNITY, A NATIONAL COMMUNITY ADVISORY REPORT ON ICE'S FAILED "SECURE COMMUNITIES" PROGRAM 25-28 (Aug. 2011), available at <http://altopolimigra.com/s-comm-shadow-report>.

on the constitutional power of states to control their own borders and interiors. Certainly the most conspicuous — and perhaps ultimately the most consequential — expression of these convictions originated in Arizona.²⁴⁶ That it did should perhaps come as no surprise. Arizona's historical identity has been inextricably linked with racism and xenophobia.²⁴⁷ Even in relatively modern history, the Grand Canyon State denied the right to vote to those unable to read the Constitution in English,²⁴⁸ enacted in 1988 the most restrictive English-only law in the country,²⁴⁹ and, until finally caving in 1992 to extraordinary pressures, ostentatiously refused to recognize Martin Luther King, Jr. Day as an official holiday.²⁵⁰

Roused by California's Proposition 187 and angry about the increased number of undocumented Mexicans who began crossing the border in the Tucson area following the implementation of Clinton's militarized border strategies, Arizona passed a an ambitious slate of anti-undocumented immigrant legislative and ballot initiatives in the 2000s. Victorious ballot initiatives included Proposition 200 (prohibiting undocumented immigrants from receiving state or local public benefits), Proposition 100 (making undocumented immigrants charged with certain felonies ineligible for bail), and Proposition 300 (forbidding undocumented students at state community colleges and universities from receiving in-state tuition or financial aid and from enrolling in adult education courses).²⁵¹ Successful legislation, signed

²⁴⁶ Arizona's practices and policies outrage many immigrant advocates, but few understand the complexities like Bill Ong Hing, the nation's preeminent immigration lawyer and scholar, who was born and raised in Superior, Arizona, and who contributed in many ways to helping the undocumented and documented immigrant communities in his home state. For a sample of Hing's political commentary, see U.S.F. SCHOOL OF LAW, *Bill Ong Hing*, http://www.usfca.edu/law/faculty/bill_ong_hing/ (last visited June 2, 2012).

²⁴⁷ See generally ERIC V. MEEKS, *BORDER CITIZENS: THE MAKING OF INDIANS, MEXICANS, AND ANGLOS IN ARIZONA* (2007) (documenting and analyzing how race, culture, ethnicity, and political economy interacted in Arizona's unfolding history).

²⁴⁸ See ARIZ. REV. STAT. ANN. §§ 16-101.A.4 to A.5 (1956); see also JAMES THOMAS TUCKER & RODOLFO ESPINO, *VOTING RIGHTS IN ARIZONA: 1982-2006*, 8-10 (2006), available at <http://www.protectcivilrights.org/pdf/voting/ArizonaVRA.pdf>.

²⁴⁹ ARIZ. REV. STAT. ANN. §§ 16-101A.4 to A.5 (requiring that state and local government business be conducted in English). See also Don Terry, *Arizona Court Strikes Down Law Requiring English Use*, N.Y. TIMES (Apr. 29, 1988), <http://www.nytimes.com/1998/04/29/us/arizona-court-strikes-down-law-requiring-english-use.html?src=pm>.

²⁵⁰ See *Arizona Scandals: Martin Luther King, Jr. Holiday*, AZCENTRAL.COM (Feb. 13, 2012), <http://www.azcentral.com/centennial/news/articles/2012/01/31/20120131scandals-arizona-martin-luther-king-jr-holiday.html> (last visited Feb. 13, 2012).

²⁵¹ Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero*

by Governor Napolitano, included a 2005 anti-human smuggling law²⁵² (enabling state prosecutors to impose criminal sanctions on those who transport illegal immigrants into the state)²⁵³ and the 2007 Legal Arizona Workers Act (an employer sanctions law requiring businesses to participate in otherwise-voluntary federal E-Verify program and penalizing businesses intentionally employing undocumented workers).²⁵⁴

Through these laws, Arizona staged the revolt typically attributed to the subsequent passage of S.B. 1070. State and local governments can neither select migrants nor impose burdens that conflict with federal immigration law, yet Arizona created prohibitions stricter than federal prohibitions and negated permissions allowed by Congress or the President. If denying the tacit federal go-ahead to provide services and meet needs were not enough, Arizona's insurrection aimed directly at making each day a massive state sweep of undocumented-appearing Arizonans. Through the 2005 anti-human smuggling law and the discretionary decisions made by prosecutors (most notably, Maricopa County Prosecutor Andrew Thomas) and law enforcement personnel (most notoriously, Maricopa County Sheriff Joe Arpaio), Arizona created a separate and sophisticated criminal immigration system.²⁵⁵ Complete with state alienage-based regulations for criminal bail, material witnesses, sentencing, and incarceration, Maricopa County

for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America, 14 HARV. LATINO L. REV. 1, 3-8 (2011).

²⁵² ARIZ. REV. STAT. ANN. § 13-2319 (2012).

²⁵³ *Arizona Cops Use Human Smuggling Laws to Round Up Illegal Immigrants*, FOX NEWS (May 10, 2006), <http://www.foxnews.com/story/0,2933,194934,00.html>; *Court: Immigrants Subject to Smuggling Law*, AZCENTRAL.COM (Jul. 17, 2008), <http://www.azcentral.com/news/articles/2008/07/17/20080717immig-smuggling0717-ON.html>.

²⁵⁴ ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214.

²⁵⁵ Recent research by Ingrid Eagly empirically verifies and valuably illuminates what immigrants, criminal defense attorneys, community organizers, and civil rights advocates have been challenging for years, including through work undertaken in collaboration with students in my *Rebellious Lawyering Workshops* and in strategic discussions at *Rebellious Lawyering Training Institutes*. See, e.g., Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011) (empirically documenting how Maricopa County's prosecution of criminal immigration systematically functions, and how it alters authority over immigration policy). The pathologies of radically expanded prosecutorial discretion — and, more sweepingly, of the modern criminal justice system in the U.S. — should be scrutinized and challenged, as William Stuntz did so remarkably well. See generally WILLIAM STUNTZ, *THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2011) (discussing why the U.S. criminal justice system labels so much as criminal while bringing so little justice).

implemented its own policies and practices for arresting, charging, detaining, and plea bargaining.²⁵⁶

What Maricopa County could not achieve through legal channels, Arpaio and Thomas aimed to pull off by any means necessary. By the time the two joined forces, in 2004, Arpaio already had achieved national and international notoriety, particularly for his cruelly inhumane treatment of those locked up in the county jails.²⁵⁷ With overwhelming popular support, they were afforded great freedom by Arizona's leading politicians, including Janet Napolitano and John McCain, in pursuing their anti-undocumented (Mexican) immigrant agenda.²⁵⁸ Together Arpaio and Thomas created a brutally discriminatory and audaciously unconstitutional environment for all Latinos in Maricopa County. They brought unfounded and malicious criminal charges against political opponents, including four state judges and the state attorney general. They "outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law"

²⁵⁶ See Eagly, *supra* note 255, at 1753.

