

# The Political Economies of Immigration Law

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*A largely dysfunctional American immigration system is only poorly explained by simple depictions of the political economy of lawmaking on this issue, blaming factors such as deliberate economic policy choices, longstanding public attitudes, explicit presidential decisions, or general gridlock. Instead, the structure of immigration law emerges from intersecting effects of three separate dynamics—statutory compromises rooted in the political economy of lawmaking, organizational practices reflecting the political economy of implementation, and public reactions implicating the responses of policy elites and the larger public to each other. Together, these factors help constitute an immigration status quo characterized by intense public concern, continuing legal controversies, and powerful obstacles to change. (1) Particularly since 1986, American immigration statutes have created a legal arrangement essentially built to fail, giving authorities regulatory responsibilities that were all but impossible to achieve under existing law. (2) Implementation has been characterized by organizational fragmentation, with policy changes involving one agency producing externalities not owned by that agency, and limited presidential power to change enforcement or implementation. And (3) the interplay of unrealistic statutory goals, enforcement, and growing public concern engenders a polarizing implementation dynamic, where agencies' incapacity to enforce existing law tends to spur polarized political responses producing legislation that further exacerbates agency difficulties in meeting public expectations.*

*The resulting process over the last few decades persistently favored expansion in the provision of border enforcement resources. This development is widely supported or at least tolerated by most political actors, even though it fails to address the core institutional problems of the status quo. Beyond what these developments tell us about immigration, they also reveal much about (a) how statutory entrenchment in the United States is affected by political cycles capable of eroding the legitimacy of public agencies, and (b) how powerful nation-states control, in limited but nonetheless significant ways, the transnational flows affecting their well-being and security.*

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## INTRODUCTION

American immigration law rarely appears as a coherent body of legal doctrine. Instead of creating a defensible prescriptive scheme for regulating national membership, the day-to-day realities of immigration law are more often defined by a long list of controversial disputes sprawling across federal courtrooms, state legislative chambers, congressional committees, and federal agencies. Immigration cases reaching the Courts of Appeal frequently engender growing skepticism about specialized immigration adjudicators, and showcase appellate judges’ increasing reluctance regarding deference to factual or legal judgments of administrative adjudicators making wildly inconsistent decisions.<sup>1</sup> Many of the same appellate judges have long wrestled with the perennially divisive problem of immigration federalism,<sup>2</sup> each dispute underscoring the depth of state-level frustration with a system that simultaneously tolerates the presence of over

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1. See, e.g., Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–80 (2007).

2. See, e.g., *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999).

ten million undocumented immigrants while it spends billions of dollars to avoid such migration.<sup>3</sup> Another doctrinal corner features agencies subject to growing pressure for strict interior immigration enforcement, even as agencies face stark limits on federal power to punish employers harboring “constructive knowledge” of their workers’ illegal status.<sup>4</sup> Still other cases provoke controversy by declining to extend labor law protections to unauthorized immigrants whose presence affects broader labor market conditions.<sup>5</sup>

Indeed, because these immigration disputes involve matters ranging from labor markets to judicial deference, they often appear to implicate fundamentally distinct legal, cultural, and economic disagreements. Yet closer scrutiny reveals instead a curious measure of convergence. In fact, most of these controversies constitute the gnarled, partially occluded roots of a single statutory compromise shaped by decades of legislative accretion: the Immigration and Nationality Act (INA). Within the text of the INA are enshrined difficult-to-prove state-of-mind requirements governing employer liability for hiring unauthorized workers.<sup>6</sup> The statute’s provisions helped generate the contested relationship between immigration laws and labor-related statutory protections for workers.<sup>7</sup> They define the discretionary powers of immigration courts and produce their vast caseloads.<sup>8</sup> Perhaps more than any other aspect of American law, the statute defines how the country addresses the extent of unlawful migration galvanizing state and local interest in immigration regulation.<sup>9</sup> As federal agencies have sought to implement the statutory scheme in recent years, moreover, rising numbers of concerned Americans have derided the process through which the United States appears (or fails) to govern immigration.<sup>10</sup>

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3. See *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011) (“Against a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns, the Arizona Legislature enacted a set of statutes and statutory amendments in the form of Senate Bill 1070.”).

4. *Collins Foods Int’l, Inc. v. INS*, 948 F.2d 549, 555 (9th Cir. 1991).

5. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002); see also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (noting that “most undocumented workers are reluctant to report abusive . . . [labor] practices”).

6. See, e.g., *United States v. New El Rey Sausage Co.*, 1 O.C.A.H.O. 78 (1989), *aff’d*, 925 F.2d 1153 (9th Cir. 1991).

7. See generally Annie Decker, Comment, *Suspending Employers’ Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, 115 YALE L.J. 2193 (2006) (proposing statutory changes to clarify the importance of labor law responsibilities in relation to immigration requirements).

8. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006) (discussing statutory changes restricting the discretion of immigration judges); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (discussing the chronic problems with immigration adjudication, and the changing scope of discretion for immigration judges).

9. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571–76 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008).

10. See Randal C. Archibold & Megan Thee-Brenan, *Poll Finds Serious Concerns Among Americans*

But how exactly does the United States govern immigration? It is a thesis of this Article that the answer lies not only in the content of statutory provisions, but in the distinctive relationships between statutes, public organizations, and the larger public. Describing these relationships, and particularly how they can drive immigration policy outcomes, is the major purpose of this Article. In the process, I elucidate how current immigration law persists even in the face of widespread public scorn. I also explore what this state of affairs tells us about the broader process of statutory entrenchment in a changing world of organized interests, complex regulatory challenges, and transnational flows. Immigration officials may shoulder the unique responsibility for administering laws that shape the character of a nation and, as we shall see, face an often unforgiving institutional context. But in a larger sense, they share with food safety inspectors, transportation security supervisors, and countless other civil servants a role in feedback loops that connect statutory schemes to public reactions and legal outcomes in a world of difficult-to-control transnational flows.

A focus on institutions can tell us much about statutory implementation in a pluralist system. But it can be particularly illuminating in the immigration context. In immigration, a complex overlay of distinct bureaucracies and political cross-currents exists in an uncertain relationship to elaborate statutory language.<sup>11</sup> It is important to scrutinize the interplay of statutes, implementing institutions, and public reactions in this context because simpler explanations for the law's development come up short. As explained in Part I, the content and persistence of the nation's broad immigration architecture is only partially and incompletely explained by accounts focusing on the general difficulty of achieving major statutory changes in any domain, public attitudes, or rational economic policymaking. Because statutes come alive (or die) through the implementation process, we should look there for some of the answers missing from simpler accounts. We will therefore need to understand the implementation trajectory of a scheme that, by most accounts, took its present form around the mid-1980s when lawmakers enacted the Immigration Reform and Control Act (IRCA) that promised to rationalize immigration through a combination of enforcement and legalization of undocumented individuals.

That promise was never realized. In some cases, of course, the implementation process can smooth out statutory contradictions, as when administrative agencies and even courts have sometimes brought coherence in statutory domains involving civil rights<sup>12</sup> or public health.<sup>13</sup> Not so with

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*About Immigration*, N.Y. TIMES, May 4, 2010, at A15.

11. See *infra* Part II.

12. See generally WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES (2010) (discussing the harmonization and development of statutory schemes in a variety of contexts, including civil rights).

13. See generally LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW (2008).

immigration. Here, statutory contradictions involving a domain fertile for social, cultural, and economic concerns have grown ever more toxic because of organizational problems, and agencies lack the flexibility to better align regulatory activity and public expectations. In this environment, formidable cross-winds arising from statutory limitations, implementation problems, and public reactions have engendered a cycle of increasingly polarized public attitudes and legislative responses. Properly understood, this dynamic goes a long way toward revealing the terrain in which legal disputes about immigration arise.

In Part II, I lay the groundwork for understanding that terrain. In addition to reviewing some often-neglected economic and political factors affecting complex regulatory schemes, I explain how those forces interact. Scholars and observers with some interest in the institutional dynamics affecting American immigration have occasionally devoted valuable attention to understanding discrete features of immigration law, such as the history of the President's role,<sup>14</sup> the implications of state and local action in this area,<sup>15</sup> and the swelling importance of border or criminal enforcement.<sup>16</sup> Though each of these areas alone merits scrutiny, one recurring challenge in unpacking the system is the entanglements among these and other institutional realities of immigration, including the reactions of organized interests and the public as agencies struggle to implement an intricate statutory scheme amidst growing national concerns about the issue.

Immigration regulation thus presents policymakers with unusually severe dilemmas. Even as policymakers pursue relatively distinct agendas at opposite ends of Pennsylvania Avenue, they share a surfeit of technical challenges, growing public scrutiny, and competing pressures from factions seeking to protect, exclude, or exploit immigrants. Accordingly, in Part III, I train attention on how those realities fuel the existence of three interlocking political economies that shape modern immigration law: statutory compromises rooted in the political economy of lawmaking, organizational practices reflecting the political economy of implementation, and public reactions implicating the responses of policy elites and the larger public to each other.<sup>17</sup> All three are necessary to assess the law as implemented and perceived by the public. The first political economy implicates the major statutory features of immigration law, particularly the modern, post-

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14. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

15. See generally Rodríguez, *supra* note 9 (discussing the implications of and interactions between state and local government actions in immigration law).

16. See, e.g., Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897 (2002).

17. The reference to "political economy" describes the process through which individuals and organizations manage scarce resources and political capital and make trade-offs in an environment that is difficult to control. Cf. Alberto Alesina, *Program Report: Political Economy*, 3 NBER REP. 1, 1–3 (2007), <http://www.nber.org/reporter/2007number3>.

IRCA Immigration and Nationality Act (INA). Here, interested parties feature prominently, often having done their work against the backdrop of relatively limited public attention.<sup>18</sup> The second dynamic implicates public organizations and their incentives, which share control over immigration and respond to a presidency with surprisingly limited capacity to drastically change the immigration status quo through executive action. Finally, the third political economy implicates the process through which policymakers and stakeholders decide on their strategy to capture, shape, and respond to public attention about immigration.

Together, these multiple political economies reveal the relationship between a complicated statutory law and its larger institutional context. They define the subtleties of a “policy feedback” process that partly reflects the insights of the established literature on the subject and partly showcases some underappreciated dynamics allowing much-maligned legal regimes to persist in the face of eroding public legitimacy for the agencies and the statutes they implement. By taking these factors into account, a more useful picture emerges of the immigration law status quo—as well as some of the powerful constraints that keep it in place. We can thus better understand how resource constraints on interior enforcement counter-intuitively coexist with and even encourage some forms of aggressive enforcement,<sup>19</sup> and why statutory changes justified in the name of empowering agencies and restoring public confidence are more likely to have precisely the opposite effect.<sup>20</sup>

The resulting picture is not merely one of statutory dysfunction. It portrays instead a cluster of responses driven by entanglements between statutory provisions, organizational fragmentation, and political backlash. Those entanglements exist because of the overlapping political economies of immigration law, where statutes affect agency actions, and these actions in turn impact politics as well as the durability of an important piece of the nation’s legal architecture. Because the modern immigration system avoided difficult trade-offs (such as the consequences of actually enforcing statutory requirements in the domestic labor market) and originated in a policymaking process that needed to satisfy multiple stakeholders (perpetrating a system that kept domestic enforcement limited and blocked or deferred changes in lawful immigration), it lacked the essential legal attributes that would have made it more feasible for administrators to align the system’s outputs with its putative goals.<sup>21</sup> That is, IRCA’s regulation of the labor market is rarely enforced and harbors virtually no flexibility to address changing

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18. See *infra* Part III.A. The “modern” immigration system means the statutes, rules, and enforcement practices that have emerged in light of the passage of two landmark pieces of legislation that (respectively) created the foundations of the modern immigration enforcement system and visa allocation scheme governing American immigration law: the Immigration Reform and Control Act of 1986, and the Immigration and Nationality Act of 1965.

19. See *infra* Part III.D.

20. See *id.*

21. See *infra* Part III.A.

U.S. economic rationales for migration. Meanwhile, the mix of labor market incentives and limited legal immigration opportunities all but ensures a vast, long-term undocumented population in the United States which has been increasingly discouraged from leaving because of a build-up in border security that has proven an easier sell than the alternative policy solutions.<sup>22</sup> Agencies thus struggled with modern immigration law from the outset as they implemented statutory changes in 1965 and 1986, and the agencies' missions grew more difficult amidst rising political frustration and organizational fragmentation.

Political reactions from lawmakers and the public have compounded these structural weaknesses. Those reactions subject the system to increasing derision while simultaneously fomenting a slew of barriers to change arising from growing public concern about immigration, public skepticism that authorities will enforce legal requirements, and risk-aversion to more dramatic changes from some stakeholders who have adapted to the status quo. The result has been substantial difficulties in both implementation and achieving change to the status quo—difficulties greater than those encountered in a variety of regulatory domains less prone to trigger deep cultural conflict, such as disease surveillance or tax enforcement.<sup>23</sup> Those difficulties have persisted even in the face of support for reform from Presidents, many economic stakeholders, and the public. Instead, the institutional realities of modern immigration law have served up a constant ratcheting up of border security resources and changes in agency authority incapable of resolving broader immigration problems. In short, the system was built to fail, and because it does, immigration law engenders growing public skepticism and political incentives for piecemeal changes that exacerbate some of the daunting problems in immigration policy. In contrast, earlier reforms benefited from lower public salience, a more supportive interest group context, and a policymaking process not burdened by the legacy of a major immigration scheme essentially built to fail.

Plainly, such institutional failure does not explain everything about the complicated history of immigration in the United States. The patterns of migration that produced the modern United States owe much to the politics of language and race, the long-term structure of labor markets, and the interplay of geography and economic history. Instead the point is to highlight how these and other forces capable of driving immigration law in recent decades operate through a pattern of institutional relationships, organizational problems, and public reactions that shape the meaning and entrenchment of statutes and regulatory rules. The resulting institutional challenges and political responses inevitably constrict the range of options, and change the costs and benefits of alternatives. Consider: if

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22. See, e.g., Kevin Thom, *Repeated Circular Migration: Theory and Evidence from Undocumented Migrants* (June 25, 2009) (unpublished manuscript), available at [https://files.nyu.edu/kt44/public/RepeatedCircularMigration\\_Jun09.pdf](https://files.nyu.edu/kt44/public/RepeatedCircularMigration_Jun09.pdf).

23. See *infra* Part III.A.

the landmark 1990 Immigration Act that raised worldwide ceilings for immigration illustrates how American immigration policy is far from a one-way ratchet fueled by restrictionist sentiment, it is also quite plain that such a statute—devoid as it was of large-scale enforcement measures even as it embodied changes sought by immigrant, civil rights, and business advocates—would stand little chance of passage today.

Beyond what these developments tell us about immigration law, they also reveal much about the interplay of policymaking and statutory entrenchment in American law. As Part IV explains, the federal immigration system illustrates how political feedback relationships can erode the legitimacy of public agencies. The recent history of American immigration law also sheds light on the prospects for powerful nation-states to control, in limited but nonetheless significant ways, the transnational flows affecting their well-being and security. Thus, while no thoughtful observer can deny that advanced industrialized countries like the United States have a measure of capacity to shape these flows, what power exists to control them is badly depleted under the current system. In an irony that reverberates through far-flung doctrinal corners, that capacity has itself been shaped by institutional realities producing far too much attention to controlling borders—and too little to controlling immigration.

#### I. THE STRUCTURE AND PERSISTENCE OF THE AMERICAN IMMIGRATION LAW

Ranchers in the Sonoran Desert of Arizona's Cochise County, technology executives in forested suburbs of Seattle, meatpacking managers overseeing facilities in the Nebraska prairie, New England university presidents, and California farmworkers all have something in common. All are affected in large and small ways by the American immigration system, and all have a means of affecting the lawmaking process that produced that scheme. These Americans live in a nation of vast cities, complex labor markets, and social change. In each of these domains and many others, the story of immigration—and the responses to it—is the story of the nation. This makes for a complicated history, where significant episodes of restrictive, exclusionary policymaking have alternated with self-conscious efforts to establish a framework for large-scale lawful migration.<sup>24</sup>

Recent efforts to establish such a framework have failed. In this Part, I set the stage for understanding the realities of modern immigration law by explaining its significance and the contradictions arising during a roughly quarter-century long process to build such a framework for lawful immigration. The focus then turns to the persistence of the nation's core immigration compromises, even in the face of concerted efforts by two Presidents over the last five years to make major changes amid widespread public scorn. As with other characteristics of the existing INA compromise, this persistence is not fully explained by the public's

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24. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN* 432–33 (2006).



broad acceptance of immigration law's goals or structure or by the widespread prevalence of political gridlock, nor does it arise from a reasoned strategy (either among the bulk of employers or among policymakers) to manage the labor market.

