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Daniel I. Morales

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# An Immigration Law for Abolitionists (and Reactionaries)

Daniel I. Morales\*

*Immigration law gets most things wrong and satisfies no one—not immigrants, not moderates, not restrictionists, and not abolitionists (the #AbolishICE crowd). It is bad law premised on skewed epistemic inputs—the fantasies of U.S. citizens—and enforced by a national agency with bloated resources tasked with solving a problem (illegal immigration) that causes no material harm. Migration law's biggest failing is that it admits far fewer immigrants than our country has the capacity to take in, as the decades-long, peaceful, and productive presence of twelve million undocumented immigrants definitively proves. The bankruptcy of immigration law has been obvious for a few decades at least, yet comprehensive immigration reform has been impossible to enact over the same time frame. Now, with the death of the most promising legislative reform effort in a generation at the hands of the unelected Senate parliamentarian, it's past time for a reassessment of immigration law and the ends and strategy of immigration reform.*

*In this Article, I argue that the reasons for the impasse on reform are structural and require a structural overhaul: a reconstruction of immigration law that destroys one-size-fits-all, national control and places chunks of the immigration power back in local precincts in metro areas, counties, or towns. This decentralized approach can increase our immigrant carrying capacity by allowing places that want and need immigrants to invite and attend to as many as they like. With time, some pro-immigrant locales might even cultivate an abolitionist, open-borders immigration politics from the bottom up. It wouldn't be the first time. The abolition of slavery and the gay rights movements were both nurtured in sub-national jurisdictions with special cultures and characteristics. Only after consciousness raising and proof of concept were secured were these radically new norms and modes of being scaled up.*

*A local immigration law may also better sate the needs of American reactionaries. Social scientists teach that many of us are dyed-in-the-wool authoritarians triggered by social and racial pluralism. This personality type can only be soothed with a restoration of a sense of "oneness or sameness." Locating debates about racial and social pluralism—i.e., the*

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\* Daniel I. Morales, Associate Professor of Law, University of Houston Law Center. This has been a long-gestating project that has been aided by numerous scholars and workshops. Thanks to Susan Bandes, Stephen Seigel, Mark Moller, and Greg Mark for helping me to develop the ideas in this piece at a very early stage. Mitu Gulati and Guy-Uriel Charles presided over an extraordinarily helpful seminar series at Duke Law School, where their students sharpened their knives on another early draft and where Joe Blocher offered his own helpful comments. Finally, my University of Houston colleagues offered many helpful comments at later stages, as did the faculty at the University of San Diego School of Law.

*immigration debate—at the national level constantly and unnecessarily triggers authoritarians. Many authoritarians live in places that are racially and socially homogenous. A more local immigration power would allow this group to sate their thirst for homogeneity without imperiling the benefits of immigration for the rest of us: the majority of Americans that enjoy and thrive in a pluralist, multiracial order.*

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## INTRODUCTION

As the crises of the twenty-first century mount, abolition is in the air.<sup>1</sup> But some abolitions are harder than others. Abolishing immigration law is the most ambitious abolition of all: it asks rich states to value outsiders with the drive and ambition to immigrate as much as citizen-insiders who control the levers of the immigration power.<sup>2</sup> Those insiders enjoy perpetual dominion over the most

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1. See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Shiu-Ming Cheer, *Moving Towards Reform: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISCOURSE 68 (2020).

2. As Eric Posner and Adam Cox emphasize, states are self-interested; they are designed to value the interests of their citizens exclusively over outsiders. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 812 (2007). The failure of rich nations to share vaccines during the COVID-19 pandemic is yet another example of the parochialism of nation-states, particularly those that have amassed the vast majority of global wealth.

productive territories on Earth<sup>3</sup> by dint of birth.<sup>4</sup> They are aristocrats, really, and they are partial to the exclusive control they enjoy over immigration.<sup>5</sup> Their governments reflect that partiality and jealously guard the borders to the rich world, even as thousands die attempting to reach its shores, hoping merely to contribute to and share in these riches.<sup>6</sup> Abolition of immigration law seeks to annihilate the intentional<sup>7</sup> parochialism of this arrangement; it is radical—and seemingly impossible—for seeking to do so.<sup>8</sup>

Yet, despite this radicalism and impossibility, more people—especially citizens of the rich Global North—are stumbling into this version of equality than I ever dared to hope.<sup>9</sup> Rather than regarding the entrance of all comers as a threat to

3. BRYAN CAPLAN & ZACH WEINERSMITH, OPEN BORDERS: THE SCIENCE AND ETHICS OF IMMIGRATION 27–53 (2019); Michael Clemens & Lant Pritchett, *The New Economic Case for Migration Restrictions: An Assessment*, (Center for Global Development, Working Paper No. 423, 2016).

4. JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS 27–72 (2010).

5. In prior work I have analogized citizens of wealthy nations to pre-democratic aristocracies. See generally Daniel L. Morales, *The Undocumented as New (and Peaceful) American Revolutionaries*, 12 DUKE J. CONST. L. & PUB. POL'Y 135 (2016).

6. See, e.g., *Missing Migrants Project*, INT'L ORG. FOR MIGRATION, <https://missingmigrants.iom.int/region/mediterranean> [<https://perma.cc/Q2FL-B99B>] (Last updated Sept. 5, 2023) (tracking 2,800 migrant deaths globally in 2021 along a number of routes from the Global South to the Global North); *About No More Deaths*, NO MORE DEATHS, <https://nomoredeaths.org/en/> [<https://perma.cc/FL2V-A5B7>] (tracking and trying to prevent migrant deaths along the Mexico-Arizona border) (last visited Sept. 16, 2023).

7. The Westphalian international order is premised on the sovereignty of nation-states. That sovereignty, in turn, hinges on the existence and maintenance of coherent group identities. These group “selves” are, in turn, entitled to “self-determination.” This system naturalizes and incentivizes the production of (often racialized) intergenerational group identities. Political theorists, including Jackie Stevens and Nandita Sharma, argue in different ways that this tie between territoriality and intergenerational identities causes domestic and international violence. See JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS (2010); NANDITA SHARMA, HOME RULE: NATIONAL SOVEREIGNTY AND THE SEPARATION OF NATIVES AND MIGRANTS (2020).

8. Even progressive, normative immigration law scholars tend to dismiss out of hand the possibility or desirability of open borders. See, e.g., E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) (arguing for a right to migrate to the United States for those affected by U.S. imperial practices, a very large group, but dismissing open borders).

9. In Europe, the refugee rights movement has made the hashtag #NoOneIsIllegal a popular slogan on Twitter to call out state violence against refugees. In the United States, organizations have tended to focus abolitionist calls on the elimination of the violent enforcement mechanisms used to enforce immigration law. Some organizations expressly advocate free movement of people around the globe. *Home*, FREE MIGRATION PROJECT, <https://freemigrationproject.org/> [<https://perma.cc/QS9J-XFH3>] (last visited Sept. 7, 2023) (“We [Free Migration Project] call for recognition of a human right to migrate and the abolition of deportation.”); *About*, #Not1More, <http://www.notonemoredeportation.com/about/> [<https://perma.cc/F4MR-XQ77>] (last visited Sept. 7, 2023) (“Together we say: not one more family destroyed, not one more person left behind, not one more indifferent reaction to suffering, not one more deportation.”); *Our Mission and Values*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/our-values> [<https://perma.cc/RM2V-XA4Q>] (last visited Sept. 7, 2023) (“Freedom for Immigrants is devoted to abolishing immigration detention, while ending the isolation of people currently suffering in this profit-driven system.”); *About Detention Watch Network*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/about> [<https://perma.cc/SB99-782Q>] (last visited Sept. 7, 2023) (“Detention Watch Network (DWN) is a national coalition building power through collective advocacy, grassroots organizing, and strategic communications to abolish immigration detention in the United States.”); Silky Shah, *The Immigrant Justice Movement Should Embrace Abolition*, THE FORGE (Mar. 4, 2021), <https://forgeorganizing.org/>

“nation,”<sup>10</sup> a small but growing cohort of citizens in rich states seems to view a noncitizen moving from Bangalore to Atlanta as about as threatening as an American citizen moving from Chicago to Houston.<sup>11</sup> Supermajorities nationally accept that long-term, undocumented residents deserve the right to remain in the United States.<sup>12</sup> This sentiment, under the right conditions, could become the normative foundation of immigration law abolitionism. The question for open-borders partisans, or even immigration expansionists,<sup>13</sup> is whether comfort with this kind of human movement can be scaled and enriched.

In this Article, the second in a series,<sup>14</sup> I ask what, if anything, law can do to help immigration law abolitionism along—or at least give it a fighting chance. After examining in detail the structures, practices, and laws that amass against immigration law abolitionism, I answer that law can aid abolition through a reconstruction of the immigration power. I suggest that decentralized power and more deliberative, participatory procedures are structural legal reforms that can extend, and perhaps grow, these nascent and exceedingly ambitious abolitionist demands. Happily, aiding abolitionists may also help to de-radicalize immigration reactionaries.

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article/immigrant-justice-movement-should-embrace-abolition [https://perma.cc/SN53-Z88W]; Favianna Rodriguez, *Migration is Beautiful* (digital image), in SMITHSONIAN ART MUSEUM (2018), https://americanart.si.edu/artwork/migration-beautiful-116971 [https://perma.cc/2GHE-IJWS]; Dan La Botz, *Ten Arguments for Open Borders, the Abolition of ICE, and an Internationalist Labor Movement*, DEMOCRATIC SOCIALISTS OF AMERICA (Fall 2019), https://socialistforum.dsausa.org/issues/fall-2019/ten-arguments-for-open-borders-the-abolition-of-ice-and-an-internationalist-labor-movement/ [https://perma.cc/YH56-Y3AG]; see also SOLIDARITY WITHOUT BORDERS: GRAMSCIAN PERSPECTIVES ON MIGRATION AND CIVIL SOCIETY ALLIANCES 3–4 (Óscar García Agustín & Martin Bak Jørgensen eds., 2016) (cataloging numerous social movements from below that manifested solidarity with refugees during the European refugee “crisis” of 2015); Jason A. Cade, “*Water is Life!*” (*and Speech!*): *Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261 (2020) (chronicling the work of the abolitionist Christian advocacy group No More Deaths, which provides water to undocumented border crossers in Arizona). International conferences have also emerged that expressly make the intellectual, political, and social case for open borders or no borders. The Free Migration Project, a U.S. based organization that seeks to abolish borders and prisons, hosts an annual conference and working group on open borders. FREE MIGRATION PROJECT, *supra* note 9. The picture that emerges from these texts, movements, and convenings is an awakening among many rich-world inhabitants to the horrors of border violence.

10. See NILS HOLTUG, KASPER LIPPERT-RASMUSSEN, & SUNE LAEGAARD, NATIONALISM AND MULTICULTURALISM IN A WORLD OF IMMIGRATION 119 (2009).

11. One way to gauge this comfort is the way cities market themselves. Houston, for example, brags relentlessly about being the most diverse city in the United States and its status as a destination for international migration. See, e.g., A.J. Mistretta, *Houston Still Most Diverse City in the Nation*, *Report Finds*, GREATER HOUS. P'SHIP (Apr. 12, 2019), https://www.houston.org/news/houston-still-most-diverse-city-nation-report-finds [https://perma.cc/PMX3-9NV6]. Note too that the migration of Californians in particular to states like Arizona and Texas has provoked a reaction from conservatives. See e.g., David Siders, *The State Where the GOP Would Rather Lose Than Change*, POLITICO (Feb. 3, 2023, 4:30 AM) https://www.politico.com/news/magazine/2023/02/03/arizona-republican-party-election-denialism-lae-00080615 [https://perma.cc/6UZP-M85Q].

12. *Immigration*, GALLUP, https://news.gallup.com/poll/1660/immigration.aspx [https://perma.cc/AV99-KESM] (Last visited Sept. 7, 2023) (asking Americans whether they would favor or oppose allowing illegal immigrants already in the country the opportunity to become U.S. citizens if they meet certain requirements over a period of time).

13. MATTHEW YGLESIAS, ONE BILLION AMERICANS: THE CASE FOR THINKING BIGGER (2020).

14. See Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698 (2017).

Calls to abolish immigration law are growing. Louder, more forceful demands to abolish the state apparatuses that enforce immigration law—Immigration Customs Enforcement (ICE), Customs and Border Protection (CBP), and the Executive Office for Immigration Review (EOIR)—are increasingly forces to be reckoned with.<sup>15</sup> These demands have grown more potent by allying themselves with social movements seeking abolition of the carceral state in toto—and *tout suite*.<sup>16</sup>

Immigration law abolition, however, carries a burden that other abolitions don't: "normative nationalism."<sup>17</sup> Normative nationalism is the conviction that every nation-state has the right and duty to manage the expulsion of noncitizens and admission of "aliens" from abroad as it sees fit.<sup>18</sup> This "commonsense"<sup>19</sup> is supported not only by the parochial citizens who gain monetary and emotional sustenance from their monopoly on immigration control, but also by hoary theories of Westphalian sovereignty that still garner regular and widely read defenses by contemporary political and legal scholars who preside over prestigious departments at elite schools.<sup>20</sup> These contemporary theorists provide ballast for normative nationalism with full awareness that normative nationalism condemns billions of human beings who wish to move across the globe to stunted horizons and lives that, for many, might count as "nasty, brutish and short."<sup>21</sup> These scholars are also aware of just how immaterial harms from immigration are for citizens in wealthy democracies.<sup>22</sup> The persistence of these arguments, despite empirical shortcomings that ought to be devastating,<sup>23</sup> is a textbook example of the way that knowledge production tends to serve existing arrangements of power<sup>24</sup> rather than dismantle them.

15. See *supra* note 9; see also Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967 (2020); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); César Cuauhtémoc García Hernández, *It's Still Time to Abolish ICE*, THE NATION (Feb. 26, 2021), <https://www.thenation.com/article/society/immigration-deportation-abolish-ice/> [https://perma.cc/7Y7D-44KQ]; CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019); Angelica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 (2021).

16. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019).

17. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP*, 135 (2008).

18. *Id.*

19. See, e.g., Michele Goodwin, *Complicit Bias and the Supreme Court*, 136 HARV. L. REV. F. 119, 120–21 (2022) (discussing how the judiciary is not immune from common biases); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894 (2014) ("One of the nationalist school's distinctive contributions is showing how structural arrangements help tee up national debates, accommodate political competition, and work through normative conflict.")

20. See, e.g., SARAH SONG, *IMMIGRATION AND DEMOCRACY* (2018); DAVID MILLER, *STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION* (2016); PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

21. THOMAS HOBBS, *LEVIATHAN* (London, 1651).

22. CAPLAN & WEINERSMITH, *supra* note 3 (amassing statistics describing open borders' material benefits to citizens in wealthy states).

23. JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* (2010).

24. Gary Gutting & Johanna Oksala, *Michael Foucault*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/foucault/> [https://perma.cc/HMW3-WV35] (last updated Aug. 5, 2022).

For abolitionism to have a chance against the cultural-social-legal fortress of normative nationalism, the immigration power should be decentralized and denationalized—it must be reconstructed. The way to attack the normative nationalism that holds the violence of immigration law together is to fortify the power of plural, distinctive, and diverse sub-national spaces to make immigration policies.<sup>25</sup> Whatever immigration law structure we adopt, normative nationalism will continue to thrive, and immigration law abolitionism will likely remain embattled. As long as the national monopoly on immigration control remains in place, immigration law abolitionism, whatever its potential, will be stunted.<sup>26</sup>

Radical as this reconstruction of immigration law may appear, we already have the evidence we need to conclude that centralized control of the immigration power is bankrupt.<sup>27</sup> We also already know that spaces of abolition can exist and can be nurtured at the sub-national level, especially in sanctuary cities.<sup>28</sup> All that's left then is to formally empower the geographies with political formations that are already experimenting with abolitionist norms, perhaps expanding these empowered geographies to metropolitan scales that track economic geography and provide sufficient room to roam for locally invited immigrants.<sup>29</sup> Chicago's metro area, after all, boasts an economy the size of Switzerland's.<sup>30</sup> Limiting the residency of immigrants to that geographic and economic scale poses no significant moral or ethical problem in the likely case that decentralization expands America's immigrant carrying capacity beyond the levels reached by centralized national control.

While a more pluralist policy regime may also embolden already-unaccommodating, anti-immigrant geographies, it's important to acknowledge that such geographies already possess most of the legal tools that they need to enact their own immigration policies, no matter the technical preemption of their authority over these issues.<sup>31</sup> Texas can erect the border wall that Trump failed to build.<sup>32</sup> Phoenix can devote local resources to rounding up immigrants for ICE to deport.<sup>33</sup>

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25. See *infra* Section II.C.

26. See *infra* Section II.C.

27. See *infra* Section II.C.

28. Christopher N. Lasch, R. Linus Chan, Ingrid Eagly & Dina Francesca Hayes, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1736–39 (2018).

29. For discussion, see Daniel I. Morales, *Postmodern Identity and the Structure of Immigration Control*, in THEORIZING LOCAL MIGRATION LAW AND GOVERNANCE, at i-ii (Moritz Baumgärtel & Sara Miellet eds., 2022).

30. *Compare Forecasted Gross Metropolitan Product (GMP) of the United States in 2021, by Metropolitan Area*, STATISTA (Feb. 3, 2023), <https://www.statista.com/statistics/183808/gmp-of-the-20-biggest-metro-areas/> [<https://perma.cc/7APR-JTNB>], with GDP (Current US\$) – Switzerland, THE WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CH> [<https://perma.cc/B2LV-UVCS>] (last visited Sept. 7, 2023).

31. Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698 (2017); PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 207–08 (2015).

32. Andrew R. Arthur, *Texas Building Its Own Border "Wall,"* CTR. FOR IMMIGR. STUD. (Apr. 13, 2022), <https://cis.org/Arthur/Texas-Building-Its-Own-Border-Wall> [<https://perma.cc/TQ99-5D4W>]; Uriel J. Garcia, *Gov. Greg Abbott Hires "Border Czar" to Accelerate Wall Construction*, TEX. TRIB., (Jan. 30, 2023), <https://www.texastribune.org/2023/01/30/texas-border-czar-greg-abbott-mike-banks/> [<https://perma.cc/C778-XEER>].

33. Colby Itkowitz, *She Helped Bring Down Sheriff Arpaio. Now She's Ready to Take on Hate Nationally*, WASH. POST (Nov. 22, 2016, 8:26 AM), <https://www.washingtonpost.com/news/inspired->



Sanctuary spaces, by contrast, lack the critical legal tools they need to become actual sanctuaries—havens from ICE and the broader immigration enforcement apparatus.<sup>34</sup> Chicago cannot stop a deportation or keep ICE from its borders. New York cannot grant asylum to Syrian, Afghan, or Venezuelan refugees—or to Ukrainians.<sup>35</sup> Formal decentralization would correct deep asymmetries in the market for immigration policies that prevail under centralized national control.

There's also reason to think that decentralization would better meet the emotional needs of citizens who object to an America in racial flux—the underlying cause of nativist backlash. Situating immigration control at lower levels may also lead to more sanguine and concrete discussions of migration law everywhere, even in places with racist and restrictionist postures. Evidence that American citizens are capable of thinking straight about immigration when they think at a small, local scale about immigration emerged in the aftermath of Trump's election.<sup>36</sup> As deportations became indiscriminate and more numerous, just as Trump had promised, countless Trump voters that despised “illegals” in the abstract found themselves crestfallen and shocked that a family member/neighbor/friend who was a “good illegal immigrant” had now been expelled.<sup>37</sup>

These moments of citizen recognition of the senseless violence of American immigration policy show that immigration politics is in large measure produced by the structure of the immigration power and is not necessarily or squarely a reflection of the polity's well-considered views.<sup>38</sup> What we view as the people's will on

life/wp/2016/11/22/she-helped-bring-down-sheriff-arpai-now-shes-ready-to-take-on-hate-nationally/  
[https://perma.cc/56DD-VX65].

34. *New York's Sanctuary City Policy Leads to Increased ICE Activity, Dozens of Arrests Throughout Metropolitan Area*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 20, 2020), <https://www.ice.gov/news/releases/new-yorks-sanctuary-city-policy-leads-increased-ice-activity-dozens-arrests> [https://perma.cc/E7VZ-TFM8].

35. In recent months, New York City has struggled to house the influx of refugees arriving there. Predictably, some New York leaders, and some residents, have adopted demagogic rhetoric in response to these struggles. These reactions do not falsify the value of decentralization. My claim is not that decentralization of immigration powers will magically erase any frictions migration brings, but rather, among other things, that it will increase the availability of constructive tools to manage those frictions in a much wider variety of political settings and formations, some of which will be pro-immigrant. While it is still too soon to fully evaluate New York's response, we can see how different cultures and commitments to migrants produce distinct responses. Most prominently, New York leaders pushed the Biden administration to issue work permits immediately (rather than after six months), in order to help to stabilize migrants' finances. See <https://apnews.com/article/migrants-work-permits-democrats-biden-c173aa553cd4b14ec05ddb2cb56e9e5f>. The pressure worked. See <https://www.cnn.com/2023/09/20/politics/venzuelans-humanitarian-relief-biden-administration/index.html>. Rather than do what Texas and Florida have done (find ways to push migrants out) New York leaders sought to find a way to stabilize migrants' material conditions; expanding the potential of this political dynamic is one of the aims of decentralization.

36. See Morales, *supra* note 31, at 703–04.

37. *Id.*

38. The notion that the form of democratic procedure effects or can even determine the substance of what people “think” or believe, or what they are willing to do about a certain public issue, is a staple insight of the deliberative democracy literature. See HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTIETH CENTURY* (2020); JAMES S. FISHKIN, *DEMOCRACY WHEN THE PEOPLE ARE THINKING: REVITALIZING OUR POLITICS THROUGH PUBLIC DELIBERATION* (2018); James S. Fishkin, *Democracy When the People Are Thinking: Deliberation and Democratic Renewal*, 163 AM. PHIL. SOC'Y 108 (2019) [hereinafter Fishkin, *Democracy When the People Are Thinking*]; James S. Fishkin, *Reviving Deliberative Democracy*, STAN. UNIV.

immigration, then, likely does not reveal stable, immutable, or underlying policy preferences<sup>39</sup> but instead reflects feelings of generalized threat, stoked and made existential by the choice to maintain the immigration debate on the national stage, or in its shadow.

The case to reconstruct the immigration power for abolition proceeds in three parts. Part I makes the case that immigration law is bad law; it shows that guarantees of legal quality in a liberal democracy simply do not exist in immigration law and that immigration law's legitimacy is weak for these reasons. The problem is so dire that abolitionist currents have emerged in immigration movements, reflecting a view that immigration law is fundamentally illegitimate and unreformable. Part II parses the Senate debate about a twenty-year-old failed immigration bill entitled the Development, Relief, and Education for Alien Minors (DREAM) Act. Through a close reading of these public and private debates, I build the case for the fundamental incompatibility of national immigration control with rational—much less “just”—immigration law. I close the section by fast-forwarding to 2021 and analyzing the failure of the most promising effort to fix immigration law in a generation: an effort that collapsed in December 2021.<sup>40</sup> I pay particular attention to the Senate parliamentarian's role and conclude that the precedents set by her rulings ensure that there will be no viable national route to granting amnesty to undocumented people for the foreseeable future. Part III lays out a vision for reconstructing the immigration power—the power to invite and remove immigrants—by granting such powers to metropolitan areas and their rural analogues. This vision is responsive to the insights of the first two Parts and makes the case that this kind of decentralization will open up a path to nurture radical abolitionist currents in immigration activism, as well as sate the needs of American reactionaries, the plurality of Americans who have trouble coping with the diversity and pluralism of modern life.

## I. WHY IMMIGRATION LAW IS BAD LAW

Immigration law and politics run on the assumption that exclusive citizen control of immigration law is both necessary and legitimate.<sup>41</sup> Constitutional

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COLLOQUIUM (2014) [hereinafter Fishkin, *Reviving Deliberative Democracy*]; Jedediah Britton-Purdy, *The Constitutional Flaw That's Killing American Democracy*, ATLANTIC (Aug. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/framersconstitution-democracy/671155/> [<https://perma.cc/AZA2-2PYK>]; see also Jason Barbaras, *How Deliberation Affects Policy Opinions*, 98 AM. POL. SCI. REV. 687, 687–701 (2004).