²⁵⁷ For Amnesty International's report on its 1997 investigation of Arpaio's Maricopa County jails, see USA: ILL-TREATMENT OF INMATES IN MARICOPA COUNTY JAILS — ARIZONA, AMNESTY INT'L (July 31, 1997), available at <http://amnesty.org/en/library/asset/AMR51/051/1997/en/a7debf26-e9dd-11dd-90b2-a9da8ab8e550/amr510511997en.pdf> (describing conditions of jails and chain gangs, concurrent investigation by U.S. Department of Justice, and including recommendations to Maricopa County Board of Supervisors). For only some of the many accounts of Arpaio's jails, including Tent City, see, for example, William Finnegan, *Sheriff Joe*, 85 NEW YORKER 42 (July 20, 2009). For Arpaio's co-written version of how he approaches law enforcement as Maricopa County Sheriff, see JOE ARPAIO & LEN SHERMAN, *JOE'S LAW: AMERICA'S TOUGHEST SHERIFF TAKES ON ILLEGAL IMMIGRATION, DRUGS, AND EVERYTHING ELSE THAT THREATENS AMERICA* (2008).

²⁵⁸ For a description of Napolitano's mutually beneficial relationship with Arpaio, see, for example, Tom Zoellner, *Partners in Pink Underwear: Janet Napolitano's Embarrassing History with Sheriff Joe Arpaio*, SLATE (Nov. 24, 2008), http://www.slate.com/articles/news_and_politics/politics/2008/11/partners_in_pink_underwear.single.html (recounting that the investigation in the 1990s of Arpaio's jails was supervised locally by Janet Napolitano, then U.S. Attorney in Phoenix, who carried out her duties with "reluctance, going out of her way to protect Arpaio from flak almost before the probe had started"). For analyses of Arpaio's political power in Arizona and Arpaio's relationship with McCain, see, for example, Matthew Hendley, *Joe Arpaio's Endorsement Still Worth Something, If Polls Are to Be Trusted*, PHOENIX NEWS TIMES BLOGS (Feb. 20, 2012, 10:55 AM), http://blogs.phoenixnewtimes.com/valleyfever/2012/02/joe_arpaio_endorsement_mitt_romney_rick_santorum.php; *McCain, Kyl Go Easy on Arpaio*, USA TODAY (Dec. 9, 2011, 4:22 AM), http://www.usatoday.com/USCP/PNI/NEWS/2011-12-09-PNI1209met-montini-blogPNIBrd_ST_U.htm; Dan Nowicki, *Claims, Missteps May Crack Arpaio's Political Armor*, AZCENTRAL.COM (Dec. 17, 2011, 11:20 PM), <http://www.azcentral.com/news/election/azelections/articles/2011/12/16/20111216arpaio-missteps-may-hurt.html>; Martin Van Der Werf, *Arpaio Plays GOP Kingmaker*, AZCENTRAL.COM (Sept. 6, 1996, 2:30 PM), <http://www.azcentral.com/news/articles/1996/09/06/19960906joe-arpaio-gop-kingmaker.html>.

against anyone who disagreed with their practices and policies and, of course, against anyone appearing to be undocumented.²⁵⁹ Thomas resigned in April 2010 to run for Arizona Attorney General, but Arpaio continued his terrorist reign, with a fervor seemingly fueled by renewed federal investigation.²⁶⁰

If the U.S. appeared too often to overlook what together Andrew Thomas and Joe Arpaio had created in Maricopa County, the Obama Administration could not ignore the message delivered by Arizona in the 2010 enactment of the Support Our Law Enforcement and Safe Neighborhoods Act — more commonly known as S.B. 1070.²⁶¹ Shaped by State Senator Russell Pearce (who had feverishly campaigned for Propositions 100, 200, and 300) and Kris Kobach (who had become an advisor to states' rights and anti-undocumented immigrant efforts), the law openly declared its policy to be “attrition through enforcement”²⁶² and its intent to make living in Arizona virtually impossible for undocumented immigrants: “[t]he provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”²⁶³ Among its many provisions, S.B. 1070 required state and local law enforcement officers to determine an individual's immigration status during a lawful stop or arrest upon reasonable suspicion that the individual is an undocumented immigrant, and created new state misdemeanors, making it a crime for an undocumented immigrant to apply for work, solicit work, or perform work in the state and for any non-citizen to be in Arizona without carrying federally required immigration documents.

²⁵⁹ See John Rudolf, *Andrew Thomas, Phoenix Prosecutor, Disbarred for “Defiled” Public Trust*, HUFFINGTON POST (Apr. 11, 2012), http://www.huffingtonpost.com/2012/04/11/andrew-thomas-disbarred-phoenix-prosecutor_n_1415815.html (describing how Thomas and Arpaio combined in unconstitutional and unethical conduct, leading to a three-member state legal ethics panel voting unanimously to disbar Andrew Thomas).

²⁶⁰ For recent scholarly analysis of Arpaio and Thomas's reign, see generally Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and “America's Toughest Sheriff,”* 14 HARV. LAT. L. REV. 337 (2011).

²⁶¹ S.B. 1070, 49th Leg., 2nd Spec. Sess. (Ariz. 2010), *invalidated in part by Arizona v. United States*, No. 11-182, 2012 WL 2368661 (U.S. June 25, 2012).

²⁶² *Id.*; see also Kris Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 159-61 (2008).

²⁶³ S.B. 1070 § 1.