#### *A. Statutory Foundations of the Immigration System*

In 1965, the Johnson administration scored a sweeping legislative victory. The Texan in the Oval Office had already achieved far-reaching changes in civil rights statutes. Now, Johnson and his congressional allies had delivered on the late President Kennedy's goal of starkly reforming American immigration law. With the enactment of the 1965 Immigration Act, the federal government began administering a new system providing a higher number of visas, removing national origin quotas, and establishing family unity (as well as continuing availability of some employment-based visas) as a core principle of immigration law. With its pragmatic accommodation for heightened legal immigration and its realization of the ideal of removing the national origin quotas that had so defined immigration law in the preceding half-century, the 1965 law was a landmark achievement.<sup>25</sup> At the same time, the law embodied some tensions that arise from pressures for compromise in a pluralistic society and which are perhaps heightened in the contested field of immigration. We will shortly discuss how agencies' implementation of these complex statutes plays a critical role in managing those contradictions and, ironically, in facilitating their persistence, but to understand that process our first task is to review some core statutory features of immigration law.

The package of intricate statutory changes drastically reformed the INA. Gone were the national origin quotas that had long garnered heavy criticism as blatantly racist, particularly at a time when domestic policy concerns were increasingly focused on matters of civil rights. The longstanding four-category preference system was replaced with a more targeted set of seven preference categories, emphasizing the goals of family unity and (subject to a smaller number of total visas) meeting employer demand for individuals with particular skills. While these changes, and particularly the elimination of national-origin quotas, reflected more tolerant attitudes toward Catholics, Asians, and Jews amidst national concerns about inclusion and equality under the law, the new statute nonetheless imposed hemisphere-specific limits on immigration. In particular, it created a worldwide quota of 120,000 immigrants for the Western Hemisphere, and 170,000 immigrants from the Eastern Hemisphere (along with a per-country limit of 20,000 for the Eastern Hemisphere). While lawmakers eventually

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25. See Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137 (1966) (providing a contemporaneous account of why the 1965 Act wrought such dramatic changes in the American immigration scheme).

abolished distinctions between the Western and Eastern hemispheres, important constraints remained with respect to overall limits on most immigrant visa categories, and applying to specific countries.<sup>26</sup>

When Congress enacted the 1990 Immigration Act, it essentially finalized the macrolevel architecture of modern American immigration law. The new legislation raised the annual limit for worldwide immigration to 675,000 (after a three-year period of higher totals to clear backlogs). Of these, about sixty-eight percent of visas were allocated to family-sponsored immigrants,<sup>27</sup> and about twenty percent for employer-petitioned immigrants. A small new diversity visa lottery system allocated 55,000 visas under the new law. In addition, the legislation (and a subsequent 1991 enactment making technical modifications) also created five new employment-based immigration categories to take the place of the two previously existing categories, and slightly altered the country-specific quotas that continue to create long backlogs in countries with higher demand for emigration to the United States.<sup>28</sup>

If the reform of legal migration opportunities drove the 1965 reforms, concern over undocumented migration drove the other major statute shaping the modern system.<sup>29</sup> Unquestionably a compromise to integrate somewhat competing visions for the future of immigration policy, the 1986 Immigration Reform and Control Act (IRCA) included two large legalization programs (one based on the amount of time individuals had unlawfully been present in the United States, and another a special program for agricultural workers).<sup>30</sup> At the

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26. For a helpful discussion of the changes in the INA, see ZOLBERG, *supra* note 24, at 317.

27. Immediate relatives of U.S. citizens, such as parents and minor children, are still exempt from numerical limits on immigrant visas. Nonetheless, their numbers are deducted from the full allocation of visas for family-based immigrants (subject to a minimum guarantee of admission of at least 226,000 other relatives of U.S. citizens and permanent residents).

28. The per-country ceiling is set at 25,000, not counting immediate family relatives. Beginning after the 1990 Immigration Act, seventy-five percent of second-preference immigrants (for example, immediate relatives of lawful permanent residents) are generally excepted from the country-specific cap. Moreover, if the limit on employment-based immigration exceeds the demand in that category in any calendar quarter, any remaining openings may be filled from among visas in other categories (even if the total otherwise exceeds the per-country cap). *See generally* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE 28–35 (6th ed. 2011) (discussing the Immigration Act of 1990 and how it reformed the rules regarding legal entry to the United States, including the numerical limitation system). Although these measures introduced a small degree of flexibility into the scheme, the overall structure of the INA, as amended, remains relatively hardwired and bereft of the flexibility often delegated to administrative agencies in the modern system.

29. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). Ironically, what was considered a relatively large undocumented population in 1986 paled in comparison to the number of illicit migrants in the United States even five or six years later. *See* JEB BUSH & THOMAS F. MCCLARTY III, COUNCIL ON FOREIGN RELATIONS, U.S. IMMIGRATION POLICY: INDEPENDENT TASK FORCE REPORT NO. 63, at 88 (2009), available at <http://www.cfr.org/immigration/us-immigration-policy/p20030> (discussing the context during which IRCA was passed).

30. Applicants in the general program were required to meet most of the requirements of immigrant admissibility to the United States, to not have been convicted of any felony or of three or more misdemeanors in the United States, to not have assisted any form of persecution, and to register

same time, IRCA made a host of other changes to immigration law reflecting an emerging political move toward regulating and reducing the relatively routine employment of undocumented migrants through a comprehensive scheme. The statute's premise of addressing immigration-related issues through a comprehensive strategy was borne out in provisions increasing border enforcement—though in retrospect, these increases were quite limited in comparison to what lawmakers would provide over the ensuing quarter century.<sup>31</sup> Most notably, it imposed landmark new affirmative responsibilities on the entire labor market by requiring employers to assess the immigration status of potential hires as part of a system to reduce the presence of unauthorized workers in the United States.

Through the anodyne language of statutory provisions forging that system, IRCA readily conveyed one of its core goals. Perhaps it even conveyed the clandestine ambition of virtually all immigration regulation: shaping labor markets. Specifically, the employer sanctions provisions of IRCA punished a “person or other entity” that hires, recruits, or refers for a fee for employment in the United States a noncitizen, either (1) knowing that person is unauthorized, or (2) without complying with the Act's employment verification system.<sup>32</sup> The new requirements extended to all employers, including those subcontracting their work, and nearly all workers (including temporary workers). Moreover, the law required employers to retain I-9 forms indicating the specific documents examined.<sup>33</sup> IRCA also permitted an employer to establish as an affirmative

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for selective service if required to do so. If noncitizens met these requirements and filed an initial application before May 4, 1988, they received temporary residence. Recipients of temporary residence then had a limited period of time during which they could adjust their status to lawful permanent residence, subject to conventional conditions involving minimal civics education and English-language requirements.

31. Because provisions included in IRCA also inaugurated the modern era of increasing concern about border security, and about (interior) enforcement, it may appear to some observers as quite similar to recent immigration laws. Nonetheless, it also created by far the largest legalization program in the history of the United States. IRCA's legalization program was responsible for putting millions of people (ultimately 2.7 million) on a path to permanent residence. See DONALD M. KERWIN, *MIGRATION POLICY INST., MORE THAN IRCA: U.S. LEGALIZATION PROGRAMS AND THE CURRENT POLICY DEBATE* 7–8 (2010), available at <http://www.migrationpolicy.org/pubs/legalization-historical.pdf>. To understand IRCA, its historic employer sanctions provision and more modest border enforcement elements need to be put in the context of the legalization program.

32. Immigration and Nationality Act of 1965 § 274A(a)(3), 8 U.S.C. § 1324(a) (2006). Note that, in principle, this formulation established that *knowledge* of an individual's undocumented status made an individual liable to sanctions *even* if the administrative requirements of the law (such as inspection of documents and maintenance of I-9 forms) were otherwise followed. Not surprisingly, the question of what constitutes knowledge soon triggered considerable legal disputes. See, e.g., *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 555 (9th Cir. 1991).

33. See Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 *LAW & SOC'Y REV.* 1041, 1049 (1990). Although penalties have changed, the fundamental problem of low detection probability and the lack of sanctions for outcomes involving employer states of mind, other than “knowledge,” plainly limit the scope and impact of enforcement.

defense to an allegation of unlawful employment that it had complied in good faith with the requirements of the new employer verification arrangement requiring inspection of an individual's documentation.<sup>34</sup> These provisions raised concerns among some lawmakers that IRCA would trigger widespread national origin discrimination among employers inclined to use such characteristics as a proxy for the appropriate immigration-focused screening—concerns that were vindicated through the creation of a new Justice Department office to enforce laws against unlawful national origin and immigration-related discrimination practices. As part of its promise to stem the flow of undocumented workers, IRCA also inaugurated a period of increasing border enforcement resources. None of these measures proved capable of stemming undocumented immigration in the succeeding decades. As explored below, IRCA's own internal contradictions soon exerted an undeniable impact on the entire immigration system, including passage of subsequent enforcement-oriented legislation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which greatly expanded the proportion of immigrants subject to removal.<sup>35</sup>

It is this statutory framework that has produced one of the largest continuing flows of legal immigration in recent history. At a time when even other countries that shared long traditions of high immigration have curtailed new legal migration, the American statutory scheme has remained favorable to high per capita levels of legal immigration.<sup>36</sup> In the process, U.S. laws have helped unify hundreds of thousands of families, incorporated millions of new workers to take part in the American system, and continued to provide a relatively unimpeded path for lawful permanent residents to become citizens. At the very same time, the system has generated a host of results often described as troubling.<sup>37</sup> Visa preference categories, interacting with country visa caps, have produced staggering visa backlogs and restricted the availability of immigrant visas for talented individuals capable of making unusual contributions to the American economy. The system harbors little flexibility to adjust as social or economic circumstances change. Crucially, two other things have been achieved by the current system: the statutes imposed ambitious labor market rules that are (for reasons discussed below)

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34. INA § 274A(a)(3).

35. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (amending the Immigration and Nationality Act of 1986).

36. Australia is one contrast. See, e.g., Gary P. Freeman & Bob Birrell, *Divergent Paths of Immigration Politics in the United States and Australia*, 27 POPULATION & DEV. REV. 525, 525–26 (2001) (“Only in Australia did [populist concern over immigration] lead to tighter control over legal and illegal entries, declining annual numbers, and significant retrenchment with regard to policies supporting multiculturalism.”).

37. For one review of such criticisms, see BUSH & MCCLARTY, *supra* note 29, at 50–51 (conceding that the current statutory framework for visa allocation provides legal resident status for family reunification, but noting that the process is slow and ineffective, leading to delays of up to a decade or more), and *id.* at 87 (criticizing the current use of national quotas because it limits the amount of skilled immigrants U.S. companies seek).

difficult to enforce, and fed now-familiar public expectations of controlling immigration through domestic regulation and border enforcement.

Perhaps even more so than with statutory schemes addressing a single sector or harboring narrower ambitions than structuring the very sovereignty of a nation, the significance of these immigration statutes depends on how they are administered. Indeed, the crucial if limited role that implementation and enforcement discretion play in the recent story of immigration law persists despite the unusually hardwired nature of statutory choices involving the allocation of immigrant visas.<sup>38</sup> Although the INA framework is primarily a vehicle for Congress to control most important details of routine immigration policy, it nonetheless leaves to agencies in the executive branch certain key decisions. Between the INA, IRCA, and IIRIRA, a vastly larger number of people are subject to removal than law enforcement is in a position to remove. Agencies have a role (constrained in limited ways by the President) in targeting resources at particular enforcement goals. They can influence the interpretation of ambiguous terms involving asylum and refugee status, as well as administrative practices determining the availability of work authorization to certain immigrants.<sup>39</sup> Routines and administrative practices therefore play a critical role in shaping how immigration law is experienced and what consequences it creates.

Some observers and stakeholders scrutinizing those practices undoubtedly approve of specific features in the existing immigration system. Indeed, some political players would prefer those features to some of the characteristics of a reformed immigration system. What is striking is nonetheless how the resulting statutory scheme bequeathed to the agencies a set of daunting practical challenges that have grown more pronounced over time. In fashioning the modern INA, Congress and the President did little to provide for flexibility in addressing changing economic and social conditions. They have left in place a system that has only to the most limited degree managed to quench the thirst of the American labor market for unauthorized workers, despite a staggering increase in an undocumented population, including both millions of individuals who have

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38. For just one example highlighting instances of executive branch discretion in certain aspects of the implementation of immigration law, see Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993). Despite recent concerns from appellate courts regarding the provision of deference to immigration judges, immigration-related agency judgments have traditionally been afforded Chevron deference. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Formally, of course, much of immigration adjudication turns on the exercise of the Attorney General's adjudicatory discretion. Yet the overall architecture of immigration—and particularly the number and allocation of visas—provides only meager opportunities for agencies to play a meaningful role in policymaking. See *infra* Part IV.

39. See, e.g., Muzaffar Chishti & Claire Bergeron, *Signs of Change in Immigration Enforcement Policies Emerging from DHS*, MIGRATION INFO. SOURCE (Mar. 16, 2009), <http://www.migrationinformation.org/USFocus/display.cfm?ID=722> (chronicling apparent changes in enforcement under the then still-new presidential administration).

entered without inspection (the vast majority by crossing the southern border) as well as millions more who initially entered with valid nonimmigrant status that later expired.<sup>40</sup>

Indeed, it is hard to disentangle that increase in the undocumented population from the structure of the law in place after IRCA. At a time when the American public was beginning to view undocumented migration as a more serious concern, the statutory framework put the country on a path toward pronounced failure in addressing that concern. First, the law created a system for verifying employment eligibility that was full of gaps and, because of how obvious the enforcement difficulties were, virtually inviting employers not to comply.<sup>41</sup> Second, constructive knowledge of undocumented status was difficult to prove, drastically limiting the scope of severe penalties for noncompliance. Third, the law continued to provide a relatively inflexible scheme for managing changes in the demand for migration. Even acknowledging the interdependence between legal migration opportunities and future demand, it is difficult to imagine an all but entirely rigid system serving as an element of an effective strategy to reduce illicit migration.<sup>42</sup> Finally, it contained the initial installment of increases in border enforcement, thereby taking the first step in the border enforcement ramp up that eventually went a long way toward disrupting circular migration and encouraging an increasing number of illicit migrants to stay exclusively in the United States longer-term.

These features help connect the statutory framework, its subsequent implementation, and the major legal disputes defining modern immigration law. Following the enactment of IRCA, cases like *Collins Foods International, Inc. v. INS* further confirmed that the statute sets a difficult bar for authorities to show employer knowledge of their workers' illegal status.<sup>43</sup> Consider, further, the increasingly prominent issue of local and state intervention in immigration policy. For decades, such disputes have turned largely on the preemptive effect of provisions contained in the INA that limit the scope of state and local lawmaking and reflect a recognition of the difficulties implicit in unconstrained nonfederal lawmaking in this area. At the same time, the laws generating disputes about state and local intervention in immigration policy arise largely from regional perceptions

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40. See Ted Robbins, *Nearly Half of Illegal Immigrants Overstay Visas*, NPR NEWS (June 14, 2006), <http://www.npr.org/templates/story/story.php?storyId=5485917>.

41. See, e.g., *Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 112th Cong. (2011) (testimony of Austin T. Fragomen), available at [http://waysandmeans.house.gov/UploadedFiles/Fragomen\\_Embargoed\\_Testimony.pdf](http://waysandmeans.house.gov/UploadedFiles/Fragomen_Embargoed_Testimony.pdf).

42. In the short term, legal migration opportunities almost certainly serve as a partial substitute for unlawful migration activity. See *infra* Part III.A. The value of illicit migration should be expected to depend at least in part on the gap between legal migration opportunities and demand; if demand fluctuates by increasing and legal migration opportunities remain rigid, the value of illicit migration (*ceteris paribus*) will tend to increase.