39. This basic point applies far more generally and was made over sixty years ago in a seminal book. E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* (1960); cf. *id.* at 68 (“Political conflict is not like an intercollegiate debate in which opponents agree in advance on a definition of the issues. As a matter of fact, *the definition of the alternatives is the supreme instrument of power.*”). For a full discussion of the implications of this point for immigration, see Daniel I. Morales, *Immigration Reform and the Democratic Will*, 6 U. PA. J.L. & SOC. CHANGE 49 (2013), reprinted in 34 IMMIGR. & NAT'Y L. REV. 123 (2014) (Prof. Gabriel J. Chin ed.).

40. Robert Suro, *Congress Has Killed Immigration Reform. It'll Regret That*, WASH. POST. (Dec. 19, 2022, 5:26 PM), <https://www.washingtonpost.com/opinions/2022/12/19/congress-immigration-reform-dead-end/> [<https://perma.cc/BP5A-RERH>].

41. See *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory

immigration doctrine's exceptional deference to the political branches reflects this assumption and a corollary point: there is no subject more important for citizens to rule over than immigration law. Citizens and only citizens ought to determine the terms of entry and exit into the territory and the criteria for, and availability of, citizenship to noncitizens—courts should not question the citizenry's judgment as expressed by the legislative branch.<sup>42</sup>

But citizens' monopoly on immigration decision-making makes immigration law bad law. Democratic decision-making is good decision-making<sup>43</sup> in part because it collects and brings to bear radically diverse perspectives on the impacts of laws on those they affect.<sup>44</sup> Democratic decisions are better than autocratic<sup>45</sup> decisions because the people who are concretely affected by laws have a say in their initial

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is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”); Christopher Freiman & Javier Hidalgo, *Liberalism or Immigration Restrictions, but Not Both*, 10 J. ETHICS & SOC. PHIL. 1, 7 (2016) (“‘People have an interest in ensuring that, both individually and collectively, they have control over their lives, over the place that they live, and over the collective character of their community.’ David Miller defends immigration restrictions by arguing that ‘the public culture of their country is something that people have an interest in controlling: they want to be able to shape the way that their nation develops, including the values that are contained in the public culture.’ In a recent paper, Miller also says that a democratic state has ‘the right to determine its own future membership’ and that states have an interest in being able to control the number of people in their jurisdiction. Wellman argues that citizens have entitlements to exclude foreigners in part because ‘a country’s immigration policy determines who has the opportunity to join the current citizens in shaping the country’s future’ and ‘this policy will matter enormously to any citizen who cares what course her political community will take.’”).

42. Freiman & Hidalgo, *supra* note 41.

43. I mean “good” in a variety of senses. Inclusive democratic decisions are more likely to be welfare maximizing, “wise” thanks to the effects of cognitive diversity, and easier to enforce for having been procedurally legitimate. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 80 (Prometheus Books 1991) (1861) (“The only government which can fully satisfy all the exigencies of the social state is one in which the whole people participate; that any participation, even in the smallest public function, is useful; that the participation should everywhere be as great as the general degree of improvement of the community will allow; and that nothing less can be ultimately desirable than the admission of all to a share in the sovereign power of the state.”); Niko Kolodny, *Rule Over None I: What Justifies Democracy*, 42 PHIL. & PUB. AFF. 195 (2014) (“As things actually are, or could reasonably be expected to be, some democratic procedure of decision making is more *substantively reliable* than any nondemocratic procedure. That is, there is some democratic procedure such that if people, in general, try, over the long run, to follow it, then substantive interests will be better served than they would be if people were to try to follow any nondemocratic procedure.”); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 107 (William Rehg trans., 1996).

44. *Id.*

45. I use the term “autocratic” here and throughout to emphasize how immigration law looks from the noncitizens’ vantage point. For the noncitizen excluded from political participation in the production of immigration law, it *is* autocratic. Democratically made immigration law might appear more autocratic to the noncitizen than immigration law produced by a dictatorship because immigration law in a dictatorship is not exceptional. All law in a dictatorship is law that must be followed just because it is backed by the threat of force. In a democracy, only immigration law has this exceptional, autocratic character. See MILL, *supra* note 43; see also Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1277–89 (2015) (describing the distinctive and illegitimate character of the federal immigration crimes of unlawful entry and reentry).

designs and can modify them over time.<sup>46</sup> The constant feedback democratic institutions receive from those they rule over is what drives and enables effective governance by democratic states. The legitimacy of law's coercion of human beings depends on the existence and quality of these inputs.<sup>47</sup>

Immigration law in our—and every—democracy is radically deficient in these respects.<sup>48</sup> Noncitizens, who are most affected by immigration law, are denied electoral power and adequate standing in the immigration law debate,<sup>49</sup> and the quality of immigration law is worse for that exclusion. This is “democratic” immigration law’s foundational contradiction:<sup>50</sup> democracies posit that there is nothing more important for citizens to control than immigration, and yet exclusive citizen control abrogates every guarantee of democratic legal quality. Democracy’s core epistemic advantage (the ability to provide power-backed feedback on law’s effects to the political system) is nullified by the disenfranchisement of noncitizens in the immigration context. There is perhaps no subject over which citizens are more poorly situated to make good democratic decisions. Immigration law is bad law because citizens are legislating blind when it comes to immigration.

#### A. *The Representational Deficits of Immigration Law*

Observers of immigration politics bemoan the inability of the polity to understand the truth about immigration’s salutary effects on the American economy and society.<sup>51</sup> Instead of acting on the empirical reality of immigration’s benefits and burdens, citizens’ fears, beliefs, and feelings dominate debate and discussion, which then shapes legislative and administrative responses.<sup>52</sup> Some of those feelings are reactionary.<sup>53</sup>

My claim in this Section is that a significant structural reason for the logically impoverished, sometimes fantastical quality of immigration law is noncitizens’ exclusion or second-class status within the immigration law conversation. The social and political distance of immigrants and would-be immigrants from citizens compounds the problem. This problem is thorny because immigrants’ political

46. See, e.g., HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE AND THE RULE OF THE MANY* 10 (2015) (societies learn over time, adapting to prior crises); HABERMAS, *supra* note 43, at 107.

47. *Id.*

48. Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 *POL. THEORY* 37, 38 (2008).

49. See *infra* Section I.A.

50. I mean this in the same sense that Marx locates a foundational contradiction or inherent crisis in capitalism.

51. See, e.g., Howard F. Chang, *The Economics of Immigration Reform*, 52 *U.C. DAVIS L. REV.* 111, 127 (2018) (concluding that economic benefits of liberalized and legalized migration outweigh the economic and social costs); KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 131, 136 (2007) (concluding the same); CAPLAN & WEINERSMITH, *supra* note 3 (concluding the same).

52. For extended discussion of this process, see Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 *U. PA. J.L. & SOC. CHANGE* 49, 50–51, 60 (2013). See also, SCHATTSCHEIDER *supra* note 39. Emotional responses to political events are endemic to the human condition. See BETHANY ALBERTSON & SHANA KUSHNER GADARIAN, *ANXIOUS POLITICS: DEMOCRATIC CITIZENSHIP IN A THREATENING WORLD* 1–18 (2015). A dominant emotion evoked and stoked in citizens when it comes to immigration is anxiety. *Id.* at xviii–xix.

53. KAREN STENNER, *THE AUTHORITARIAN DYNAMIC* (2005).

exclusion is a fully naturalized feature of democracy, not a bug. We just don't think immigrants should get a vote over the laws that determine their fates.<sup>54</sup> As I show below, this choice to make immigration law without the input of those it most affects damns its quality.

Noncitizens' interests are not represented at the national level in the same, direct way that those of citizens are.<sup>55</sup> To the extent that noncitizens enjoy political representation, it is by proxy of enfranchised citizens,<sup>56</sup> or by the charitable grace of a particular representative.<sup>57</sup> Representation by proxy and grace, of course, have serious flaws that contribute to the poor quality of immigration law and policy.

The indirect, proxy-based representation of noncitizens' interests in immigration law and policy operates in several different ways that sap noncitizens' interests of the electoral-power-backed voice that usually guarantees an interest group's inclusion in the law-making calculus. The specific ways in which noncitizens are represented by proxy are worth elaborating in detail since they help to explain why even commonsense, win-win immigration law reforms, like granting legal status to the DREAMers,<sup>58</sup> face an uphill climb.

Immigrants—from green card holders to the undocumented—count for purposes of apportionment in the U.S. House of Representatives, but they cannot vote.<sup>59</sup> This apportionment-sans-enfranchisement opens the possibility for

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54. *Poll: Americans Overwhelmingly Reject Voting Rights for Undocumented Immigrants*, THE HILL (July 26, 2018), <https://thehill.com/hilltv/what-americas-thinking/399016-poll-americans-overwhelmingly-reject-giving-voting-rights-to/> [<https://perma.cc/Q5KS-3NLK>].

55. See Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded*, 64 STAN. L. REV. 1503, 1515 (2012).

56. I do not mean this to discount the incredibly effective organizing that immigrants' rights organizations have done all over the country. See, e.g., Kathryn Abrams, *Contentious Citizenship: Undocumented Activism in the Not1More Deportation Campaign*, 26 BERKELEY LA RAZA L.J. 46 (2016). Campaigns, protests, and other efforts to harness noncitizen political power are absolutely necessary to make change in immigration and have achieved significant success. But the creative strategies by noncitizens deployed to achieve suboptimal versions of desired outcomes actually illustrate the barriers posed by noncitizens' proxy representation in the political branches at every level of government.

57. Luis Gutierrez, a former House member, and Senator Dick Durbin have played the role of immigration rights advocates and entrepreneurs in their respective chambers. Both have taken immigration reform up as a signature issue. While their constituencies are generally pro-immigration, their prominent role in immigration reform efforts cannot be explained by simple electoral politics. Instead, both leaders are motivated by a sense of moral duty and personal sympathy for the plight of immigrants. Their strenuous and consistent efforts to reform immigration law in a pro-immigrant direction have not borne much fruit, however. Gutierrez and Durbin's lack of tangible policy achievements, underscores how efforts motivated by charitable impulses, but lacking in constituent-backed power, are not enough to achieve significant legislative change.

58. See *infra* Part II.

59. Note that in Texas and elsewhere there is an effort to crush even the possibility of this proxy-based representation. See *generally* *Evenwel v. Abbott*, 578 U.S. 54 (2016) (rejecting plaintiff's challenge to Texas redistricting). The Court rejected the notion that states must draw districts based on citizen population rather than total population, including noncitizens. The Trump administration also attempted to eliminate proxy-based representation by adding a citizenship question on the census, which was intended to drive down undocumented and Latino response rates. See *Dep't. of Com. v. New York*, 139 S. Ct. 2551, 2565–66 (2019) (rejecting addition of citizenship question to census based on evidence that the Commerce Department's stated reason for the addition was pretextual); see also Ming Hsu Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in the Census*, 96 N.Y.U. L. Rev. 901 (2021) (discussing the way that the census undercounts the apportionment population of immigrants).

noncitizens to enjoy some political power, but it grants representatives far more discretion to deviate from the interests of their apportionment-based constituency on immigration than on other issues important to the population that they represent.<sup>60</sup> In fact, the electoral consequences of deviating one way or another regarding immigration will be determined by the citizens whose electoral power has been amplified by the presence of this disenfranchised constituency. That is, those least concretely affected by immigration law in a particular district (adult citizens) will decide whether immigrants' apportionment-derived power will inure to immigrants' benefit or not.

The dispersal of immigrants over the last two decades to regions of the United States where citizens have more negative views towards noncitizen and non-white residents has amplified the political clout of the anti-immigrant viewpoint at the national level.<sup>61</sup> But even in jurisdictions where representatives grace noncitizens by actually representing their interests (because citizen voters' attitudes are neutral or favorable towards the immigrants in their midst), the level and quality of representation is still likely to be subpar in all but the most immigrant-friendly jurisdictions.

For example, in the average "safe" Democratic-controlled district with a substantial immigrant population, there will be a subset of citizen voters who hold moderate-to-negative views of immigrants.<sup>62</sup> Without immigrant votes to counter this moderate-to-negative block, the average pro-immigrant congress member will represent an electoral base whose mean viewpoint on immigration questions will skew substantially to the right of the residential apportionment population. At this basic level of representative accountability, then, immigrants' representation by proxy is far less potent than what citizens enjoy, and that fact systematically skews legislative outcomes in an anti-immigrant direction. That is, citizens are bad proxies for immigrants' interests even in pro-immigrant jurisdictions. The problem is even worse than it seems when you consider that about 15 to 20% of democrats are reactionaries with a low tolerance for pluralism of all sorts.<sup>63</sup> These members of the nominally pro-immigrant party are triggered negatively by the diversity that immigration brings.<sup>64</sup>

And if we think a bit harder about the constituency for more immigrant visas, we see that the situation is still worse than the apportionment-sans-enfranchisement

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60. It operates not unlike the Three-fifths Clause did, overrepresenting the voices of Southern slaveholders in the national legislative calculus.

61. Since 2000 most of the growth in the foreign-born population has been in the U.S. South. See Paul Jacobs, *Where the Nation's Foreign-Born Live Has Changed Over Time: Most Live in the South and West, a Dramatic Shift from a Century Ago*, U.S. CENSUS BUREAU (May 8, 2019), <https://www.census.gov/library/stories/2019/05/where-nations-foreign-born-live-has-changed-over-time.html> [<https://perma.cc/AEW9-X4AC>].

62. Lydia Saad, *U.S. Immigration Views Remain Mixed and Highly Partisan*, GALLUP (Aug. 8, 2022), <https://news.gallup.com/poll/395882/immigration-views-remain-mixed-highly-partisan.aspx> [<https://perma.cc/5SJC-HP8F>]. (showing, for example, that 17% of Democrats support restricting immigration); John B. Oliphant & Andy Cerda, *Republicans and Democrats Have Different Top Priorities for U.S. Immigration Policy*, PEW RSCH. CTR. (Sept. 8, 2022), <https://www.pewresearch.org/fact-tank/2022/09/08/republicans-and-democrats-have-different-top-priorities-for-u-s-immigration-policy> [<https://perma.cc/PY2H-YF82>].

63. See STENNER, *supra* note 53.

64. *Id.*

analysis implies. Resident immigrants are not the purest constituency for more visas—an issue that presents one of the most contentious immigration questions and the most important for global justice.<sup>65</sup> The pure constituency for visa supply expansion resides outside the country altogether. That is, current immigrants, to the extent they exert a pull on immigration policy by proxy, are themselves proxies for the disenfranchised foreign-born,<sup>66</sup> some of whom wish to expand the U.S. visa supply to include themselves.<sup>67</sup> The proxy-based representation of the interests of the foreign-born who wish to migrate is most robustly endogenized into law by the Immigration and Nationality Act's allocation of visas for family members.<sup>68</sup> Many noncitizens wish to bring family members over for economic and noneconomic reasons.<sup>69</sup> Foreign-born relatives wish to join family members in the United States for emotional and economic reasons.<sup>70</sup> Because law grants current immigrants the right to sponsor and select new immigrants, family-based visas are the material tie that binds the interests of current resident immigrants to the foreign-born who wish to migrate.<sup>71</sup> Family sponsorship is a valuable de facto property interest that those with green cards currently, and historically, have owned.<sup>72</sup> Understanding in this way the startling degree to which immigrant selection is outsourced to immigrants themselves, it should not surprise that anti-immigration policymaking under the Trump administration has framed family migration as wrongful “chain migration.”<sup>73</sup>

This familial tie to foreign-born interests may be an important part of why lawfully present immigrants support more immigration; economic incentives do not uniformly favor such support. Indeed, immigration restriction would directly

65. MATHIAS RISSE, ON GLOBAL JUSTICE 152–53 (2012).

66. While the exclusion of nonresident aliens from the immigration lawmaking is a feature of modern national democracies, at least one political theorist has prominently argued that this exclusion from the debate about borders is properly understood to be undemocratic and indefensible by recourse to democratic principles. Abizadeh, *supra* note 48, at 44–45 (2008); cf. Meghan Benton, *The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-Citizen Population*, 16 RES PUBLICA 397, 407 (2010) (explaining that denizens' lack of citizenship makes them politically powerless, thereby excluding them from the democratic process).

67. See, e.g., Neli Esipova, Anita Pugliese & Julie Ray, *More Than 750 Million Worldwide Would Migrate If They Could*, Gallup (Dec. 10, 2018), <https://news.gallup.com/poll/245255/750-million-worldwide-migrate.aspx> [<https://perma.cc/8YDT-RXPZ>] (reporting that approximately 15% of people around the globe wished to migrate if they could). Currently migrants make up only 3.5% of global population, or 272 million persons. See Charlotte Edmond, *Global Migration, by the Numbers: Who Migrates, Where They Go and Why*, WORLD ECON. F. (Jan. 10, 2020), <https://weforum.org/agenda/2020/01/iom-global-migration-report-international-migrants-2020/> [<https://perma.cc/CFU3-XY6E>].

68. The American immigration system privileges family-based visas to an unusual degree.

69. Alan Hyde, *The Law and Economics of Family Unification*, 28 GEO. IMMIGR. L.J. 355–90 (2014).

70. *Id.* at 366.

71. *Family Immigration*, U.S. DEPARTMENT OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration.html> [<https://perma.cc/R6EJ-9YPF>] (last visited Sept. 8, 2023).

72. U.S. FAMILY-BASED IMMIGRATION POLICY, CONG. RSCH. SERV. (2018), at summary (“Family reunification has historically been a key principle underlying U.S. immigration policy.”).

73. See, e.g., Dara Lind, *What “Chain Migration” Really Means — and Why Donald Trump Hates It So Much*, VOX (Jan. 30, 2018, 12:48 PM), <https://www.vox.com/policy-and-politics/2017/12/29/16504272/chain-migration-family-how-trump-end> [<https://perma.cc/QUB8-YW9J>] (describing and analyzing the Trump administration's disdain for family-based visas).

increase the wages of current immigrants since new immigrants are close economic substitutes for current immigrants.<sup>74</sup> The native-born, by contrast, do not generally compete directly with immigrants for work and (despite the rhetoric) are almost entirely unaffected by immigrant labor when it comes to wages.<sup>75</sup> The fact that fears of competition from immigrants run vice versa underscores just how unmoored from material reality the immigration discussion tends to be.

That current lawfully present immigrants were selected by the immigration law status quo might also prime lawfully admitted immigrants to be less-than-true proxies for nonresident aliens' interests in U.S. immigration policy. As "the chosen," these immigrants—particularly green card holders—have a certain stake in the legitimacy of the citizenry's right to exclude and enjoy social benefits by distinguishing themselves from "illegals."<sup>76</sup> These sentiments are likely amplified upon naturalization, the moment former noncitizens gain hard electoral power.

Representation in the political system of those to whom law and policy apply is a basic, minimum guarantor of legislative and policymaking quality and legitimacy in a democratic state. For all the many pathologies that make representation less effective than we might otherwise hope in other policy domains,<sup>77</sup> the virtual absence of direct noncitizen representation when it comes to immigration ensures that whatever policy or legal product that emerges from political debate will be impoverished for the absence of the voices and political power of those most affected by the policy.

### B. *The Epistemic Poverty of Immigration Law*

Since immigrants' voices are defanged by their marginalization from immigration politics, immigration law and policy are firmly in citizens' hands. Yet citizens have *de minimis* first- or second-hand knowledge about immigration law's effects on the noncitizen population, or even on their own lives. This is not a problem unique to immigration. The general ignorance of citizens on a wide array

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74. See generally LANT PRITCHETT, LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON INTERNATIONAL LABOR MOBILITY (2006); Gianmarco I. P. Ottaviano & Giovanni Peri, *Rethinking the Effect of Immigration on Wages*, 10 J. EUR. ECON. ASS'N 152, 186–91 (arguing that native wages benefit from higher immigration, but existing immigrants' wages are negatively impacted by more immigrants).

75. Ottaviano & Peri, *supra* note 74, at 191.

76. Even undocumented people seek to maintain a self-perception as law-abiding. They resist viewing border exclusion as illegitimate in the abstract, preferring instead to justify their own disobedience of immigration exclusion as applied to themselves individually, or to a group they belong to. See generally Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622 (2015).

77. These areas of dysfunction are legion in the United States; immigration presents these general problems *in extremis*. Increasingly, scholarship has begun to recognize that American constitutional structures need updating. Bicameralism and the separation of the executive and the legislative branch of government, as well as the increasing unrepresentativeness of the Senate, have created a structural gap between the will of the people and that of their representatives. The bias towards inaction built into the constitutional system is causing demoscclerosis. See generally JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 3–16 (1995); FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 488–501 (2014); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).



of issues is the subject of a voluminous literature that has led some commentators to urge that democracy is in practice a poor way to govern—especially if it is highly centralized.<sup>78</sup>

Even so, immigration poses an extreme version of this problem. If any robust check exists on the manipulability of citizens by the media, fake news,<sup>79</sup> or the distorting effects of contemporary social life, it is those citizens' own lived experiences of law and policy, coupled with the experience and historical memory of their forefathers and the contemporary experiences of friends and family.<sup>80</sup> This "folk knowledge"<sup>81</sup> can make democratic input into politics valuable even if expert opinion questions its worth. But folk knowledge is thin to nonexistent for the majority of citizens who author immigration law. Their lived experience of immigration resides in the distant past.<sup>82</sup> The great remove at which most citizens view their familial immigration history, coupled with the tangible and accessible reality of their assimilated Americanness, means that what citizens know about immigration has more in common with mythmaking than the more grounded, valuable forms of folk-knowledge production.<sup>83</sup> Citizens simply have little to add to the immigration-law-making calculus.<sup>84</sup> Think of the epistemic issue this way: asking

78. See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER*, at ch. 1 (2013) (detailing the history of voter ignorance of empirical reality and summarizing the voluminous literature on voter ignorance).

79. See Lance E. Mason, Daniel G. Krutka & Jeremy Stoddard, *Media Literacy, Democracy, and the Challenge of Fake News*, 10 J. MEDIA LITERACY EDUC. 1, 2 (2018).

80. For example, it is folk knowledge that provides the foundation for Black jurors to nullify convictions against Black defendants and to understand nullification as an act of protest in a criminal justice system that systematically discriminates against Black people. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 684–86 (1995). Law and society scholars define folk knowledge as "the everyday taken-for-granted understandings that shape people's perceptions, thinking, actions and reactions to events and situations." Benjamin D. Steiner, Austin Sarat & William J. Bowers, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461, 462–63 (1999). Such knowledge "may take the form of general beliefs people hold as a matter of cultural intuitions and sensibilities or the form of specific cultural 'facts' or realizations that make up its concrete 'truths.'" *Id.* at 463.

81. Steiner, Sarat & Bowers, *supra* note 80, at 463.

82. 2013 *Current Population Survey*, U.S. CENSUS BUREAU ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT (showing that 75.4% of the U.S. population is third-and-higher-generation immigrant, meaning at least both of their parents are U.S. natives).

83. Journalist Jennifer Mendelsohn has made an effort to recover this kind of lost personal knowledge as a form of political resistance. Using her forensic genealogy skills, she has uncovered the modest or "illegal" origin stories of many prominent Americans that oppose immigration today. Much of Jennifer's work appears on her website. Jennifer Mendelsohn, *Family Histories*, RESISTANCE GENEALOGY, <http://resistancegenealogy.com> [<https://perma.cc/U5JV-PUBL>] (last visited Sept. 8, 2023). Mendelsohn, for example, responded to a tweet by Trump White House Deputy Chief of Staff Dan Scavino Jr. promoting White House policies ending "#ChainMigration" by uncovering the "chain migration" that led to Scavino's birth in the United States. Mendelsohn wrote: "So Dan. Let's say Victor Scavino arrives from Canelli, Italy in 1904, then brother Hector in 1905, brother Gildo in 1912, sister Esther in 1913, & sister Clotilde and their father Giuseppe in 1916, and they live together in NY. Do you think that would count as chain migration?" Jennifer Mendelsohn (@CleverTitleTK), TWITTER (Jan. 11, 2018, 8:06 AM), <https://twitter.com/CleverTitleTK/status/951485584090034176?s=20> [<https://perma.cc/G4RK-3QY9>].