In overwhelmingly passing and brashly celebrating S.B. 1070, Arizona faced almost immediate criticism.²⁶⁴ Belying the conventional wisdom that only Latinos care what happens to undocumented immigrants, especially the undocumented Mexicans targeted in Arizona, diverse constituencies (from business groups to civil rights organizations to faith-based communities) called for a national boycott.²⁶⁵ Prominent Arizona residents spoke out, too, including major sports figures like Charles Barkley: “As a black person, I’m always against any form of discrimination or racial profiling Living in Arizona, I’m disappointed that we came up with the law I’m very disappointed in John McCain [M]ost of those immigrants here are busting their hump, doing a great job, and to go after them every couple years because you want to raise hell doing something to get re-elected, that’s disrespectful and disgusting.”²⁶⁶

Denunciation was matched by flattery, not least in the form of imitation. Many states (including Alabama, Arkansas, Maryland, Michigan, Minnesota, Missouri, Nevada, Oklahoma, Louisiana, Pennsylvania, Rhode Island, and South Carolina) introduced, debated, and, in some instances, passed laws inspired by and paralleling Arizona’s S.B. 1070.²⁶⁷ Often in support of these laws, state elected officials unashamedly expressed hateful views. Alabama Representative Mo Brooks promised his constituents that he would “do anything short of shooting them.”²⁶⁸ Tennessee State

²⁶⁴ For one summary of the many and diverse responses, see Muzaffar Chisti & Claire Bergeron, *New Arizona Law Engulfs Immigration Debate*, MIGRATION INFO. SOURCE (May 17, 2010), <http://www.migrationinformation.org/USFocus/display.cfm?ID=782>.

²⁶⁵ For a listing of organizations and cities urging or adopting boycotts, see *Arizona and National Immigration Crisis: Responses to S.B. 1070*, HUGH & HAZEL DARLING LAW LIBRARY, <http://libguides.law.ucla.edu/content.php?pid=129802&sid=1113370> (last updated June 5, 2012) (“This guide covers Arizona and the nation’s immigration crisis. Designed especially for Rebellious Lawyering trainings, the content reflects the work of [UCLA law] librarian June Kim, [research assistant] Tara Kearns, and Professor Gerald P. López.”) [hereinafter *Arizona and National Immigration Crisis*].

²⁶⁶ Ben Armbruster, *Arizona resident Charles Barkley Call Anti-Immigration Law “Disrespectful and Disgusting,”* THINK PROGRESS (May 5, 2010), <http://thinkprogress.org/politics/2010/05/05/95341/barkley-immigration-disgusting/>.

²⁶⁷ See *Arizona and National Immigration Crisis: Copycat States & Anti-Immigrant Ordinances*, HUGH & HAZEL DARLING LAW LIBRARY, <http://libguides.law.ucla.edu/content.php?pid=129802&sid=1113372> (last visited June 5, 2012) (identifying and providing coverage of “Copycat States and Anti-Immigrant Ordinances”). For a map depicting the most recent list of state immigration laws that parallel S.B. 1070, see *Arizona- and Alabama-inspired Legislation*, NAT’L IMMIGR. LAW CTR., <http://nilc.org/state-immenfleg-2012.html> (last updated May 30, 2012).

²⁶⁸ Lee Fang, *Rep. Mo Brooks (R-AL) on Undocumented Immigrants: “I Will Do Anything Short of Shooting Them,”* THINK PROGRESS (Jun. 29, 2011), <http://thinkprogress.org/>

Representative Curry Todd likened undocumented immigrants to rats multiplying,²⁶⁹ and Kansas State Representative Virgil Peck said that illegal immigrants should be shot from helicopters like hogs.²⁷⁰ As has too often been true in U.S. history, and as too persistently proves accurate today, undocumented immigrants “are not perceived as fully human at the most fundamental neural level of cognition, thus opening the door to the harshest, most exploitative, and cruelest treatment that human beings care capable of inflicting on one another.”²⁷¹

In direct response to the passage of S.B. 1070, the Obama Administration immediately enhanced border and interior resources and issued prominent proclamations about its unparalleled enforcement record. In May 2010, one month after the passage of S.B. 1070 in Arizona, President Obama announced he would send up to 1,200 National Guard troops to the southwest border to forcefully deal with border violence.²⁷² On June 30, John Morton, Assistant Secretary of Immigration and Customs Enforcement, emphasized finding and deporting “the worst-of-the-worst” criminals.²⁷³ In August 2010, President Obama signed into law a \$600 million bill to hire 1,000 new Border Patrol agents, acquire aerial drones, pay for 160 additional ICE agents and Border Patrol canine teams, and pay for increased technology at the border.²⁷⁴ On August 10, 2010, the Obama Administration issued a press release stating that, in its first eighteen

justice/2011/06/29/257324/mo-brooks-anything-but-shoot-immigrants/?mobile=nc.

²⁶⁹ Lucas, L. Johnson II, *State Rep. Curry Todd Likens Illegal Immigrant Births to Multiplying Rats*, ASSOCIATED PRESS (Nov. 11, 2010), <http://www.commercialappeal.com/news/2010/nov/11/lawmaker-makes-rat-comparison>.

²⁷⁰ Todd Fertig, *Lawmaker's Immigrant Remark Draws Grasps*, WICHITA EAGLE (Mar. 15, 2011), <http://www.kansas.com/2011/03/15/1762925/lawmakers-immigrant-remark-draws.html>.

²⁷¹ DOUGLAS MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 150 (2007). For only one example of the exceptional work Jerry Kang has produced exploring the cognitively complex nature and impact of racism, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

²⁷² Archibold, *supra* note 192.

²⁷³ See John Morton, Memorandum, U.S. Immigr. & Customs Enforcement (June 30, 2010), available at http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf (stressing the agency's new priorities to find and deport immigrants who have committed serious crimes (or “worst-of-the-worst”)).

²⁷⁴ Peter Nicholas, *Obama Requests \$600 Million for Border Security*, L.A. TIMES (June 22, 2010), <http://articles.latimes.com/2010/jun/22/nation/la-na-border-patrol-20100623>; Press Release, The White House, Statement by the President on the Passage of the Southwest Border Security Bill (Aug. 12, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/08/12/statement-president-passage-southwest-border-security-bill>.

months, it had dedicated “unprecedented resources to the Southwest border, leading to increases in seizures of illicit narcotics, weapons, and bulk cash, as well as decreases in border crossings.”²⁷⁵

More provocatively still, the Obama Administration emphasized the expansion of the Secure Communities program. In 2009, John Morton had labeled Secure Communities “the future of immigration enforcement” because it “focuses our resources on identifying and removing the most serious criminal offenders first and foremost,”²⁷⁶ and, by August 2010, the Department of Homeland Security had expanded the Secure Communities initiative from 14 to 544 jurisdictions and planned by 2013 to make the program operative in every law enforcement jurisdiction in the country.²⁷⁷ Critics of the program feared the program tolerated racial profiling in immigrant and of color communities, undermined trust between vulnerable populations and cops on the beat, and further enabled states like Arizona to control immigration law through their criminal justice systems.²⁷⁸ Obama officials proved largely indifferent to these concerns and continued to laud the undertaking. “Secure Communities gives ICE the ability to work with our state and local law enforcement partners,” said Secretary Napolitano, “to identify criminal aliens who are already in their custody, expediting their removal and keeping our communities safer.”²⁷⁹

Meanwhile, President Obama’s Department of Justice sued to enjoin the most notorious provisions of S.B. 1070 and then defended the judgment successfully before the Ninth Circuit.²⁸⁰ Sidestepping substantial evidence of racial profiling and anti-immigrant hysteria,²⁸¹

²⁷⁵ The Administration’s language can be found in a press release. See Press Release, Secretary Napolitano Announces Secure Communities Deployment to All Southwest Border Counties, Facilitating Identification and Removal of Convicted Criminal Aliens (Aug. 10, 2010) [hereinafter Napolitano August 10, 2010 Press Release], available at http://www.dhs.gov/ynews/releases/pr_1281457837494.shtm.