43. *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 555 (9th Cir. 1991).

that the federal government has defaulted on its end of the bargain. The district court's opinion in the litigation over Arizona's S.B. 1070 legislation, for example, explicitly acknowledged that frustration.<sup>44</sup> Meanwhile, even though the Supreme Court ultimately declined to extend the full coterie of labor regulatory protections to undocumented workers in *Hoffman Plastic Compounds, Inc. v. NLRB*, both the dissent and the lower court opinions in the case recognize—as explicitly as Judge Bolton acknowledged the public's frustration in the Arizona case—that labor markets are affected by the presence of millions of undocumented workers.<sup>45</sup>

The unwieldy statutory compromise that has played a major role in generating that undocumented population has thus given rise to a doctrinal picture replete with contradictions. In that picture, society commits not to hire undocumented workers but makes it difficult to enforce that commitment. Even as unauthorized migrants generate increasingly intense political debate and enforcement initiatives, those workers nonetheless merit legal protections and the overall structure of the IRCA enforcement regime remains unchanged. Moreover, the presence of undocumented workers at a time of significant social and economic change generates continued regional demand for state and local laws even as the federal government seeks to discharge its preeminent responsibility in this area. Whatever else one expects from judicial efforts to clarify and police these doctrinal domains, the underlying disputes will persist as long as the present statutory regime (or something like it) persists.

The legacy of today's INA has been growing controversy and concern. Certain features of the status quo play a significant role in our national architecture. These include continued high legal immigration, and a relatively open path from lawful permanent residence to citizenship. Yet many of its consequences are also costly, even if the subtleties are poorly understood. An example: today's immigration law is characterized by vast and growing sums spent on compliance even as noncompliance is commonplace.<sup>46</sup> Although it is difficult to measure the precise social welfare effects of immigration law, it would be a heavy lift to argue that the status quo is socially optimal from an economic perspective. There is at least a plausible case lending credence to the arguments of economic stakeholders who maintain that, in the short-term, the country's capacity to excel in scientific and technical innovation, higher education, and

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44. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011)

45. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (concluding that “denial [to the NLRB of the power to award back pay to unauthorized immigrants in the event of labor law violations] lowers the cost to employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and to hire illegal-alien employees.”).

46. *See generally* Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 POPULATION & DEV. REV. 661 (2001) (discussing unintended consequences of the enforcement buildup in border policing occurring since the early 1990s, and questioning the impact of border enforcement on illicit entries into the United States).

certain forms of business activity depends on continued capacity to attract economic immigrants with advanced skills and creative prospects—and that existing policies create costly barriers to this process.<sup>47</sup> At the other end of the economic spectrum, the large undocumented population experiences a gap in wages relative to what they would earn if they were legal workers. The size of that population, too, has the potential to adversely impact wages and working conditions for legal workers.<sup>48</sup>

Just as bleak is the security-related legacy of the status quo. The status quo brings with it a large cost of significant outlays of funding focused on routine immigration enforcement, which could focus on more effectively targeting terrorist mobility and related problems.<sup>49</sup> A related concern voiced even by police is the potential for growing distrust of law enforcement in immigrant communities, making it more difficult for police to build relationships helpful for gathering routine intelligence about individuals and organizations capable of posing more serious threats.<sup>50</sup> The complex impact of additional border enforcement, while providing a heightened sense of safety in some communities, also raises questions about the longer-term security implications of the status quo. Like other forms of regulation, efforts to engage in shadow governance are replete with trade-offs. As one potential source of further example, take the movement of people across the U.S.-Mexico border. Historically this has been a relatively disorganized activity, and the prices charged by smugglers have been low. But aggressive border enforcement could theoretically drive up prices, induce larger shares of aliens to cross at ports of entry (where greater organization is required), and entice cartels to become involved in controlling an increasingly lucrative trade.

In fact, the evidence from the price of illicit migration from Mexico to the United States is quite striking. The number of migrants pursuing high-risk routes through the desert has skyrocketed, and as a consequence, so has the number of illicit migrants who die while seeking to cross the U.S.-Mexico border. The

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47. See BUSH & MCCLARTY, *supra* note 29, at 47 (discussing the context during which IRCA was passed); see also SPENCER ABRAHAM ET AL., *MIGRATION POL'Y INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER 40* (2006), available at <http://www.migrationpolicy.org/ITFIAF/> [hereinafter MPI TASK FORCE].

48. See, e.g., William Shaw, *U.S. Immigration Policy Must Change*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 17, 2010), <http://carnegieendowment.org/publications/index.cfm?fa=view&id=41001> (stating that “[u]ndocumented workers are limited in their ability to organize to protect their rights, which may erode working conditions for American workers in general through competition (though some employers benefit from this)”).

49. See *infra* Part III for a discussion of the rising costs of immigration enforcement. If we leave aside border enforcement policy, moreover, even the large increases in immigration funding nonetheless probably prove poorly matched for the tasks that agencies are supposed to carry out.

50. See generally SUSAN GINSBURG, *MIGRATION POL'Y INST., SECURING HUMAN MOBILITY IN THE AGE OF RISK* (2010) (discussing the resource-intensive challenges in monitoring and disrupting terrorist mobility, and opportunity costs of immigration enforcement strategies that fail to prioritize high value targets).



alternative for migrants is to seek assistance from alien smugglers, whose response to an increasingly fortified U.S.-Mexico border has been to increase prices starkly. Studies of illegal border crossing behavior indicate an increasing concentration of aliens crossing through border checkpoints (requiring more sophisticated planning, forged documents, and other techniques), the proportion of aliens using *coyotes* rising, and border crossing fees rising. These changes are likely to further the pattern of more organized trafficking networks becoming involved in alien smuggling.<sup>51</sup> News reports on these issues are not always accurate, but it is telling that they show a major spike in reporting on drug trafficking organizations' interest and involvement in alien smuggling.<sup>52</sup>

At some level this is no surprise. As the border buildup proceeded it altered the risk of nonassisted border crossings, driving many crossers towards dangerous and sometimes fatal crossings in the desert. But others paid more to smugglers—making the average price for being smuggled across the border quintuple in inflation-adjusted dollars between 1990 and 2009. Crucially, the price change is likely to attract, as well as encourage, organized illicit activity, as the returns of controlling the smuggling market rise dramatically and the methods of successful illicit crossing increasingly involve use of ports of entry. These developments illustrate how domestic laws can affect the organization of transnational criminal activity. The impact of domestic immigration and border security policy on other states, including fragile jurisdictions, underscore the importance of disentangling distinct security goals affected by immigration and border policy. While the multidecade buildup of border enforcement unquestionably raised the cost of illicit activity, such a development could simultaneously contribute to the rising concentration of the remaining illegal cross-border migration in large criminal organizations with greater capacity to threaten state authority structures.

Some of these limitations are not entirely lost on policymakers or the public. Many recent surveys document widespread public scorn regarding the status quo associated with immigration law. Stakeholders and organized interests representing law enforcement, business, civil rights, and religious concerns (among others) have decried the present system. Since 2006, hundreds of lawmakers and two Presidents (a Republican and a Democrat) have heavily criticized the present

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51. See Wayne Cornelius, Presentation at the Center for Comparative Studies in Race and Ethnicity, Stanford University: Does Border Enforcement Matter? What Mexican Migrants Can Teach Us (Sept. 30, 2010) (discussing rising prices for alien smuggling in the last ten to fifteen years, and the increasing concentration of border crossing activity occurring at ports of entry in California and Texas, but not Arizona).

52. As just one example of the analyses emphasizing the connection between alien smuggling and drug trafficking organizations, see *Alien Smuggling: DHS Could Better Address Alien Smuggling Along the Southwest Border by Leveraging Investigative Resources and Measuring Program Performance*, Hearing Before the Subcomm. on Border, Maritime and Global Counterterrorism of the H. Comm. on Homeland Security, 111th Cong. (2010) (statement of Richard M. Stana). Separately, I am working on a project that chronicles changes in alien smuggling and its relationship to organized criminal entities along the U.S.-Mexico border in recent years.

immigration law regime and made efforts to change it. These moves have failed to dislodge or fundamentally modify the preceding arrangement, raising questions about the staying power of broadly disfavored legal regimes and the consequences of their entrenchment.

*B. Statutory Entrenchment and Its Persistence*

When a statutory scheme is entrenched, the challenges entailed in changing the law stretch beyond the mere requirements of lawmaking and instead implicate the broader logic of the entire political system.<sup>53</sup> In the American pluralist political system, organized interests and their closely allied public supporters routinely end up at the center of the policymaking process. In one version of the now-classic account of American pluralism influenced by political scientist Robert Dahl, organized interests offset broader public concerns in lawmaking and regulatory implementation,<sup>54</sup> resulting in many arrangements with concentrated benefits to specific groups even if the aggregate benefits are far outweighed by diffuse costs borne more broadly. A generally functionalist account of immigration law could pivot on the idea that perhaps the most relevant concentrated interests—employers—are perfectly happy to keep in place a system that lets them squeeze value from undocumented labor or workers with temporary H-1b visas, while maintaining (given the problems with employer sanctions) a relatively low risk of sanctions by federal authorities.

There is no question that some players in the system benefit more than others from existing immigration law. But the very behavior of some of the industries that allegedly benefit most from current law—including, for example agribusiness and the service sector—tells a more complex story. Indeed, neither the simple functional labor market account nor conventional variations of it adequately explain the persistence of the present statutory scheme, a persistence that defied three recent efforts by a Republican President and a Democratic President, and majority votes in both houses of Congress over the course of four years. Nor can this pattern be explained convincingly by political economy accounts focused purely on public opinion or general gridlock. Each of these factors may be important to some degree, by illustrating a means through which social or political developments can make an imprint in the nation's approach to migration. None, however, explains the persistence of recent compromises built into American immigration law. To understand the logic of how America regulates migration, we must account for why the existing scheme persists.

**Rational Labor-Market Management.** Consider first the fit between existing immigration law and domestic economic concerns. Certain stakeholders

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53. See ESKRIDGE & FEREJOHN, *supra* note 12, at 127–32 (discussing the definition of entrenchment).

54. See ROBERT A. DAHL, *POLYARCHY* (1971).

benefit from the status quo because they gain from a labor market with a large number of undocumented workers.<sup>55</sup> To be more precise, some businesses and individuals reap rewards from the nation's existing immigration scheme relative to a system with some mix of characteristics associated with potential alternative paths for immigration law: (1) far more limited undocumented immigration; (2) aggressive and reliable employer verification; and/or (3) less employer control of the heavily rationed opportunities for employment-based legal migration (such as opportunities available through H-1b visas). Moreover, because some econometric studies suggest that most Americans have benefited from immigration,<sup>56</sup> it may also be tempting for some observers to conclude that Americans gain something from the status quo because it provides cheaper labor and lower prices that redound to the advantage of both employers and businesses.

But the benefits from the status quo are not uniformly distributed, and have helped create strong dissatisfaction with immigration policy among economic actors ranging from technology companies to unions. Even agribusiness, a sector that arguably derives some benefit from the cheaper labor costs that undocumented immigration makes possible, has strongly pressed for reform (through, for example, enactment of the so-called AgJobs legislation addressing the unlawful status of certain agricultural workers). The key issue here is not whether some Americans benefit from lower labor costs relative to a (counterfactual) world with little or no undocumented immigration; it is whether the status quo carries economic costs relative to a regime where the undocumented population is regularized (and some reform of future flows of immigrants occurs).

This question, in turn, implicates the recurring logic of pluralist division and is vigorously present in the sense that parties interested in the economics of the labor market have a variety of reactions—and increasingly, those reactions disfavor the immigration status quo. Many leading labor groups and business interests increasingly express dissatisfaction or outright hostility regarding the existing immigration system. The U.S. Chamber of Commerce and the Service Employees International Union (SEIU) rarely agree, but they both staunchly criticize the status quo and insist their stakeholder constituents bear high costs as a

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55. Cf. Sabrina Isé & Jeffrey M. Perloff, *Legal Status and Earnings of Agricultural Workers*, 77 AM. J. AGRIC. ECON. 375, 386 (1995) (noting that “[a]gricultural workers who work in the United States legally earn substantially more per hour and per week than those who are unauthorized to work here”). Note also that the research indicating wage increases after legalization suggests fairly clear linkages between legal status and wages, even if we consider that many of the workers affected by legalization increased their wages by changing their occupations. Such changes can still impact the labor market most directly relevant to their previous employers by forcing them to bid up wages.

56. See BUSH & MCCLARTY, *supra* note 29, at 3–5; GIOVANNI PERI, MIGRATION POL’Y INST., THE IMPACT OF IMMIGRANTS IN RECESSION AND ECONOMIC EXPANSION (2010), available at <http://www.migrationpolicy.org/pubs/Peri-June2010.pdf>.

consequence.<sup>57</sup> Businesses seeking greater levels of employment-based migration, often though not exclusively clustered in the technology sector, argue that the nation's immigration status quo is a major cost. Employers depending on semiskilled labor formed the Coalition for Essential Workers to advocate for a regime that entails lower risks (by reducing the amount of unlawful activity) while still providing access to foreign workers through legal channels. From a broader perspective, some participants in the economy undoubtedly view the existing system as imposing some high costs and it is difficult to argue that it represents the optimal approach to increasing domestic social welfare.

It is easy to see, on reflection, how many participants in the economy relying on semi-skilled labor could simultaneously face manageable-to-low risks of sanctions while still desiring a more regularized, less risky scheme to obtain workers at what they consider an acceptable wage. None of these arguments, however, settle the more complex empirical question of how much Americans gain and lose economically from the existing immigration system. Scholars continue to debate this issue, even though it is becoming increasingly clear that most native-born workers benefit from our immigration status quo while a smaller number of such workers (particularly those lacking a high school education) do not benefit. Instead, the preceding discussion of the economic context for American immigration laws shows the limitations of the idea that the current system, by and large, implements a rational scheme to manage the labor market. At a minimum, that assertion raises the question of whose perspective (e.g., large or small employers, particular unions, Americans hiring domestic labor, or families of the undocumented) counts when defining the nature of rational labor market management.

**Democratic Choice and Immigration.** The structure and staying power of the current scheme are not sufficiently explained by the idea that Americans have, at core, chosen their system.<sup>58</sup> This idea turns out to be persuasive only if we accept the circular notion that the status quo is chosen because it is the product of the American system of representative democracy, executive power, and administrative governance. Instead, public reactions paint a complicated picture. Strong evidence suggests that substantial majorities of the public dislike the current scheme—although they often differ on the details. Many surveys depict an increasingly hostile trend toward the immigration status quo, and corresponding erosion in the public's trust that the government can address the problem effectively (a point to which we return below).<sup>59</sup> In some surveys, the public

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57. *Id.* (discussing support among business and labor constituencies for comprehensive immigration reform, including legalization of the undocumented).

58. *Cf.* Thomas J. Espenshade, *Unauthorized Immigrants to the United States*, 21 ANN. REV. SOC. 195, 195 (1995) (noting that the "current level of clandestine US immigration may not be far from what society might view as socially optimal.").

59. *See infra* Part III.

appears to hold contradictory views about immigration policy, raising the question of *what* explicit choices are reflected in such attitudes.<sup>60</sup>

Where survey data do highlight substantial public majorities supporting a particular policy change (for example, favoring some form of legalization; or seeking lower levels of overall immigration, as well as fewer backlogs), such views are often at odds with existing immigration law. Even allowing for question-framing effects and other complexities in the nature of public opinion about a complicated issue, there is little support for the idea that the public is satisfied with immigration law and policy. Trends in public responses to immigration policy also showcase increasing concern about immigration, rather than a pattern where the issue increasingly fades from view as the public comes to accept the present arrangement.<sup>61</sup>

Some observers have remarked on the possible connection between the large number of undocumented immigrants and public perceptions about erosion of the rule of law. Indeed, both the increase in media coverage and changing patterns of geographic dispersion make it difficult for members of the public to ignore the presence of such a large undocumented population. Nonetheless, it is also the case that the current immigration status quo turns a vast number of Americans into lawbreakers. By creating a requirement to hire legal workers without a workable enforcement regime and institutionalizing relatively high costs of compliance for *all* hiring transactions (including household assistance, for example), IRCA contributes to a situation where millions of Americans violate federal law by hiring undocumented workers. In short, for every undocumented worker, there is an employer on the other side of the transaction. With the proportion of household help provided by unlawful workers as high as it is and the relative domestic burden of compliance, a vast number of Americans are almost certainly failing to comply with relevant laws.<sup>62</sup> This state of affairs all but certainly impedes what John Skrentny has described as the “moral” entrenchment of existing immigration

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60. *See id.*

61. Such gradual acceptance is often understood to play an important role in entrenching the legitimacy of a particular statutory scheme. *See, e.g.,* ESKRIDGE & FEREJOHN, *supra* note 12. The fate of the INA, in contrast, has been quite different. *See infra* Part III. These reactions raise the question of whether, over time, the public’s concerns about certain aspects of existing immigration law could spread to other domains, such as the existing, relatively unimpeded path from permanent residence to citizenship.