84. Recent quantitative empirical research not only confirms this ignorance but suggests that learning about the near impossibility of legal migration for most migrants increases support for migrants. See Alexander Kustov and Michelangelo G. Landgrave, *Immigration is Difficult?! Informing*

the average U.S. citizen about immigration is like asking the average Chicagoan to opine on the problem of wildfires in the San Francisco Bay Area. The Chicagoan will likely have a view to offer, but it is of scant utility from the point of view of a democratic epistemology, since it is uninformed by the kind of knowledge that makes input from citizens valuable in the law and policymaking process.

Again, while the unmoored nature of citizens' political views is a broad problem, the absence of lived experience with immigration law makes the issue far more acute with immigration. For example, the average citizen may be completely ignorant of their position on proper monetary policy, but they know whether they are richer or poorer, whether they have a job or not, whether milk or gasoline<sup>85</sup> is more costly or less, and whether their friends, neighbors, or relatives have been laid off. While this idiosyncratic, personalized policy knowledge may be more or less stable than we would like,<sup>86</sup> it still ensures on average that some modicum of empirical reality enters into citizens' political views on those subjects on average. By contrast, the average citizen's knowledge of immigration is far less concrete than her knowledge of the economy. As with white citizens' ideas about African Americans and other minority groups, citizens' social segregation from the immigrant population ensures that citizens' knowledge of immigration's effects is formed by media representations, vivid chance encounters, sudden racial diversification in their town or neighborhood,<sup>87</sup> or hearing linguistic differences.<sup>88</sup> Friendships, family ties, work, or personal experiences are not reliable sources of immigration law's effects because of the segregation of citizens from immigrants' lives.<sup>89</sup>

### C. *The Asymmetric Drives of Reactionaries and Immigration "Normies"*

Immigration politics and law, for most citizens, becomes an area of knowledge production where the imagination is given a particularly wide berth. The reactionary

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*Voters About Immigration Policy Fosters Pro-Immigration Views*, OSF PREPRINTS (Sep. 6, 2023), [osf.io/mu4j5](https://osf.io/mu4j5) [<https://perma.cc/5LUP-NQMN>].

85. The price of gasoline in particular is widely tracked and acts as a heuristic for broader assessments of the economy. Emily Badger & Eve Washington, *Why the Price of Gas Has Such Power Over Us*, N.Y. TIMES (Oct. 25, 2022) <https://www.nytimes.com/2022/10/25/upshot/gas-prices-biden-midterms.html> [<https://perma.cc/JJ69-MEYY>].

86. *Public's Views of Nation's Economy Remain Positive and Deeply Partisan*, PEW RSCH. CTR. (July 25, 2019), <https://www.pewresearch.org/politics/2019/07/25/publics-views-of-nations-economy-remain-positive-and-deeply-partisan/> [<https://perma.cc/956A-SAKT>]; Brad Plumer, *The Partisan Split In How Americans View the Economy*, WASH. POST (Oct. 25, 2012, 10:43 AM), <https://www.washingtonpost.com/news/wonk/wp/2012/10/25/the-partisan-split-in-how-americans-view-the-economy/> [<https://perma.cc/WSX5-T7J5>]; *Views of Nation's Economy Remain Positive, Sharply Divided by Partisanship*, PEW RSCH. CTR. (Feb. 7, 2020) <https://www.pewresearch.org/politics/2020/02/07/views-of-nations-economy-remain-positive-sharply-divided-by-partisanship/> [<https://perma.cc/X3UT-FAZF>].

87. Sociologist Ryan Enos has published extensively on the way that social stereotypes manifest in these ways. See RYAN D. ENOS, *THE SPACE BETWEEN US: SOCIAL GEOGRAPHY AND POLITICS* 114 (2017) (describing experimental results that show that merely hearing Spanish spoken on a train platform makes whites more conservative and restrictionist in their attitudes towards immigrants). Enos argues that the strong correlation between Trump votes and the increase in Latino population in a particular geography is electoral proof of the validity of his train-experiment findings. *Id.* at 139.

88. See ENOS, *supra* note 87, at 114.

89. *Id.*

imagination in particular can find much fodder for concern. More perniciously still, the canvas on which citizens paint their vision of immigration encompasses the emotionally charged plane of the nation. In this plane, abstraction and imagination can slide easily into fantasy. The nation is an imagined—not a “natural”—community, as Benedict Anderson established thirty years ago.<sup>90</sup> Still, it is an imagined community so intoxicating that it motivates its citizen members to die on its behalf.<sup>91</sup> This elemental, blood-and-soil aspect of national membership can lead citizens to “know” things about immigration that are emotionally potent and fantastical, with dire consequences for policymaking.

Thinking about immigration in the absence of concrete, personal knowledge of its effects—and under the spell of nationalism—leads to fantastical thinking.<sup>92</sup> Rather than resist the fantastical quality of citizens’ views, the institutions that preside over fashioning and implementing immigration law—Congress and the Department of Homeland Security (DHS)—make the fantasy real in various ways.<sup>93</sup> But the potency of these fantasies is asymmetric, and those asymmetries have policy consequences. Immigration restrictionists are motivated to make immigration law more draconian because the mere presence of outsiders within the imagined community—especially racialized others—triggers a sense of injury to pro-restriction citizens. For instance, Stephen Miller, the architect of Trump’s immigration reign of terror, was moved to *tears* in advocating for a restrictionist<sup>94</sup> policy position and wrote approvingly of an idea peddled on a white nationalist website urging “the U.S. [to] deport immigrants on trains ‘to scare out the people who want to undo our country.’”<sup>95</sup> Miller pressed hard for Trump’s violent family separation policy out of a similar nationalist zeal.<sup>96</sup> These policies both respond to the authoritarian mindset and inflame it.

For pro-immigrant citizens, the emotional drive to work to change or prioritize further liberalizing immigration law is simply not as intense or lasting on average or collectively, in the same way that the effect of George Floyd’s murder on whites’ attitudes towards racism has already faded.<sup>97</sup> For reactionaries, immigration itself is a psychic affront that needs to be remedied to reach their own internal

90. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (3d ed. 2006).

91. See JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* 5–6 (2008).

92. See, e.g., Mary D. Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 *LAW & SOC’Y REV.* 701, 721–22 (2008) (illustrating the emotional resonance of unlawful border crossing on anti-immigrant groups).

93. For illustrations of the way immigration policy reifies fantasies, see Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 *AM. CRIM. L. REV.* 105 (2012); Pratheepan Gulasekaram, *Why a Wall*, 2 *U.C. IRVINE L. REV.* 147, 156–68 (2012); and Daniel I. Morales, *In Democracy’s Shadow: Fences, Raids, and the Production of Migrant Illegality*, 30 *IMMIGR. & NAT’Y L. REV.* 547 (2009).

94. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, *NEW YORKER* (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> [<https://perma.cc/EG47-Z8X2>].

95. *Id.*

96. *Id.*

97. Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 *HOUS. L. REV.* 817, 841–43 (2021).

equilibrium and restore a sense of safety and order. For the average pro-immigrant partisan, immigration reform is a nice-to-have, but it doesn't pose an existential threat to most pro-immigrant voters or their loved ones *themselves*.<sup>98</sup> Immigration is existential for the many disenfranchised noncitizens who are present in the United States and for those outside the United States who wish to enter, but for whom no visas have been allocated—their actual power, as I have shown, is radically limited or nonexistent.<sup>99</sup> While these asymmetries of motivation have perhaps been overcome for a time in the post-Trump era, it remains to be seen if Trump's overt cruelty is enough to motivate pro-immigrant citizens to force lasting change.<sup>100</sup> The failure to pass comprehensive immigration reform in the 117th Congress suggests strongly that the asymmetry cannot be overcome in the near future.<sup>101</sup>

#### *D. National Control Promotes Fantasy Fulfillment*

None of this is new, and it is a large part of why immigration law is bad law. Fantasy fulfillment has operated as a core tenant of modern immigration regulation since its inception. Our national immigration agencies were consolidated and tightened in the 1920s with the purpose of fashioning a pure *herrenvolk* nation of white northern Europeans.<sup>102</sup> America was to be made great again by restocking the country with the “right” Anglo/Teutonic white people.<sup>103</sup> By shutting off immigration from Asia and the “lesser” southern races of Europe,<sup>104</sup> the American body politic would be reinvigorated with the blood of its founding peoples.

As Europe's “unworthy” bloodlines were cut off from the American project, the miscegenated Spanish colonial populations who wished to migrate from the Americas were criminalized.<sup>105</sup> Crossing the border without permission was made a crime whose enforcement was presided over by a sparse and symbolic border patrol.<sup>106</sup> With officers stationed every twenty miles, seasonal and permanent

98. Libertarians—those whose psychology lies at the opposite end from authoritarians—are triggered by blatant affronts to pluralism. This may explain the ferocity of the response to the Muslim ban in cities that likely carry higher than average numbers of residents who fit this psychological profile. See STENNER, *supra* note 53.

99. Migrating in violation of the law or amassing at the border is actually the most potent form of power migrants possess. As Ayten Gündoğdu has emphasized, this kind of doing is in fact how human rights are made: “Human rights owe their origins, guarantees, and reinvention to political practices that are not fully authorized by the prevailing institutional and normative frameworks.” AYTEN GÜNDOĞDU, *RIGHTSLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS* 188 (2015).

100. For details about this asymmetry in motivation, see generally Daniel I. Morales, *Dissent in Immigration*, 16 *LAW CULTURE & HUMAN* 250 (2020).

101. See *infra* Part II.

102. ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 8 (2006).

103. *Id.*

104. *Id.*

105. See *United States v. Carillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021); Jesse Franzblau, *Landmark Decision Finds “Illegal Reentry” Charges Are Racist in Origin, Discriminatory in Practice*, NAT. IMMIGRANT JUST. CTR. (Aug. 26, 2021), <https://immigrantjustice.org/staff/blog/landmark-decision-finds-illegal-reentry-charges-are-racist-origin-discriminatory> [<https://perma.cc/ZL44-FWPK>].

106. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 60 (2014).

migrants could still physically enter the United States,<sup>107</sup> but the token presence of immigration enforcers marked that migration as a wrongful trespass. Thus, the transfusion of Anglo-Teutonic people imagined and implemented by Congress in the 1920s was realized only partially. The unfinished quality of the project was not precisely caused by lack of will but rather a lack of technological capacity, as well as a desire for a pliable, seasonal labor force in agricultural regions.<sup>108</sup> Where early twentieth-century bureaucratic know-how could meet the challenge of excluding Italians and Greeks, securing the southern border from racially unsuitable invaders remained just a dream.<sup>109</sup> The mounted border patrol officers stationed at city-size intervals in the hot, southern sun were placeholders for an aspirational ambition.<sup>110</sup> Like the flags planted in *terra virginis* by Columbus and his successors, the border patrol officers were staking a claim that later generations, with more bureaucratic capacity and technological know-how, would perfect and fulfill.

A century later, Donald Trump ascended to power by promising to renew and complete this racial project. The symmetry between his nationalist fantasy and the early twentieth-century nativists' is startling. Trump focused on "Mexican" immigrants (a catchall for all Latinos) from the beginning of his 2016 presidential campaign: his very first tweet labeled Mexicans "druggies, rapists and killers."<sup>111</sup> His promise to build a wall at the southern border would literally fill in the space between those mounted, thinly deployed, 1920s border patrol officers. Though the wall shares with the early border patrol a symbolic, monumental quality, the ambition to secure the United States from the races to the South is already more fully realized today than the nativists of the early twentieth century could have believed possible—the execution of this vision long predates Trump.<sup>112</sup>

Donald Trump's immigration policy came as a shock (a discontinuity rather than a continuation of a longstanding national aspiration) because a competing vision, with its own fantastical qualities, emerged in the 1960s. It is that more cosmopolitan vision with which most immigration liberals identify that has dominated the national—and especially the elite—imagination.<sup>113</sup> With the passage

107. Doing so with advanced permission was nominally legal and possible at the time, though, in practice, access by those who most needed to migrate was restricted by various bars to legal entry, like the risk of becoming a public charge. See Mae M. Ngai, *The Lost Immigration Debate*, BOS. REV. (Sept. 6, 2006), <https://www.bostonreview.net/articles/mae-m-ngai-the-lost-immigration-debate-border-control/> [<https://perma.cc/2VBS-SVJJ>].

108. NGAI, *supra* note 106 at 312. There is also a history of the border patrol that may be interesting by Kelly Lytle Hernandez that probably talks about that too.

109. See generally ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006).

110. NGAI, *supra* note 106. See also KELLY LYTLE HERNANDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* (2010).

111. Donald Trump (@realDonaldTrump), TWITTER (June 19, 2015, 7:22 PM), <https://twitter.com/realdonaldtrump/status/612083064945180672> [<https://perma.cc/D7NR-RHAE>].

112. See generally Daniel I. Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 30 IMMIGR. & NAT'Y L. REV. 547 (2009); Gulasekaram, *supra* note 93, at 163–69 (2012).

113. See, e.g., Sheen S. Levine & David Stark, Opinion, *Diversity Makes You Brighter*, N.Y. TIMES (Dec. 9, 2015), <https://www.nytimes.com/2015/12/09/opinion/diversity-makes-you-brighter.html> [<https://perma.cc/AT55-76RQ>]; Kimberlé Crenshaw, Opinion, *Why Intersectionality Can't Wait*, WASH. POST (Sept. 24, 2015, 3:00 PM), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/> [<https://perma.cc/WP34-69EM>].

of the Hart-Celler Act in 1965, a new dream took shape in its place: a nation drawn from the peoples of every corner of the globe. This cosmopolitan nationalism was captured evocatively in a coda to Justice Kennedy's majority opinion in *Arizona v. United States*:

Immigration policy shapes the destiny of the Nation. On May 24, 2012, at one of this Nation's most distinguished museums of history, a dozen immigrants stood before the tattered flag that inspired Francis Scott Key to write the National Anthem. There they took the oath to become American citizens. . . . These naturalization ceremonies bring together men and women of different origins who now share a common destiny. They swear a common oath to renounce fidelity to foreign princes, to defend the Constitution, and to bear arms on behalf of the country when required by law. 8 CFR §337.1(a). The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.<sup>114</sup>

It is this dream of a creedal, contractual, enlightenment nationalism that is now beginning to curdle as the old *herrenvolk* fantasy reasserts itself—just as whites face the reality of demographic eclipse.

But it is important to appreciate fully that this dream, the dream of a nation of people with radically diverse bloodlines bound together in an oath of allegiance to a constitutional document, is just as unnatural, just as constructed, just as much a fantasy made real,<sup>115</sup> as the nativists' northern European *volk*. The fabricated, dream-like quality of the post-1964 vision is most glaring when one considers that Hart-Celler's race neutrality—equal immigration quotas for every country of origin—ignored the long history of disproportionate seasonal and permanent migration from Mexico and South and Central America.<sup>116</sup> The imposition of global equality of access to U.S. borders thus rendered well-established routes of circular migration<sup>117</sup> even more marginal and criminal than they already were.<sup>118</sup> Like 1920s nativists, sixties immigration liberals imagined the American terrain as one that the citizenry could design and control,<sup>119</sup> but now, instead of fashioning a northern Europe on the frontier, the United States was to be a global microcosm sandwiched between the world's great oceans.<sup>120</sup>

114. *Arizona v. United States*, 567 U.S. 387, 415–16 (2012).

115. All nations are, in a significant sense, fantasies that rely on stories to bolster the connections and solidarities that sustain a sense of nation. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 113–14 (1983); see also KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* (2018).

116. See Roger Waldinger, *US Immigration Policy in the 1980s*, 10 *ETHNIC & RACIAL STUD.* 370, 370 (1987).

117. See Molly E. Kammien, *No More Band-Aid Solutions: Improving Immigration Reform by Addressing the Root Causes of Mexican Migration and Refining Foreign Direct Investment*, 80 *BROOK. L. REV.* 503, 509 (2015).

118. *Id.*

119. ZOLBERG, *supra* note 109.

120. This is the vision that equal immigration quotas for countries of vastly different scale implies. Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 *HARV. C.R.-C.L. REV.* 291, 309 (2014).

In some respects, the globe-between-the-coasts vision has been successfully and peacefully realized. Whereas in the 1960s a full 80% of foreign-born Americans still hailed from Europe, today European immigration is a marginal phenomenon.<sup>121</sup> For the most part, this radically diverse population has adjusted well to American life, integrating into the social fabric—under dramatically different economic conditions—about as well as previous generations of immigrants.<sup>122</sup> Unlike in Europe, the United States has largely avoided alienating its immigrant populations to such a degree that immigrant’s native-born children become reliable sources of domestic terrorism.<sup>123</sup> That said, the violence of some angry, native-born white men suggests the alienation might run in the other direction.<sup>124</sup>

Still, the retention of the nativists’ commitment to border closure has had pernicious effects. Latinos have been singled out for stigmatization, and the economic and social outcomes of American-born Latinos have suffered as a result.<sup>125</sup> Perhaps worse, however, is that the premise of border closure, which sixties liberals adopted as forcefully as 1920s nativists, is increasingly one that can and is being realized—at outrageous cost. The eight billion<sup>126</sup> dollars spent annually to deport migrants or prevent their entry is, in economic terms, pure, deadweight

121. *Chapter 5: U.S. Foreign-Born Population Trends*, PEW RSCH. CTR. (Sept. 29, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/chapter-5-u-s-foreign-born-population-trends/> [<https://perma.cc/N36J-6UD7>].

122. *Immigration’s Economic Impact*, WHITE HOUSE COUNCIL OF ECONOMIC ADVISORS (June 20, 2007), [https://georgewbush-whitehouse.archives.gov/cea/cea\\_immigration\\_062007.html](https://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.html) [<https://perma.cc/U6J3-YT46>].

123. *See, e.g.*, Richard Wike, Bruce Stokes & Katie Simmons, *Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs*, PEW RSCH. CTR. (July 11, 2016), <https://www.pewresearch.org/global/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> [<https://perma.cc/633L-AV46>].

124. *See, e.g.*, Alan Feuer, *How Buffalo Suspect’s Racist Writings Reveal Links to Other Attacks*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/buffalo-shooting-replacement-theory-christchurch-el-paso.html> [<https://perma.cc/J98P-AN7K>]; Jelani Cobb, *How the Trail of American White Supremacy Led to El Paso*, NEW YORKER (Aug. 6, 2019), <https://www.newyorker.com/news/daily-comment/how-the-trail-of-american-white-supremacy-led-to-el-paso> [<https://perma.cc/W7PS-S3LV>]. The persistence of white supremacy can also be seen in the phenomenon of “multi-racial whiteness,” whereby people whom whites would code as nonwhite nonetheless find participation in white supremacy and antiblackness particularly alluring. *See* Cristina B eltran, Opinion, *To Understand Trump’s Support, We Must Think in Terms of Multiracial Whiteness*, WASH. POST (Jan. 15, 2021, 4:44 PM), <https://www.washingtonpost.com/opinions/2021/01/15/understand-trumps-support-we-must-think-terms-multiracial-whiteness/> [<https://perma.cc/RN4D-5SKA>].

125. *See* Luis Noe-Bustamante, *Latinos experience discrimination from other Latinos about as much as from non-Latinos*, PEW RSCH. CTR. (May 2, 2022), <https://www.pewresearch.org/short-reads/2022/05/02/latinos-experience-discrimination-from-other-latinos-about-as-much-as-from-non-latinos> [<https://perma.cc/3DE3-Z5EB>]; Aditya Aladangady and Akila Forde, *Wealth Inequality and the Racial Wealth Gap*, FEDS NOTES, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Oct. 22, 2021), <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html> [<https://perma.cc/45LR-UZF7>] (“In the United States, the average Black and Hispanic or Latino households earn about half as much as the average White household and own only about 15 to 20 percent as much net wealth.”).

126. *Who We Are*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/about-ice#:~:text=The%20agency%20has%20an%20annual,Principal%20Legal%20Advisor%20> [<https://perma.cc/JS7B-D36G>] (last visited Sept. 9, 2023) (noting that ICE has an annual budget of \$8 billion).

loss<sup>127</sup>—an expenditure for which no concrete material benefit is gained by any relevant constituency. Billions were—and are—being burned to keep willing workers from contributing their labor to American economic production.<sup>128</sup>

Worse still, the establishment of a norm and expectation of aggressive, punitive, and expressive immigration enforcement creates institutions that lobby for their own continued existence—and amplified budget lines.<sup>129</sup> That DHS budget allocations ballooned about equally under Republican and Democratic administrations underscores the structural nature of the problem and the now-entrenched power of the immigration-industrial complex.<sup>130</sup> That complex has self-interested bureaucrats, contractors, and political actors that lobby for the perpetuation of the high-enforcement status quo.<sup>131</sup> The border patrol union's decision to file suit against the Obama administration's exercise of prosecutorial discretion in favor of DREAMers underscores the point.<sup>132</sup> And a demagogic, nativist President set the complex loose to work on an expressly white nationalist, anti-immigrant agenda.<sup>133</sup> The daily drip of news reports during the Trump years of DHS's absurd and wasteful targeting of good, hardworking immigrants because of Trump and Attorney General Jeff Sessions's zero-tolerance immigration policy

127. FISCALLY IRRESPONSIBLE: IMMIGRATION ENFORCEMENT WITHOUT REFORM WASTES TAXPAYER DOLLARS, IMMIGR. POL'Y CTR. (2011), <https://www.americanimmigrationcouncil.org/research/fiscally-irresponsible-immigration-enforcement-without-reform-wastes-taxpayer-dollars> [<https://perma.cc/92D2-5MQB>].

128. This is true of global immigration restriction expenditures as well. See Michael A. Clemens, *Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?*, J. ECON. PERSPS., Summer 2011, at 83–106.

129. Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012).

130. *DHS Budget*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/dhs-budget> [<https://perma.cc/3WZW-9C5K>] (showing the DHS budget from the years 2003–2024) (last updated Mar. 1, 2023); Todd Miller, *The Real Border Surge: The End of Title 42 and the Triumph of the Border-Industrial Complex*, BORDER CHRON., (Jun. 8, 2023) [https://www.theborderchronicle.com/p/the-real-border-surge-the-end-of?utm\\_source=post-email-title&publication\\_id=373432&post\\_id=126885228&isFreemail=true&utm\\_medium=email](https://www.theborderchronicle.com/p/the-real-border-surge-the-end-of?utm_source=post-email-title&publication_id=373432&post_id=126885228&isFreemail=true&utm_medium=email) [<https://perma.cc/V554-VBYJ>] (describing the swarm of hi-tech vendors hawking their wares at the annual border security expo as evidence of self-perpetuating nature of the border security apparatus).

131. See Alyssa Ray, *The Business of Immigration: Tracking Prison Privatization's Influence on Immigration Policy*, 33 GEO. IMMIGR. L. REV. 115 (2019); Michael Cohen, *How For-profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/> [<https://perma.cc/2BZF-52BU>]; Washington v. GEO Grp., Inc., No. C17-5769 RJB, 2021 WL 4263743 (W.D. Wash. Sept. 20, 2021); see also Miller, *supra* note 130.

132. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 731 (N.D. Tex. 2013).

133. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> [<https://perma.cc/63U5-UVQP>]; Caitlin Dickerson, *The Secret History of the U.S. Government's Family-Separation Policy*, ATLANTIC (Aug. 7, 2022), <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/> [<https://perma.cc/V6QE-HNFS>].



brought this fantastical reality home.<sup>134</sup> The abject horror of family separation was simply the most distilled version of these violent forces.<sup>135</sup>

Powerful nations must pay heed to their dreams since they just might come true. The fatal flaws in the 1960s dream, the illegalization of migration from the southern hemisphere, and the retention of the nativists' commitment to border closure were not as problematic from the 1960s through the 1990s because the bureaucratic infrastructure to rigorously enforce closure still did not exist. The relatively unregulated southern border allowed for heavily stigmatized, but still market-sensitive and mutually beneficial labor arrangements between employers and workers to occur and self-correct.

But as the will and capacity to tighten the border increased after the great migrations that resulted from the North American Free Trade Agreement (NAFTA) and the anxieties of the post-9/11 era, the dream of closure has become more and more realized on the ground.<sup>136</sup> The increasing, technocratic perfection of the ability to exclude and deport has rendered the lives of millions of hardworking contributors to the American project ghastly, brutish, and terrifying.<sup>137</sup> Citizens' dream of closure and their monopoly on designing the territory, whether as a white-nationalist haven or a multiracial utopia, is the nightmare for migrants who have long-term, ad hoc, mutually beneficial—but illegalized—arrangements with the United States. And still worse for those seeking entry but kept on the outside.