²⁷⁶ See Julia Presto, *U.S. Identifies 111,000 Immigrants With Criminal Records*, N.Y. TIMES, (Nov. 12, 2009), http://www.nytimes.com/2009/11/13/us/13ice.html?_r=1 (describing promise, success, and controversy surrounding Secure Community).

²⁷⁷ See Napolitano August 10, 2010 Press Release, *supra* note 275.

²⁷⁸ For an illustration of such concerns, see New York Civil Liberties Union, *Fact Sheet: The Secure Communities Program* (2011), <http://www.nyclu.org/publications/fact-sheet-secure-communities-program-2011>. For an expansive collection of reactions to the Obama Administration’s expansion of Secure Communities, see Arizona and National Immigration Crisis, *supra* note 265.

²⁷⁹ See Napolitano August 10, 2010 Press Release, *supra* note 275.

²⁸⁰ *United States v. Arizona*, 641 F.3d 339, 339 (9th Cir. 2011); see also *United States v. Arizona*, 703 F. Supp. 2d 980, 980 (D. Ariz. 2010).

²⁸¹ The lawsuit filed against Arizona by a coalition of immigrants and civil rights

lawyers for the United States relied upon traditionally influential preemption arguments.²⁸² Within the lawsuit, Arizona presented itself as both cooperating with the federal government (“Arizona’s policy of cooperative enforcement of the federal immigration laws”) and doing what a sovereign state must when the federal government fails to defend borders against illegal immigrants (“determined that it had to take action” considering “the federal government has failed to secure Arizona’s border” and the resulting rise in illegal immigrants in the state).²⁸³ Outside the courtroom, Senator Russell Pearce urged the courts to “[u]phold states’ rights. This is a battle of epic proportions. This is the states versus the central government,”²⁸⁴ and Governor Brewer promised that “Arizona will prevail in its right to protect our citizens” and “our efforts to defend against the failures of the federal government.”²⁸⁵ Preemption prevailed.

With these judicial victories in hand, with classical formulations of plenary power reaffirmed, the Obama Administration may well have sensed order had been restored.²⁸⁶ The Executive Branch could continue to press its border and interior strategies, to command state and local cooperation on terms dictated by the federal government, and to exhort Congress finally to enact comprehensive immigration reform. Order restored included turmoil continued, of course. The Department of Homeland Security’s declaration that Secure Communities did not permit opting out enraged some elected leaders (particularly in states like New York, Illinois, and Massachusetts).²⁸⁷

organizations included claims that S.B. 1070 violated equal protection. See Complaint for Declaratory and Injunctive Relief at 1, *Friendly House v. Whiting*, No. CV-10-1061-PHX-SRB (D. Ariz. May 17, 2010), 2012 WL 671674.

²⁸² Complaint, *United States v. Arizona*, No. 2:10 CV 01413 (D. Ariz. July 6, 2010), 2010 WL 2653363.

²⁸³ Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction, 703 F. Supp. 2d 980 (D. Ariz. 2010), 2010 WL 3154413.

²⁸⁴ *Legal Battle Looms over Arizona Immigration Law*, CNN (Jul. 28, 2010, 3:32 PM), <http://www.cnn.com/2010/US/07/28/arizona.immigration.law/index.html>.

²⁸⁵ *Id.*

²⁸⁶ For a sample of reactions to Ninth Circuit ruling, see Marc Lacey, *Appeals Court Rules Against Arizona Law*, N.Y. TIMES (Apr. 11, 2011), <http://www.nytimes.com/2011/04/12/us/12arizona.html> (describing defiance of Senator Pearce and Governor Brewer and uncertainty over Arizona’s strategy); Editorial, *A Setback for Arizona-Style Immigration Laws* N.Y. TIMES (Apr. 13, 2012), <http://www.nytimes.com/2011/04/14/opinion/14thu3.html> (“In matters affecting intercourse of the federal nation with other nations, the federal nation must speak with one voice.”).

²⁸⁷ For only some accounts describing how the Cuomo Administration and immigrant advocates in New York (particularly the remarkably ambitious and effective Immigrant Defense Project) could come to feel repeatedly deceived by the Obama Administration, see articles and reports collected in *Gov. Cuomo Suspends New York’s*

The promotion of the Obama Administration quota (the deportation of 400,000 undocumented immigrants annually²⁸⁸) sickened immigrant advocates and hardly satisfied anti-undocumented immigrant zealots.²⁸⁹ Still these agitated circumstances reflected familiar foundations and boundaries — foundations and boundaries defined, centrally, by ground rules imposed by the nation's legal regime.

This recognizable topography faced a demolition crew as soon as the Supreme Court agreed on December 12, 2011 to consider *Arizona v. United States*.²⁹⁰ If it is a bit strong to say the Obama Administration had won too easily at the district and intermediate appellate levels, certainly the lawyers who had been representing the United States had yet to encounter Paul Clement, the head of Arizona's new legal team. Clement would portray S.B. 1070 in reassuringly measured and mainstream terms, even as he aimed, together with his client, to topple the federal government's plenary power over immigration and to magnify state authority to protect citizens against illegal immigrants.²⁹¹

Participation in Secure Communities, in *Arizona and National Immigration Crisis*, *supra* note 265.

²⁸⁸ Memorandum from James M. Chaparro, Ass't Dir. of Intelligence, U.S. Immigr. & Customs Enforcement, Dep't of Homeland Sec., to Field Off. Dirs. & Deputy Field Off. Dirs. (Feb. 22, 2010), available at <http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf?sid=ST2010032700037>; Spencer S. Hsu & Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST (Mar. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html>.

²⁸⁹ For only one of many reports on record-shattering deportations numbers in 2011, of quotas for future years, and for mixed reactions from the nation's polarized constituents, see Elise Foley, *Obama Administration Sets Deportation Record*, THE HUFFINGTON POST, (Oct. 18, 2011) available at http://www.huffingtonpost.com/2011/10/18/deportations-customs-remove-record-number_n_1018002.html.