62. *See generally* MPI TASK FORCE, *supra* note 47, at 3–14 (discussing the proportion of U.S. employees who are undocumented); *id.* at 35 (“[A]n estimated 300,000–350,000 [unauthorized immigrants] enter the US labor force [each year]. The overwhelming majority work . . . in the low-skill, low-wage, low-value-added sectors of the economy. Similarly, although the H-2A program for temporary agricultural workers has no caps, the program is deeply underutilized. It is seen as overly bureaucratic and unresponsive to employers and it contains few commensurate gains for workers. With little enforcement against illegal hiring, there are few incentives to use the program.”); *id.* at 46 (discussing the low priority and ineffectiveness of meaningful employer enforcement under the IRCA, and stating that “[f]or non-compliant employers, the cost savings from employing illegal labor can outweigh the possible cost of sanctions.”).

laws.<sup>63</sup>

Nor is the current situation fully explained by anxieties about immigration—whether recently engendered or reflected in episodic historical turns toward greater restriction. American immigration policy embodies a limited but significant tradition of aperture to immigrants (motivated by foreign policy and other factors) incorporated into existing immigration law alongside a heritage of concern about new immigrants. Moreover, American immigration law and policy reflects major variations in priorities over the last few decades. The 1965 INA amendments contrast with the previously enacted status quo by raising visa totals dramatically, instituting hemispheric caps, and eliminating racial quotas.<sup>64</sup> Further, IRCA's legalization provisions contrast with the 1996 reforms focusing on unauthorized migration. Evidence of public attitudes about immigration from 1986 to the present show growing public willingness to support harsh immigration measures expanding the scope of removable individuals.

**Changing Public Mood.** Similarly, the argument that the country has simply grown more ideologically conservative since IRCA provides little insight. Whether the country has in fact become more conservative, as the term is generally understood in discussions of American politics and policymaking, is a question that implicates conceptual debate over both the nature of ideological labels and methodological issues. Regardless of how one measures the nation's aggregate ideological changes, the direction of immigration policy has long had a contested relationship to conventional political ideology. Specifically, many interests that are sometimes labeled conservative (in a conventional political sense) support larger immigration flows or legalization, while some progressives question the impact of immigration on wages or oppose significant policy changes including legalization.<sup>65</sup>

Any reasonable analyst must acknowledge that politicians have been rewarded for keeping in place our overall immigration architecture and ratcheting up enforcement. In that sense, Americans *have* chosen the current system. But subtleties soon emerge whenever one juxtaposes the concept of democracy against a complex regulatory regime like immigration. The question of what the public

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63. See, e.g., John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 YALE L.J. ONLINE 325, 328–29 (Mar. 18, 2011), <http://yalelawjournal.org/3/18/skrentny-gellredman.html>.

64. See, e.g., Roger Daniels, *The Immigration Act of 1965: Intended and Unintended Consequences*, in HISTORIANS ON AMERICA: DECISIONS THAT MADE A DIFFERENCE 77, 82 (U.S. Dep't of State 2008), available at <http://www.america.gov/publications/books/historiansonamerica.html> (describing how the political logic of the 1965 amendments to the INA heavily reflects the idea “that immigration policy is a subset of foreign policy and that the monocultural goals of policies laid down in the 1920s were inappropriate for a nation seeking global leadership”).

65. See generally Wendy M. Rahn et al., *A Framework for the Study of Public Mood*, 17 POL. PSYCHOL. 29 (1996) (discussing some of the complexities inherent in assessing the ideology of the public's mood).

chooses in a democracy is far more complex than what is implied by axiomatic acceptance of the notion that the status quo neatly reveals the public's preferences. In a pluralistic system, stakeholders advocate competing positions and the public's attention is fragmented. Lawmakers, governors, and Presidents can garner attention for a variety of reasons, leading some members of the public to support candidates with whom they disagree on particular issues. Attitudes can be complex or even contradictory, raising the possibility that individuals may simultaneously appreciate some details of the current scheme while being concerned about the overall system. Leaving aside the issue of how we evaluate the public's views and the relevance of multiple issues in elections, the existence of "veto gates" establishing supermajority requirements for policy change all but ensure that some statutory schemes will persist long after public views evolve.<sup>66</sup>

In the end, immigration is a compelling example of the subtle and sometimes strained relationship between public attitudes and policy outcomes. The vast majority of the public lacks views about the intricate details of immigration policy, even if they have generalized attitudes about the overall system. The salience of immigration issues, far from being stable, has been growing over time. Moreover, while some individuals and interests benefit from the immigration status quo, a large majority of Americans seem to strongly disfavor the present system. These features suggest that public reactions about immigration are likely to be *one* important ingredient in explaining the political context in which immigration law exists and evolves, but certainly not the only factor that turns far-reaching policy goals into an administrative scheme.

**Gridlock.** The fact that statutory change is slow and difficult in the United States does not sufficiently explain the existing equilibrium either.<sup>67</sup> The status quo does not reflect a longstanding constitutional requirement.<sup>68</sup> History matters in explaining how the current system developed, but the word "developed" appropriately conveys the presence of important changes creating current conditions. The current status quo resulted as much from dramatic statutory changes (including, in particular, the 1965 amendments to the INA and the 1986 IRCA) as from long-term continuity. If we define the modern era as stretching from the moment that the core legal architecture of visa caps and worldwide immigration was put in place in 1965, it is clear that significant policy change has

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66. On the nature and significance of veto gates, see McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992).

67. For a discussion of some of the institutional factors creating "gridlock" and exacerbating the difficulty of broad legislative changes, see generally, DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK* (2006).

68. Neither, it is helpful to remember, did many supermajoritarian requirements that now unquestionably have a role in shaping the prospects for legal change. See generally Daniel Carpenter, *Institutional Strangulation: Bureaucratic Politics and Financial Reform in the Obama Administration*, 8 PERSP. ON POL. 825 (2010) (using legislative debates over financial regulatory reform to illustrate a broader process routinizing the use of once-exceptional procedural devices to slow legislative action).

occurred over the last half century. Some of those changes, including the 1980 Refugee Act, the 1986 IRCA, the 1990 Immigration Act, and the original 1965 amendments to the INA, reflect policy change in a direction that could be described as broadly generous toward immigrants.<sup>69</sup>

Even if we examine more recent trends *since* 1990, the presence of veto—though not unimportant in the political economy of lawmaking—also neglects to explain the continued production of immigration-related statutes and resource changes since then.<sup>70</sup> These changes do not fundamentally alter the structure of the system because they leave in place most of the undocumented population, do not change interior enforcement much, and leave future flows unchanged. But they showcase the continued capacity of American policymakers to modify immigration law and policy in a particular direction even as key features of the overall system prove resistant to change.

In short, while it is almost certainly true that changes in supermajority requirements, other things being equal, would have affected recent legislative debates about immigration, these constraints have not thwarted far-reaching immigration reforms over the last half century.<sup>71</sup> The bare invocation of gridlock (or even the notion of growing gridlock) also proves unsatisfying as an explanation in light of massive statutory changes in domains outside immigration, including financial regulatory reform and health insurance reform.<sup>72</sup> Finally, explanations focused on the existence of gridlock do not offer much detail (beyond simply underscoring that statutory gridlock leaves room for presidential action) about executive branch incentives with respect to the crucial implementation and gap-filling functions defining the actual significance of immigration law. If we want to explain variations in the production of statutes, we must look beyond the simple existence of gridlock and supermajoritarian institutions.

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Unquestionably, the lawmaking process in America, and in all pluralist democracies, is affected to some extent by cultural or ideological attitudes, overarching national or sector-specific economic interests, and institutional constraints slowing down statutory change. Each of these factors shapes the

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69. See generally ZOLBERG, *supra* note 24 (discussing major legislative enactments).

70. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (amending the Immigration and Nationality Act of 1986). For a brief summary of the recently enacted border security bill signed by President Obama, see Julia Preston, *Obama Signs Border Bill to Increase Surveillance*, N.Y. TIMES, Aug. 14, 2010, at A10.

71. Immigration reform would have all but certainly been enacted absent the filibuster in 2007, and then again—at least as far as the DREAM Act is concerned—in 2010. See generally Michael Barone, *Immigration Reform: The New Third Rail*, WALL ST. J., Apr. 16, 2010, at A19 (discussing the political risks of pursuing substantial statutory reforms of immigration policy for Republican and Democratic lawmakers).

72. Note that in some of these domains, public attitudes and opinions appear to have shifted significantly in the course of a particular legislative or policy debate, emphasizing some of the limits of static applications of gridlock-oriented models.



political economy of lawmaking in general, and immigration in particular. But there is more to the story of American immigration law. Statutes are rarely, if ever, pure reflections of public attitudes—even attitudes far more monolithic and less replete with the subtleties that characterize public reactions to immigration.<sup>73</sup> Statutes are instead produced through institutional mechanisms designed in our system to accommodate multiple (and often competing) interests. Such fragmentation of interests also raises serious questions about assertions that statutes reflect overarching national interests in rational labor market-management or rational anything. More relevant is the question of whose interests a particular arrangement serves, and (potentially) which constituencies might pay a corresponding price. And to say that American policymaking is replete with veto gates creating vast “gridlock” regions where the status quo prevents change is largely to restate the question of how and when—given those constraints—statutory schemes change or remain relatively stable. This assertion also says little, if anything, about the related question of how the executive branch turns statutes into administrative schemes affecting millions or even hundreds of millions.

If it is difficult to account for the architecture and staying power of American immigration law by arguing that Americans have simply chosen it or face too many veto points to change it, how else might we explain it? A reasonable place to start in our exploration of this situation is with the mechanisms that turn immigration laws from dry statutory commands into a more elaborate, organic system of administrative regulation and enforcement. The immigration statutes are not unique in the extent to which they call for administrative elaboration. Perhaps more than many statutory schemes, the immigration system embodies contradictions and internal tensions that raise the importance of agency implementation. Those choices, along with developments in public attitudes about immigration policy that almost certainly included responses to the system itself, go a long way toward explaining the nature and persistence of the current American system.

## II. IMMIGRATION AS A REGULATORY SYSTEM

In the late 1990s, enforcement officials were determined to crack down on illegal hiring practices despite the statutory limitations of modern immigration laws. The sprawling meat processing plants in the nation’s vast Great Plains almost inevitably drew their attention. These firms had dramatically changed their workforces in less than a decade and were increasingly staffed by relatively low-

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73. *See, e.g.*, R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 6–9 (1990) (Despite the fact that most voters know little about candidates’ policy positions, and few elections hinge on those positions, legislators nevertheless obsess over what they anticipate the electoral consequences of their decisions to be. Additionally, “[t]hose who have studied the link between constituency opinion and legislative decisions have found little evidence to support such a strong claim about legislators responding to opinion in their home districts.”).

wage Latino workers.<sup>74</sup> As agents of the then-INS responded to concerns about the hiring of undocumented workers in the meat packing industry, they sought production of I-9 documents for tens of thousands of workers in Nebraska meat processing facilities before embarking on a similar effort in other states.<sup>75</sup> The paperwork associated with thousands of workers exhibited irregularities, and as federal agents further scrutinized the situation, vast numbers of the relevant workers left the meat packing plants. The employers then reported widespread labor disruptions,<sup>76</sup> and both state and federal politicians condemned the program energetically enough to stop it.<sup>77</sup>

Any useful account of the modern American immigration system needs to explain why Operation Vanguard collapsed under its own weight even as many lawmakers and members of the public claimed to seek more aggressive enforcement. Such outcomes underscore the reality that immigration is a regulatory system, defined as much by its pervasive similarity to other areas as it is by the issue's distinctive multidimensionality and cultural stakes. The discretion lodged in DHS to initiate removal proceedings holds considerable importance.<sup>78</sup> Yet the anodyne language of judicial opinions rarely, if ever, acknowledges the complexities agencies face in applying such discretion. As a regulatory domain simultaneously shaping labor markets, perceptions of security, and the scope of the national community, immigration policy affects a vast array of economic, political, and social interests. Those interests, in turn, work through several layers of institutions and a larger public context to shape policy outcomes. A country's approach to immigration is a major feature of its national architecture, defining the scope of a national community as well as functional issues of economic consequences and security-related concerns.

Just as multiple constituencies ranging from high-technology executives to farmworkers are affected by immigration policy outside the government, different players share power over immigration within the public sector. A swelling number of border patrol agents and their supervisors play a part in a system also affected by interior enforcement officials, lawmakers authorizing new immigration laws, appropriators controlling the financial spigot to immigration bureaucracies, and executive officials working against the backdrop of an increasingly engaged public.

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74. See Dell Champlin & Eric Hake, *Immigration as Industrial Strategy in American Meatpacking*, 18 REV. POL. ECON. 49 (2006).

75. See Matt Kelley, *INS Is Staunch on Crackdown: Operation Vanguard Is Successful and Will Be Expanded, an Agency Official Tells Congress*, OMAHA WORLD HERALD, July 2, 1999, at 1.

76. See Nelson Says INS Operation Draining State's Labor Pool, LINCOLN J. STAR, June 4, 1999, at B2.

77. See *id.* (discussing politicians' opposition to the INS operation); *After Vanguard, Plan Next Trial Somewhere Else*, LINCOLN J. STAR, Aug. 28, 1999, at B6 (discussing the widespread criticism of Operation Vanguard); Art Hovey, *Panel Calls for Changes Immigration Issues: Task Force Tackles INS Crackdown*, LINCOLN J. STAR, Oct. 17, 2000, at A1 (discussing how Operation Vanguard was suspended and placed under review by INS Commissioner Doris Meissner).

78. See *Juarez v. Holder*, 599 F.3d 560, 566 (7th Cir. 2010).

Because immigration law's complex statutory and regulatory structure is not the product of a single economic or political ingredient, understanding immigration law requires us to investigate the factors structuring the relationships among these actors.<sup>79</sup>

We will see that immigration law's role as yet another body of regulatory law proves at least as important as the uniqueness of the immigration issue. To a considerable extent, immigration law is forged in the same cauldron of lawmakers, institutions, agency officials, political reactions, and stakeholder interests that produces policies involving public health, national security, taxes, or criminal justice. Because immigration is capable of affecting the economic and political fortunes of multiple stakeholders in a pluralist democracy, it can trigger political reactions reminiscent of those arising in other domains. To understand immigration, we must contend with its distinctiveness as well as its similarities to problems arising in alternative domains.

*A. Shaping the System: Lawmakers, Implementers, Interests, and the Public*

Because immigration policy is first and foremost regulatory policy, it implicates conflict and competition. Agency officials, businesses, lawmakers, and other political actors engage in fights over agency autonomy, legal interpretation, and political economy common to other forms of regulation. Rules governing visas, border enforcement, and interior investigations represent more than merely a static bargain negotiated among competing interests. Migrants carry with them the potential to define both the very essence of a society as well as its outer limits. As such, the stakes in immigration policy implicate a variety of complex motivations. And the system has evolved in intricate ways in response to distinctive feedback relationships reflecting the responses of elites and the public to each other. But no account can make sense of an important regulatory system such as immigration without taking account of the relevant interests.

As with public health or environmental regulation, stakeholders have considerable economic and political interests at stake when it comes to controlling migration. As with criminal justice, the public rarely understands a variety of complexities, but has strong opinions on the subject. As with other intricate domains of legal regulation, then, immigration implicates compromises rooted in a pluralist political system. Agencies can fragment and reflect different priorities given pressure from labor unions, domestic law enforcement agencies, large employers, and civil rights organizations representing recent immigrants.

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79. Although the United States offers a unique legal, geographic, and political context, immigration has the potential to trigger similarly contentious debates in other advanced industrialized democracies. See ZOLBERG, *supra* note 24, at 449–50 (“As I have emphasized throughout, the debates that immigration provokes are especially contentious because they implicate disparate spheres of concerns and interests, and also involve both domestic and external policy considerations.”); Freeman & Birrell, *supra* note 36, 532–36 (discussing the experience of Australia).

Businesses are likely to contest vigorous enforcement. Minimizing the far-reaching influence of such pressure is akin to arguing that immigration, despite its enormous economic, political, and social stakes, is sharply different from the vast array of regulatory contexts where politics and organizations play a critical role in legal implementation.