#### *E. Centralization Makes It All Worse*

The only thing worse than bad law is bad law that reigns over a large swath of territory.<sup>138</sup> Bad immigration law in the United States dooms millions around the globe to the stunted horizons realizable in the countries of their birth.<sup>139</sup> Even in

134. See Ron Nixon, 'Zero Tolerance' Immigration Policy Surprised Agencies, Report Finds, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/us/politics/immigration-family-separation-zero-tolerance.html> [<https://perma.cc/TB6J-ZHGE>]; see also Sean Sullivan, 'Zero-tolerance Policy Means Zero Humanity:' Democrats Decry Trump Immigration Policy After Tour of Detention Center, WASH. POST (June 17, 2018, 7:05 PM), [https://www.washingtonpost.com/politics/zero-tolerance-policy-means-zero-humanity-democrats-decry-trump-immigration-policy-after-tour-of-detention-center/2018/06/17/bbf68b2c-7248-11e8-9780-b1dd6a09b549\\_story.html](https://www.washingtonpost.com/politics/zero-tolerance-policy-means-zero-humanity-democrats-decry-trump-immigration-policy-after-tour-of-detention-center/2018/06/17/bbf68b2c-7248-11e8-9780-b1dd6a09b549_story.html) [<https://perma.cc/X4LM-LHCZ>].

135. For a chronicle of the policy decisions that led to border patrol agents separating children from their mothers and fathers, see Dickerson, *supra* note 133.

136. See Robert Warren, *In 2019, the US Population Continued a Decade-Long Decline and the Foreign Born Population Neared Zero Growth*, 9 J. ON MIGRATION & HUM. SOC'Y 31 (2021); Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/4GAM-N57K>].

137. See Randy Capps & Michael Fix, *How the Fear of Immigration Enforcement Affects Mental Health of Latino Youth*, MIGRATION POL'Y INST. (Dec. 2020), <https://www.migrationpolicy.org/news/how-fear-immigration-enforcement-affects-mental-health-latino-youth> [<https://perma.cc/BAP2-932N>]; *Facing the Fear of Deportation*, UNIV. OF S. CAL. SUZANNE DWORAK-PECK (June 6, 2019), <https://msw.usc.edu/mswusc-blog/facing-the-fear-of-deportation/> [<https://perma.cc/P65J-4J9C>].

138. See Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. R. 913 (2018).

139. See Lant Pritchett & Farah Hani, *The Economics of International Migrations*, in OXFORD RES. ENCYCLOPEDIA OF ECON. & FIN. (2019), [https://lantpritchett.org/wp-content/uploads/2019/12/Encyclopedia-economics-of-international-migration\\_final\\_v2.pdf](https://lantpritchett.org/wp-content/uploads/2019/12/Encyclopedia-economics-of-international-migration_final_v2.pdf) [<https://perma.cc/2UEJ->

our increasingly centralized<sup>140</sup> and nationalized<sup>141</sup> political system, immigration law stands out for its entrenched anti-federalist commitment.<sup>142</sup> And the wisdom of centralizing immigration questions is so entrenched and naturalized that it goes virtually uncontested in the law reviews.<sup>143</sup>

The conviction that immigration is a national concern underwrites this extreme centralization, yet even a facial examination of the way immigration impacts citizens reveals that immigration is really only a marginally national concern.<sup>144</sup> And, as Senator Sessions's comments in Part II will illustrate, whatever immigration concerns really are national, like maintaining respect for the rule of law, or maintaining a particular (usually racialized) vision of national identity, are abstract or even metaphysical. Why, then, should all core policy decisions be made exclusively at the national level? The case for centralization is even less clear when we consider that it makes bad immigration law worse, while also failing to satisfy the citizenry's need to feel in control of immigration.

While immigrants have spread to areas of the country unaccustomed to immigrants, immigration remains heavily concentrated in major metropolitan areas. Yet it is rural residents, the citizens least likely to feel the impact of immigration, who are most likely to oppose immigration and most strongly opposed to it.<sup>145</sup> Centralization, then, grants a decisive political say over immigration to a group of citizens that have relatively little concrete information about the effects of immigration policy on their lives and for whom any shifts in immigration policy are likely to be imperceptible, since they never had any concrete way to judge noncitizens' impact in the first place. This overrepresentation is even more troubling when we consider that what little these citizens do know about immigration is radically skewed.

Recall that citizens' knowledge of immigration is idiosyncratic and structurally impoverished. Citizens don't really live in the United States in their daily lives; they live in an incredibly diverse set of towns, cities, and neighborhoods.<sup>146</sup> To the extent

RH7K]; Michael A. Clemons, Claudio E. Montenegro & Lant Pritchett, *The Place Premium: Wage Differences for Identical Workers Across the US Border*, (Harv. Univ: John F. Kennedy Sch. of Gov't, Working Paper No. 09-004, 2009), <https://dash.harvard.edu/bitstream/handle/1/4412631/Clemens%20Place%20Premium.pdf> [<https://perma.cc/SYE2-V5LR>].

140. See Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483 (1998).

141. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1091 (2014).

142. But see Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085 (2019) (suggesting that the centralized quality of immigration decision-making is relatively extreme).

143. See, e.g., Ilya Somin, *How to Curb Executive Power to Exclude Immigrants*, YALE J. ON REGUL. (Mar. 31, 2021), <https://www.yalejreg.com/nc/the-president-and-immigration-law-05/> [<https://perma.cc/AS5R-33QK>]; Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107 (2014). The work of Ilya Somin and Elina Treyger is an exception to the rule.

144. See *infra* Part III.

145. See ENOS, *supra* note 87; Maria Sacchetti & Emily Guskin, *In Rural America, Fewer Immigrants and Less Tolerance*, WASH. POST (June 17, 2017, 10:00 AM), [https://www.washingtonpost.com/local/in-rural-america-fewer-immigrants-and-less-tolerance/2017/06/16/7b448454-4d1d-11e7-bc1b-fddb8359dee\\_story.html](https://www.washingtonpost.com/local/in-rural-america-fewer-immigrants-and-less-tolerance/2017/06/16/7b448454-4d1d-11e7-bc1b-fddb8359dee_story.html) [<https://perma.cc/RD46-HQTL>].

146. See Richard V. Reeves, Opinion, *America's Zip Code Inequality*, BROOKINGS (Dec. 21, 2015), <https://www.brookings.edu/opinions/americas-zip-code-inequality/> [<https://perma.cc/9SV4->

the United States has a reality in people's daily lives, it is a virtual reality lived through the consumption of media—Fox News, Facebook, Twitter, or print.<sup>147</sup> Placing immigration in the national domain, then, is a choice to have citizens' experience of immigration mediated through national media consumption. Thus, a woman killed by an undocumented person in San Francisco is consumed by citizens in Iowa as a threat to the United States; though, to these Iowa citizens, there is no realistic prospect of such a murder ever happening where they live. And, indeed, San Franciscans are much better situated to regulate the risk of immigrant violence in their midst.<sup>148</sup> In this way, the placement of immigration politics in a national, centralized domain actively creates national anxiety about immigration; in doing so, it manufactures a feeling of local threat to citizens by immigrants in places where no local threat exists in fact. This structure needlessly feeds the authoritarian dynamic.<sup>149</sup>

Beyond creating fictional threats that activate reactionaries needlessly, centralization promises citizens a sense of control over immigration that it cannot deliver. Indeed, centralization makes citizens feel as if they lack control over immigration: that a distant cabal of pointy hats and elites is running the show and not looking out for the interest of “real Americans.” The judicial preservation of centralized control compounds this feeling. When citizens do feel themselves to be impacted locally by immigration and they legislate in response, their efforts are routinely quashed by federal courts who use an especially robust version of the preemption doctrine to prevent most exercises of local immigration control.

In this way, the preservation of radically centralized control over immigration policy exacerbates the already deep deficiencies in immigration law production. It empowers people with no prospect of being affected by immigration policy to influence that policy based on prejudice, insecurity, fear, and a skewed nationalized media vision of immigration. Centralization empowers this ignorance while also making the citizens who act on their ignorance feel disempowered because the decision maker is far away in Washington, and local legislation on immigration is quashed in court to preserve centralized control, inflaming the issue still further. Given these dynamics, the surprising thing about Trump's rise is that it took so long

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QQVT]; see also Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L.R. 577 (2015).

147. Media has always been a central technology of nationalism. See ANDERSON, *supra* note 90 at 24–30, 37–46. Newspapers were essential to the establishment and maintenance of national identities during the anti-imperial period that began with the American Revolution. *Id.* Local life was not eclipsed, however, by national life—a separate sphere existed. The decline of local media, or its nationalization, and the rise of newer forms of media, like social networks, have helped to make all politics national. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (showing how state and local politics are sites of national contestation); see also GULASEKARAM & RAMAKRISHNAN, *supra* note 31. Social networks have also made media far more statistically unrepresentative of empirical reality. Virality and the well documented way that social media feeds users more and more extreme content means that media consumption today, on average, creates a far more skewed and disunified picture of reality than in previous eras. Again, while these forces make a host of political and social issues less tractable, the impact on immigration is more devastating than in other domains because of the lack of vote-backed feedback into the system from those most affected by the policies.

148. See Morales, *supra* note 14.

149. STENNER, *supra* note 53.

for an anti-immigrant figure like him to arrive and triumph—not that he ultimately did.

#### *F. Presidentialist Control is Dangerous*

In addition to centralized rule, technocratic mismanagement of immigration law is characterized by broad agency and presidential discretion to administer immigration law.<sup>150</sup> In practice, this discretion has effectively encompassed the right to legislate<sup>151</sup> immigration law since DHS has a number of tools at its disposal to grant functional immigration status to groups of immigrants en masse, or to refrain from deporting them en masse.<sup>152</sup> A recent example of this power in practice is the grant of Deferred Action for Childhood Arrivals (DACA) to millions of DREAMers by the Obama administration and its subsequent rescission by Trump (and its reinstatement by Courts and then Biden, and now its undoing by the Courts yet again).<sup>153</sup> Grants of long-term (decades) “Temporary” Protective Status to groups of refugees by every administration since Eisenhower have been just as impactful but have flown under the radar. Trump rescinded many of these grants for hundreds of thousands of noncitizens who have lived lawfully in the United States for decades under this status.<sup>154</sup>

The wide berth given to the immigration agency has in practice functioned as, and been valued for, ameliorating the poor quality of immigration law. Laws passed by Congress are harsh in order to be responsive to the anti-immigrant citizens over-represented in the legislature;<sup>155</sup> agency discretion to grant forms of legal status and refrain from deporting groups of immigrants has sometimes softened the harshness of Congress’s commands.<sup>156</sup>

More important than either of these delegations of authority, however, has been a long history of Congress appropriating to the immigration agency at levels that provide for skimpy enforcement capacity.<sup>157</sup> But in recent decades, enforcement capacity has been ramping up dramatically.<sup>158</sup> The post-9/11 reorganization of the Immigration and Naturalization Service (INS) into ICE and the Bureau of Citizenship and Immigration (BCIS) has led to a shift in culture where

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150. ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020).

151. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 513 (2009).

152. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); COX & RODRIGUEZ, *supra* note 150, at 492.

153. Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 39 *IMMIGR. & NAT’Y L. REV.* 265, 267–69 (2018).

154. SARAH PIERCE & ANDREW SELEE, *IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION* (Dec. 2017), <https://www.migrationpolicy.org/sites/default/files/publications/TrumpatOne-final.pdf> [<https://perma.cc/6HP8-ENX3>].

155. See Daniel I. Morales, *In Democracy’s Shadows: Fences, Raids, and the Production of Migrant Illegality*, 5 *STAN. J. C.R. & C.L.* 23 (2009).

156. COX & RODRIGUEZ, *supra* note 150, at 521; see also NGAI, *supra* note 108 (describing the early twentieth century agency action to ameliorate deportation).

157. See AM. IMMIGR. COUNCIL, *THE GROWTH OF THE U.S. DEPORTATION MACHINE* (2014), <https://www.americanimmigrationcouncil.org/research/growth-us-deportation-machine> [<https://perma.cc/9XWY-TUEC>].

158. *Id.*

ICE and its agents are monomaniacally focused on immigration enforcement.<sup>159</sup> In the Cold War period, presidentialist control was asymmetric in favor of a positive disposition towards immigrants and immigration, relative to the congressional posture.<sup>160</sup> But with the ramp-up in immigration enforcement capacity and various curtailments of pro-immigrant presidential discretion elaborated by the judiciary, the presidentialism of immigration law has lately made bad immigration law worse. Trump made the problem obvious, but the writing was on the wall even during the Obama administration.<sup>161</sup> What Trump added to the mix was a return to racialized justifications for immigration enforcement and regulation, and a relentless focus on the issue in the immigration bureaucracy.<sup>162</sup> Crossing the radical Rubicon paid dividends by galvanizing his base with taboo ideas.<sup>163</sup> And this policy focus in a domain of high presidential discretion led to one of Trump's signal successes—terrifying immigrants and dropping immigration levels down to near zero by the end of his term.<sup>164</sup>

159. USCIS HIST. OFFICE & LIBR., OVERVIEW OF INS HISTORY 11 (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf> [<https://perma.cc/8G36-RPAL>]. McLeod, *supra* note 127 at 151 (emphasizing the pathologies of this enforcement-focused culture).

160. COX & RODRIGUEZ, *supra* note 150, at 506.

161. The Obama years made clear that immigration enforcement at very high levels had taken on a life of its own. The logics of immigration enforcement and the national political structure simply didn't allow any significant off-ramp from border closure and a zealous enforcement posture. Biden's continued use of Title 42 to prevent Venezuelans from entering the US confirms the structural nature of high immigration enforcement. See Yvette Benavides & Dan Katz, *Biden Administration Extending Title 42 Migrant Expulsions, Says Mexican Government*, TEX. PUB. RADIO (Oct. 11, 2022, 11:58 AM), <https://www.tpr.org/border-immigration/2022-10-11/biden-administration-extending-title-42-migrant-expulsions-says-mexican-government> [<https://perma.cc/5L7B-UHRJ>]; Ted Hesson, Dave Graham & Humeyra Pamuk, *Exclusive: Biden Urges Mexico to Take Migrants Under COVID Expulsion Order He Promised to End*, REUTERS (Sept. 15, 2022, 12:47 PM), <https://www.reuters.com/world/americas/exclusive-biden-urges-mexico-take-migrants-under-covid-expulsion-order-he-2022-09-14/> [<https://perma.cc/VV2Z-ACVW>]. The persistence of radically high enforcement has two parts—the first is capacity: we can keep people from entering the country to a degree that has never been achievable before. The second structural characteristic stems from the media environment and the entrepreneurialism of Republican politicians. By constantly calling attention to the movement of migrants across the U.S. border with Mexico, conservative politicians can shape a border “disorder” narrative that triggers feelings of threat in voters. See ALBERTSON & GADARIAN *supra* note 52.

162. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> [<https://perma.cc/7435-MQZZ>].

163. Eugene Scott, *For Trump and Some of His Supporters, Violence Against Immigrants Appears Totally Acceptable*, WASH. POST (May 10, 2019, 10:23 AM), <https://www.washingtonpost.com/politics/2019/05/10/trump-some-his-supporters-violence-against-immigrants-appears-totally-acceptable/> [<https://perma.cc/2AL9-B7A3>].

164. See Stuart Anderson, *Trump Cuts Legal Immigrants By Half And He's Not Done Yet*, FORBES (July 21, 2020, 1:03 AM), <https://www.forbes.com/sites/stuartanderson/2020/07/21/trump-cuts-legal-immigrants-by-half-and-hes-not-done-yet/?sh=39daea976168> [<https://perma.cc/RP8T-9E9C>]; see also Alex Nowrasteh, *President Trump Reduced Legal Immigration. He Did Not Reduce Illegal Immigration*, CATO INST. (Jan. 20, 2021, 10:01 AM), <https://www.cato.org/blog/president-trump-reduced-legal-immigration-he-did-not-reduce-illegal-immigration> [<https://perma.cc/68XZ-QD7H>].

Trump understood the needs of reactionary citizens for homogeneity and repurposed all the technocratic tools available to the executive to deliver what anti-immigrant citizens have always wanted: a whiter America.<sup>165</sup> Hence, Trump's legislative proposal to gut legal immigration, in particular family-based immigration<sup>166</sup> and the visa lottery (both of which skew very non-white);<sup>167</sup> his administrative illegalization of millions of black and brown refugees from Haiti and Guatemala with his withdrawal of temporary protective status from these groups;<sup>168</sup> the administration's public charge rules; and his success in driving down immigration levels to record lows.<sup>169</sup> By increasing the undocumented population in this way, Trump has created more enforcement targets for ICE, and thus more opportunities to stoke the national fear of immigrants that propelled him into office.<sup>170</sup> Now, post-Trump, the broader danger of technocratic, presidentialist rule is painfully obvious. The immigration agency was delegated broader than usual discretion to make immigration law and policy on the theory that experts would do better than (largely ignorant) citizens and yet would be able to mollify citizens enough that they wouldn't revolt against the arrangement. The revolt is now here, and the lead revolutionary—Trump—used all the unchecked technocratic levers at his disposal to remake immigration law.<sup>171</sup>

### G. Can Bad Law Be Better?

With law this structurally unsound, one might wonder what, if anything, can redeem it. One answer, increasingly prominent among activists<sup>172</sup> and scholars,<sup>173</sup> is “nothing.” Abolition of immigration law, or at least its institutional forms, e.g., #AbolishICE, is the only answer that can meet the force of my and other<sup>174</sup>

165. Daniel Morales, *Dissent in Immigration*, 16 LAW CULTURE & HUMAN. 250, 254–55 (2020) (invited commentary).

166. *Remarks by President Trump on Modernizing Our Immigration System for a Stronger America*, WHITE HOUSE (May 16, 2019, 2:35 PM), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-modernizing-immigration-system-stronger-america/> [<https://perma.cc/BGE4-H7N4>].

167. Nazli Kibria, #FamiliesBelongTogether: Facts and Fictions of Race and Family in U.S. Immigration Policy, 34 SOCIO. F. 809, 813 (2019).

168. Miriam Jordan, *Trump Administration Ends Temporary Protection for Haitians*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/haitians-temporary-status.html> [<https://perma.cc/U3NH-FY84>]; see also Brian Naylor, *Trump Signs Agreement With Guatemala To Limit Asylum Seekers*, NPR (July 26, 2019, 4:47 PM), <https://www.npr.org/2019/07/26/745727128/trump-signs-agreement-with-guatemala-to-limit-asylum-seekers> [<https://perma.cc/H7DV-25FA>].

169. See Nowrasteh, *supra* note 164.

170. Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 12–14 (2012).

171. See David Nakamura, *It's Not Just Deportations and The Border: Trump Seeks to Remake the Immigration System*, WASH. POST (Mar. 6, 2017, 6:00 AM), [https://www.washingtonpost.com/politics/its-not-just-deportations-and-the-border-trump-seeks-to-remake-the-immigration-system/2017/03/05/a4231b52-fec5-11e6-8ebe-6e0dbe4f2bca\\_story.html](https://www.washingtonpost.com/politics/its-not-just-deportations-and-the-border-trump-seeks-to-remake-the-immigration-system/2017/03/05/a4231b52-fec5-11e6-8ebe-6e0dbe4f2bca_story.html) [<https://perma.cc/EMD4-HJL9>].

172. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

173. McLeod, *supra* note 1.

174. CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS (Benjamin N. Lawrence & Jacqueline Stevens eds., 2017); STEVENS, *supra* note 4; INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE (Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens eds., 2008); JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS (2011); Cházaro, *supra* note 15.

critiques. Fanciful as this posture may strike the average law professor, a kind of backdoor abolitionist approach has always been at the core of comprehensive immigration proposals for as long as they have been proposed. This crypto-abolitionism is embodied in the amnesty provisions, and the centrality of that amnesty to any reform proposal deemed “comprehensive.”<sup>175</sup> The call for a mass amnesty of ten million undocumented is abolitionist in deed, if not in word.<sup>176</sup> The reality of this relationship between amnesty and abolitionism, while denied by nearly all lawmakers proposing amnesty, in part explains the durability and ferocity of comprehensive reform opponents: a law that can be suspended or forgiven at that scale, the thinking goes, can’t really remain law at all; the necessity and justice of mass amnesty nonetheless exposes the bankruptcy of immigration law in general. This is a principal reason why amnesty is so threatening to reactionaries, who believe that they need immigration law to maintain their internal equilibria by excluding those who threaten social homogeneity.

This proto-abolitionism in the immigration context is hyper-fragile, though. The conditions for its fulfillment or even growth do not exist at the national level. The localities with deeper proto-abolitionist commitments lack the power to expand their practices beyond their refusal to cooperate with the federal government or their inclusion of the undocumented in the provision of social services. Another possibility for structural change, however, emerges from the epistemic focus of my critique in this Part. Correction of epistemic failures in immigration politics may point the way to more than reformist possibilities in immigration law but stop short of across-the-board abolitionism. I call these shifts in legal structure “reconstructive,” and I will elaborate on them in Part III.

## II. PARSING THE FAILURES OF NATIONAL IMMIGRATION CONTROL

In the last Part, I theorized why citizens systematically make bad immigration law and suggested that the monopoly of citizen control over immigration policy, as well as the articulation of citizen control at the national level, doomed immigration law to its current (poor) state.

This Part provides proof of concept, showing in detail how the epistemic failures I described in Part I play out in the national legislative arena. Using a close analysis of debates that derailed the DREAM Act in 2003—and seemingly forever after—I show that the claims of undocumented people to belonging in the United States are systematically corroded by their placement in the national frame of reference. The national frame distorts perspectives on both the right and the left, I show, casting serious—perhaps, fatal—doubts on the suitability of the *national* political conversation to produce even modestly rational immigration law—especially in Congress, which enjoys plenary power to shape it.

My close reading of usually closed-door conversations, along with public ones between senators and their staffers, shows that debate about immigration in these

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175. Reform proposals that lack an amnesty for undocumented people are not referred to as “comprehensive” proposals in policy circles. See *Comprehensive Migration Policy Reform*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/topics/comprehensive-immigration-reform#:~:text=Comprehensive%20immigration%20reform%2C%20a%20policy,by%20the%20U.S.%20labor%20market> [https://perma.cc/E476-2P3Y].

176. Linda Bosniak, *Arguing for Amnesty*, 9 LAW CULTURE & HUMAN. 432, 441 (2013).

national political bodies does not just reflect the distortions of the immigration debate among the citizenry; debate among representatives adds its own distinct, distorting layer. When senators take up the question of immigration, they do not take it up on its own, or on its own terms. Discussion of immigration activates or motivates senators to defend the sanctity of metaphysical concepts like citizenship (particularly the superiority of the kind held by natural-born citizens); the usually forgotten role of senators to act as trustees of the national interest rather than as parochial poll aggregators beholden to their constituents' views on every individual issue; and the assertion of national supremacy and uniformity in immigration matters. Together, the activation of these first-order metaphysical concerns about the abstract soundness of national concepts serves as yet another barrier—to date insurmountable—to the uptake of the material reality of immigration on the ground and the production of rational law in response to it. I show through my analysis of these debates that the discussion of immigration in national institutions activates scripts, roles, and modes of argumentation that alienate immigration issues from material reality, damning the interests of the undocumented in the process.<sup>177</sup>

Apart from and above the distorting influence of the national frame of reference on the debate about immigration questions, the failure to pass the DREAM Act over the last twenty years is its own damning data point. An immigration lawmaking structure that cannot legalize the DREAMers is a structure that needs top-to-bottom reconstruction, not reform.

DREAMers, educated in American schools for the bulk of their young lives, are “Americans in their heart, in their minds, in every single way but one: on paper.”<sup>178</sup> There is simply no credible, rational argument to deny this group of undocumented children a visa and a path to citizenship. Everyone loses as a result of the multi-decade legislative failure to legalize these “constructive” Americans. Empowering a level of government this dysfunctional with a virtual monopoly on immigration lawmaking *and* continuing to believe that it can produce different and better outcomes if the stars would align just so is its own naivete, if not madness. It is past time immigration scholars and reformers look to reconstruct immigration law by placing these powers in other jurisdictional locations more amenable to rational policy. I argue that the local, municipal, or (preferably) metro levels represent more fertile jurisdictional locations to produce a better immigration law that we so desperately need.