²⁹⁰ See Adam Liptak, *Court to Weigh Arizona Statute on Immigration*, N.Y. TIMES, (Dec. 12, 2011), <http://www.nytimes.com/2011/12/13/us/supreme-court-to-rule-on-immigration-law-in-arizona.html?pagewanted=all> ("recent decisions suggest that a majority of justices may look favorably on the positions of state officials, which would entail upholding the Arizona immigration law").

²⁹¹ Paul Clement is the former Solicitor General under President Bush, with extensive Supreme Court experience, and impeccable conservative pedigree, including a clerkship with Justice Scalia. See BANCROFT PLLC, *Paul D. Clement*, <http://www.bancroftpllc.com/professionals/paul-d-clement/>. For a revealing description of Clement's views on federalism, his political ideology, and his commitment to sending rebukes to the Obama Administration, see Chris Geidner, *Paul Clement Argues Both Sides of the Federalism Debate* (Apr. 26, 2012), <http://www.thedailybeast.com/articles/2012/04/26/paul-clement-argues-both-sides-of-the-federalism-debate.html> ("No one is saying it out loud, but Clement's federalism principles, whatever they may be, have shown themselves to be inconsistent when

The Obama Administration's lawyers had yet to appear before justices who would welcome, in the name of cooperative law enforcement, shifting significant power from the federal to the state government;²⁹² who would profess not to fathom how the federal government could credibly claim a vital sovereign interest in whether and how immigration laws are enforced;²⁹³ who would think the immediate deportation of all undocumented immigrants would eliminate any foreign relations problem (particularly with Mexico).²⁹⁴

Perhaps none of this surprised Solicitor General Donald Verrilli, Jr., the new leader of Obama's team and an experienced Supreme Court advocate. Verrilli knew enough to have anticipated that Paul Clement and Justice Roberts would be performing as a team, coyly downplaying S.B. 1070's challenge to the federal government's immigration power while brazenly aspiring to enhance a state's capacity to rid itself of undocumented immigrants and to control its borders. Verrilli knew enough to expect both that Justice Alito's ideological predispositions would appear in the particularized questions of a lawyer who regards himself as an effective cross-examiner and that Justice Scalia's doctrinaire conservatism would come in the form of bullying taunts. What perhaps Verrilli could not have foreseen was how much Justices Sotomayor and Breyer (liberals in taxonomy of the Court's politics) and Justice Kennedy (the vaunted swing vote) would evince deep skepticism toward the assumptions and aspirations of federal plenary power. Friends and foes of the Obama Administration blended together, all granting Clement and Arizona deferential respect, all jostling to dispute Verrilli's defense of mainstream immigration law.

they bump up against his political ideology.”) For an account of Governor Brewer's hiring of Clement, “a hero to conservatives,” apparently surprising the lawyers who had handled the litigation before the district court and Ninth Circuit, see Victor Li, *Arizona Hires Paul Clement to Defend Immigration Law*, THE AMLAW DAILY, (June 8, 2011), <http://amlawdaily.typepad.com/amlawdaily/2011/06/clementarizona.html>.

²⁹² Transcript of Oral Argument at 35, *Arizona v. United States*, 132 S. Ct. 845 (2012) (No. 11-182) [hereinafter Transcript] (J. Scalia: “What does sovereignty mean if it does not include the ability to defend your borders?”); see also Adam Liptak, *Justices Seem Sympathetic to Central Parts of Arizona Law*, N.Y. TIMES, (Apr. 25, 2012), http://www.nytimes.com/2012/04/26/us/considering-arizona-immigration-law-justices-are-again-in-political-storm.html?_r=2&ref=adamliptak.

²⁹³ Transcript, *supra* note 292, at 36, 51 (J. Roberts: “Well, if that State does — well, that's a question of enforcement priorities”; J. Scalia: “Anyway, what — what's wrong about the States enforcing Federal law?”).

²⁹⁴ *Id.* at 69 (J. Scalia: “Well, can't you avoid that particular foreign relations problem by simply deporting these people? Look, free them from the jails . . . [a]nd send them back to the countries that are — that are objecting.”).

Much has been made of how the Solicitor General might have been both more lucid and less gentlemanly at oral argument.²⁹⁵ Certainly it is possible to imagine Verrilli more uncompromisingly confronting the justices' questions, observations, and asides. Yes, Verrilli, might have said, "absolutely, the federal government takes a strong interest in its deliberate mixes of permissions and prohibitions, in all the choices it makes about when and how to enforce its laws, not just in immigration matters but across all fields of federal law." Yes, Verrilli might have said, "absolutely, the United States does care and should care about Arizona's harassment of those who are present in the United States without authorization." Yes, Verrilli might have said, "absolutely, Mexico's views and sensibilities do matter in shaping federal immigration choices, just as foreign relations have mattered throughout the course of history to immigration policies and practices."

Yet nothing Verrilli might have done at oral argument would persuade the justices to abandon their disbelief in, much less their crusade against, the federal government's traditionally plenary power over immigration. The limits on what Verrilli could be expected effectively to accomplish reflects not only that oral argument counts far less than most imagine²⁹⁶ but that, even before agreeing to hear the case, most of the justices had already become convinced of the intellectual legitimacy of the state sovereignty and the anti-undocumented immigrant movements.²⁹⁷ "Every state is a border

²⁹⁵ See, e.g., *id.* at 45, 56 (J. Sotomayor: "General, I'm terribly confused by your answer. Okay? And — and I don't know that you're focusing in on what my colleagues are trying to get to . . . you can see it's not selling very well — why don't you try to come up with something else?"); Dahlia Lithwick, *The Supreme Court Would Like to See Your Papers*, SLATE (Apr. 25, 2012, 8:10 P.M.), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/04/the_supreme_court_appears_ready_to_uphold_parts_of_arizona_s_controversial_immigration_law_.html; Jonathan S. Tobin, *Arizona Immigration Law: Verrilli Strikes Out Again with SCOTUS*, COMMENTARY, Apr. 25, 2012, <http://www.commentarymagazine.com/2012/04/25/arizona-immigration-law-verelli-strikes-out-again-with-scotus/#more-792108>.

²⁹⁶ See, e.g., Adam Liptak, *Are Oral Arguments Worth Arguing About?*, N.Y. TIMES (May 5, 2012), http://www.nytimes.com/2012/05/06/sunday-review/are-oral-arguments-worth-arguing-about.html?_r=2 (quoting Clarence Thomas as saying oral arguments count "[a]lmost never" although for his colleagues oral arguments may make a difference "in 5 or 10 percent of the cases, maybe, and I'm being generous there," and John Roberts as saying about oral arguments: "Quite often the judges are debating among themselves and just using the lawyers as a backboard.").