Organized interests shape not only the implementation of regulatory laws, but also their content. Even as lawmakers scramble to respond to district-specific concerns, their political fortunes and constraints are heavily affected by regional and national advocacy organizations, businesses, labor groups, and related constituencies.<sup>80</sup> Indeed, the pluralist character of American legislative politics may tend to engender not only competition between constituencies who want to protect immigrants and organizations determined to limit immigration flows, but also the consequences of shifting alliances resulting between either of those constituencies and interests seeking primarily to reap economic rewards from immigrant labor.

The otherwise noteworthy distinctions in the roots of those interests—only some of which involve explicit economic or material goals—are not as critical at this juncture as is recognizing that, for all its differences, immigration bears some similarity to tax policy or economic regulation. Competition among interests hardly implies that agencies are “captured,” a far more specific claim that refers to the eliding of contingent factors which drives the capacity of agencies to achieve a measure of independence.<sup>81</sup> Deeper ideological reactions or psychological processes may also play a major role in issues seen by the public as a bellwether of the nation’s culture and future direction.<sup>82</sup>

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80. Lawmakers’ interactions with interest groups take place, moreover, in a setting where institutional rules play a critical role in shaping policy outcomes for regulatory systems such as those implicated in immigration policy. In a system where policymaking is multidimensional (and, indeed, even if the legislature focused exclusively on writing immigration laws, the following section unpacks the multidimensionality of this issue), and lawmakers are elected locally from heterogeneous districts, there is essentially no single, predictable relationship between voter preferences and policy outcomes that does not depend on institutional rules. *See, e.g.*, Timothy Besley & Anne Case, *Political Institutions and Policy Choices: Evidence from the United States*, 41 J. ECON. LITERATURE 7 (2003).

81. For a discussion of those factors, at least in the context of public health, see Mariano-Florentino Cuéllar, *Coalitions, Autonomy, and Regulatory Bargains in Public Health Law, in PREVENTING CAPTURE* (Daniel Carpenter et al. eds., forthcoming 2011) [hereinafter Cuéllar, *Coalitions*].

82. Cultural conflict matters, and issues vary in terms of the intensity of cultural conflict they provoke. *See, e.g.*, Stephen Ansolabehere et al., *Purple America*, 20 J. ECON. PERSP. 97 (2006) (acknowledging divergent public reactions to social issues compared to economic issues and recognizing the significance of social issues even in a larger political environment where reactions to economic issues have a stronger effect). At least some studies, for example, suggest that reactions to undocumented immigrants are driven in part by respondents’ perceived cultural affinity with the unauthorized migrants. *See, e.g.*, Thomas J. Espenshade & Charles A. Calhoun, *An Analysis of Public Opinion Toward Undocumented Immigration*, 12 POPULATION RES. & POL’Y REV. 189 (1993). For an interesting discussion of the relationship between elite polarization on cultural issues and reactions among the larger public, see Ryan L. Claassen & Benjamin Highton, *Policy Polarization Among Party Elites and the Significance of Political Awareness in the Mass Public*, 62 POL. RES. Q. 538 (2009) (increasing

Public reactions to issues with an intense cultural or social dimension, moreover, can interact with the strategies of interested parties whose strategic repertoire can include mobilization of the public. At core, however, if businesses have something to gain from (say) a new regulatory approach to one of America's few existing temporary work programs, they will fight for their preferred outcome.<sup>83</sup> Where the recent history of immigration law is concerned, organized interests have had a lot to say, even with the longstanding potential (increasingly realized) for greater concern about immigration among the larger public.<sup>84</sup> Given the significant consequences of regulation, the enforcement of regulatory rules is also an all but inevitably contested arena. Contrary to strong versions of the "regulatory capture" thesis popular among some political economy scholars and observers of the policy process, economic interests often vigorously contest regulatory enforcement. Sometimes, they succeed.<sup>85</sup> In the immigration context, witness some of the forces driving the demise of Operation Vanguard,<sup>86</sup> or the relatively weak requirements for obtaining approval of H-1b temporary visa petitions often made by large corporations.<sup>87</sup>

The success of organized interests in any policymaking domain must contend, however, with the possibility of intense public reactions capable of reshaping the policymaking environment. The influential literature on "policy feedback" in political science addresses one aspect of the political economy of statutory and policy entrenchment, whereby policy changes create their own

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elite polarization on cultural issues involving race, social welfare policy, and abortion is associated with growing polarization among survey respondents with high levels of political information).

83. Such conflict plays out against a status quo offering a limited number of employment-based and temporary worker visas, and imposing administrative costs on employers seeking to make use of such visas. See ANDORRA BRUNO, CONG. RESEARCH SERV., RL32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS (2010).

84. Interests and coalitions, and not just longstanding cultural or social reactions, play a major role in shaping immigration law. For a discussion of the role of political interests and coalitions in the development of the 1965 Immigration Act, see generally ZOLBERG, *supra* note 24, at 337–82. An insightful summary of the role of economic interests in shaping IRCA and the potential for temporary worker arrangements is found in Daniel J. Tichenor, *The Politics of Immigration Reform in the United States, 1981–1990*, 26 POLITY 333 (1994). See also John A. Clark & Jerome S. Legge, Jr., *Economics, Racism, and Attitudes Toward Immigration in the New Germany*, 50 POL. RES. Q. 901 (1997) (arguing, on the basis of survey results comparing Germans from different regions, that economic concerns explain policy attitudes in the former German Democratic Republic).

85. See, e.g., Carpenter, *supra* note 68 (discussing organized interests' approach to diluting financial regulatory reform, including efforts to weaken the statutory bases for subsequent regulatory enforcement); John T. Scholz & Feng Heng Wei, *Regulatory Enforcement in a Federalist System*, 80 AM. POL. SCI. REV. 1249 (1986) (discussing how state occupational safety activities respond to contact with interest groups).

86. See *supra* notes 74–77 (describing the context, nature, and fate of Operation Vanguard).

87. See generally Sabrina Underwood, Note, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers Under the H-1B Visa Program*, 15 GEO. IMMIGR. L.J. 727 (2001) (describing the H-1B visa program and the American Competitiveness in the 21st Century Act of 2000 that increased the number of H-1B visas for 2001–2003).

political responses and support.<sup>88</sup> In underappreciated respects, this literature may shed important light on the fate of immigration. In particular, some of this literature underscores the extent to which public perceptions play an important role in the trajectory of public policy in a democracy.<sup>89</sup> For example, members of the public whose lives are positively affected by new health or environmental regulations that are effectively administered can mobilize constituencies that would not have supported the original legislative package.

At the same time, the public's role in influencing policymaking can create strategic dilemmas for politicians, as they consider what appeals they will make to the public or how (for example) patterns of enforcement facilitate (or hinder) politicians' decisions to focus on particular aspects of an issue. In other cases, exogenous developments might initially change the distribution of public attention focused on an issue, thereby affecting the political context even if the public's underlying substantive views on the issue remain largely unchanged. By investigating the role of the public (and its potential reactions to enforcement patterns), we could also shed light on whether forms of "policy feedback" not commonly described in the literature could arise. In particular, it is possible that greater public attention—far from either entrenching and legitimizing a statutory compromise or failing to bring attention to it—could also bring attention to an issue without legitimizing the statute in question.<sup>90</sup>

If interests and reactions *outside* government are all but certain to go a long

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88. Policy feedback might be understood as one potentially significant element in explaining the evolution of policy, particularly in a democracy. *E.g.*, E.E. SCHATTSCHEIDER, POLITICS, PRESSURES, AND THE TARIFF 288 (Schuyler C. Wallace ed., 1935) (coining the phrase that "new policies create a new politics"). More recent works provide a more systematic treatment of policy feedback. For two seminal works, see DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (James Alt & Douglass North eds., 1990), and THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS (1992). For an interesting explanation of policy feedback in the context of the GI Bill, see Suzanne Mettler, *Bringing the State Back In to Civic Engagement: Policy Feedback Effects of the G.I. Bill for World War II Veterans*, 96 AM. POL. SCI. REV. 351 (2002). *See also* Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000) [hereinafter Pierson, *Increasing Returns*] (demonstrating that "increasing returns" (positive feedback) processes are likely to be prevalent, and can provide a more rigorous framework for developing some of the key claims described in historical institutionalism scholarship).

89. A useful overview of the theoretical terrain (and some of the gaps that remain) can be found in Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595, 610 (1993) [hereinafter Pierson, *When Effect Becomes Cause*] ("Policies do create powerful packages of resources and incentives that influence the positions of interest groups, government elites, and individual social actors in politically consequential ways.")

90. Plainly, changing attitudes can affect policy developments, a phenomenon sometimes obscured by the fact that policymakers also shape attitudes. For an insightful effort to disentangle both dynamics (while also acknowledging the strategic consequences of the potential feedback relationship between them), see BRANDICE CANES-WRONE, WHO LEADS WHOM? PRESIDENTS, POLICY, AND THE PUBLIC (Susan Herbst & Benjamin I. Page eds., 2006). What has received less attention is the potential for the implementation of statutory compromises to affect the environment in which attitudes develop and (through some version of "policy feedback") the further evolution of those compromises.

way toward explaining how regulation evolves, the organization of public authority *within* government is also critical. The organizational context can help policy remain in place, as with the long resistance of the U.S. Department of Defense and its services to legislative reform of the combatant commander structure.<sup>91</sup> Organizations and their leaders can also affect the costs and benefits of executive action, by building coalitions with lawmakers and seeking to undermine executive decisions that they reject.<sup>92</sup> Organizations can also mobilize to change existing policies, as epitomized by the role of the Interstate Commerce Commission in reshaping its jurisdiction in response to changing economic conditions and the rising power of the trucking industry.<sup>93</sup> In addition, poor organizational reputation could damage the prospect for substantive legal changes that depend on (or at least on the perception of) competence and effectiveness on the part of the relevant public agencies.<sup>94</sup>

Since organizations matter, so can the fragmentation of authority across them. Hierarchical organizations with few constraints and preeminent authority over a particular function, such as the Centers for Disease Control and Prevention (CDC) in relation to measures involving restrictions on travel, are bound to operate quite differently from those that must share power over a domain of public activity with other players. Simple trade-offs rarely exist in this context, of course, as unifying one mission (e.g., infrastructure security, by placing the Transportation Security Administration (TSA) within the Department of Homeland Security (DHS)) fragments another (transportation policy).<sup>95</sup> Whatever the original prescriptive or political rationale for splitting up power among multiple bureaus, the resulting organizational fragmentation can carry costs such as making policymaking (and policy implementation) more difficult.<sup>96</sup> Organizations are thus central players in the political economy of legal implementation. Between efforts to accommodate the competing goals of multiple bureaucracies and the differing views held by organizations with distinct expertise

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91. See generally AMY B. ZEGART, *FLAWED BY DESIGN* 131–35 (1999) (describing how presidential reform was thwarted by the Joint Chiefs of Staff design).

92. See JAMES Q. WILSON, *BUREAUCRACY* 217 (1989); Mariano-Florentino Cuéllar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 654 (2009) [hereinafter Cuéllar, *Securing*] (“Across the constellation of interests within and around an agency, it remains possible that some players will be all too aware of an agency’s potential capacity to acquire a greater measure of autonomy over time, as it builds an external constituency of support or acquires an ever stronger reputation for technical competence.”).

93. See generally LAWRENCE S. ROTHENBERG, *REGULATION, ORGANIZATIONS, AND POLITICS* (1994) (describing the evolution of Interstate Commerce Commission motor freight policy in response to changes within the trucking industry).

94. This is a major implication of Daniel Carpenter’s magisterial account of the evolution of the FDA. See DANIEL CARPENTER, *REPUTATION AND POWER* (Ira Katznelson et al. eds., 2010).

95. See generally Cuéllar, *Securing*, *supra* note 92, at 653 (discussing the inevitable prescriptive trade-offs in organizing the bureaucracy).

96. See, e.g., WILSON, *supra* note 92, at 257–58, 267–71 (agency fragmentation raises the difficulty and costs of coordination).

and value commitments, then, fragmentation may create at least two consequences: (1) a “transaction cost” on policymaking that, in an ideal world, would implicate coordination across agencies (e.g., enforcement *plus* adjudication *plus* prosecution coordination); and (2) questions about the capacity of the President to tightly control immigration policy.<sup>97</sup>

*B. Shaping the Context: Immigration Law’s Multidimensionality*

The more specific immigration-related context is just as important, particularly in one crucial respect. No single prescriptive ideal or goal defines the immigration issue. Instead, the social context in which immigration law is written and implemented is likely to reflect at least three different dimensions, where elite and public concerns straddle the divide between cultural and more conventional policy concerns. This multidimensionality thus yields a more complex debate relative to a variety of more conventional regulatory domains.

First, immigration has powerful effects on the labor market. Although most Americans appear to benefit from these effects, not everyone does. Immigration probably also bears some relationship to society’s capacity for innovation—a dynamic that may be partly rooted in immigration’s relationship to diverse skill-sets and approaches to economic activity (as recognized in some econometric analyses of immigration’s impact on the labor market). Although we are not close to understanding all substantial questions regarding immigration’s (conventional) economic impact, it is relatively easy to appreciate immigration’s far-reaching consequences as an economic issue, and thereby its potential to shape broader public reactions to economic and social policy.<sup>98</sup>

Second, immigration and its closely related domain of border security clearly have an impact on Americans’ perceptions of security, and, at the margin, on the country’s broader instrumental security agenda.<sup>99</sup> The dilemmas associated with regulating terrorist mobility are an example. Absolute control over the mobility of individuals engaged in terrorist activity (or very likely to be, on the basis of strong, justifiable suspicion) is all but impossible. But what *is* possible depends substantially on immigration policy, particularly in a relatively open society that

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97. Contrast this view with that advanced (admittedly with at least a few caveats) in Cox & Rodríguez, *supra* note 14. There, they argue that perhaps the single most significant underappreciated feature of American immigration law is the critical role of the President in controlling immigration (largely through *ex post facto* discretionary enforcement). *Id.* at 528. But organizational fragmentation—plus pressures involving public and lawmaker reactions—could squelch that control or at least severely limit it. *Id.* at 537–38.

98. See, e.g., Ann-Helén Bay & Axel West Pedersen, *The Limits of Social Solidarity: Basic Income, Immigration and the Legitimacy of the Universal Welfare State*, 49 ACTA SOC. 419 (2006).

99. For a helpful overview of some of the terrain, see generally Christopher Rudolph, *Security and the Political Economy of International Migration*, 97 AM. POL. SCI. REV. 603 (2003) (describing how migration affects the security of advanced industrial states and how the security environment shapes the way states deal with international migration).



values limits on the scope of internal surveillance and policing. Not surprisingly, the larger public often (though certainly not always) views immigration through a security lens—and this pattern varies over time.

Finally, immigration, at its core, is a means through which we delimit national communities in a world where laws and societies are defined—at least in principle—by the scope of the nation-state.<sup>100</sup> This dimension implicates not only concerns about the stability and reach of legal arrangements (and, consequently, potential concern about the efficacy of those arrangements in the face of larger global forces) but also reactions (sometimes subtle and less than fully conscious) to demographic and cultural change. As a descriptive matter, capacity to accept demographic and cultural change is neither infinite nor is it uniformly distributed across a large and diverse country such as the United States.<sup>101</sup>

These factors reflect differing dynamics and interests relevant to immigration law. Because recessions, security concerns, and demographic change have activated concerns in all three domains over the last few years, Americans have become increasingly concerned about the nature of their immigration policy in recent years (though not necessarily about immigration as such). As Figures 1 and 2 reflect, news coverage of immigration has increased dramatically over the last three decades. Particularly striking is the proportion of news coverage focused on border issues. Such news coverage, in turn, coincides with public reactions reflecting swelling national concerns about immigration.<sup>102</sup> Demographic change means larger undocumented populations are moving into parts of the country with less of a history of large-scale recent (Latino) immigration, turning policy disputes about migration into increasingly national concerns. With these considerations in mind, we can turn to assessing the details of immigration law's evolution and implementation in recent decades.

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100. See ZOLBERG, *supra* note 24, at 11 (describing “the [formal] organization of the world into a congeries of mutually exclusive sovereign states, commonly referred to as the ‘Westphalian system’”).