My critique of the national at this historical juncture does not deny or displace the importance of the national struggle for immigrant rights and immigration reform. The struggle against bad immigration law has to occur at all levels of government. These decades of deferred DREAMs were not for naught, even though Congress has refused action. The impossibility of producing decent immigration law is what produced, dialectically, the abolitionist currents we see today. Had the DREAM Act passed decades ago, it is doubtful the immigration abolitionist consciousness spreading today—however tenuous—would have come into being at all. The concrete knowledge of political impossibility that DREAMer

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177. *But cf.* McLeod, *supra* note 93 (describing a similar methodology).

178. *Remarks by the President on Immigration*, WHITE HOUSE (Jun. 15, 2012, 2:09 PM), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/45XB-WXXB>].



activists gained in their struggle radicalized the tranche of undocumented people with the most political standing and power to make demands, like “No one is illegal,” “Not one more deportation,” and “Abolish ICE”—movements that are truly democratic and emancipatory.

*A. The Impoverished DREAM Act Deliberation in the Senate*

The plenary power doctrine vests sovereign power over immigration questions in Congress, and Congress articulates that power in debates about legislation among representatives and with the public. Representatives are sensitive to a variety of influences on their behavior—donor views,<sup>179</sup> ideology,<sup>180</sup> and party loyalty<sup>181</sup>—as well as the persuasive force of their constituents.<sup>182</sup> The Tea Party (and since Trump’s election, Indivisible, from the left) have channeled and deployed “constituent power”<sup>183</sup> to direct—and especially to block—legislation in Congress.<sup>184</sup> These people-powered strategies depend, however, on representatives consistently recognizing these protesting individuals as constituents, i.e., as local voters with political power that can imperil a candidate’s prospects for reelection, or to whom they otherwise owe a duty of representation.<sup>185</sup> The local tie is important. When a representative sees protestors as constituents, she is reminded of her role as a direct representative of their interests as those constituents see them.<sup>186</sup>

179. There is a rich, empirical political science literature documenting the myriad ways in which representatives listen and act on the views of some constituencies more than others. See Lynda W. Powell, *The Influence of Campaign Contributions on Legislative Policy*, 11 FORUM 339 (2013); Heinz Eulau & Paul D. Karpis, *The Puzzle of Representation: Specifying Components of Responsiveness*, 2 LEGIS. STUD. Q. 233 (1977); Matthew S. Mendez & Christian R. Grose, *Doubling Down: Inequality in Responsiveness and the Policy Preferences of Elected Officials: Doubling Down*, 43 LEGIS. STUD. Q. 457 (2018); Christopher Ellis, *Understanding Economic Biases in Representation: Income, Resources, and Policy Representation in the 110th House*, 65 POL. RSCH. Q. 938, 939 (2012) (arguing representatives are more responsive to wealthy constituents); Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463 (2011) (arguing representatives are more responsive to white citizens).

180. See John E. Jackson & John W. Kingdon, *Ideology, Interest Group Scores, and Legislative Votes*, 36 AM. J. POL. SCI. 805 (1992).

181. See generally GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993).

182. See Joshua D. Clinton, *Representation in Congress: Constituents and Roll Calls in the 106th House*, 68 J. POL. 397, 398 (2006) (summarizing research on the relationship between constituent preferences and representative voting behavior).

183. See LEAH GREENBERG & EZRA LEVIN, *WE ARE INDIVISIBLE: A BLUEPRINT FOR DEMOCRACY AFTER TRUMP* (2019).

184. See Benita Roth, *Learning from the Tea Party: The US Indivisible Movement as Countermovement in the Era of Trump*, 23 SOCIO. RSCH. ONLINE 539 (2018), <https://journals.sagepub.com/doi/10.1177/1360780418764733> [<https://perma.cc/E322-WG4U>].

185. *Id.* at 540; see also *supra* Part I.A.

186. Empirical political science research reveals that protests by poorer, minoritized voters in a district can trigger responsive political decisions in representatives for fear of electoral reprisal. See LaGina Gause, *Revealing Issue Salience via Costly Protest: How Legislative Behavior Following Protest Advantages Low-Resource Groups*, BRIT. J. POL. SCI. 259 (2020) <https://www.cambridge.org/core/journals/british-journal-of-political-science/article/revealing-issue-salience-via-costly-protest-how-legislative-behavior-following-protest-advantages-low-resource-groups/E0A861EEB8758CDA77D0DC86A5F7110A#> [<https://perma.cc/V67S-SUBL>]. DREAMers

As we shall see from an examination of a debate among senators in a committee markup of the DREAM Act, however, a failure to see DREAMers as constituents in this sense leads members of the Senate—across ideological divides—to act as trustees of a perceived “national interest”<sup>187</sup> that excludes the interests of the DREAMers themselves. This activation of senators’ role as trustees of a national interest,<sup>188</sup> rather than representatives of local interests, significantly disadvantages immigrants, even extraordinarily sympathetic ones like the DREAMers, from persuading Congress to adopt policies that would benefit them. National framing erases even the limited proxy representation DREAMers would otherwise enjoy. Beyond this erasure, the national interest damns DREAMers by serving as a vessel into which politicians pour their own fantasies or those of their enfranchised (white) constituents. These fantasies distort the discussion of *citizens’* interest in DREAMers’ emancipation. The national frame unmoors immigration discourse from material reality.

The following analysis proves up the argument with a close reading of “Story 6: Marking up the DREAM,” an episode of a documentary entitled “*Twelve Stories: How Democracy Works Now*.”<sup>189</sup> The documentarians gained unprecedented access to closed-door conversations about comprehensive immigration reform bills and a standalone bill called the DREAM Act, which failed to make it into law, but was intended to legalize DREAMers.

#### B. A Close Reading of DREAM Act Deliberations

We can see how the trusteeship framework undermined DREAMers’ constituent power from the very beginning of the legislative process. In a conversation between Senator Dick Durbin and representatives of the Mexican Consulate, we are informed that the bipartisan effort to pass the DREAM Act is only possible at all because of Senator Orin Hatch, the chair of the immigration subcommittee, “whom God has touched and believes in this bill.”<sup>190</sup>

Christian charity or belief in the divine can be a powerful driver of social change,<sup>191</sup> as it was during the Civil Rights era, yet constituent/representative relationships do not normally depend on such stuff but rather on democratic norms. A charitable posture towards the enactment of legislation provides a lesser

and the immigrants that are the primary advocates of legalization do not enjoy the same level of responsiveness because they do not trigger a fear of electoral reprisal since they cannot vote.

187. See Dario Castiglione & Mark E. Warren, Rethinking Democratic Representation: Eight Theoretical Issues 8 (May 2006) (unpublished manuscript) (on file with the Centre for the Study of Democratic Institutions, University of British Columbia) (“Representation, argued Edmund Burke, should be ‘virtual’: representatives should not be delegates, but rather trustees who use their best judgment on behalf of those they represent.”) <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.565.9652&rep=rep1&type=pdf> [<https://perma.cc/L277-KQRA>].

188. This discussion expands on the argument set forward in Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 710–35 (2017) (Part I), that the national interest is an inhospitable framework in which to launch pro-immigrant policies.

189. *Twelve Stories: How Democracy Works Now: Story 6: Marking up the DREAM* (H.B.O. Mar. 24, 2010) [hereinafter *Marking up the DREAM*].

190. *Id.*

191. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

motivation than, for example, fear of voter reprisal,<sup>192</sup> or even a sense of duty grounded in longstanding norms of representative behavior.<sup>193</sup> Advocating in Congress for the DREAMers is optional, not required, despite the urgency of the issue for DREAMers themselves. It therefore shouldn't come as a surprise that legislative solutions for this inconsistently recognized, nonvoting, "charity-case" constituency have languished.

Leading Democrats on the subcommittee approached the issue in a similar posture to Senator Hatch. Senator Feinstein's staffer, LaVita Strickland, framed the need for a DREAM Act as one of charity and bureaucratic necessity: "We only have like 2000 agents to pick up 11 million people so we have to prioritize." Feinstein's staffer later added: "We just want to help these high school kids." Though this statement gets closer to the idea that these kids are Feinstein's constituents, the formulation is still removed from full-throated advocacy of the interests of DREAMers as Californians. Instead, Californians' interests would, following the logic of the staffer, perhaps be better represented by a radical increase in agents to "pick up 11 million" undocumented people—an immigration "reform" that in the last two decades has actually come to pass. The logic that places DREAMers outside the political community is bipartisan.

That said, on the right, the erasure of the DREAMers' local constituent power is more pronounced and logically knotty. Whereas Feinstein's staffer stops short of transforming DREAMers into red-blooded Americans, the right is interested in protecting the privileged status of natural-born citizens (read: white citizens) by firming up the hierarchy between citizen and alien. There is an effort to shore up the citizen/noncitizen distinction by cutting off state-level developments that blur this line, symbolically reasserting the supremacy of citizens in the national interest.

In a behind-the-scenes discussion between Georgia Senator Saxby Chambliss and his staffer Joe Jacquot,<sup>194</sup> Jacquot informs Senator Chambliss that the DREAM Act "repeals a provision that says that if a university offers 'illegal aliens' [DREAMers] in-state tuition, then it has to offer it for U.S. citizen or legal immigrants from *any* state."<sup>195</sup>

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192. See Gause, *supra* note 186, at 261 (emphasizing that fear of low-propensity voter reprisal at the ballot box drives representatives to act in conformity to the protests of marginalized groups).

193. Legislative entrepreneurship is a pervasive phenomenon explained in part by the genuine interest that certain legislators have in particular issues. Such interest and motivation can come from a range of sources, including religious belief. See GREGORY WAWRO, LEGISLATIVE ENTREPRENEURSHIP IN THE U.S. HOUSE OF REPRESENTATIVES (2001). Sincere religious belief has played a critical role in animating nearly all the liberationist civil rights struggles in U.S. history, from slavery and abolitionism to the Civil Rights Movement of the sixties and into the battle for immigrants' rights being fought today. See also Cover, *supra* note 191 (arguing that robust protections for religious pluralism is juris generative. Law can draw from alternative normative traditions of law and religion in order to imagine new ways of justice and law).

194. Jacquot is better known today as the Florida Deputy Attorney General who brought suit against Obamacare. Emily L. Mahoney, *Desantis Hires Lawyer with Major Role in Obamacare Suit To Counsel Administration*, TAMPA BAY TIMES (Dec. 19, 2018) <https://www.tampabay.com/florida-politics/buzz/2018/12/19/desantis-hires-lawyer-with-major-role-in-obamacare-suit-to-counsel-administration/> [<https://perma.cc/MJ9E-Q8ZH>] ("Jacquot played a major role in Florida's first suit (along with 25 other states) against the Affordable Care Act, also known as 'Obamacare.'").

195. *Marking Up the DREAM*, *supra* note 189 (emphasis added).

This provision, passed years before,<sup>196</sup> sits quite uncomfortably against background norms of American federalism. Offering in-state tuition is a quintessentially state-level prerogative that is uncontroversial.<sup>197</sup> Qualifications for in-state tuition vary from state to state, but all qualifying criteria tend to hinge on length of in-state presence—“residence”—within the state. Indeed, in-state tuition, along with admissions benefits tied to residency, represent the wages of state citizenship,<sup>198</sup> and even state-based cultural allegiance, at perhaps their most robust.<sup>199</sup>

Rather than recognize the obvious oddity of having nationalized the question of which state residents receive in-state tuition in the context of “our federalism,”<sup>200</sup> Chambliss’s staffer extends the nationalizing logic, arguing that repeal of the provision is a problem because Georgia’s state-funded Hope Scholarships will go to undocumented eighteen-year-olds just the same as to U.S. citizen Georgians.<sup>201</sup> He says, “there are good students who are US citizens who are not going to get Hope scholarships because illegal aliens will get them.”<sup>202</sup>

Why Georgia’s state-level officials are incapable of making the decision to fund or not the DREAMers tuition for themselves is not mentioned. Nor is the fact that undocumented children attend and earn diplomas from Georgia’s public schools, just like citizens, and so may be deserving of scholarships on that basis.

Chambliss endorses his staffer’s point:

I think you know I certainly got compassion for kids of illegal aliens and think we ought not to punish the kids but it’s a fact that you can’t give them preference . . . over children of normal citizens. If they’re exceptional students, I hate to see them penalized, but by the same token I don’t want to see them have advantages over hardworking, tax-paying American citizens’ children.<sup>203</sup>

Note the reassertion of the supremacy of national citizenship and the charitable posture in which Chambliss considers this issue (“I certainly got

196. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 § 505, 8 U.S.C. § 1623.

197. All fifty states offer in-state tuition to state residents (citizens) even though much of the land (or the wealth that land generates) was donated by the national government to the States for the purpose of establishing universities. See Margaret A. Nash, *The Dark History of Land-grant Universities*, WASH. POST. (Nov. 8, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/11/08/dark-history-land-grant-universities/> [<https://perma.cc/CL9N-SNEV>] (“‘Land-grant’ means that the federal government set aside tracts of unclaimed public land and said that when that land was sold, the profit would go to support new and already existing colleges in each state.”). That is, the federal government devolved land from its sovereignty to the state, yet the institutions were always governed and maintained for the benefit of the individual states themselves. Jacquot’s argument is, for this reason, an abrogation of state citizenship in favor of a national ownership over state universities that the federal government clearly divested itself of.

198. For a discussion of the history of state citizenship, see Jonathan D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

199. See Morales, *supra* note 52.

200. For a summary of the distinctive debates and structural elements of American federalism, see generally Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012).

201. *Marking Up the DREAM*, *supra* note 189.

202. *Id.*

203. *Id.*

compassion for these kids”). Also note the way that Chambliss and his staffer have erased the possibility that vis-à-vis the state of Georgia, which paid for K-12 education for undocumented children just the same as for citizen children, national status could just not matter at *all* in the provision of Georgia’s Hope Scholarships. That these DREAMERS could be Georgia’s kids—if not the “nation’s”—is dismissed without a thought, even though that position is the most natural extension of the logic of state membership in the context of state educational benefits. Instead, this core, state-level question is reflexively and unthinkingly nationalized.

### C. Quashing Experimentation with Non-Citizen Status

Understanding and unpacking the “natural” way in which political discussions about the undocumented take for granted the “necessary” primacy of national citizenship is important.<sup>204</sup> It is important not just to explain why the easiest amnesty is so difficult but also to explain the legal and political intractability of undocumented status more generally.

The logics driving norms and laws about state citizenship and national citizenship differ markedly in their openness to the undocumented. The legal provision under discussion in Senator Chambliss’s office restricting states’ ability to grant in-state tuition to the undocumented, nullified the open- borders (presence-equals-membership) logic of state citizenship by extending this privilege of state citizenship to national citizens with no residential tie to a state university system.

Unlike national citizenship, state citizenship is not the product of express invitation (immigration control),<sup>205</sup> blood (*jus sanguinis*),<sup>206</sup> or birth (*jus soli*).<sup>207</sup> It is simply a function of individual choice of residence, perfected with presence in a state over time.<sup>208</sup> In these ways, state residence models an open-borders world—a world where immigration law has been abolished.<sup>209</sup> If it’s possible to imagine a borderless nation for purposes of human migration,<sup>210</sup> then peaceful and productive residence of uninvited noncitizens within the United States is a test case for the feasibility of such a regime.

204. For a discussion of the possibilities that might emerge were states to amplify the status of the citizenship that they alone have the power to extend to the undocumented, see Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869 (2015).

205. See generally Immigration and Nationality Act, 8 U.S.C. §§ 1101–1573.

206. For a discussion of the racist history of the U.S. *jus sanguinis* citizenship law, see generally Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

207. See Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521 (2006–2007) (elaborating the concept of “alien citizenship,” a form of citizenship lived by certain racialized classes of birthright citizens who face relentless suspicion of their legal status).

208. *Crowley v. Glaze*, 710 F.2d 676, 678 (1983); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

209. While some assert that state citizenship can operate in this borderless way precisely because national citizenship does the hard work of discrimination between outsiders and insiders, this isn’t necessarily true; that is an open, empirical question. See STEVENS, *supra* note 4, at 77 (critiquing Michael Walzer and others and arguing for “a world of states without nations, where people belong because of choice, residence, and commitment.”).

210. For efforts to imagine how a world with free movement might work, see JOHNSON, *supra* note 51, at 168–69.

The DREAMers themselves—productive and assimilated—are positive evidence for that feasibility. If we accept that state reactions to undocumented residents can represent test cases for open borders, then the relative economic and social success of the DREAMers and undocumented persons in general, for many years and through the rise of Trump, along with the acceptance and embrace of undocumented presence by many states and localities—today, 81% percent of Americans nominally support granting long-term undocumented residents citizenship<sup>211</sup>—may be viewed as compelling evidence that the national government’s discriminatory apparatus excludes too many.

When U.S. states act on that borderless, residence-driven state citizenship logic by granting in-state tuition or admissions preference—or other goods—to DREAMers, they also can be said to implicitly adopt the premise that the national exclusionary apparatus was unnecessary, or failed effectively to identify the universe of individuals with valuable social and economic contributions to make.<sup>212</sup> In doing so, states also blur the lines of social entitlement between citizens and “aliens.”

It follows, then, that the national legal provision barring in-state tuition for the undocumented sought to prevent states from acting on the evidence of the inefficacy of national immigration law. It was an attempt to stop states from acting on this knowledge; it also sought to shore-up the primacy of national immigration control and national citizenship, even by trammeling on domains where state sovereignty is normally given pride of place—places where our commitment to federalism should embrace experimentation with norms of inclusion at lower levels of government.

This tendency to cut off sub-national pluralism and experimentation in immigration law is an expression of the epistemic flaws laid out in Part I. These representatives feel the need to act on flawed epistemic inputs and default understandings and concepts. But it is also another structural institutional barrier. The nationalizing move will always cut off abolitionist possibilities like state or local citizenship unless there is a groundswell for those positions below. Crucially, though, abolitionist immigration politics from below cannot happen unless national law makes room for sub-national understandings of migrant belonging, or it continues to be seized through uncooperative federalism or more radical noncompliance, akin to what occurred in some northern jurisdictions in the run-up to the Civil War.<sup>213</sup> Still, Dan Farbman’s work on that period shows that historically, most localities deferred to national determinations of what constitute national questions. Rebellious localism was the rare exception in the fight for slavery abolitionism, for example.<sup>214</sup> Curiously, if immigration abolitionism is to grow from

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211. Eighty-one percent of Americans either favor, or strongly favor a proposal “[a]llowing immigrants living in the U.S. illegally the chance to become U.S. citizens if they meet certain requirements over a period of time.” *In Depth: Topics A to Z, Immigration, 2019 Jan 21–27*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> [<https://perma.cc/3KAU-7L4X>] (last visited Apr. 1, 2023).

212. I further develop this idea of “evidence” for the possibility of a borderless U.S. in Daniel I. Morales, *“Illegal” Migration is Speech*, 92 IND. L.J. 735 (2017).

213. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019).

214. *Id.*

below, the legitimacy of immigration policy pluralism must be sanctioned from above.<sup>215</sup>

*D. Shoring up the Sanctity of National Immigration Law*

The violent impact of cutting off this experiment in citizenship from development at the state and local level—and of senators’ insistence on approaching the issue of the DREAMers as national trustees—is on full display in Senator Jeff Sessions’s colloquy at the DREAM Act markup hearing:

[W]ith regard to in-state tuition . . . and we have to think about policy here . . . let’s get back to the fundamental problem that we’re dealing with our immigration laws are a joke and it’s time for us as a nation to reevaluate the entire deal here with immigration. Is this just a utilitarian deal, is this just something we need to take care of old people, is this just something we need to get work done that Americans might not want to do. Or are we . . . charged with the responsibility of establishing a rational legal system to deal with immigration.<sup>216</sup>

Note the way Sessions erases the local nature of in-state tuition preferences by portraying any shift in such local policies as triggering a need for an avalanche of national legislative policy revision. That revision is also aimed at re-establishing the sanctity of law as a “rational” legal system, by which he means a system that it is not “utilitarian,” one that is instead doctrinaire and formalist; a system whose purity and sanctity is demonstrated by resisting the public recognition of the obvious material contributions of DREAMers and their parents to American society. Seeing these undocumented people as *constructive* citizens—for what they are in material reality—is a breach of the “rule of law.”

Senator Feinstein responds respectfully to Sessions’s argument, emphasizing their shared view:

[T]he law’s the law don’t selectively enforce it. I think he’s right about that . . . that’s I think good public policy. The problem with that is that there is enormous human complexity when attached to it so it becomes very difficult to have the rigidity because a lot of people are going to be very hurt by it.<sup>217</sup>

The problem isn’t the law in itself for Feinstein, it’s more the law’s inconvenient subjects—DREAMers—that mar the law’s otherwise Apollonian perfection. That is, the systematic and structural poverty of immigration law that I put forward in Part I goes unrecognized; it is the charitable or humanitarian impact of the law that demands a legislative response—not the fundamental injustice of immigration exclusion, and not a failure of political representation of those persons most affected by immigration law.

Feinstein then goes on to talk about a DREAMer whose parents are farmworkers:

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215. *Id.*

216. *Marking Up the DREAM*, *supra* note 189.

217. *Id.*

The whole family was going to be deported. They've been here for twenty years. The young girl who I think is a senior in high school is fourth in a class of 300. She's one of the most promising students, she's a mentor, she works with cancer patients. She does everything we would want her to do. So I guess that's why I would say to Senator Sessions, you know, the law also has to be flexible.<sup>218</sup>

While this is the closest Feinstein gets to representing DREAMers as constituents, notice how her language is still framed in abstractions, i.e., the policy value of giving space for “human complexity.” She expresses no language of obligation—just charity. Feinstein also separates her model high school senior from “us”— U.S. citizens, Californians. The DREAMer in Feinstein’s example does everything “we [U.S. citizens] would want her to do.” The DREAMer is not us—not a Californian and not an American in Feinstein’s formulation.

That said, Feinstein’s entreaty was moving and grounded in local detail. To her clear and specific example of the impact of the DREAM Act on one of the DREAMers, Senator Sessions offers this extraordinary reply:

I thank the senator from California for her thoughts I know that she has given a lot of thought to this over a lot of years and it's a matter of great importance to her state. Sometimes being so close to the issue makes it maybe more difficult to comprehend what to me is a pretty simple thing and that is that we're creating a system that rewards and incentivizes and encourages families, illegal workers to bring children and there is no doubt whatsoever that if we pass this bill we will have passed a law that would encourage people to bring children and encourage illegal immigration.<sup>219</sup>

This is as complete a dismissal as one could imagine of the possibility that DREAMers are constituents whose interests as state residents are worthy of consideration and representation at all. Indeed, first-hand knowledge of the law’s effects on undocumented lives—Feinstein’s partial efforts to actually represent the DREAMers as her constituents—is for Sessions a problem to be overcome. Sessions’s knowledge of abstract “rule of law” principles, and his Apollonian distance from the undocumented immigrants, he urges, ought to be given evidentiary pride of place in immigration policymaking.<sup>220</sup>

Fatally flawed knowledge, in my terms, is for Sessions the *correct* knowledge on which to base policy. The elevation of formal, national citizenship status over the performance of citizenship<sup>221</sup> is for Sessions a feature, not a bug, of policymaking at the national level.

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218. *Id.*

219. *Id.*

220. This kind of logic rhymes with the way property law was used to naturalize slavery and preserve and extend the rights that flowed from ownership of human beings. *See generally* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 *YALE L.J.* 1062 (2022).

221. *But see* Press Release, Barack Obama, President, United States of America, Remarks on Immigration (June 15, 2012) (transcript available at *Remarks by the President on Immigration*, OBAMA



Perhaps just as troubling for DREAMers is the fact that that most senators miss the possibility that a state that rewards undocumented children or parents may be asserting—in part—that illegal immigration is not as grave or menacing a problem as the national government asserts; “rewarding” the undocumented, in Sessions’s terms, is really granting them just desserts, correcting bad, poorly informed law and policy; and states and localities doing so is a legitimate rebellion against the national government’s monopoly on immigration policy-setting. That is, this colloquy helps show how the national legislature is incapable of seeing or acting on the knowledge about immigration emanating from below.