²⁹⁷ *Id.* (quoting Theodore B. Olson, Solicitor General under George W. Bush, about Verrilli's arguments before the Court against S.B. 1070 and in favor of the Affordable Care Act: "It always looks bad when the justices aren't buying what you're selling. Don had very, very difficult cases. That hand was dealt before he got there.").

state” had become their mantra too — even if they might not acknowledge as much to themselves, much less to others. The revered rationales long supporting plenary power had already become a judicial casualty. Most of the justices — not just the Court’s right wing but Sotomayor, Breyer, and Kennedy — were following a deep script authored by those who voted for Proposition 187, with a recent rewrite by proselytizing legal counsel like Kris Kobach.²⁹⁸ Even had Verrilli transformed himself into the best advocate ever to have appeared in any court of law, nothing of significance would have changed. Judicial endorsement of movement ideology is not open to persuasion.

Whatever the Supreme Court would decide, Arizona already could declare victory. In the past decade, state and local officials in the Grand Canyon State have demonstrated the *de jure* and *de facto* capacity to control immigration in ways fervent supporters of California’s Proposition 187 must have wistfully contemplated. They have shifted ideologies so far toward the once-and-for-all-excluding-and-removing-all-undocumented-Mexicans-and-Mexican-looking pole that, today, very few dare disregard the constitutional merits of their most extreme positions and many centrists now concede positions that, not long ago, were regarded as a fanatical way for a nation to run its immigration policy. Perhaps as a concession to this severe ideological and jurisprudential shift, some who stand with undocumented immigrants urge the merits of regional immigration law.²⁹⁹ If the federal government no longer exclusively sets the floor (through mixes of prohibitions and permissions) about how we treat undocumented and documented immigrants, then perhaps encouraging power-sharing federalism will help take back the night.

What exactly the Obama Administration makes of the ideological and jurisprudential shift — that pre-dates and will outlive the Supreme Court’s decision on S.B. 1070 — remains murky. Certainly

²⁹⁸ See generally Transcript, *supra* note 292. See also Lyle Denniston, *Argument Recap: A Choice Between Radical and Reasonable?*, SCOTUSBLOG (Apr. 25, 2012, 4:30 P.M.), <http://www.scotusblog.com/2012/04/argument-recap-a-choice-between-radical-and-reasonable>; Liptak, *supra* note 292; David G. Savage, *Supreme Court May Uphold Part of Arizona Immigration Law*, L.A. TIMES, (Apr. 26, 2012), <http://articles.latimes.com/2012/apr/26/nation/la-na-court-immigration-20120426>.

²⁹⁹ See Aoki & Shuford, *supra* note 2, at 63 (“We believe that the creation of a participatory administrative structure for rational reforms and solutions to temporary regional and national concerns through regional experimentation and national replication of good practices, safeguarded within a federal oversight framework, may be a particularly effective, principled, and forward-looking innovation in comprehensive reform.”).

through the emphatic insistence on cooperative federalism, President Obama produced contradictory messages. The Administration maintains it is demanding effective cooperation and nothing more. Yet Arizona and Maricopa County (and other state and local governments) have declined to play the humble supporters and instead have hubristically cast themselves as sovereign rivals. No one should have needed S.B. 1070 to recognize this showdown, particularly since on-the-ground practices already have enlarged sovereign state power over immigration. Yet, as with so much in the U.S. history of undocumented Mexican migration, people see what they want to see.³⁰⁰ If denial can serve many salutary ends, willful ignorance can lead presidents not to feel the ground moving beneath their feet.

VI. EPILOGUE

Some might say this is all simply business as usual. As the economy improves, or at least as the November 2012 election nears, the Obama Administration and even the Republican Party will tack back toward the pole where officials look the other way. On April 2, 2012, the Wall Street Journal reported that Republicans, concerned about having alienated Latinos with their contemptuous attacks on undocumented immigrants, were considering ways of wooing back Latino voters, including offering a downsized version of the Dream Act crafted by possible Vice Presidential nominee Marco Rubio, the Republican Senator from Florida.³⁰¹ The Obama Administration already had begun its own courtship rituals, with Adrian Saenz, the 2012 national Latino vote director, insisting that the best way to energize Latinos is to permit Republicans to continue “tough talk about ethnicity, education, and the path to citizenship.”³⁰²

Yet for President Obama and Governor Romney to ingratiate themselves with Latinos would appear a tall order when both the Obama Administration and the Romney Campaign remained committed to cold-bloodedly tracking down undocumented immigrants. In a press conference announcing that targeted sweeps conducted by Immigration and Customs Enforcement from March 24

³⁰⁰ For a splendid analysis of this experience and empirical truth, see generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

³⁰¹ See Laura Meckler, *GOP Tries to Woo Hispanics: After Tough Rhetoric on Immigration in Primary, a Push to Win Key Constituency*, WALL ST. J., Apr. 2, 2012, at A1, available at <http://online.wsj.com/article/SB10001424052702304177104577314002404328774.html>.

³⁰² See Kirk Johnson, *G.O.P. Strategy for Hispanic Voters: It's the Economy*, N.Y. TIMES, Mar. 16, 2012, at A1, available at <http://www.nytimes.com/2012/03/16/us/politics/gop-strategy-for-hispanic-voters-its-the-economy.html>.

through March 29, 2012, had yielded the arrests of more than 3,100 illegal immigrants with criminal convictions, ICE Director John Morton said “These are not people we want roaming our streets.”³⁰³ Even as President Obama and his campaign staff cozy up to Latinos, even as they insist Congressional Republicans block their immigrant-friendly comprehensive reform agenda, Morton and others members of Obama’s Executive Branch showily emphasize enhanced border enforcement and record-shattering 2011 deportation numbers. Meanwhile, Governor Romney apparently regards the Obama Administration’s deportation records as too trivial even to acknowledge; instead, he reportedly spent the spring hanging out with Proposition 187’s leader Pete Wilson and S.B. 1070’s architect Kris Kobach, mulling over exactly “what his position on immigration is.”³⁰⁴

This lackluster stroll toward the November 2012 election took a startling turn when, on June 15, 2012, President Obama announced the Department of Homeland Security would no longer seek to deport illegal immigrants 30 years of age or younger, who came to the U.S. before age 16, lived in the U.S. for at least five years, have no criminal records, and are in school, high school graduates, or military veterans.³⁰⁵ In this Rose Garden announcement, Obama carefully stressed how his Administration has put historically unprecedented “boots on the southern border,” leading to “fewer illegal crossings than at any time in the past 40 years,” and he pointedly insisted this improved administrative policy was not “amnesty” or a “permanent fix.”³⁰⁶ Knowing this exercise of executive power had long been described by immigration scholars as constitutionally permissible, President Obama spoke with the confidence that his message would

³⁰³ Elise Foley, *Immigration Enforcement Nets Thousands in Six-Day Operation*, THE HUFFINGTON POST (Apr. 2, 2012), http://www.huffingtonpost.com/2012/04/02/immigration-enforcement-six-day-operation_n_1397216.html?ir=Latino+Voices.