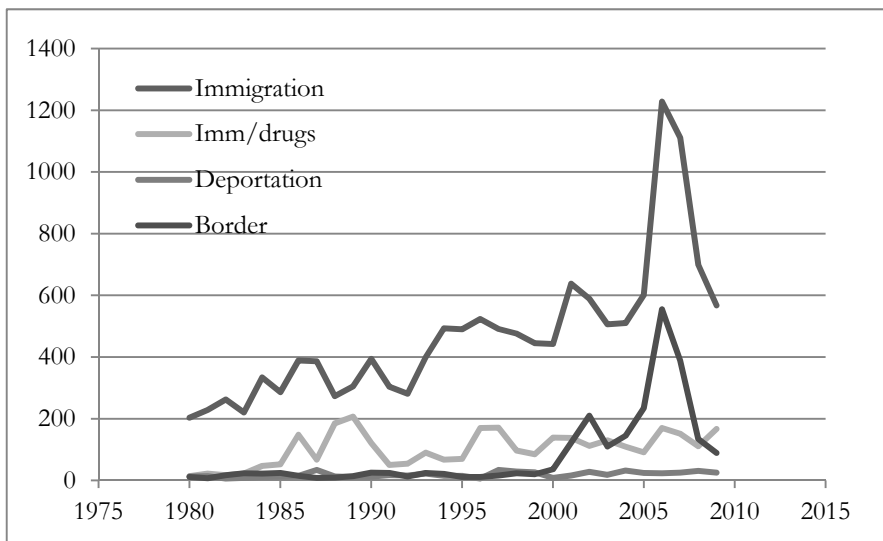
101. See, e.g., S. REP. NO. 98-62, at 4 (1983). The Report notes:

We see evidence that if the newcomers to a community do not excessively disrupt or change the attributes of the community which make it familiar to its residents and uniquely their “home” . . . then the newcomers may well be welcome, especially if they make positive contributions to the community’s economic and general well-being. On the other hand, it is seen that if the newcomers remain “foreign,” they may not be welcome, especially if they seek to carve out separate enclaves to embrace only their own language and culture and if their numbers and the areas of the community which they directly affect are great. *This should not be so in the “ideal” world, but it is real.*

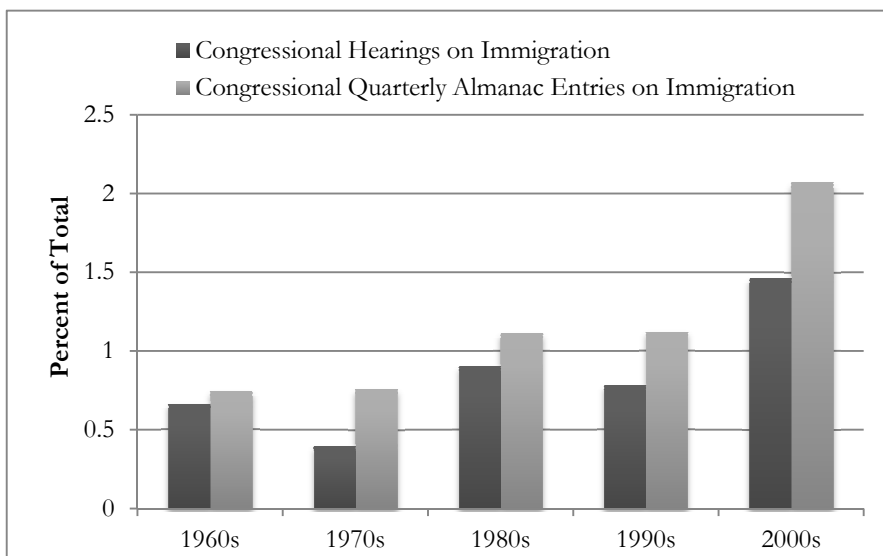
*Id.* (emphasis added).

102. Francine Segovia & Renatta Defever, *American Public Opinion on Immigrants and Immigration Policy*, 74 PUB. OPINION Q. 375, 393 (2010) (“Spanning what will now be over a decade, public opinion on immigration indicates an increasing lack of confidence in U.S. leaders’ abilities to address immigration issues.”).

**Figure 1:** Yearly Count of Major Newspaper Articles Mentioning Immigration Issues in the Title<sup>103</sup>



**Figure 2:** Percentage of Total Congressional Hearings and Congressional Quarterly Almanac Articles Focused on Immigration, 1960–2009<sup>104</sup>



103. Headlines were compiled from the *New York Times*, *Washington Post*, *Wall Street Journal*, and *USA Today* (accessed through Westlaw database).

104. POLICY AGENDAS PROJECT, UNIVERSITY OF TEXAS AT AUSTIN (search of Congressional Hearing and Congressional Quarterly Almanac databases, 1960–2009), available at <http://policyagendas.org/page/trend-analysis>.

### III. THE INSTITUTIONAL DYNAMICS OF THE IMMIGRATION STATUS QUO

From legislative action to agency enforcement choices, the broad evolution of immigration law and policy since the mid-1980s bears out the institutional story described above, and goes quite a distance toward explaining some of the limitations and contradictions bedeviling the American immigration system. As we will see, that system avoided crucial trade-offs, hastening what can only be described as a considerable degree of statutory dysfunction. The constraints built into the system, in turn, were exacerbated by organizational problems and limited presidential control and have become, ironically, more difficult to change as public concern about immigration has grown in response to demographic changes and to some of the structural problems with the system itself.

By leveraging the multiple political economies just discussed as well as some of the uniquely multidimensional features of immigration, the following account goes a long way toward explaining why changes in immigration policy have run into increasing difficulty as the years since IRCA stretch into decades. Put simply, the problem is not merely the role of veto gates creating institutional gridlock, but rather a combination of continued opposition from politically significant stakeholders, pervasive employer-based enforcement, and diminishing public legitimacy which together make large-scale change easier to undermine. The next part takes a closer look at the factors that can help us better understand the relationship between a complex statutory scheme and the administrative process that gives it relevance.

#### *A. Statutory Dysfunction: Statutory Bargains Built on Contradictions*

If ever a competition discriminated among statutes on the basis of how loudly they send mixed messages, surely IRCA would merit a gold medal. At the same time that IRCA enshrined in American law an explicit new employer responsibility to avoid hiring undocumented workers, the statute embodied a regime of enforcement and verification that seemed only a few small steps removed from what someone might have designed to make the law fail. If IRCA visibly failed to deliver what it promised, the INA's visa allocation scheme—constituting the backdrop for IRCA and subsequent rounds of immigration lawmaking—also came up short, although perhaps in subtler and more complex ways.

But the challenges associated with immigration statutes go well beyond the employer sanctions system inaugurated by IRCA, and it is helpful to understand some of the limitations built into the broader immigration system before revisiting employer sanctions. Immigration flows reflect a variety of changing domestic and international conditions, some of which are in principle relevant to the institutional design of immigration laws. Yet very little flexibility is built into the American system for allocating visas. Country quotas often result in both waits exceeding a decade for many categories (particularly family-based visas), as well as

a small number of employment-based visas, which are allocated through a cumbersome process primarily involving employers.<sup>105</sup> The INA includes strict constraints on most aspects of agency substantive regulatory policymaking, forcing agencies to explore far more limited and imperfect options involving enforcement-related changes (many of which are not implemented through rules or even explicit enforcement guidelines).

A good example is found in the structure of the INA provisions governing family-based immigrant admissions following the Immigration Act of 1990. Rather than addressing concerns about backlogs and flexibility by repealing the ceiling for family-based visas (or allowing an agency to change the ceiling pursuant to certain conditions), Congress instead established an elaborate formula found in INA section 201(c). Under that arrangement, the statute establishes a floor for family-based preference categories (a minimum of just under 230,000 spaces each year).<sup>106</sup> Whenever total family admissions (including those that are *not* capped) exceed 480,000 in a single year, the guaranteed floor overrides the ceiling that would otherwise be applicable for the succeeding fiscal year (thus ensuring that uncapped family categories do not entirely preclude admission of a minimum number of individuals in capped family visa categories). In a similar vein, recent policy regarding temporary visas, epitomized by the H-1b program, involve compromises that please virtually no one—the program meets short-term employer needs yet denies employers the benefit of recipients' accumulated experience because they are forced to leave. In this manner, labor and similar constituencies are placated with pro forma administrative procedures putatively designed to protect American jobs that raise costs and increase delays with little consequence.<sup>107</sup>

This very pattern contrasts with the degree of substantive flexibility agencies routinely receive in other regulatory contexts. In the context of illegal drug policy, relevant federal statutes provide the Attorney General with authority to temporarily “schedule” (e.g., establish criminal penalties associated with the distribution of) a drug if “necessary to avoid an imminent hazard to the public safety.”<sup>108</sup> Other examples abound, in domains ranging from air pollution regulation to occupational safety.<sup>109</sup> Even among domains that involve more circumscribed delegations of authority to agencies than those spawning colorable nondelegation claims, agencies are rarely subjected to the type of constraints so

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105. For a discussion of the relative rigidity in the system and the potential policy consequences of modifying such a scheme, see MPI TASK FORCE, *supra* note 47, at 22.

106. 8 U.S.C. § 1151(c)(1)(B)(ii) (2009).

107. See Underwood, *supra* note 87.

108. 21 U.S.C. § 811 (2004).

109. Two of many other examples include the legislative authority to establish National Ambient Air Quality Standards under the Clean Air Act, discussed in *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001), and provisions of the Occupational Safety and Health Act at issue in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

common in immigration.<sup>110</sup> With lawmakers exhibiting continued reluctance to write statutes conferring widespread formal discretion to agencies and executive branch officials on decisions regarding such a politically sensitive subject, the executive branch ends up with relatively limited capacity to adapt legal provisions to changing objective conditions and public demands.<sup>111</sup>

Plainly, greater flexibility in allocating visas is not guaranteed to end unlawful migration. The precise elasticity of demand for undocumented immigration relative to changes in legal migration opportunities is difficult to anticipate precisely. That said, we can learn something from the history of the Bracero program in the 1960s. When the program was abruptly terminated and quotas were imposed on Western hemisphere migration, businesses turned in vast numbers to hiring undocumented workers, which in turn helped establish the pattern of illicit migration.<sup>112</sup> Historical examples of this type suggest the extent to which lawful and illegal migration are (imperfect) substitutes for each other, and highlight the trade-offs and incentives potential migrants face as they contemplate their choices.<sup>113</sup> Other things being equal, it probably makes sense to presume that potential migrants would probably prefer safer legal migration opportunities to illicit ones. Employers who are weighing the value of making a concerted effort to hire legal workers might confront a similar calculus. Sensitivity to the potential risks of illicit crossing (particularly as the danger involved changes) is certainly consistent with undocumented migrants' increasing unwillingness to risk crossing

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110. For an overview of a variety of statutory domains that evolved over time largely in response to relatively flexible grants of statutory authority to agencies, see ESKRIDGE & FERREJOHN, *supra* note 12.

111. At least in the short term, this trend bodes poorly for efforts seeking to address structural problems in immigration law through creation of an executive branch agency or independent commission with the power to make substantial adjustments in the availability of visas. The historical pattern suggests extreme congressional reluctance to create such an entity, and even if such an effort succeeded, it would almost certainly face substantial congressional pressure unless lawmakers were persuaded that the public would not hold them accountable for the new entity's decisions. See MPI TASK FORCE, *supra* note 47, at 42 (developing a proposal for an independent commission); Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787 (2010). For further discussion on delegation, see *infra* Part V.A.

112. See, e.g., DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS (2002).

113. The experiences of migrants in South Korea in past decades provide another example of how migrants choose between lawful and unlawful status given a variety of constraints and incentives. Temporary workers were given "trainee" visas to enter the country, but soon discovered they could make more money as undocumented workers and began working illegally. See Wang-Bae Kim, *Migration of Foreign Workers into South Korea: From Periphery to Semi-Periphery in the Global Labor Market*, 44 ASIAN SURV. 316, 324 (2004) ("The primary reason for deviance from the original contract [to work only in jobs authorized for "trainee" visas] lies in the simple reality that these workers are able to make more money through illegal work."). For an informative discussion of the trade-offs involved in designing policies, including temporary migration opportunities, to manage the demand for migration, see GORDON H. HANSON, MIGRATION POLICY INST., THE ECONOMICS AND POLICY OF ILLEGAL IMMIGRATION IN THE UNITED STATES 3–8 (2009). These experiences and challenges illustrate the importance of program design details in any framework seeking to deploy changes in legal migration as a means of discouraging unauthorized workers.

the U.S.-Mexico border in the context of circular migration.<sup>114</sup> Moreover, the marginal benefit that residents of other countries expect to realize from emigrating varies, so there's no reason to expect that allocating (for example) two or three times as many U.S. visas to Mexicans would immediately generate a two or threefold increase in the overall willingness of Mexicans to emigrate to the United States (thereby maintaining the pre-existing ratio of legal visas to overall demand).

It is admittedly difficult to evaluate the precise injury to immigration law's legitimacy arising from the visa allocation scheme. The consequences of those compromises, however, are unlikely to bolster Americans' opinions of the efficacy and legitimacy of their immigration policy. The public's opinions are affected by the baseline expectations set by policymakers, elites, legal proceedings, and the media. In multiple ways, these sources emphasized the expectation that the country's southern border could be relatively easily "secured" in the sense that—despite the existence of Western Hemisphere quotas after 1965 and a labor market thirsty for semiskilled labor from Latin America—little or no illicit immigration would occur. The combination of physical proximity to an attractive labor market, visa overstays (which even today make up well over a third of all undocumented immigrants), and limits on legal migration opportunities for semiskilled workers from Latin America made it difficult to deliver on converging expectations about border control. Missing these nuances, some modern observers describe the problem in terms of "regaining" control of the borders without recognizing the extent to which the new dynamics create a novel and important challenge for the country.<sup>115</sup>

Meanwhile, the undocumented population has crept steadily upward.<sup>116</sup> At the same time, employers with strong interests in hiring immigrants (particularly ones with specific skills) have been constantly at loggerheads with civil servants and labor organizations in a process that increases the administrative costs of such hires while rarely changing the number of available visas. This process has also

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114. See Douglas S. Massey, *Borderline Madness: America's Counterproductive Immigration Policy*, in DEBATING IMMIGRATION 129, 135–36 (Carol M. Swain ed., 2007) (discussing the sensitivity of migrants to the costs and benefits of illicit border crossing). The threats associated with illicit migration may arise from migrants' desire to avoid heavily policed, formerly attractive locations for border crossing by attempting to cross in the desert. Migrants may also encounter risks as organized criminal groups become increasingly involved in alien smuggling. See *supra* Part I.A (discussing the potential for increased interest in alien smuggling from organized criminal networks as the real price of border crossing increases).

115. Compare Ross Douthat, Op-Ed., *The Borders We Deserve*, N.Y. TIMES, May 3, 2010, at A25 (noting that progress on immigration is only possible "if America first regains control of its southern border"), with Edward Alden & Peter Andreas, Letter to the Editor, *The Big Picture Beyond Arizona's Law*, N.Y. TIMES, May 9, 2010, at WK7 ("[C]alls to 'regain' control of the border suffer from historical amnesia, perpetrating a common myth that it was ever actually under control.").

116. See generally JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER REPORT, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 1–31 (2011).

given rise to a process that poorly serves its stated purpose and almost certainly engenders cynicism about immigration policy.

IRCA was not built to solve these problems. By the mid-1980s, the relatively high undocumented population and the politics of congressional compromise all but guaranteed that any new legislation would include a considerable emphasis on enforcement. Few thoughtful observers expected success in controlling illicit migration through an exclusive focus on border enforcement. Lawmakers and the Reagan Administration thus incorporated a new employer sanctions regime in even the earliest version of the principal immigration reform bill then being discussed. In retrospect, the move toward greater employer responsibility in immigration policy was at least as historically significant as the IRCA legalization program. Throughout the nation's past trajectory, employers had avoided such responsibilities. When lawmakers had previously enacted laws criminalizing the harboring of unlawful immigrants, a "Texas proviso" clarified that any such harboring offense did not encompass the mere existence of an employment relationship.<sup>117</sup> Even as the Texas proviso was eliminated in IRCA, the new reforms soon came to reflect the contested nature of regulatory policy. The resulting scheme was one that accommodated employers' considerable influence, while nonetheless creating a set of requirements that allowed policymakers to herald a new era in immigration law.