In this small example of the language political elites use to discuss what to do about DREAMers—scripts that remain in circulation<sup>222</sup>—we see the way that national control leads to the blockage of the easiest amnesty’s passage. Decades later, DREAMers are still waiting.

#### *E. Dialectical Political Lessons for the DREAMers*

When the easiest amnesty failed in Congress in 2003,<sup>223</sup> the DREAMers moved on. They lobbied for legislative action again and again; they almost achieved it during the Obama years on a bipartisan basis, but the bill died in the Republican-majority House.<sup>224</sup> As down payment on that legislative failure, Obama cracked down on undocumented people to show “enforcement seriousness” to Republicans.<sup>225</sup> He showed so much zeal in the role that activists—led by DREAMers—dubbed him the “Deporter-in-Chief.”<sup>226</sup> Eventually, though, DREAMers were able to persuade President Obama to take up their case through executive action. That program, Deferred Action for Childhood Arrivals (“DACA”), granted renewable, temporary reprieves to DREAMers and a much larger group of undocumented people. But the larger population covered by the

WHITE HOUSE ARCHIVE, [www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration](http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration) [<https://perma.cc/XG7R-M3GT>] (deemphasizing formal citizenship in favor of performance: “[Undocumented immigrants] are Americans in their heart, in their minds, in every single way but one: on paper”).

222. For current examples, see Press Release, Susan Collins, Senator, United States Senate, Senators Unveil Bipartisan Amendment to Protect Dreamers, Strengthen Border Security (Feb. 14, 2018), <https://www.collins.senate.gov/newsroom/senators-unveil-bipartisan-amendment-protect-dreamers-strengthen-border-security> [<https://perma.cc/GK34-A9AX>], and Press Release, Elizabeth Warren, Senator, United States Senate, Senator Warren Delivers Floor Speech on the Dream Act (Dec. 21, 2017), <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-delivers-floor-speech-on-the-dream-act> [<https://perma.cc/WUD5-JYQT>].

223. *DREAM Act, with Weakening Provisions, Voted Out of Full Senate Judiciary Committee*, AM. IMMIGR. L. ASS’N (Oct. 24, 2003), <https://www.aila.org/infonet/dream-act-weakening-full-senate-judiciary-committee> [<https://perma.cc/26FX-YT2B>].

224. See Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO (Dec. 18, 2010, 11:39 AM), <https://www.politico.com/story/2010/12/dream-act-dies-in-senate-046573> [<https://perma.cc/W55K-WP9U>].

225. Nicole Narea, *What Biden Can Learn from Obama’s Immigration Mistakes*, VOX (Feb. 3, 2021, 8:00 AM), <https://www.vox.com/policy-and-politics/22256267/obama-biden-immigration-policy> (“Obama, by contrast, initially maintained the status quo on immigration enforcement, which he saw as a means of building goodwill with Republicans ahead of immigration reform negotiations.”).

226. *Obama Leaves Office As ‘Deporter-In-Chief’*, NPR (Jan. 30, 2017, 3:04 PM) <https://www.npr.org/2017/01/20/510799842/obama-leaves-office-as-deporter-in-chief>.

action—which aimed to protect almost eight million people—was enjoined from receiving relief by a notoriously partisan district court judge in Texas: only a nub of the undocumented beneficiaries remained, the DREAMers themselves. What lessons did DREAMers take from these bruising experiences? What lessons would you draw, were you in their shoes?

One lesson involves the futility of respectability politics. DREAMers’ perfectly assimilated selves were still unworthy of full inclusion, or even full consideration by Congress, as the Senate DREAM Act debate showed. Worse, even as DREAMers themselves were deemed too imperfect to deserve amnesty, their relative perfection and lack of culpability compared to other, “culpable” undocumented people was used to condemn as unworthy the DREAMers’ own parents and other undocumented people.<sup>227</sup>

The unreason<sup>228</sup> of the denial of the easiest impossible amnesty radicalized the DREAMers, dialectically,<sup>229</sup> towards abolition, much as the stagnation and even regression of Black life under a Black president clarified and made broadly legible the structural nature of Black subordination and helped to catalyze radical movements like Black Lives Matter.<sup>230</sup>

The aftermath of the DREAM Act’s legislative failure—from executive to judicial branch and back and forth again—definitively showed the bankruptcy of reformist national immigration politics, pushing movements to embrace proto-abolitionist orientations.<sup>231</sup>

#### *F. RIP Comprehensive Immigration Reform, B.2000-D.2021*

Prior to his inauguration, President Biden promised immigrants’ rights advocates that his presidency would mark a dramatic break from the Trump years. He promised to prioritize amnesty for the entire group of twelve million undocumented and broke decisively with past legislative amnesty efforts by refusing to predicate legalization on the expansion or entrenchment of immigration enforcement.<sup>232</sup>

Propitiously, in January 2021, just prior to inauguration day, the Democrats won run-off elections in Georgia and learned that they would narrowly control the Senate, granting them full control of government for the first time since the early Obama years. Long-deferred hopes for immigration reform swooned, especially when the few Democratic holdouts for maintaining the Senate filibuster agreed to support an immigration amnesty passed through the budget reconciliation process.

227. See Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1 (2017).

228. Donald A. Nielsen, *A Theory of Communicative Action or a Sociology of Civilizations? A Critique of Jürgen Habermas*, 1 INT’L J. POL. CULTURE & SOC’Y, 159 (1987).

229. Francis Fukuyama, *The End of History?*, 16 NAT’L INT. 3, 4 (1989).

230. See Keeanga-Yamahtta Taylor, *Barack Obama’s Original Sin: American’s Post-Racial Illusion*, GUARDIAN (Jan. 13, 2017, 4:00), <https://www.theguardian.com/us-news/2017/jan/13/barack-obama-legacy-racism-criminal-justice-system> [<https://perma.cc/YC65-VVZH>].

231. See KATHRYN ABRAMS, *OPEN HAND, CLOSED FIST: PRACTICES OF UNDOCUMENTED ORGANIZING IN A HOSTILE STATE* (2022).

232. Oliver Contreras, *Biden’s Immigration Plan Would Offer Path to Citizenship For Millions*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/live/2021/02/18/us/joe-biden-news> [<https://perma.cc/W54M-CJAY>].

This agreement nullified the filibuster's effective supermajority requirement for immigration reform. This route to reform was essential in light of the past failure of bipartisan efforts, as well as Trump's radicalization of Republican politics on immigration issues. Democrats had fully internalized the lesson from past legislative failure and the new radicalization of the Republican party on migration issues; they understood *ab initio* that a bipartisan bill was not in the cards and that efforts to achieve one in order to surpass the filibuster's sixty-vote threshold were a waste of time.

The significance of this agreement to use budget reconciliation cannot be overstated. By agreeing to proceed without any Republican votes, it appeared that congressional Democrats were finally ready to let the material reality of immigration and the urgent need for reform prevail over metaphysical concerns about the sanctity of the "rule of law," the need to "secure our borders," or the importance of defending the "institutional values" of the Senate—commitments that played decisive roles in stymying past efforts at amnesty.<sup>233</sup>

But just as the scripts and roles that destroyed the DREAM Act and every other legalization proposal since Reagan's mass amnesty of 1986 were beginning to recede, another institutional actor emerged to reassert the primacy of metaphysical national interests over the material interests of undocumented people and the country as a whole, and to make salient again the concerns that Democrats' agreement to proceed through budget reconciliation sublimated: the senate parliamentarian, Elizabeth MacDonough.<sup>234</sup> Her decision to block the use of budget reconciliation to legalize undocumented people likely foreclosed a legislative amnesty for another generation.

Any use of the budget reconciliation process is subject to the Byrd Rule.<sup>235</sup> The unelected senate parliamentarian is effectively the judicial officer who presides over the final meaning of all the Senate rules. The Byrd Rule seeks to limit the use of the reconciliation process (and reinforces the supermajority filibuster default rule in the Senate) by narrowing the measures that can be passed through reconciliation to those related to spending or taxes. In particular, the rule specifies that provisions of a reconciliation bill that "produce[] changes in outlays or revenues which are *merely incidental* to the non-budgetary components of the provision" run afoul of the Byrd Rule and are potentially vulnerable to removal from the bill.<sup>236</sup>

The rule is adjudicated by weighing the budgetary effect score, produced by the Congressional Budget Office (CBO), against the "nonbudgetary" policy-change impact of the proposed legislation. Given the difficulty of balancing seemingly incommensurable sets of factors (budgetary impact—which has a clear number attached to it) and "non-budgetary components" (which is, in essence, the ineffable

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233. See Maria Sacchetti, *How the House Spending Bill Sets a Path to Legalization for Undocumented Immigrants*, WASH. POST (Nov. 19, 2021, 9:50 AM), <https://www.washingtonpost.com/us-policy/2021/11/19/immigration-biden-spending-bill/> [https://perma.cc/MS4C-8DFE].

234. See generally Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 2006–07 (2020). I draw extensively on this piece for my analysis of the parliamentarian's rulings, as it is the definitive contemporary piece of legal scholarship on the inner workings of the senate parliamentarian's office.

235. 2 U.S.C. § 644 (2016).

236. See BILL HENIFF JR., CONG. RSCH. SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (2022).

policy substance of the legislative provision), precedent plays a large role in Byrd Rule determinations. If a particular balance of budgetary to policy factors flew for a prior Congress, it usually—and ought to—fly for a subsequent one.

Students of the senate parliamentarian's office emphasize that it runs on a particularly strong, even rigid, understanding of *stare decisis*.<sup>237</sup> This commitment to past practice is designed to bolster the parliamentarian's credibility, serving as she does in an institution that is governed by rules that are intended to serve high-minded values (unlimited debate, protection of minority interests, comity, etc.), yet on that is also a den of vipers filled with hyper-strategic partisans (many of them legally trained). *Stare decisis*, along with the careful parsing of past practice to determine the outcomes of present controversies, aids the parliamentarian's effort to gain the trust of all senators. Stringent *stare decisis* practices also place pressure to change the rules where it ought to reside, with the senators themselves, rather than an unelected servant of the institution.

Precedent, Democrats believed, was strongly on their side. In 2017, during a Republican-majority Congress, McDonough was asked to opine on whether a provision in a Republican tax-cut bill (which gave over a trillion dollars to corporations and the wealthy) could properly include a provision that permitted private oil companies to drill for oil in the Alaska National Wildlife Refuge (ANWR). The provision was challenged under the very same portion of the Byrd Rule at issue in the immigration bill, the “merely incidental” provision. As part of Byrd Rule determinations, the CBO issues a “score” of challenged legislative provisions to assess their “budgetary impact,” as the statute requires. That CBO score is then balanced against the “non-budgetary components” in the Byrd Rule analysis. In this case, the CBO found that the privatization of rights to 4.3–11.8 billion barrels of oil estimated to be available for extraction in the refuge—trillions of dollars in oil wealth—would yield a paltry one billion in revenues to the treasury over ten years.

One would think that in this sort of case, the 100 million a year to the treasury's coffers would be found “merely incidental” to the “non-budgetary components of the provision” which simply aimed to grant private actors access to public land to boost corporate profits. To the surprise of many, however, MacDonough gave her blessing to the scheme and faced substantial criticism for doing so by, among others, David Super, a law professor at Georgetown who is probably the most prominent scholar of Senate procedure in the United States (and an advocate for maintaining the filibuster).<sup>238</sup> But a precedent is a precedent. And given the parliamentarian's strong institutional incentives to stick to precedent in order to preserve her status as a neutral arbiter, Democrats had reason to be confident that immigration legalization—which has 100 times the budgetary impact of ANWR drilling—would sail through the parliamentarian's office.

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237. Gould, *supra* note 234, at 1982.

238. See David Super, *Keep the Filibuster. It Could Save Progressive Legislation in The Future.*, WASH. POST (June 22, 2023, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/06/22/filibuster-reform-republican-extremism-hr1/>.

It was not to be.<sup>239</sup> MacDonough held that a 103-billion-dollar budget impact was “merely incidental” to the non-budgetary components of the bill. She reached

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239. Decisions of the senate parliamentarian are not public and may only be obtained through leaks to the media. All the relevant opinions were leaked, and I have included them in the footnotes for reference. The initial decision reads as follows:

The question before us is whether a series of proposed amendments to the Immigration and Nationality Act (INA) that remove existing barriers to adjustment of status to that of lawful permanent resident (LPR) for a variety of existing and newly created classes of immigrants and non-immigrants, including many not legally present in the United States, is a policy change that substantially outweighs the budgetary impact of that change. We believe it is, and we find that the material from previous reconciliation bills cited as support for the current proposal is distinguishable or not controlling on this issue.

In summary, CBO estimates that 8 million people will adjust to LPR status under this proposal and that such adjustment will increase the deficit by 140B over 10 years as a result of the social safety net/benefits programs to which LPR's would be entitled. Although the proposed change does not grant LPR status, CBO's score is not based on the likely number of applications for status – it is based on the “number of people who would receive LPR status” [emphasis added]. While a portion of that 8 million has one form or another of temporary legal status under statute or Presidential order, the vast majority (nearly 7 million by CBO's estimate) are unlawfully present and generally ineligible for adjustment of status under current law (as are some of the temporary status holders). The current proposal would waive the relevant sections of the INA, and create a new class of alien who is eligible for adjustment of status, including a wholly new category of persons called “essential critical infrastructure workers” (derived from a 16 page list that covers 18 major categories and over 220 sub-categories of employment). The provision also includes conditions of ineligibility for these applicants along with waivers of many of those disqualifiers at the discretion of DHS. It is by any standard a broad, new immigration policy.

In support of their argument, proponents cite provisions from several previous reconciliation bills – OBRA 1990, PRWORA 1996, BBA 1997 and the DRA from 2005. None of these provisions was the basis of an actual Senate precedent under 313(b)(1)(D) – the merely incidental clause. There was no such point of order raised and no ruling by the Chair – so the value is limited (4 sections of the qualified alien title of PRWORA were subject to Byrd points of order – 3 on committee jurisdiction, as Judiciary was not instructed, and 1 for having no score). There is also evidence that the provisions had broad bipartisan support which made inclusion in reconciliation less fraught.

Each provision can be distinguished from the current proposal. The OBRA and PRWORA provisions cited were not amendments to the INA. OBRA 1990 contained an amendment to the Social Security Act (not the INA) decriminalizing the use of social security numbers by LPR's who had obtained their legal status specifically through a direct Act of Congress (IRCA/Simpson-Mazzoli) – they were already in status. PRWORA's provisions were reported by the Ways and Means and Finance Committees – there was no Judiciary title. It contained a series of free-standing provisions (later codified in title 8) that changed the definitions of eligibility for a range of federal benefits – a common theme of reconciliation measures. Among the people disqualified or restricted from the various benefits were many classes of immigrants (documented and undocumented), whose prior access to federal benefit programs had been patchy. But there were also classes of U.S. citizens who were disqualified from receipt of federal benefits, including felons, parole violators, people who were in arrears in child support payments and under certain circumstances, people who were not working. BBA 1997 further amended PRWORA's eligibility standards with respect to SSI benefits and Food Stamps. PRWORA's restrictions had by that time been codified in title 8, but again, this was not about immigration status, it was about access to

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benefits. Those changes to eligibility for various benefits, which did not change the status or ability to adjust status of any immigrant or non-immigrant, are a far cry from amending the INA to remove legal bars to adjustment for many millions of people.

The DRA of 2005, which did contain amendments to the INA, was, again, the product of a bipartisan agreement. The provisions cited are distinguishable as they applied to persons who were already admissible and not barred under law from applying for status, which is not the case here. Additionally, the provisions had broad support in the Senate and while most INA amendments were not on the committee's "Byrd list" they also were not reviewed with the Parliamentarian at the time or anyone in the office. Neither the Parliamentarian nor any of the staff of the office in 2005 have any notes pertaining to the merits of the proposal (there is one email relating to a possible "no score" finding from CBO of hypothetical text), despite the fact that this bill, and the Judiciary committee proposal on splitting the 9th circuit were the subject of many meetings. The provisions did not survive the process of conference or amendments between the Houses and their value is, for all those reasons, minimal. There are innumerable provisions in reconciliation bills that are popular and receive no initial scrutiny. Most are small changes in law and policy, and some – like CHIP – are massive policy changes — and we are still litigating them though the ink has long since dried.

The reasons that people risk their lives to come to this country – to escape religious and political persecution, famine, war, unspeakable violence and lack of opportunity in their home countries – cannot be measured in federal dollars. The same is true of the value of having the security of LPR status in this country. LPR status comes with a wide range of benefits far beyond the social safety net programs (Medicare, Medicaid, SNAP, CHIP, SSI, etc.) that generate the CBO score. Broadly speaking, as most of the beneficiaries of this policy change are not in status, there will be other, life-changing federal, state and societal benefits to having LPR status, for example: the ability to work anywhere in almost any job, the ability to obtain a driver's license in any state, in-state tuition in any state, the ability to sponsor family members under the INA, the ability to make campaign contributions, the freedom from the specter of deportation to the very country from which they fled. Many undocumented persons live and work in the shadows of our society out of fear of deportation. They are exploited by employers, face extra hurdles in the banking and housing sectors and are often afraid to report that they are victims of crime or seek medical care for fear of exposing themselves to authorities. LPR status would give these persons freedom to work, freedom to travel, freedom to live openly in our society in any state in the nation, and to reunite with their families and it would make them eligible, in time, to apply for citizenship – things for which there is no federal fiscal equivalent. Changing the law to clear the way to LPR status is tremendous and enduring policy change that dwarfs its budgetary impact.

Finally, it is important to note that an obvious corollary of a finding that this proposal is appropriate for inclusion in reconciliation would be that it could be repealed by simple majority vote in a subsequent reconciliation measure. Perhaps more critically, permitting this provision in reconciliation would set a precedent that could be used to argue that rescinding any immigration status from anyone – not just those who obtain LPR status by virtue of this provision — would be permissible because the policy of stripping status from any immigrant does not vastly outweigh whatever budgetary impact there might be. That would be a stunning development but a logical outgrowth of permitting this proposed change in reconciliation and is further evidence that the policy changes of this proposal far outweigh the budgetary impact scored to it and it is not appropriate for inclusion in reconciliation.

Lisa Desjardins, *Read the Senate Rules Decision That Blocks Democrats From Putting Immigration Reform in Budget*, PUB. BROAD. SERV. (Sept. 20, 2021, 10:44 AM), <https://www.pbs.org/newshour/politics/>

her conclusion in a stunningly political way. The tone, style, and substance of her reasoning deviated substantially from the dry weighing of the budgetary impact that Byrd Rule analysis traditionally requires. Worse, the opinion appeared transparently designed to serve a strategic political purpose for a very specific audience: the two Democratic senators who, though they signed off on the use of the reconciliation process for immigration legalization, had stifled calls for broader reform of the filibuster. These Senators, Joseph Manchin III and Kyrsten Sinema, had rejected filibuster reform in extensive public comments<sup>240</sup> for three core, empirically unsubstantiated reasons: (1) the filibuster promotes bipartisanship, (2) the filibuster prevents radical swings in policy change (cycling), and (3) budget reconciliation should not replace regular order (i.e., that all controversial legislation ought to be passed by a supermajority of sixty).

Despite the legal irrelevance of all of these arguments in favor of the maintenance of the filibuster to the picayune, nitty-gritty of determining whether a provision runs afoul of the “merely incidental” clause of the Byrd Rule, MacDonough’s ruling was structured around Manchin and Sinema’s publicly articulated defenses of the filibuster itself. Still worse, MacDonough never addressed in her opinion the elephant in the room, the Alaska National Wildlife Refuge, instead distinguishing a series of immigration changes previously made through the reconciliation process. Even her procedurally appropriate discussion of the precedents was tainted by her transparent aim to persuade Manchin and Sinema to block Democrats from overruling her decision—something that happens with some regularity by the majority party.<sup>241</sup> She revealed this intent in her opinion by emphasizing more than once that immigration law changes made in prior reconciliation bills had “bipartisan” support. Whether prior reconciliation votes included a smattering of senators from the other party is a completely extraneous factor in Byrd Rule analysis. Indeed, MacDonough appeared to create a novel exception to the Byrd Rule—lacking any textual support—that requires that immigration changes made in reconciliation must be minimally bipartisan.

The net effect of MacDonough’s rhetorical choices was to draft a memorandum to the Senate filibuster’s most stalwart defenders, warning—falsely—in flashing lights that the use of budget reconciliation proposed here was the most radical change to Senate order in living memory and would threaten the very foundations of the Senate that Manchin and Sinema have sworn fealty to.

Still more self-serving, MacDonough cast herself as acting to protect the interests of the undocumented. She urged that her ruling would prevent immigration policy cycling: the possibility that legalization, once granted, would immediately be taken away (this too is one of the favored tropes of filibuster

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read-the-senate-rules-decision-that-blocks-democrats-from-putting-immigration-reform-in-budget [https://perma.cc/5P3Z-5KQN].

240. Joe Manchin III, Opinion, *Joe Manchin: I Will Not Vote to Eliminate or Weaken the Filibuster*, WASH. POST. (Apr. 7, 2021, 7:40 PM), [https://www.washingtonpost.com/opinions/joe-manchin-filibuster-vote/2021/04/07/cdbd53c6-97da-11eb-a6d0-13d207aadb78\\_story.html](https://www.washingtonpost.com/opinions/joe-manchin-filibuster-vote/2021/04/07/cdbd53c6-97da-11eb-a6d0-13d207aadb78_story.html) [https://perma.cc/MQ4B-7SF7]; Kyrsten Sinema, Opinion, *Kyrsten Sinema: We Have More to Lose than Gain by Ending the Filibuster*, WASH. POST., (June 21, 2021, 8:31 PM), <https://www.washingtonpost.com/opinions/2021/06/21/kyrsten-sinema-filibuster-for-the-people-act/> [https://perma.cc/L8R4-VF2Z].

241. Gould, *supra* note 234.

defenders). Not content to simply let her policy argument stand on its own, MacDonough spent nearly a quarter of the opinion waxing eloquent on how difficult the lives of the undocumented are and how much better a grant of legal status—which her ruling prevents—would make them. This “factual” roundup of the misery of undocumented people ironically grounded her analysis that legalization was such a monumental policy change that it radically outweighed its budgetary impact.

Her subsequent opinions on two distinct sets of modifications to Democrats’ undocumented immigration legalization plans fortify the conclusion that MacDonough was acting strategically, engaging in motivated reasoning with a view towards a particular substantive end. Democrats’ plan B policy change involved modifying four characters in an existing immigration legalization statute. The existing immigrant registry law had an eligibility date set at 1972. By modifying the date to 2010, up to 6.7 million undocumented people would become eligible for legal permanent resident (LPR) status.<sup>242</sup> In rejecting this plan, MacDonough wrote that a single date change in an existing statute that permits legalization was the same as simply creating a wholly new law that made millions eligible for LPR status: “The change in status to [lawful permanent resident] remains a life-long change in circumstances the value of which vastly outweighs its budgetary impact.”<sup>243</sup>

Recall that the Byrd Rule text bars use of budget reconciliation for laws that “produce[] changes in outlays or revenues which are *merely incidental* to the non-budgetary components of the provision.”<sup>244</sup> The date of eligibility for the registry law has been changed numerous times since its initial passage in 1929. How could legalization that happens through an existing legalization program be a weighty policy change? It is not. Abolishing the registry statute might qualify as weighty, since it has been on the books for almost a century, but reimplementing it? That claim seems unsupportable. MacDonough worked hard to get to her Byrd Rule rejection by focusing on the permanence of the change in legal status for the

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242. Caroline Coudriet, *Parliamentarian Rejects Democrats’ Plan B on Immigration*, ROLL CALL (Sept. 29, 2021, 3:09 PM), <https://rollcall.com/2021/09/29/parliamentarian-rejects-democrats-plan-b-on-immigration/> [<https://perma.cc/P22J-3RC8>].