³⁰⁴ Steve Benen, *RNC: Romney ‘still deciding’ his position on immigration*, THE MADDOW BLOG (May 8, 2012, 12:31 P.M.), http://maddowblog.msnbc.msn.com/_news/2012/05/08/11599638-rnc-romney-still-deciding-his-position-on-immigration?lite.

³⁰⁵ See Laura Mecker & Miriam Jordan, *U.S. to Stop Deporting Some Illegal Immigrants*, WALL ST. J. (June 15, 2012), <http://online.wsj.com/article/SB10001424052702303822204577468343924191180.html>; Christi Parsons & Kathleen Hennessey, *Obama to Halt Deportation of Some Illegal Immigrants*, L.A. TIMES (June 15, 2012), <http://www.latimes.com/news/politics/la-pn-obama-to-order-immunity-for-young-illegal-immigrants-20120615,0,184438.story>; Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?_r=1.

³⁰⁶ See President Barack Obama, *Remarks on Immigration* (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

likely leave Republicans scrambling to figure out what to do.³⁰⁷ Predictably enough, anti-undocumented and state sovereignty forces vociferously objected, and yet they seemed entirely to appreciate the considerable political payoff Obama had produced for himself with his ostensibly humanitarian gesture.³⁰⁸

Then, on June 25, 2012, the Supreme Court issued its decision in *Arizona v. United States*. Writing for a 5-3 majority (including Chief Justice Roberts), Justice Kennedy ruled that federal law preempted most of the challenged sections of S.B. 1070 except the “show me your papers” provision that requires the police to determine the immigration status of anyone they stop if there is a “reasonable suspicion” the person is an illegal immigrant.³⁰⁹ In overriding sweeping dissents by Justices Thomas and Alito, and an immediately controversial dissent by Justice Scalia proclaiming broad state immigration powers as a necessary element of state sovereignty,³¹⁰ the

³⁰⁷ See David Grant, *Was Obama's Move on Immigration Legal? Lawyers' Memo Makes the Case*, CHRISTIAN SCI. MONITOR (June 19, 2012), <http://www.csmonitor.com/USA/DC-Decoder/2012/0619/Was-Obama-s-move-on-immigration-legal-Lawyers-memo-makes-the-case>; Van Le, *Law Professors Agree: Obama Has Executive Authority to Provide Relief to DREAMers*, AMERICA'S VOICE (June 1, 2012), <http://americasvoiceonline.org/blog/law-professors-agree-obama-has-executive-power-to-provide-relief-to-dreamers/>.

³⁰⁸ Karen Hughes & Mark Penn, *Was Obama's Immigration Announcement Good Politics?* TIME (June 20, 2012), <http://ideas.time.com/2012/06/20/was-obamas-immigration-announcement-good-politics/>. For examples of the skepticism aimed at President Obama and his Administration by immigrant-friendly journalists, both before and after his June 15 announcement, see Julianne Hing, *DREAMers Welcome Obama's Immigration Shift, But Pledge Caution*, COLORLINES (June 18, 2012), http://colorlines.com/archives/2012/06/obamas_small_immigration_fix_for_dreamers_a_big_political_win.html; Ruben Navarrette Jr., *Obama's Immigration Policy a Shell Game*, CNN (June 13, 2012), <http://www.cnn.com/2012/06/13/opinion/navarrette-deportation-immigrants/index.html>.

³⁰⁹ See *Arizona v. United States*, No. 11-182, 2012 WL 2368661, at *17 (U.S. June 25, 2012); Julia Preston, *Immigration Ruling Leaves Issues Unresolved*, N.Y. TIMES (June 26, 2012), <http://www.nytimes.com/2012/06/27/us/immigration-ruling-leaves-issues-unresolved.html>. For a sample of the fury aimed at Justice Roberts and suggestions about his reasons for joining this majority and writing the majority opinion in affirming the health care law, see Adam Liptak, *After Ruling, Roberts Makes a Getaway from the Scorn*, N.Y. TIMES (July 2, 2012), http://www.nytimes.com/2012/07/03/us/politics/scorn-and-withering-scorn-for-chief-justice-roberts.html?_r=1&hp.

³¹⁰ For only a small sample of the politically diverse commentators challenging the less-than-judicial and even disgraceful nature of Scalia's dissent, see, for example, Ethan Bronner, *A Dissent by Scalia is Criticized as Political*, N.Y. TIMES (June 27, 2012), <http://www.nytimes.com/2012/06/28/us/scalias-immigration-dissent-is-criticized-as-political.html>; E.J. Dionne Jr., Editorial, *Justice Scalia Must Resign*, WASH. POST (June 27, 2012), http://www.washingtonpost.com/opinions/ej-dionne-jr-justice-scalia-should-resign/2012/06/27/gJQApkO06V_story.html; David G. Savage, *Did Justice*

Court reaffirmed in principle traditional federal plenary power over immigration.³¹¹ Justice Kennedy's majority opinion let stand, at least for now, the very provision that would seem to invite, indeed potentially provide cover for, the very racial profiling attacked and feared by undocumented immigrants and all those who condemn such state-sanctioned behavior. But the Court provided strong warnings against unconstitutional implementation, including assurances that practices will be carefully monitored, if necessary by the Court itself.³¹²

Both sides claimed victory.³¹³ Governor Brewer and the state sovereignty and anti-undocumented Mexican forces declared states had a legitimate sovereign role in protecting their borders, and the pro-undocumented immigrant forces claimed federal plenary power preempted almost everything rogue states have been trying to do.³¹⁴ The Court's opinion can be credibly described as order restored, in just the way the rival theory describes as pivotal to the historical operation of both the illegal and legal systems of immigration. But that order has been shaken and stirred. Justice Kennedy's opinion for the majority permits states the formal authority to act at least in some narrowly cooperative ways historically regarded as preempted, and the three dissents consecrate far more extensive and even extreme visions of state sovereignty. Especially for those whom law enforcement perceive as possibly undocumented, there will be no immediate relief from threatening and dangerous law enforcement behavior, especially