In effect, IRCA established a framework that rendered vast tracts of labor market activity unlawful, including employer activity that was not previously unlawful. At the same time, lawmakers coupled this ambitious change in the scope of labor market regulation with a rickety, easy to evade system that drastically limited enforcement. Far from being strictly liable for hiring unauthorized workers, or even being subject to a simple negligence standard, meaningful sanctions only kicked in if employers had knowledge of their worker's unlawful status. Given the relevant procedural and substantive limitations, neither the conventional penalties, nor the harsher "pattern or practice" provisions, provided a simple means of enforcing IRCA's requirements. Nor did courts interpret the relevant provisions in ways that would have systematically eased the authorities' burdens when enforcing the law.<sup>118</sup> Employers could avail themselves of a "good faith" exception if they had otherwise followed the requirements of IRCA, which included simply examining required identity documents to determine if they appeared valid.

Hence, instead of providing incentives for the reporting of information to authorities and routine monitoring, IRCA's most severe penalties (and even these were relatively meager) were reserved for willful violations that were difficult to

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117. See ROGER DANIELS, *GUARDING THE GOLDEN DOOR* 121 (2004).

118. See *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 553–56 (9th Cir. 1991) (A valid finding of "constructive knowledge" requires, for example, lower-level managers to have actual information of an employee's ineligibility to work.).

prove. At the same time that it gave immigration authorities the staggering task of policing tens of millions of businesses, IRCA left the agency little flexibility to dramatically heighten penalty levels to a degree that could have changed businesses' expected utility calculations in an environment where the probability of detection was low.<sup>119</sup> Kitty Calavita reviews how IRCA constituted a "reversal of the long-standing laissez-faire policy" that previously governed low- and semiskilled immigration to the United States. Moreover, she notes, "[E]mployer violations are widespread and . . . the continued hiring of undocumented workers is a direct consequence of the high benefits that employers derive from this source of cheap labor, coupled with the low risks associated with this 'white-collar crime.'"<sup>120</sup> At a minimum, certain tensions were built into the statutory scheme in light of the mismatch between the public expectations IRCA helped cement (regarding the extent of legal regulation of labor markets) and the limited tools the public sector received to achieve these goals.<sup>121</sup> Those tensions could become even worse if resources for interior enforcement eroded—a subject addressed in detail below.

Admitting defeat is politically risky for agency leaders. If the Federal Drug Administration (FDA) is not likely to convey its inability to inspect the vast array of food processing establishments under its jurisdiction and the FBI is scarcely about to simply accept the difficult odds it faces in disrupting some terrorist plots, neither are immigration officials eager to convey the full range of difficulties they face in implementing their responsibilities. If anything, those risks are greatest just as the agency prepares to implement a major new statutory responsibility. So it is not surprising that immigration authorities' first response to their daunting task was to assert the existence of widespread compliance. Early in the history of IRCA, law enforcers claimed widespread compliance on the presumption that employers would generally (and voluntarily) comply with the law. The INS District Counsel in San Diego, for example, trumpeted "the success we've had across the board in securing voluntary compliance from employers nationwide."<sup>122</sup> No doubt some employers, whether vast corporations or small businesses, make an effort to comply. But in an environment where compliance is administratively burdensome and may carry a considerable opportunity cost in terms of labor expenditures, it is far more likely that the extent of compliance would depend in good measure on some combination of social norms about the value of conforming to legal requirements and reliable enforcement.<sup>123</sup>

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119. For an insightful analysis, see Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1042 (1990).

120. *Id.*

121. *See id.*

122. *See id.* at 1050.

123. *Cf.* Dorothy Thornton et al., *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL'Y 262 (2005). Thornton and her coauthors conclude that most firms are already in compliance



To wit, Calavita conducted a survey of sectors that had long relied on immigrant labor in Southern California. She assessed behavior in the garment industry, construction, restaurants, hotels, and building and landscape maintenance. Results revealed a widespread lack of compliance with employer responsibilities under IRCA. Forty-eight percent of the employers who were interviewed indicated they “thought” they had undocumented workers in their work force. Of these, nearly half estimated that a quarter or more of their workforce was undocumented. Further, the workers themselves reported information validating these findings (thirty percent were undocumented, and another thirty percent were in the process of applying for legal status under IRCA’s legalization provisions).<sup>124</sup>

The trajectory of the IRCA-imposed employer sanctions, and their subsequent implementation, reflects the extent to which regulatory enforcement implicates competition and contestation. In the immigration context, the conflict over targeting employers with potentially far more aggressive regulatory enforcement targeting employers is exacerbated by the potential costs to business and some agency resistance and risk aversion.<sup>125</sup> As Martin puts it, in principle, interior enforcement imposes quite tangible burdens on business:

As a result, significant interest group pressure quietly helps push Congress toward underfunding these enforcement endeavors, and there has been no equivalently organized constituency pushing back. Moreover, though employers may not like the current I-9 verification process, involving the examination of work authorization documents of all new hires (albeit according to a very lax standard of scrutiny), they have become accustomed to it. Proposed revisions in the employers’ obligations generate determined resistance among a highly influential interest group.<sup>126</sup>

The features thus built into the IRCA system from the outset contrast with more functional schemes, such as those governing aviation safety and health surveillance. True, all regulatory schemes require some implementation and enforcement. If they did not, then the regulation itself would not be necessary. While the challenge of implementation makes virtually every regulatory scheme susceptible to problems of execution, several factors probably combine to exacerbate the problems with regard to immigration. In immigration, the relevant agencies did not begin with a reservoir of public reputational capital, unlike (for

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with environmental regulations because of social norms and that “explicit general deterrence” knowledge usually serves not to enhance the perceived threat of legal punishment, but as reassurance that compliance is not foolish and as a reminder to check on the reliability of existing compliance routines.

124. See Calavita, *supra* note 119, at 1051.

125. See, e.g., David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 525, 544–48 (2007).

126. *Id.* at 546.

example) the FDA. Agencies lacked statutory authority or resources to better align activities with public expectations (because of congressional reluctance to delegate formal authority to agencies on most immigration policy issues). Contrast this with agencies possessing broader authority to reshape regulatory requirements in order to address substitution problems (e.g., financial regulatory agencies charged with antilaundersing responsibilities; food safety agencies). The social and cultural dimensions of immigration make it easier for social, economic, and political developments to engender divisive reactions and changes in public concern, and complicate the argument that the use of enforcement discretion is a legitimate means of achieving de facto regulation of immigration policy in the absence of broad rulemaking authority.

For all these reasons, many regulatory agencies encounter a less dysfunctional picture when working with complex regulatory schemes not involving immigration. The Federal Aviation Administration's (FAA) regulation of aviation safety is more tightly coupled to asserted regulatory goals than anything involving immigration. Even in acknowledging some limitations of historically existing regulatory practices, reports on FAA surveillance of safety problems indicate a variety of detection mechanisms for assessing the risk of regulatory violations not available to immigration authorities, including a greater flexibility to determine fines, prophylactic requirements, and general regulatory requirements.<sup>127</sup> As another point of contrast, the Centers for Disease Control and Prevention's (CDC) monitoring of health conditions leverages state authorities and health reporting throughout the country to create a relatively reliable system for tracking recent changes in infections or incidence of foodborne illness. Congress requires the CDC to collect data on a variety of diseases through the National Notifiable Diseases Surveillance System.<sup>128</sup> To facilitate reporting, the CDC established a National Electronic Telecommunications System for Surveillance, which includes participation of all fifty state health departments, New York City, the District of Columbia, and five U.S. territories. While Congress does not require all states to participate, the fact that every single state health agency in the country participates underscores the extent to which jurisdictions face incentives to take part in the system. A similarly comprehensive arrangement

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127. For a brief overview of some of the scope of regulation and detection mechanisms involved in FAA aviation safety regulation, see generally Kendal Van Wagner, Comment, *Cutting Costs and Cutting Corners—The Safety Risks Associated with Outsourcing Aircraft Maintenance and the Need for Effective Safety Oversight by the Federal Aviation Administration*, 72 J. AIR L. & COM. 631 (2007). For an overview of the mechanisms through which the FAA monitors the nature and magnitude of commercial aviation safety developments, see AL GORE, FINAL REPORT TO PRESIDENT CLINTON: WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY (1997).

128. See *National Notifiable Diseases Surveillance System*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/osels/ph\\_surveillance/nndss/nndsshis.htm](http://www.cdc.gov/osels/ph_surveillance/nndss/nndsshis.htm) (last visited Nov. 17, 2011).

is in place to provide information on foodborne illness through the FoodNet and PulseNet initiatives.<sup>129</sup>

These regulatory efforts exist in a larger context. Budget constraints and institutional features combine with public reactions to limit the scope of federal authority. As a result, federal capacity for national-scale, routine regulatory monitoring is far from unlimited. While the federal government is by no means a classic weak state, its development has followed a historically contingent path that has made some regulatory and administrative functions easier than others.<sup>130</sup> The federal government's historical trajectory led it to build public organizations capable of administering benefits and federal resources on a national scale. By contrast, exclusive federal administration of a pervasive, national-level regulatory *monitoring* system (designed to detect and facilitate responses to real-time developments that call for regulatory action or enforcement) is less common.

In fact, virtually all such systems at the federal level fall into four categories, each possessed of a certain institutional logic making it at least plausible to expect some results. The first involves building elaborate mechanisms for third party reporting coupled with a large bureaucracy for civil enforcement and criminal referrals. A classic example is the IRS.<sup>131</sup> Second, federal regulatory monitoring systems can also leverage the presence of individual, organizational, and state-level incentives for accurate reporting, with the aforementioned CDC schemes relying on the incentives of the reporting jurisdictions to share accurate information.<sup>132</sup> The third category involves relatively close monitoring of a small, tightly circumscribed industry with strong barriers to entry, as with the Nuclear Regulatory Commission's oversight of safety in nuclear power plants or the FAA's

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129. See generally Sandra Hoffmann & William Harder, *Food Safety and Risk Governance in Globalized Markets*, 20 HEALTH MATRIX 5, 48 (2010) ("The United States has also invested in improvements in disease monitoring to provide the information basis for risk-based targeting of policy by federal and state government—most importantly through development of FoodNet, a nationwide active surveillance system, and PulseNet, which uses genetic fingerprinting in tracing the source of outbreaks."). The CDC is in many respects not a conventional regulatory agency: it engages in few regulatory rulemakings or enforcement actions. Yet its monitoring of public health developments, and its analysis of and reporting on such information can trigger powerful enforcement, rulemaking, or adjudicatory actions from other public agencies. Cf. JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW 17 (6th ed. 2009) (describing the stereotypical frameworks of regulatory agencies with respect to promulgating regulations and enforcement).

130. For two insightful discussions of changes in federal capacity to implement administrative and regulatory programs, see DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2001), and Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006). While both accounts underscore the longstanding capacity of the federal government to undertake regulatory and administrative activity, they also acknowledge that such capacity has developed in accordance with a variety of constraints and limitations.

131. See JOEL SLEMIROD & JON M. BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 181 (4th ed. 2008) ("[E]mployers are required to send information reports on wages and salaries for all their employees to the IRS. The IRS computers then match up most of these information reports against tax returns.").

132. See Cuéllar, *Coalitions*, *supra* note 81.

regulation of safety in commercial aviation. Finally, federal regulatory monitoring schemes sometimes involve wholesale deployment of state-level bureaucracies, as with environmental protection, leveraging local monitoring systems and institutional knowledge.<sup>133</sup>

By contrast, employer sanctions do not fall into any of these categories, though the early history of the federal effort shows an aborted attempt to borrow some elements from these models and that the relevant officials initially sought to argue that (as with the CDC) incentives for compliance were high. Without the institutional logic available for any of the aforementioned categories and no clear precedent for the success of a vast new federal regulatory monitoring scheme, IRCA faced staggering challenges from the very beginning. If there was any plausible way to see how federal officials could manage those challenges, it would all but certainly involve a combination of regulatory flexibility coupled with substantial resources for interior enforcement. As discussed below, neither of these elements materialized.

The present discussion of statutory dysfunction began by acknowledging that employer sanctions are not the only cumbersome compromise built into immigration law. Some observers might therefore emphasize that the immigration system would be severely compromised even *without* the problems of enforcing IRCA's employer sanctions provisions. It is true enough that a good deal probably depends on how statutes are implemented—a topic taken up below. Although a variety of factors may affect the legitimacy of the immigration system, however, it is revealing to examine the specific criticisms that lawmakers and other politicians levy at the status quo. The fiercest critics frequently focus on enforcement problems.<sup>134</sup> Moreover, the decisions of prospective unauthorized immigrants are affected by labor market opportunities,<sup>135</sup> which are in turn affected by enforcement of labor market regulations. In effect, the mechanisms enshrined in law have almost certainly contributed to public skepticism of the system, eroding support for the more ambitious goals and heightening the focus on a growing undocumented population.

Even if one acknowledges the trade-offs and limitations built right into existing statutes, might the general public have been persuaded to take seriously

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133. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1178 (1995) (“[T]he federal government simply does not have the capacity to regulate [pollution] effectively without the cooperation of state and local governments.”).

134. For just a couple recent examples, see Press Release, Committee on the Judiciary, Subpoena Issued to DHS for Secure Communities Data (Nov. 4, 2011), <http://judiciary.house.gov/news/DHS%20Subpoena.html> (criticizing DHS for failure to provide necessary data), and Mickey McCarter, *DHS: Republican Lawmakers Demand DHS Drop “Irresponsible” Deferments of Immigration Enforcement*, HOMELAND SECURITY TODAY (July 6, 2011), available at <http://www.hstoday.us/briefings/daily-news-briefings/single-article/republican-lawmakers-demand-dhs-drop-irresponsible-deferments-of-immigration-enforcement/65aee030d8e786ec0a89851fcb54bd3.html>.

135. For a description on migration decisions of prospective immigrants, see Cornelius, *supra* note 46.

the idea that they were often *themselves* the very employers from whom compliance was expected? It is among law's most meaningful characteristics that compliance arises in settings where enforcement is difficult or even nonexistent. Public health regulatory rules, for example, matter for multiple reasons, and not only because failure to comply could result in adverse material consequences for state or private sector officials. Legal regimes can generate a considerable degree of support because of the law's perceived legitimacy or social significance, or because a failure to comply could expose an individual to informal sanction from among her peers.<sup>136</sup> It is just as true that some laws fail to garner such support because the public perceives them as widely ignored, ineffective, burdensome, and ultimately illegitimate. Scholars investigating the regulatory process have long analyzed the consequences of different enforcement regimes on compliance. In particular, a major effort to understand private sector compliance (or the lack of it) in the environmental context emphasized the role of industry's perceptions regarding enforcement. If widespread perceptions exist that a law is not being enforced against the most obvious transgressors, interest in compliance—and indeed, the law's very legitimacy—could profoundly erode.<sup>137</sup>

No account of compliance with the law would be accurate if it focused only on individuals' responses to short-term material costs and benefits. It is just as true, however, that administrative enforcement is part of what shapes "acculturation," or the process through which individuals internalize legal commitments. The process through which acculturation arises depends in part on what other parties are doing and saying about the law. In the case of employer sanctions, millions of employers possess substantial economic incentives to disregard the law. They could easily describe the paperwork requirements as burdensome and observe blatant failures to honor it (particularly among their friends, family members, and coworkers hiring domestic labor). As the months after IRCA's passage turned into years and then decades, growing segments of the public increasingly viewed the system as poorly designed.<sup>138</sup>

#### *B. Organizational Fragmentation #1: Interagency Coordination Costs*

Most statutory authority for regulating migration is concentrated in a single, far-reaching statute, the INA. But immigration law functions differently in a world where the DHS and DOJ share power over many immigration agencies, and where at least three agencies within DHS vie for attention. Without suggesting that the fragmentation of authority over immigration is entirely new or responsible

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136. See, e.g., Douglas D. Heckathorn, *Collective Sanctions and Compliance Norms: A Formal Theory of Group-Mediated Social Control*, 55 AM. SOC. REV. 366, 382 (1990).

137. See Thornton et al., *supra* note 123, at 273 (discussing environmental compliance in the private sector).

138. See Segovia & Defever, *supra* note 102, at 393 (describing the public's increasing rejection of the existing immigration system and lack of confidence in the enforcement of immigration laws).

for every feature of immigration enforcement, consider the distinction between the status quo and a world where a single official is responsible for immigration services along with enforcement, and that single official reports to the Attorney General. In the earlier discussion of regulation's institutional context, we considered how bureaus, cabinet agencies, and other public organizations can play a major role in the story of how laws are interpreted or even modified. Lawmakers, organized interests, and agencies themselves fight over structure. Hence, even if a variety of forces help determine how the INA is implemented, we should investigate whether the organizational context helps or hurts the coherence and practical viability of immigration policy.