243. Decisions of the senate parliamentarian are not public and may only be obtained through leaks to the media. All the relevant opinions were leaked, and I have included them in the footnotes for reference. Decision of the senate parliamentarian:

This registry proposal is also one in which those persons who are not currently eligible to adjust status under the law (a substantial proportion of the targeted population) would become eligible, which is a weighty policy change and our analysis of this issue is thus largely the same as the [lawful permanent resident] proposal. While this registry proposal is not a wholly new immigration policy, it is still distinguishable from the [Personal Responsibility and Work Opportunity Reconciliation Act of 1996] text in that it is an adjustment in status through an amendment to the [Immigration and Nationality Act] and not free standing or to the various government benefit programs. The number of beneficiaries and score of this amendment to the INA are largely the same as those of the earlier proposal which does not dramatically shift the balance of policy vs. score. The change in status to [lawful permanent resident] remains a life-long change in circumstances the value of which vastly outweighs its budgetary impact.

SENATE PARLIAMENTARIAN, 117TH CONG., RULING ON LAWFUL PERMANENT RESIDENTS 1, <https://www.aila.org/File/Related/21091005f.pdf> [<https://perma.cc/CDK5-X2PF>].

244. 2 U.S.C. § 644(b)(1)(A).



immigrants who benefit, not, as would seem more appropriate, the actual scope of the change to the statutory language or policy (which is minimal).

But any semblance of neutrality in these rulings falls away when MacDonough rejected the final effort to secure some change in status for undocumented people through reconciliation.<sup>245</sup> Here the Democrats proposed an extension of immigration parole, an expressly temporary legal status that permits immigrants the ability to legally work, but must be renewed, much like DACA recipients' current status. The temporary nature of the status eliminated her ability to object to the permanent nature of the legal status claim, which she highlighted in her prior opinions to bolster the weight of the policy impact over the budgetary. Faced with an inability to object on this basis, MacDonough changed gears to focus on the fact that too many people benefit from the change in status for the policy change to not outweigh its budgetary impact.

Though many Democrats and activists called for the overruling of this poorly reasoned—bad faith—series of decisions, MacDonough's pitch-perfect opinion worked on its targets. Manchin quickly swore fealty to MacDonough's flattering reasoning, which mimicked an op-ed he had published in the *Washington Post*<sup>246</sup>—“[Y]ou stick with the parliamentarian . . . you can't pick and choose.”<sup>247</sup> Sinema also affirmed her support for the parliamentarian, calling her rulings “legal limitations to what can be done in a reconciliation package”<sup>248</sup> that she would abide by. However, Sinema also said she “support[s] the immigration proposals that are being offered in the upcoming reconciliation package.”<sup>249</sup> Not only did MacDonough

245. Decision of senate parliamentarian:

The proposed parole policy is not much different in its effect than the previous proposals we have considered. The proposal, which would increase the deficit by \$131 billion over 10 years, creates a class of eligible people (those who have been in the country for 10 years or more) who will qualify for a grant of parole in place status. This new class would make eligible for parole 6.5 million people - nearly the same number of people as the previous two plans. CBO estimates that 3 million people would adjust to LPR status - 2 million of whom would be otherwise ineligible under current law. In order to effectuate the policy, the parole proposal changes the contours of the current parole in place program, making it a mandatory award of status for qualifying applicants rather than the current discretionary use of the Secretary's authority and assessment, which the USCIS website states that the Secretary grants “only sparingly.” The grant of parole will be accompanied by mandatory issuances of work authorization, travel documents, a deeming of qualification for REAL ID and automatic renewal of PIP. These are substantial policy changes with lasting effects just like those we previously considered and outweigh the budgetary impact and would subject to the proposal to a 313(b)(1)(D) point of order.

Pablo Manriquez, *Senate Parliamentarian Advises Against Third Immigrant Relief Proposal for Budget Bill*, LATINO REBELS (Dec. 16, 2021, 7:39 PM), <https://www.latinorebels.com/2021/12/16/parliamentarianplanc/> [https://perma.cc/SRV5-YWYZ].

246. See Joe Manchin III, *supra* note 240.

247. Alan Fram, *Manchin Says He Wouldn't Defy Parliamentarian on Immigration*, ASSOCIATED PRESS (Dec. 9, 2021, 12:16 AM), <https://www.usnews.com/news/best-states/west-virginia/articles/2021-12-08/manchin-says-he-wouldnt-defy-parliamentarian-on-immigration> [https://perma.cc/V8LT-ZW29].

248. See Griselda Zetino, *Sen. Kyrsten Sinema Supports Adding Immigration Policies to Spending Bill*, KTAR NEWS (Nov. 11, 2021, 6:15 AM), <https://ktar.com/story/4764678/sen-kyrsten-sinema-supports-adding-immigration-policies-to-spending-bill/> [https://perma.cc/F8M3-PU23].

249. *Id.*

manipulate her ruling to kill undocumented legalization today, she effectively killed it for the foreseeable future. Now there is a clear precedent—forever binding on future parliamentarians—holding that legalization via a simple majority of the Senate is prohibited.

Of course, with the background I have put forward in this section, this ultimate result is predictable. MacDonough is not exactly a rogue actor, even if her actions are strategic and illegitimate; she is a creature whose views, habits of mind, and national institutional prerogatives have been formed by the Senate itself.<sup>250</sup> The parliamentarian views herself as a servant and protector of the Senate as a body, a body which, as I have already shown, systematically finds ways to reject the interest of undocumented people in favor of phantoms like “the laws the law,” “regular order,” “bipartisanship,” and “comity.”<sup>251</sup> None of these values are things that the eleven million undocumented can eat.

As terrible as this loss is for the eleven million undocumented and for the country, which stands to benefit enormously by bringing this group out of the shadows and into the body politic, the form of the loss makes the situation more dire than it might seem. By issuing her ruling in written form after due consideration, MacDonough’s ruling binds any future parliamentarian from signing off on an immigration reform performed on a party-line vote in the reconciliation process. Given the way that the contemporary Senate radically overrepresents the views of the plurality constituency that opposes immigration reform, it is hard to imagine that a sixty-vote majority for legalization will emerge in the next twenty years, and certainly not on the terms—no further ramp-up in immigration enforcement—that the fifty Democrats in this Congress were proposing. This leaves abolition of the filibuster itself as the only future option to proceed on comprehensive immigration reform.

Given that Republicans are more satisfied with not legislating at all because of their deregulatory agenda and their control of an increasingly radical federal court system, it seems the Democrats would have to make the move for filibuster abolition. The recent failure to carve out an exception to the filibuster for voting rights does not bode well for these prospects, especially since the political upside for Democrats for voting rights was far clearer than it is for immigration reform. Comprehensive immigration reform is the perpetual third wheel on the Democrats’ own agenda, so it seems unlikely that immigration reform would be the reason for the filibuster’s demise, and it is certainly not a candidate for a carve out—à la Supreme Court and Article III court nominations.

MacDonough’s precedent means that there is now a permanent barrier to immigration reform made in the name of the Senate’s procedural integrity, a metaphysical value that has less and less legitimacy by the day.<sup>252</sup>

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250. Gould, *supra* note 234.

251. See discussion, *supra* Part II.A-D.

252. MacDonough’s ruling literally asserts the value of the metaphysical over the material, rendering billions, if not trillions, incidental to the ineffable value of Senate procedure.

### III. RECONSTRUCTING IMMIGRATION LAW FOR ABOLITIONISTS AND REACTIONARIES

The failure of comprehensive immigration reform to provide a pathway to legalization in 2021 (and at various points over the past two decades) despite consistent support from a majority of citizens<sup>253</sup> illustrates how the national debate surrounding immigration is distorted by the exclusion of immigrants' vote-backed voices and by the centralization of these questions in the national political system. This structural combination creates pathologies above and below the national level (discussed at length in Part I). The pickle for both radical and moderate reformers is that national control of immigration is all we know and is so legally entrenched and naturalized that any other way of structuring immigration seems unthinkable, impossible, and undesirable.<sup>254</sup>

This Part argues that decentralization is quite the opposite—thinkable, possible, and desirable. Representative, national political institutions could plausibly adopt a reconstruction of the immigration power. Those same institutions have not (and perhaps cannot) produced a supermajority for an immigration amnesty of any kind—even for the most desirable candidates, like the DREAMers. Such a legal change in structure would better meet the needs of both citizens and immigrants. Abolitionists, reactionaries, and immigration moderates would all stand to benefit in metaphysical and material terms from such a change.

Because such a reconstruction could plausibly (if not *likely*) emerge and because national, comprehensive immigration reform is now effectively a dead letter (barring massive changes in the composition of the Senate), I make a strategic claim as well: that decentralization is something advocates, policymakers, and undocumented people should take up as the principal change they wish to make to the immigration regime going forward.

The shift to this sort of reconstruction of the immigration power down is strategic, responding to the structural limits on immigration reform that have been revealed over the past two decades; it is also more than just strategic. There is an increasing recognition among scholars and policymakers that current allocations of governmental power among national and sub-national geographies are increasingly ill-suited to economic, social, and political life on the ground.<sup>255</sup> Relatedly, political theorists like H el ene Landemore, political empiricists like James Fishkin, and legal scholars like Jedidiah Purdy are making the general case for deepening direct and deliberative democratic control of political institutions.<sup>256</sup>

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253. See Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RSCH. CTR. (June 17, 2020), <https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/> [https://perma.cc/WPM7-ZRWF]; Nicole Narea, *Poll: Most Americans Support a Path to Citizenship for Undocumented Immigrants*, VOX (Feb. 4, 2021, 8:30 AM), <https://www.vox.com/policy-and-politics/2021/2/4/22264074/poll-undocumented-immigrants-citizenship-stimulus-biden> [https://perma.cc/7CUA-CMAT].

254. See *supra* notes 17–24 and accompanying text.

255. See RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY* (2020).

256. See generally LANDEMORE, *supra* note 46; LANDEMORE, *supra* note 38; FISHKIN, *supra* note 38; Fishkin, *Democracy When the People Are Thinking*, *supra* note 38; Fishkin, *Reviving Deliberative Democracy*, *supra* note 38; Britton-Purdy, *supra* note 38.

Indeed, one way of making sense of the rise of populism and nationalized, anti-immigrant sentiment in rich, Western democracies, particularly in the United States, is to read it as an inarticulate cry for the kinds of deep, participatory democracies that deliberative Democrats have long theorized and are increasingly (and more persuasively) calling for. The elite-representative form of democratic rule has run its course—it is not the “end of history.”<sup>257</sup> We should know this now, two years post-Trump. The inherent corruptibility and tendency towards kleptocracy<sup>258</sup> of our fragile democracy can no longer be ignored if we wish to protect democratic decision-making into the future. The fact of elite-kleptocratic democracy, in combination with the never-realized promise of *actual* democratic rule, is a foundational source of our current malaise and the rise of populism. This failure to deliver on democracy’s promise is what makes scapegoating possible.<sup>259</sup>

These general calls for a radical deepening of citizen control over democratic decision-making power apply ever more forcefully to the immigration context. This insight is counterintuitive. The tight correlation between immigration and populism makes it appear as if “the people” are the problem with immigration. However, I hope by this point in my analysis that it is clear what the people think about immigration is distinct from what the political system produces. In this Part, I hope to also persuade you that the context and geographic jurisdiction in which immigration questions are posed and considered has a profound effect on what the people think about immigration. Again, this is a core insight of deliberative democracy, but its revelations are still more compelling in an area of decision-making, like immigration, where even the deeply flawed democratic epistemology that operates in most spheres of our elite-representative democracy is basically inoperative. Finally, I elaborate the benefits of immigration law’s reconstruction and make the case that such a reconstruction is possible and even strategically wise because it makes the most of the limited energy and capacity of immigration advocates and stakeholders.<sup>260</sup>

#### *A. Decentralization Corrects Epistemic Problems*

In Part I, I described the threefold epistemic failures of immigration law: the omission of noncitizens that are most affected by immigration law from political enfranchisement; the way the national framework promotes fantastical thinking about immigrants and immigration; and the problems arising from extreme centralization.

The most obvious way to correct the errors and pathologies I describe is to simply endogenize the views of those currently excluded into the political machine

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257. Fukuyama, *supra* note 229.

258. Michael J. Klarman, *The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1 (2020).

259. See ALEXANDER GÖRLACH, HOMO EMPATHICUS: ON SCAPEGOATS, POPULISTS, AND SAVING DEMOCRACY (2021).

260. Traditions that run the gamut from Catholic subsidiarity, anarchism, our federalism, and democratic socialism all point to the necessity of organizing society and building social and political consensus from below, especially where the change desired represents a significant departure from current practice and dominant understandings. Decreeing justice from above, of course, has its uses as well. But for immigration, in our social context in the U.S., the value of the top-down approach has largely run its course for free-movement partisans.

by empowering them with the vote. Indeed, this is what political theorist Arash Abizadeh has argued that democracy requires for border regimes to be just: that all affected by immigration law have a vote in its formation.<sup>261</sup> You read that right. Per Abizadeh, when it comes to the border, foreign nationals who may wish to migrate or who are affected by border exclusion must have a democratic say in border law formation (literally, get a vote on immigration law in the United States) in order for border laws to be democratically legitimate.

However persuasive or appealing we may find Abizadeh's theorizing about the necessity of democratizing border regimes, the current structure of immigration law around the globe makes achieving such democratization of border regimes impossible. Think of it as a kind of chicken/egg problem. What justice requires for borders—their global democratization—is the precise opposite of the parochial organizing principle of all extant immigration regimes. The United States may be a democracy and Russia a dictatorship, but they are both authoritarian dictatorships at the border from the perspective of migrants. Russia and the United States both dictate unilaterally terms of admission, exclusion, and expulsion for noncitizens. Noncitizens affected by exclusion or unfavorable terms of admission have no say in making those laws.

This universal dictatorship of national borders makes ending these dictatorships nearly a logical impossibility. Enacting a truly representative and democratic immigration regime requires the abandonment of the central, parochial organizing principle of every government in the world: to protect and defend their citizens' interests over others. That is, democratizing borders entails abandoning the core logic of the nation-state. This entrenched parochialism, which Linda Bosniak has dubbed “normative nationalism,” makes Abizadeh's call to internationally democratize the formation of border laws appear to be just a thought experiment. There appears to be no plausible political or geopolitical path from the entrenched ground of normative nationalism to the Valhalla of open borders and free movement of peaceful humans.<sup>262</sup> Internationally democratizing borders appears as impossible globally as comprehensive immigration reform does nationally.

Beyond the logical Gordian knot posed by border abolitionism/democratization at the level of nation-state logic, the practical epistemic barriers illustrated in Part II are just as daunting. Again and again, senators in both parties had trouble thinking past the sanctity of the distinction between citizen and alien. They could not see or cognize, or at least did not articulate, the illegitimacy of a legal system that would render ten million workers illegal and deportable at any time. Again and again in that conversation, the law was not inherently problematic. The disagreement was about whether or not to make an exception for the most exceptional victims of the broader and deeper injustice that immigration law abolitionists, Abizadeh, and other thinkers have articulated.<sup>263</sup>

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261. In truth, the demands are more stringent than that. *See* Abizadeh, *supra* note 48; *see also* Richard Delgado and Jean Stefancic, *Borders by Consent: A Proposal for Reducing Two Kinds of Violence in Immigration Practice*, 52 ARIZ. ST. L.J. 337 (2020).

262. Judith Resnik, *Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail*, 57 NOMOS: AM. SOC'Y POL. LEGAL PHIL. 79, 144 (2017).

263. *See* Abizadeh, *supra* note 48.

Decentralization of immigration questions to a different scale of government, a scale below the national, won't cut this knot, but it may be able to loosen it in parts, opening a path that can aspire to free movement of human beings; or something better and more just than the immigration law we have today.

*1. The Democratic Epistemology of a Decentralized and Local Immigration Law*

We know that citizens think of immigration differently at the local level because they have expressed that difference in opinion with local legislation. The literature has largely derided such legislation, including sanctuary laws and locally restrictive laws, as expressive or symbolic.<sup>264</sup> Legal scholars have also urged that locally restrictive laws in particular are impermissible, and the courts have, to a significant degree, agreed, finding that they are preempted by national law. Sanctuary laws have held up better in court under the non-commandeering doctrine.<sup>265</sup>

What the expressive or symbolic critiques of local immigration legislation miss is that such expression is extremely meaningful in the context of a national conversation about immigration law that is also dominated by symbolic expression. The material aspects of national law in the immigration sphere are largely byproducts of symbolic expression, not the sought-after end of immigration legislation in itself.

As Parts I and II demonstrated, when it comes to immigration, the symbolic or metaphysical has always dominated the material because the material case for more immigration is largely open and shut in favor of more immigration. So then, whatever the material inadequacies of local immigration laws, they ought to be read by commentators as strong signals of underlying differences in political formations, interests, and knowledge about immigration in those places that express their views as legislation that “dissented by deciding,” as Heather Gerken puts it.<sup>266</sup> Those divergences from national policy point us to the possibilities that might emerge from decentralization. They suggest that new and plural forms of democratic knowledge about immigration can emerge. The already-existing pluralism in views expressed about immigration also tells us that decentralization is likely to produce different approaches in different places. There is fertility in the local when it comes to immigration. And fertility is what is needed to break out of the calcified, epistemic morass of national immigration law. Planting immigration policy in different soils allows us to imagine the possibility of a path from normative nationalism to the immigration abolitionist dream of free movement for all humans, however improbable or contingent reaching such a destination may be.

Of course, fertile soil can yield fruits of different sorts. We might reasonably worry about tilling more ground for white nationalism, xenophobia, or other dangerous ideologies. But here my point about the strength of the material case for

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264. Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 319 (1989); see also RICK SU, THE RISE OF SECOND AMENDMENT SANCTUARIES (2021), <https://www.acslaw.org/wp-content/uploads/2021/03/The-Rise-of-Second-Amendment-Sanctuaries.pdf> [<https://perma.cc/C2DC-3QS8>].

265. See *City & Cnty. of S.F. v. Sessions*, 349 F. Supp. 3d 924, 950–53 (N.D. Cal. 2018); *City of Chi. v. Sessions*, 264 F. Supp. 3d 933, 943, 949–51 (N.D. Ill. 2017).

266. See Gerken, *supra* note 200.

more immigration plays a critical role in supporting the epistemic and strategic case for decentralization of immigration questions. Localizing immigration questions increases the degree to which material costs and benefits plays into the immigration calculus. As it stands with national control, expelling immigrants from your town, or discouraging them, is basically a free lunch. There are other places in a particular metro area where those immigrants go live, and the economy of the metro area doesn't really lose labor. State-level, restrictive laws also fail to drive that many immigrants out because the level of deportation is really set by the national government and has remained fairly fixed at about a half million people per year for some years now. Under a decentralized regime, by contrast, if (for example) a metro area like Chicago or Houston came together to decide to adopt anti-immigrant immigration policies,<sup>267</sup> no immigrants would arrive in those regions. Thus, these regions would own both the material and metaphysical aspects of their policy choices.

In this way, decentralization can better endogenize material factors in the immigration decision-making calculus. And, as we know, making immigration lawmaking more materially grounded has a pro-immigrant bias. Since volumes of research assure that that calculus tends to be a net positive, it is reasonable to assume that making immigration law discussions more focused on material interests would discipline ideologies like white nationalism or radical immigration restrictionism. Regardless of the ultimate policy outcome, better accounting of costs and benefits in the immigration policy calculus is a good in itself from the point of view of epistemic theories of democracy.

Localization also creates spaces for endogenizing the views of immigrants themselves into the immigration law conversation.<sup>268</sup> Indeed, local anti-immigrant laws in California and Arizona, to give two examples, galvanized immigrants to organize themselves into a force for political change on immigration issues. California is now a “sanctuary state,” and Maricopa County, Arizona ousted its notorious Sheriff Joe Arpaio—all because of organization in reaction to the passage of anti-immigrant local and state laws.<sup>269</sup> That is, the epistemic poverty and violence of those anti-immigrant laws was met with immigrant-led efforts to change the way people thought about the immigrants in their midst—even absent local electoral power.

Not only does localization correct epistemic problems in immigration by giving immigrant movements more traction and voice, localization also shifts the terrain of public discussion to geographies with a track record of ideological dynamism: dramatic epistemic shifts have occurred in these localities during the same period where the national legislative conversation has stagnated. The stagnancy has persisted at the national level even after Trump did for national immigration politics what Joe Arpaio and California Proposition 187 did for those respective states' politics. Had Biden's presidency followed the pattern in California and Arizona and evolved dialectically, we should be experiencing a major

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267. See Morales, *supra* note 29, at 223–51.

268. Aziz Rana, *Left Internationalism in the Heart of Empire*, DISSENT (May 23, 2022), [https://www.dissentmagazine.org/online\\_articles/left-internationalism-in-the-heart-of-empire](https://www.dissentmagazine.org/online_articles/left-internationalism-in-the-heart-of-empire) [<https://perma.cc/PH7D-BBXH>].

269. ABRAMS, *supra* note 229, at 74–94.

immigration policy shift and reset right now. Instead, the administration has continued many of Trump's worst policies.<sup>270</sup> And the Senate, as discussed in Part II, has confirmed anew the impossibility of national reform.<sup>271</sup> After over twenty years of trying to change these policies and discussions at the national level, the stagnancy in rhetoric and policy is remarkable. This stagnancy is also evidence of the structural nature of the problem of national immigration law production.<sup>272</sup> The evidence for this interpretation is especially strong when we compare the sclerosis of the national conversation to the vibrancy and oscillation of local and state conversations. These spaces have acted and shifted where the national government has not.

## 2. Encouraging Experimentation with Democratic Forms and Fora

Beyond the indirect effect immigrants can have on the dialogue by organizing for local change, decentralization of immigration questions would also encourage localities to permit noncitizen voting on immigration questions or all local questions. Entrusting a formerly sacred<sup>273</sup> national political prerogative to the local level may catalyze a number of changes to local politics. For example, direct enfranchisement of noncitizens, something New York City recently attempted,<sup>274</sup> would have ameliorated the epistemic problems with immigration law even further than decentralization itself. Localities might also consider experimenting with different forms of democratic decision-making on immigration questions, perhaps eschewing representative forms, like city councils, for deliberative democratic forms, like juries,<sup>275</sup> citizen panels, and legislatures by lot.

The idea here is that actually achieving a shift in immigration decision making power down would entail a shift in mindset about democratic potentiality that transcends the traditional representative model. And given the higher level of plasticity in local public decision-making structures (which are not constitutionalized in the same way that national and state bodies are)<sup>276</sup> that shift

270. See Anita Kumar, *Biden Railed Against Trump's Immigration Policies, Now Defends Them in Courts*, POLITICO (Aug. 10, 2021, 4:31 AM), <https://www.politico.com/news/2021/08/10/biden-trump-immigration-policies-503108> [<https://perma.cc/8GBZ-GX5G>].

271. See *supra* Section II.F.

272. See generally Thomas R. Bates, *Gramsci and the Theory of Hegemony*, 36 J. HIST. IDEAS 351, 352 (1975) (explaining Gramsci's concept of hegemony as "political leadership based on the consent of the led . . . secured by the diffusion and popularization of the world view of the ruling class").

273. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999).

274. Jeffery C. Mays, *New York City's Noncitizen Voting Law Is Struck Down*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/nyregion/noncitizen-voting-ruling-nyc.html> [<https://perma.cc/774M-EGL4>].

275. See, e.g., Daniel I. Morales, *It's Time for an Immigration Jury*, 108 NW. U. L. REV. 36 (2013).

276. The governmental structure of both the state and national governments is constitutionalized. In the case of the Senate's malapportionment the structure may even be beyond Constitutional amendment. See George Mader, *Binding Authority: Unamendability in the United States Constitution a Textual and Historical Analysis*, 99 MARQ. L. REV. 841 (2016) (arguing that the equal Senate suffrage provision does not mean, contra the understanding of many, that the Senate's apportionment is unamendable). Local governmental structure, by contrast, is usually governed by statute and so is much more amenable to change.



could lead to broader shifts in the *way* that “democratic” immigration decisions are made, not just the substantive content of those decisions. Democracy reformers with broader visions for democracy<sup>277</sup> should look to immigration decentralization as a fecund test case and potential catalyst for the far-ranging reforms to representative democracy that they seek.