Antonin Scalia Go Too Far This Time?, L.A. TIMES (June 27, 2012), <http://articles.latimes.com/2012/jun/27/nation/la-na-scalia-20120627>; Lyle Denniston, *Opinion recap: Immigration and Judicial Styles*, SCOTUSBLOG (June 25, 2012, 7:03 P.M.), <http://www.scotusblog.com/2012/06/opinion-recap-immigration-and-judicial-styles/>; Ben Jacobs, *Scalia Dissents, in Nakedly Political Terms, from the Supreme Court's Broad 'Arizona' Consensus*, CAPITAL N.Y. BLOG (June 25, 2012, 4:18 P.M.), <http://www.capitalnewyork.com/article/politics/2012/06/6069280/scalia-dissents-nakedly-political-terms-supreme-courts-broad-arizon>; Richard A. Posner, *Supreme Court Year in Review: Entry 11: Justice Scalia is Upset About Immigration. But Where Is His Evidence?* SLATE (June 27, 2012, 10:21 A.M.), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html.

³¹¹ Julia Preston, *Immigration Ruling Leaves Issues Unresolved*, N.Y. TIMES (June 26, 2012), <http://www.nytimes.com/2012/06/27/us/immigration-ruling-leaves-issues-unresolved.html>.

³¹² See *Arizona v. United States*, No. 11-182, 2012 WL 2368661, at *17 (U.S. June 25, 2012).

³¹³ Christopher Leone, *SB 1070: Who Won? Both Sides Claim Victory in Ruling*, E. VALLEY TRIB. (June 26, 2012), http://www.eastvalleytribune.com/arizona/immigration/article_c866f410-bfa6-11e1-bcd6-0019bb2963f4.html.

³¹⁴ *Id.*

in places like Maricopa County with experience in developing their entirely separable (and often grotesquely harmful) local immigration system.³¹⁵

If in some sense order has been restored, the Clinton, Bush, and Obama Administrations have shifted the nation's institutions and ideologies so far toward the once-and-for-all excluding-detecting-and-deporting all undocumented Mexicans that we may no longer be readily able to tack back very far at all toward the hands-off pole. It is difficult indeed to scale back a war, especially with so many powerful interests (departments, organizations, personnel) dependent and insistent upon its continuance. To make matters more complicated, Clinton, Bush, and Obama did not anticipate that their force multiplier approach would serve only to fortify the state sovereignty movement and anti-immigration hysteria that they perseveringly have tried for eighteen years to calm through their brisk march toward to the exclusion pole. What in 1994 might well have looked like off-the-wall challenges to the federal government's plenary power over immigration appear now to have become intellectually legitimate and jurisprudentially no longer "off the wall." Control over the illegal and legal systems — over the combination of prohibitions and permissions — seems over time credibly up for grabs.

This predicament will strike some in the U.S. and even in Mexico as their fantasy come true: a foreseeable future with absolutely no undocumented (particularly Mexican) immigrants and with states exercising constitutionally recognized power to do at least some of what they feel necessary to protect their borders and their citizens. Others of a more pragmatic bent might say that maybe the U.S. and Mexico need just such a crisis, the U.S. to wake up from its anti-immigrant scapegoating frenzies and Mexico to finally distribute resources far more equitably than its elites have ever felt compelled. Meanwhile, angry idealists in both nations might insist, with good reasons, that our system is so corrupt and destructive that it should fail, and in its place we should erect something brave and new, something far deeper and broader and more open than the various versions of what gets grandly labeled "comprehensive immigration reform."³¹⁶

³¹⁵ See Eagly, *supra* note 255, at 1753; Chris Kirkham, *Arizona Immigration Law Ruling May Mean Boon for Private Prison Business*, HUFFINGTON POST (June 25, 2012), http://www.huffingtonpost.com/2012/06/25/arizona-immigration-law-ruling-private-prisons-_n_1625998.html.

³¹⁶ For evocative visions consciously rejecting comprehensive immigration reform as routinely debated and deliberately aiming for broader and deeper alterations, see,

Yet, these sentiments understate the perverse complexity of the twisted beast we have created. Those who will pay most dearly for the possible loss of our historically flexible undocumented migration system will be undocumented migrants themselves. At least in the short and middle run — and perhaps further out still — they need and depend upon the availability of the difficult life as undocumented transnationals. And, in turn, many others (families and co-workers, elders, children, and friends, neighbors, and communities) need and depend upon undocumented migrants having access to life as they have long known it. Presidents Obama, Clinton, and Bush — together with their foes within the states' rights and anti-undocumented Mexicans alliance — may well have permanently altered what might be the most humane alternative (of a set of admittedly inhumane alternatives) that the U.S. currently takes at all seriously.

I realize seeing history through the rival theory takes us only so far. We must still decide if we believe in borders and nations. Even if we are among those who do, we still must resolve how we define membership in the national community. Can members be formally illegal? Can they be members of other national communities at the same time? Even facing such difficult questions, we can recognize through the rival theory what the prevailing theory disguises and conceals. We can see the phony patriots, the habitual liars, the sociopathic officials. We can see that, especially for these people, undocumented Mexican migration has always been a racket, sweeping within it good and decent human beings, as rackets inevitably must.

I do not anticipate our conflict over undocumented Mexicans to end. The years have taught me not to expect too much justice in any tentative resolution we may reach. As with all laws, not least the Constitution, the deal will be but a truce, to be interpreted differently, obeyed and challenged, in time publicly decreed unprincipled and unworkable.³¹⁷ What I cannot abide, any more than can my close allies and friends, is the perpetuation of a tidy history and theory that ease

for example, HING, *supra* note 51. For only some samples of legal scholars addressing Comprehensive Immigration Reform, see Richard Boswell, *Crafting an Amnesty With Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175 (2010) (offering empirically grounded and theoretically ambitious approach to amnesty provisions); Hiroshi Motomura, *What is "Comprehensive Immigration Reform"?* *Taking the Long View*, 63 ARK. L. REV. 225, 225, 238-39 (2010) (describing what such reform should consider). See generally Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009) (providing fundamentals to any sweeping reform).

³¹⁷ See generally López, *supra* note 44 (sketching the idea of a constitution understood through Chicano experience).

the conscience of too many in the United States and Mexico, especially the ruling elite, whether they reign over a nation or over Maricopa County. Through the rival theory, we can and should face ourselves, whatever that may say about us, wherever that may lead us. We should wonder why undocumented Mexicans in our communities should mean — any more than we who are not undocumented Mexicans should signify that — something is broken rather than functioning.