### *B. Identity-Formation Benefits of Decentralization*

National control of immigration questions feeds and magnifies oppositional and conflictual ideas about national identity that are destructive and unsound. Nationalizing immigration questions makes the operative metaphor of immigration regulation international borders. Talk of borders sounds immigration regulation in the key of war, invasion, and national vulnerability—us versus them; it reflexively raises the stakes of immigration questions to the existential level. Placing immigration questions at the level of the municipal, especially if organized around the level of the metropolitan statistical area, creates a different set of resonances.<sup>278</sup> Openness and growth are the dominant chords of the metropolitan area, especially the most successful ones. Free, unregulated movement is the default in metro areas; who moves in and who moves out are questions left to individuals and firms. Metro areas, and the localities that make them up, plan and exclude, especially with zoning, but newcomers are not viewed, by default, as hostile invaders. Openness is not conceptualized as vulnerability but rather as opportunity for growth. Metro areas view themselves as competing for population and resources. Placing questions of migration in this kind of normative context flips migration discourse on its head.<sup>279</sup>

These points are relative, of course. There is a long and dark history of neighborhood and municipal violence in response to the settlement of different races in segregated neighborhoods.<sup>280</sup> But the past, in this respect especially, is not a facsimile of the present. While exclusionary zoning and housing affordability create walls around neighborhoods and towns,<sup>281</sup> local pogroms and the wholesale barring of business based on race are simply not as imaginable, or as consistently imaginable in localities as they once were, in part because of the consolidation of federal prohibitions and force in these areas.<sup>282</sup> The costs of white nationalism, great

277. See LANDEMORE, *supra* note 38; FISHKIN, *supra* note 38; Fishkin, *Democracy When the People Are Thinking*, *supra* note 38; Fishkin, *Reviving Deliberative Democracy*, *supra* note 38; Britton-Purdy, *supra* note 38.

278. See Morales, *supra* note 29, at 223–51.

279. Kenneth Stahl writes that cities should try to steer a course for inclusion and belonging of local residents that lies somewhere between the reactionary nationalism endemic to nation-states and the neoliberal-commercial anonymity embedded in cities' founding DNA. See KENNETH A STAHL, LOCAL CITIZENSHIP IN A GLOBAL AGE 225–37 (2020).

280. John Runyan, Erin Gianopoulos & John E. Mogk, *50 Years After Milliken v. Bradley*, 101 MICH. BAR J. 18, 19 (2002).

281. See Rick Su, *Local Fragmentation as Immigrant Regulation*, 47 HOUS. L. REV. 367, 380, 430 (2010).

282. Additionally, though many studies show the durability of the desire of white populations to continue to self-segregate with white neighbors in outlying suburbs, along with the persistence of anti-minority bias, other evidence points to the increasing tolerance of whites for multiracial diversity. See Peter Q. Blair, *Beyond Racial Attitudes: The Role of Outside Options in the Dynamic of White Flight*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 31136, 2023) [https://www.nber.org/system/files/working\\_papers/w31136/w31136.pdf](https://www.nber.org/system/files/working_papers/w31136/w31136.pdf) [https://perma.cc/ER9G-

replacement theory, and other hateful ideologies that thrive on national immigration control, by contrast, are plain to see. Norms and interests that take the most violent forms of large-scale, local retribution off the table have been successfully consolidated. Indeed, this is why the protest against demographic change on January 6, 2021, went national. The highest correlation for arrest on January 6 was the percent decline in white population in a metropolitan area.<sup>283</sup> Thus, dissent against local demographic change drove a national political insurrection—not a local one—in part because the national level is the overdetermined focal point of identity-related claims.

The frictions of local demographic change and diversity are still there in force, of course, but the rank vigilantism of the past will have a much more difficult time repeating itself. Much remains the same in the United States with respect to race and difference, but much has changed—some norms have been consolidated, whatever the frightening echoes the past that the Trump years have brought. And while the horrors of nineteenth and twentieth century localism<sup>284</sup> urge appropriate caution over decentralization, history should not blind us to the possibilities and opportunities of the local or the metro in the twenty-first century. Large metro areas in particular are the spaces today that contain the political and economic formations most amenable to immigration liberalization. This doesn't mean that immigration questions will be easy or necessarily superior to the national status quo in every metropolitan area. The difference I am pointing to between metro-areas and national borders is relative, not absolute. But there is a lot of normative fertility in that relative difference.

For the non-metro areas or localities that do view outsiders, or people who are “different,” with suspicion and fear, localization of immigration questions offers them actual control over the settlement of noncitizens within their jurisdictions—something that was never on offer at the national level. For many decades, citizens who fear immigration have been told that it would be controlled or curtailed, but on the ground, the country's racial makeup kept changing inexorably: non-whites kept moving in, and support for Trump (and the January 6 insurrection) correlated strongly with the rate of change in non-white composition in particular places.<sup>285</sup> The long-promised, never -met desire for a stop to demographic change put Trump

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JAGD] (finding that tolerance for multiracial diversity at the neighborhood level has increased over time and that the ability to act on preferences for white homogeneity by switching neighborhoods in a metro area has decreased over time as more neighborhoods in a given metro area have diversified).

283. Robert A. Pape, Opinion, *What an Analysis of 377 Americans Arrested or Charged in the Capitol Insurrection Tells Us*, WASH. POST, (Apr. 6, 2021, 10:58 AM) <https://www.washingtonpost.com/opinions/2021/04/06/capitol-insurrection-arrests-cpost-analysis/> [https://perma.cc/7R34-3ZAX].

284. See generally Daniel Farberman, *Redemption Localism*, 100 N.C. L. REV. 1527 (2022); BETH LEW WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (2021).

285. See Michael H. Keller & David D. Kirkpatrick, *Their America Is Vanishing. Like Trump, They Insist They Were Cheated*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/23/us/politics/republican-election-objectors-demographics.html> [https://perma.cc/7HQK-KX35]; Matthew Fowler, Vladimir E. Medenica & Cathy J. Cohen, *Why 41 Percent of White Millennials Voted for Trump*, WASH. POST (Dec. 15, 2015, 5:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/15/racial-resentment-is-why-41-percent-of-white-millennials-voted-for-trump-in-2016/> [https://perma.cc/ETN9-4RCW].

in the White House. Citizens who have these desires, however forbidden and unsavory they may be, cannot be wished away. They must be dealt with head-on. And their citizenship status, however reprehensible we find their views, grants people with these needs and views enormous political power. Post-Trump, we know that they cannot just be managed technocratically in the same way they had always been.<sup>286</sup>

Providing actual control over immigration meets a fundamental, emotional need to manage identity that all Americans have across the political and social spectrum. Attending to citizens' emotions about immigration is a critical part of managing migration law and politics in the technocratic sense as well as in harnessing emotion for legal transformation.

Martha Nussbaum teaches that good, stable, liberal democracies must attend to, guide, shape, and cultivate the emotional lives of their citizens. "All political principles," Nussbaum writes, "need emotional support to ensure their stability over time, and all decent societies need to guard against division and hierarchy by cultivating appropriate sentiments of sympathy and love."<sup>287</sup> Immigration, especially of diverse peoples, brings up some of the strongest, most potent, and most dangerous emotions with which liberal societies must reckon. Our liberal society has made an effort to manage these emotions technocratically at the national level. These choices have been counterproductive. In particular, the deep emotional need that citizens have to control immigration, to play a part in deciding what kinds of people we embrace as part of our society, has been neglected or inflamed in dangerous and wasteful ways.<sup>288</sup> These emotions can be better dealt with if control is delegated to lower levels of government.

Much is made in the political theory and immigration law literatures of the way that citizen control over immigration facilitates national self-determination and social cohesion. The need to cultivate these two emotionally charged social values often serves as the justification for putting citizens' raw, poorly informed beliefs about immigrants into national policy form. But the way in which exclusion of any sort necessarily builds social cohesion, or creates a satisfyingly determined national self, is poorly defended in the literature.

In fact, the way we exercise national control over immigration corrodes social cohesion at least in some geographies and facilitates a dangerous set of fantasies linked to the right to self-determination. But we can imagine that a more participatory, localized process of letting immigrants in might actually help to build

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286. The data and analysis laid out in Blair, *supra* note 282, can also be read as revealing that there is a set of whites who wish to escape multiracial diversity at the neighborhood level in their diverse metropolitan region but no longer can because of a relative lack of homogenous white neighborhoods in their particular metropolitan regions. Pairing this evidence with the high correlation between racial diversification and arrest at the January 6 insurrection, we can surmise a kind of desperation to escape racial pluralism among some subset of the white population. *See generally* Pape, *supra* note 283. That desperation among white reactionaries or authoritarians is dangerous and needs to be accounted for. A key insight of this piece is that such management can happen more effectively if we pluralize and decentralize the immigration power.

287. MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 3 (2013).

288. Marissa B. Litwin, *The Decentralization of Immigration Law: The Mischief of § 287(g)*, 41 SETON HALL L. REV. 399, 404 (2011).

a sense of social cohesion in many places around liberals' enlightenment/golden door vision of nationalism. If we structured immigration law to help citizens feel that we Americans are engaged actively in the project of building a society where we love our immigrants because they are ours—we hand-picked them for our local communities, we invested in them—rather than because some distant technocratic actor holding an arcane and inscrutable calculus told us to, if immigration law were a constructive community undertaking, that would be worth doing and worth fighting for. The expansion in the availability of private sponsorship of refugees (both by individuals and groups of individuals, rather than exclusively by organizations) under the Biden administration's new policy is one example of what this kind of undertaking could look like.<sup>289</sup>

### C. Calming the Reactionary Mind

Political scientist Karen Stenner<sup>290</sup> posits that between 30% and 40% of Americans are dyed-in-the-wool “authoritarians.” What she means is that more than a third of citizens find the modern United States and its near-constant rhetorical emphasis on difference—and the actual pluralism and diversity of the United States—acutely threatening. When authoritarians feel threatened, they lash out, sanctioning any means necessary to restore their sense of oneness and sameness. Trump's rise, as Stenner has pointed out in popular fora,<sup>291</sup> tracks her decades-old thesis.

National control of immigration regulation turns reactionaries into political pawns to be manipulated by savvy, fearmongering politicians at the national, local, and state level. Demagogues can easily activate fear of difference to drive authoritarian voters to the polls with promises to restore oneness and sameness—to make America, or Texas, or Florida, white again. Following Trump's proof of concept for the power of this strategy, governors like Ron DeSantis of Florida and

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289. Jennifer Hansler, *Biden Admin Unveils New Program to Allow Private Citizen Groups to Sponsor Refugees*, CNN, (Jan. 19, 2023), <https://www.cnn.com/2023/01/19/politics/welcome-corps-program-launch/index.html> [<https://perma.cc/3ECJ-49SN>]. By allowing any group of five individuals to sponsor a refugee, and even refer an individual refugee for screening, the Welcome Corps program helps to create a constituency of care and a politics of welcome to counteract the constituency of carcerality and closure created by the border industrial complex. see Miller *supra* note 130. Of course, in its current form the Welcome Corps is ameliorative—it does not increase the number of refugees the U.S. can take in, capped today at 125,000 (though the cap is not being reached, despite massive need). Nonetheless, the way that the Welcome Corps could help to inculcate an ethic of care and welcome among people with more political clout than noncitizens is a promising shift in approach. The fact that the Center for Immigration Studies, a restrictionist “think-tank,” views the program as threatening despite the limitations underscores the importance of this shift in tactics. See Nayla Rush, *The Welcome Corps: A 'Private' Sponsorship Program for Refugees*, CTR. FOR IMMIGR. STUD. (Mar. 16, 2023), <https://cis.org/Report/Welcome-Corps-Private-Sponsorship-Program-Refugees> [<https://perma.cc/7YDT-JRVW>]. The author has particular concerns about the intent among Welcome Corps advocates to use private sponsorship to increase the capacity of the United States to admit refugees beyond existing numerical caps.

290. STENNER, *supra* note 53, at 25–31; Karen Stenner & Jessica Stern, *How to Live With Authoritarians: Democracies Have to Learn to Manage Some People's Innate Fears of Change*, FOREIGN POL'Y (Feb. 11, 2021, 4:32 PM), <https://foreignpolicy.com/2021/02/11/capitol-insurrection-trump-authoritarianism-psychology-innate-fear-envy-change-diversity-populism/> [<https://perma.cc/M6PK-X5DL>].

291. Stenner & Sterns, *supra* note 290.

Greg Abbot of Texas have followed suit. That these governors—and Trump—cannot actually deliver on this promise doesn't matter. In fact, demagoguery may be even more useful as a political strategy when following through on the promise to restrict migration cannot come to pass. National control lets Governors Abbot and DeSantis have it both ways. They can reap the material benefits of the immigrants in their state, while demonizing them in order to activate authoritarian voters to the polls.

Pushing immigration questions down changes the equation on immigrant demonization, even at the state level, where we can imagine it continuing to pay off in some or even many states. Placing such power at the level of the metro area is probably the best medicine for reactionaries, since some places where reactionaries are located would actually get to control who they get to add to their population. But even devolution of immigration questions to the state level may be salutary in the medium-to-long run for pro-immigration partisans, since it would endogenize the material effects of immigration into the political calculus, cutting off state politicians' free lunch on demagoguery.

Additionally, under centralized immigration rule, migration hits local communities today as an imposition from without, whether legal or illegal. Visas are granted by employers, by immigrants themselves, and by lottery, but not by the local communities where immigrants live out their day-to-day lives. The undocumented are employed by companies indifferent to the effects on the communities the undocumented occupy. Giving local communities some leverage in this situation, especially in places like rural areas<sup>292</sup> where authoritarian personalities are likely overrepresented in the population, is likely to ameliorate some of the negative reaction to the threat authoritarians feel from difference. In places where that reaction is strongest, authoritarians will actually have the power to stop immigration into their communities.

#### *D. Nurturing Abolitionism*

Open borders make good sense on paper<sup>293</sup> but are anathema to the commonsense that runs politics at any level. Historically, radical ideas about social organization like free movement of persons have relied on jurisdictional pluralism, often in urban areas, to develop and thrive.<sup>294</sup> The combination of urbanity and jurisdictional autonomy is especially important where the desired social change involves consciousness raising, a transformation about the way people think about social life and its possibilities.

One way to think about the value of jurisdictional pluralism for radical ideas is to ask where the gay rights movement would be without the relative political and

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292. Tony McDougal, *European Parliament Votes to Ban the Use of Cages by 2027*, POULTRY WORLD (June 14, 2021), <https://www.poultryworld.net/poultry/european-parliament-votes-to-ban-the-use-of-cages-by-2027/> [<https://perma.cc/BGE5-Z3K5>].

293. See CAPLAN & WEINERSMITH, *supra* note 3, at 163–75.

294. See Paul Schiff Berman, *Global Legal Pluralism as a Normative Project*, 8 U.C. IRVINE L. REV. 149, 177–81 (2018); Deborah M. Weissman, Jacquelin Hagan, Ricardo Martínez Schuldt & Alyssa Peavey, *The Politics of Immigrant Rights: Between Political Geography and Transnational Interventions*, 2018 MICH. ST. L. REV. 117, 122 (2018); CATHRYN COSTELLO, *THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW* 41–62 (Paul Craig & Gráinne de Búrca eds., 2015).

legal autonomy of cities like San Francisco. San Francisco's emergence as a gay-rights mecca was catalyzed by a host of unique social, economic, political, and legal characteristics that enabled residents of San Francisco to develop a gay consciousness and to then resist the national government's effort to re-establish traditional gender roles and family structures after the social upheaval of the war effort.<sup>295</sup>

World War II uprooted tens of millions of American men and women from traditional family structures, and the social control those structures entailed, into impersonal, sex-segregated environments like the military and industrial production. These environments allowed people inclined to homosexual attraction space in which to explore those desires that otherwise would have been unavailable.<sup>296</sup> San Francisco was a principal beneficiary of the migrations of people and production during the war; it also, uniquely, became a depository of servicemembers dishonorably discharged from service for homosexual activity. Many of these servicemembers stayed in the Bay Area after the war, rather than return home.<sup>297</sup> The wartime destabilization of American's social worlds thus set the stage for gay consciousness and life to develop in certain geographies, like San Francisco.

As a reactionary crackdown to re-establish traditional family relations took shape on the national stage,<sup>298</sup> places where gay people congregated in San Francisco, largely gay bars, enjoyed some legal and economic protections that kept those spaces open long enough for a gay political consciousness to emerge that was capable of resisting the local backlash to gay presence when it arrived in the late 1950s.<sup>299</sup> Particularly instrumental were the California state courts that "upheld the right of homosexuals to congregate in bars and other public establishments. Though the police found ways around the decision and continued to harass gay bars, the ruling gave to bars in San Francisco a tiny measure of security lacking elsewhere."<sup>300</sup>

These small, local differences in law and social and economic structure snowballed over time into distinctions that turned San Francisco into one of a few cities that nationalized the gay rights movement.

What if, during the postwar period, the federal government had had the authority and capacity to deport LGBTQ people out of San Francisco and return them to their hometowns? Their renewed proximity to tradition-minded relatives and traditional religious authority figures might have snuffed out their emerging gay consciousness? Or what if the FBI had the scale and authority at the time to raid gay bars, clubs, or other places where gay life was coming into its own in these cities of relative tolerance?<sup>301</sup> If national power and national policies like these had been in place—or if existing national powers like the FBI were far stronger than they were—it is far more difficult to imagine the development of the consciousness and

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295. See generally John D'Emilio, *Gay Politics, Gay Community: San Francisco's Experience*, 55 SOCIALIST REV. 77 (1981).

296. *Id.*

297. *Id.* at 80.

298. *Id.* at 81.

299. *Id.*

300. *Id.*

301. FBI Director Hoover used sexuality as a way to damage those with communist or socialist tendencies, or even civil rights era activists. See MARY STANTON, FROM SELMA TO SORROW: THE LIFE AND DEATH OF VIOLA LIUZZO (2004).

confidence of gay people in those local communities. Radical social possibilities and new orders have to be built through knowledge that comes from hands-on experience. Fear of new ways of being human in the world have to be countered in community, in places where the world does not fall apart when people choose to live differently. Urban areas are technologies for this sort of consciousness raising.<sup>302</sup>

Pluralism, localism, and urbanity support immigration law abolitionism in similar ways. The Constitution and case law have dictated that the national government cannot by fiat or excessive coercion commandeer local resources for its immigration enforcement goals. This set of rules and norms has helped to shape contingent, limited spaces of sanctuary, and the nascent ideas about immigration abolitionism have gained a limited foothold in such places. Not least because these policies have allowed large undocumented populations to persist. That any cosmopolitan geography exists at all—that any locality would fight the federal government’s desire to deport noncitizens with criminal convictions—is a kind of secular miracle: a testament to the empathetic, integrative possibilities of local democratic politics, where those possibilities are not crushed by centralized authorities.

Compare, for example, a place like Denmark, typical of centralized police forces in Europe, where even church property cannot provide sanctuary for the undocumented because the national church is an arm of the national state.<sup>303</sup> There is no distinction in Denmark or most of Europe between local and national police, no commandeering doctrine to stop the reach of national common sense and allow space for other possibilities and the accretion of new social knowledge about those possibilities.<sup>304</sup>

But immigration abolitionism requires more than tolerance or negation to endure and expand into something that will gain traction and move the ultra-entrenched legal regime that legitimates borders, or at least makes them feel natural and essential, just, and right, to most denizens of the rich world (or, for the skeptical, a necessary evil). To have a chance to grow and thrive, abolitionism needs an affirmative project and possibilities at small-scale to provide proof of concept. Border abolitionism needs such spaces in order to even entertain the possibility of scaling up to take on national boundaries.

San Francisco had the legal tools, sovereignty, and autonomy to allow gay people to develop consciousness, community, and local political power that ultimately led to emancipatory possibilities across the United States, including at the Supreme Court. With power over immigration firmly ensconced at the national level, such that sanctuary cities cannot keep the national immigration police force

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302. See JOSEPH HENRICH, *THE WEIRDEST PEOPLE IN THE WORLD: HOW THE WEST BECAME PSYCHOLOGICALLY PECULIAR AND PARTICULARLY PROSPEROUS* 307–21 (2020).

303. NIELS VALDEMAR VINDING, *STATE AND CHURCH IN DENMARK* 87 (2019).

304. Even with these more centralized police forces, “Solidarity Cities” have emerged throughout Europe, suggesting the popularity of the underlying demand for immigrants from city-dwellers. See Amy Foerster, *Solidarity or Sanctuary? A Global Strategy for Migrant Rights*, 43 *HUMAN. & SOC’Y*, 19 (2019), <https://doi.org/10.1177/0160597618817456> [<https://perma.cc/S68G-RRG7>].

out of their communities and locales with the rare conditions to nurture abolitionism cannot come together as a community to stop deportations or invite desperate refugees into the arms of a welcoming community, it's hard to imagine how immigration abolitionism does not hit a dead end. Without the redistribution of power, immigration abolitionism would seem destined to remain perpetually in the realm of utopia: to be discussed in seminar rooms as a foil for the durability of the permanent commonsense that borders are legitimate and necessary. The practice—really praxis—necessary to act on the political transformation that abolitionism demands is not viable in the absence of a more plural immigration power structure.

#### *E. Thoughts on Practicalities*

At this point the reader's mind has surely taken a practical turn, asking how this would actually work. Would immigrants be stuck in the city of Chicago, or New York, or Houston? Or Wichita? Could they travel? What about enforcement?

We manage the overlapping and cooperative decentralized legal and decision-making regimes in a variety of areas, and this would be no different. Addressing practicalities could inform an entire full-length paper or book, but ultimately, I don't believe that ink spilled on these issues is particularly useful at a conceptual level, both because I am not making an absolutist case for this approach and because the national level is so replete with problems. In my view, the current nationalized structure is so deeply and irredeemably damaged that even small shifts in the direction of decentralization that grow gradually, or as capacity to administer decentralization develops, would be productive. Targeted devolution of the power would both aid migrants themselves and make space for normative development in the direction of abolition. In prior work, I advocated for decentralizing the power to forgive migrants facing deportation for crime. Other test cases for decentralization might include permitting localities or states to issue visas,<sup>305</sup> allowing localities to stop deportations for locally-articulated reasons, permitting localities or states to prevent ICE from entering their jurisdictions, permitting liberal private sponsorship of refugees at levels set by localities,<sup>306</sup> or permitting localities or states to articulate and execute preferences for migration and deportation—consistent with constitutional or national legislative floors.<sup>307</sup>

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305. Ilya Somin, *Let States Issue Immigration Visas—a Federalist Response to GOP Governors' Migrant Busing Stunts*, REASON (Sept. 23, 2022, 2:05 PM), <https://reason.com/volokh/2022/09/23/let-states-sponsor-immigration-visas-a-federalist-response-to-florida-and-texas-migrant-busing-stunt/> [https://perma.cc/HLC8-6XZG]; SOMIN, *supra* note 78. Somin has written in favor of decentralization as a second-best alternative to free movement across international borders, see ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION AND POLITICAL FREEDOM* 161–64 (2020).

306. Ilya Somin & Sabine El-Chidiac, *Americans Should be Able to Sponsor Refugees Who Can Stay Permanently*, WASH. POST (July 18, 2022, 5:00 AM), <https://www.washingtonpost.com/outlook/2022/07/18/refugee-sponsored-ukraine/> [https://perma.cc/TK4T-QRYD].

307. Morales, *supra* note 14.



CONCLUSION: STRATEGIC BENEFITS OF IMMIGRATION POWER  
RECONSTRUCTION

My final suggestion for immigration reformers: elevate the status of decentralization on the reform agenda. Careful and thoughtful decentralization should be second on the reform agenda only to the full legalization of our eleven million undocumented. My case for the strategic wisdom of prioritizing this change over many others is that it is a win-win structural reform that opens up possibilities for much better pro-immigrant outcomes in the future in many localities or states that migrants would be willing to move to. Abolitionists and restrictionists gain something tangible in this reform, a rare thing in a political battle that has become increasingly absolutist and zero sum.

For those who nonetheless continue to fear terrible outcomes despite my arguments here and elsewhere, I suppose I would ask two questions. First, do you truly believe in the material or normative case for more migration? And second, do you believe in the power of advocates in a properly structured democratic setting to persuade fellow citizens of the material and moral case for more migration? I believe in the truth of both of these statements. If you do as well, then I believe your fears of immigration law decentralization are unfounded and I urge you to join in the effort to make immigration power decentralization a priority.