In the existing system, organizational problems tend to hurt the effectiveness of immigration regulations in three interrelated ways. First, the fragmented incentives and agendas of different agencies—both within and outside the DHS—tend to raise the “transaction cost” of implementing policy changes, as the distinct agencies can and do resist changes and do not answer to a single senior official. Second, the problems implementing immigration law across competing agencies, and in particular the swelling backlogs in immigration adjudication, feed the widespread perception across the political spectrum that immigration policymaking is ineffective. This erodes the federal government's credibility regarding successful implementation of a complex new system involving both enforcement of laws and procedural guarantees. Finally, agency fragmentation and resistance to outside control raise the cost to the President of exercising authority over what appears to some observers to be executive discretion in immigration (particularly in an environment where, as explained below, immigration issues have become higher-profile public concerns).

American immigration law is a sterling example of organizational fragmentation. One cabinet agency (the DHS) enforces laws, adjudicates immigration benefits, and administers national boundaries. Within that cabinet agency, three separate agencies with differing agendas and (in some cases) profound rivalries coexist. The DOJ, a different cabinet agency altogether, prosecutes immigration crimes, defends U.S. immigration policies in court, runs an adjudicatory system of immigration law judges, and retains limited rulemaking and adjudicatory powers over the small sliver of substantive immigration issues over which Congress provided flexibility to agencies. The result is a considerable disjuncture between the DHS and DOJ, and even within the DHS. Large increases in border enforcement can impact the work of other agencies within DHS, and the overall bundle of DHS enforcement activities carries even larger downstream consequences outside the department for immigration adjudication (by immigration judges), prosecutions, and incarceration functions overseen by the DOJ.<sup>139</sup>

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139. The gap between immigration judge resources and DHS resources helps explain vastly

Far more than organizational fragmentation drives immigration outcomes. But a number of accounts suggest that since the creation of DHS, even the bureaus within the DHS entrusted to manage immigration and border policy have experienced considerable conflicts.<sup>140</sup> Tensions seem especially pronounced between the Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) over jurisdiction involving domestic investigations, and between ICE and Citizenship and Immigration Services (CIS) over the proper balance between immigration enforcement and service provision. These competitive pressures illustrate the double-edged consequences of seemingly straightforward technocratic rationales to split agencies into units with more coherent missions.<sup>141</sup> The trade-off is that a greater focus on a particular mission can exacerbate interbureau tensions over shared policy domains and undermine the capacity of higher-level managers to make reasonable accommodations to competing needs.

The lack of coordination almost certainly carries consequences for both operations and agency-level policymaking. As noted below, since the DHS was created in 2003, the number of unresolved immigration court cases has nearly doubled.<sup>142</sup> Relations between immigration authorities and many local entities have often grown strained.<sup>143</sup> Some longtime observers of immigration policy who have examined DHS's early performance on immigration policy and enforcement also harbor rising concerns about the agency's capacity to effectively coordinate immigration both within and beyond the department. They conclude that one result of the creation of the DHS has been "fragmentation of responsibility and weak, largely ineffective immigration policy development and coordination by the executive branch."<sup>144</sup>

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increasing backlogs and greater (more costly) litigation in federal courts, making the DOJ Office of Immigration Litigation the largest component of the Civil Division.

140. See DORIS MEISSNER & DONALD KERWIN, *MIGRATION POLICY INSTITUTION, DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE* 92 (2009) (reviewing reasons for concluding that the performance of DHS has been adversely affected by "the absence of mechanisms for resolving [problems between the three immigration and border agencies] in the new DHS structure"); see also e.g., Jay Weaver & Alfonso Chardy, *Agencies' Merger Spawns Tension, Arrests*, MIAMI HERALD, Mar. 4, 2008 (reporting tension, dissatisfaction, and criminal conduct among employees after agencies merged).

141. See Cuéllar, *Coalitions*, *supra* note 81, at 647 (discussing the prescriptive tensions in agency [re]organization).

142. See *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGR. (2011), [http://trac.syr.edu/phptools/immigration/court\\_backlog](http://trac.syr.edu/phptools/immigration/court_backlog) (last updated Sept. 30, 2011) (graphing pending cases as a time-series data through September 30, 2011).

143. See, e.g., Jason Buch, *States at Odds over U.S. Plan*, SAN ANTONIO EXP. NEWS, June 13, 2011, at 11A; see also David Raths, *Federal Fingerprint Sharing Program Meets Resistance*, GOV'T TECH. (July 5, 2011), <http://www.govtech.com/public-safety/Federal-Fingerprint-Sharing-Program-Meets-Resistance.html> (discussing Secure Communities and the lack of compliance with this program at the local level).

144. See MEISSNER & KERWIN, *supra* note 140, at 86.

Beyond the situation within DHS, the condition of the immigration adjudication system is especially problematic. Immigration courts within the DOJ reconcile the enforcement of immigration laws with process-oriented aspirations and limited due process requirements. If immigration adjudication is subject to widespread delays and the analyses of immigration judges are routinely questioned, stakeholders with a variety of views about immigration can further lose confidence in the capacity of the system—or even a reformed system—to enforce laws and vindicate individual protections. Saddled with a growing number of cases and insufficient resources to address them, the total number of unresolved cases before immigration courts has swelled from about 125,000 in 1999 to about 270,000 by 2011.<sup>145</sup> Average completion time for immigration cases has grown from 184 days in 1999 to 280 days in 2010.<sup>146</sup> Some burdens reflect the dissatisfaction of immigration courts with the bases for deportation advanced by authorities in cases brought before them. Immigration courts are finding that in a growing proportion of individuals brought before them (about ten percent nationally, and roughly twenty percent in large districts such as Los Angeles and Miami), ICE has no grounds to remove the person in question.<sup>147</sup>

Immigration judges review these cases against the backdrop of skyrocketing apprehensions and diminishing resources for the Executive Office for Immigration Review (EOIR). The accelerating increase in backlogs since the EOIR was created and the immigration enforcement agencies were placed in different departments underscores the differing incentives faced by the DHS and DOJ as they sit together at the budget policymaking table. Even if individual policymakers at the DHS are concerned about the adjudication-related consequences of new policies, their department does not own the adjudicatory function and is unlikely to approach it with as much concern as the DOJ. Within the DOJ, meanwhile, resources for nearly all functions—including immigration adjudication—have been squeezed by the redirection of resources toward national security functions and prison operations.

In short, the immigration adjudication system could serve as an example of federal capacity to administer immigration laws relatively efficiently. Instead, it is an example of how certain laws are enforced in slow motion and procedural guarantees are drastically delayed, thus unavoidably raising questions about the federal government's capacity to execute complex changes in immigration laws that would also involve adjudication and procedural protections. Little wonder that Judge Richard Posner, channeling widespread criticism within and outside the

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145. See *Growing Backlog of Pending Cases in Immigration Courts*, TRAC IMMIGR. (2011), <http://trac.syr.edu/immigration/reports/246/include/pendingG.html> (last visited Dec. 23, 2011).

146. See *Immigration Courts Taking Longer to Reach Decisions*, TRAC IMMIGR. (Nov. 11, 2010), <http://trac.syr.edu/immigration/reports/244>.

147. See *ICE Seeks to Deport the Wrong People*, TRAC IMMIGR. (Nov. 9, 2010), <http://trac.syr.edu/immigration/reports/243>.



bench, described the performance of the immigration courts and the Board of Immigration Appeals (BIA) as “depressing.”<sup>148</sup> This is not to say that all of the problems and limitations associated with the recent performance of these agencies are driven by funding problems or by the differing priorities of the DHS and DOJ. It is all but impossible to understand those problems, however, without considering the resource and caseload constraints of these adjudicatory bureaucracies, or the extent to which the DHS and DOJ lack incentives to coordinate enforcement, adjudicatory, prosecutorial, and civil litigation capacity.

These organizational problems may seem paltry in comparison to some of the economic and political forces shaping administrators’ decisions to accept or challenge existing provisions of immigration law, or lawmakers’ incentives when facing organized interests unhappy with the status quo. Still, without some attention to organizational factors, it is harder to understand why the agencies cope with such a protracted policymaking cycle, particularly since the creation of DHS. The glacial pace of policy change is evident, despite considerable effort from some quarters, in the problems with immigration courts, in the slow-moving reforms of Terrorism-Related Inadmissibility Grounds exceptions, and in the process for revising agreements between ICE and the Department of Labor (DOL).<sup>149</sup> Nor can we understand the limits of presidential control over immigration—discussed below—without appreciating the competing priorities of agencies charged with immigration policy. And in the years following the creation of DHS, the reforging of agency responsibilities almost certainly exacerbated fragmentation, as it created coordination challenges both within the cabinet department as well as with sister departments. So even if organization does not explain every shortcoming in immigration law, or even in the law’s implementation, policy change is more difficult and costly because of multiple agency interests.

Of course, the presence of multiple agency interests in a given policy domain is not unusual. For example, the Department of Health and Human Services (encompassing both the FDA and CDC) shares jurisdiction with the Department of Agriculture (USDA) over food safety.<sup>150</sup> The FDA and the Environmental Protection Agency (EPA) both play a role in assuring the safety of drinking water, with the EPA focused on tap water regulation and the FDA responsible for regulating bottled water.<sup>151</sup> In these and many other cases, though, agencies

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148. See *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005) (“At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals . . . . The performance of these federal agencies is too often inadequate. This case presents another depressing example.”).

149. Labor and immigration authorities have long struggled to resolve internal disputes involving the coordination of their jurisdiction. For a discussion, see Decker, *supra* note 7.

150. See Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61 (2000).

151. See *Processing and Bottling of Bottled Drinking Water*, 21 C.F.R. § 129.1 (2011).

(whether by informal arrangement or more explicit legal distinction) split responsibilities in a manner that does not require agencies to coordinate on a large proportion of individual matters. There is thus a distinction between an arrangement wherein the USDA shoulders near-exclusive responsibility for meat and poultry safety even as the FDA regulates roughly the other eighty percent of the food supply, and the more common situation involving immigration. In the latter, a single case may involve an apprehension made by the CBP, an investigation by ICE, immigration adjudication within the DOJ or in the federal courts, criminal prosecution and eventual imprisonment also under the purview of the DOJ, and collateral immigration benefit consequences impacting CIS and the State Department.

In short, Americans have built an immigration system that is profoundly fragmented and has become more so in the last decade. It may be tempting to think of this motley arrangement as all but inevitable. If so, it is worth recalling that the three other advanced industrialized nations with high rates of immigration (Australia, Canada, and New Zealand) all have unified cabinet-level immigration agencies.<sup>152</sup> In contrast, the Homeland Security Act moved American bureaucracy even further along the continuum of fragmentation by splitting the INS three ways and lodging most of its functions within a new cabinet agency.<sup>153</sup>

### C. Organizational Fragmentation #2: Limited Presidential Control

If the agencies charged with executing immigration laws and border enforcement policies are fragmented, perhaps presidential control is the answer. Yet the President, too, pays a price for the fragmentation, while also facing political and institutional constraints arising from heightened public awareness of immigration policy. Presidential administrations can, at the margin, pull on some of the levers that might shape whether authorities focus on arresting unlawful workers or take at least mild steps to target the employers.<sup>154</sup> Though a President

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152. MEISSNER & KERWIN, *supra* note 140, at 86.

153. This is not to suggest that centralization is the solution to every legal implementation problem. In many if not most aspects of regulatory governance, centralization of certain functions (say, those involving national and homeland security, conventionally defined) inevitably results in the fragmentation of other functions (such as agricultural inspections or vaccinations). Sometimes the benefits of decentralization and even agency competition may outweigh those achievable through greater centralization. Nonetheless, administering immigration with as much fragmentation as exists in the American system entails considerable costs, and given the nature of the splits in agency responsibility, the system almost certainly suffers a good deal from the transaction costs of routine (and often case-by-case) negotiation of common functions plus the difficulty of implementing rational policy planning across the system. For a discussion of how the concept of transaction costs can inform the analysis of public bureaucracies, including those with a need to forge agreements because of overlapping mandates, see John D. Huber & Charles R. Shipan, *The Costs of Control: Legislators, Agencies, and Transaction Costs*, 25 LEGIS. STUD. Q. 25 (2000).

154. See, e.g., Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES, May 30, 2011, at A1.

has some influence over these strategic goals of immigration policy and shapes the congressional agenda on immigration, in many respects the President has more limited control over enforcement and the executive aspects of immigration policy than commonly believed.<sup>155</sup>

There is, it turns out, a deep irony to the modern presidential role in immigration. Where legal scholarship sometimes points out the difference between strict rules written into the law on the books and a more fluid, discretionary reality reflected in the “law in action,”<sup>156</sup> the situation is precisely the opposite with regard to presidential control. The law on the books, as it were, suggests extraordinary discretion. The reality is strikingly different.

Legislative changes, including ones favored by presidential administrations, expanded responsibilities for removal and reshaped prevailing public expectations. In doing so, lawmakers set in motion the now-familiar removal machinery built into the agencies responsible for immigration, bringing about a mix of new statutory authority, some initial increased budgets (though almost certainly not enough to keep up with responsibilities), relationships with state and local governments, and engendering of public expectations. The unusual spike in removals during the second term of the Clinton administration, as we shall see, helped create a new baseline, with new administrations facing elevated political costs if they were viewed as fundamentally abandoning or otherwise entirely undoing the newly-enshrined efforts to remove the undocumented population. Hence, while individual administrations retain some control in reshaping the mix of individuals removed (including, for example, the proportion being removed after serious criminal convictions), they are not making macro level removal policy decisions on a blank slate. The distinctive social and cultural elements of immigration law discussed earlier make it harder to rely on the argument that systematic changes in enforcement discretion are legitimate instances of executive discretion. Meanwhile, constraints from (actual or potential) agency resistance and lawmaker interference can play a persistent role in discouraging bold presidential reforms using existing legal authority.

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155. *Cf.* Cox & Rodríguez, *supra* note 14 (positing a substantial role for the President in shaping immigration policy as a matter of inherent constitutional authority and history, explicit statutory authorization, and enforcement discretion). While there is no question that presidents retain some capacity to influence how agencies implement immigration law, the argument above explains why that capacity is, in practice, more limited than either the full scope of the statutory grants of authority to the executive branch or the de facto degree of discretion that law enforcement officials must exercise as a result of the staggering gap between their enforcement capacity and the full scope of their responsibilities. Cox and Rodríguez are certainly right, however, to point out that the broader issue of the presidential role in immigration is one of the most important pieces (if not the single most critical piece) of the immigration puzzle.

156. *See, e.g.*, LAWRENCE M. FRIEDMAN & ROBERT C. PERCIVAL, *THE ROOTS OF JUSTICE* 6–9 (1981) (discussing the distinction between the “law on the books” and the “law in action”).

We can trace the pattern of increasingly constrained presidential capacity to reshape the implementation of immigration enforcement over a long arc of years and decades. Just as the organizational structure governing immigration law has evolved, so has presidential power. In the process, the relative power of different actors evolved as well. Since the period beginning just before IRCA, that arguably inaugurated the present chapter in American immigration history, presidential administrations have probably faced declining capacity to make stark changes in immigration enforcement as immigration has become a higher-profile national issue. In general, immigration enforcement reflects how agencies make sense of their statutory responsibilities in a politically complicated, resource-constrained world. By most accounts, the first lines of the post-IRCA chapter in immigration law were written largely by agency actions. The INS and its partner agencies already managed an elaborate (if not very flexible) arrangement to implement visa allocation schemes and enforcement; IRCA increased this complexity by adding new responsibilities for policing the labor market and creating a legalization program that required a stark, short-term expansion in the provision of immigration services.

Over time, agencies continued to play a meaningful role in many implementation-related decisions about the INA. The INS, after engaging in consultation with staff at the Justice Department and other agencies, was in a position to decide on early strategies for interior and border enforcement, requests for new resources, and how it would manage relations with other bureaus with overlapping jurisdiction (as with the then-INS and the Labor Department). If anything, these early choices about enforcement priorities and resources (including, for example, regarding the broad presumption that employers would comply with the law) were made all the more relevant because of the gaps and contradictions in the relevant statutory scheme, and as long as public concern over immigration remained low relative to other issues, these matters were less likely to attract attention from the White House.

Over time, however, immigration law became a subject of greater public concern, and early agency choices had consequences. As agency choices developed into larger, more consistent patterns of implementation, initiatives ranging from worksite enforcement changes to resource requests for border security developed a cluster of political supporters both within and outside the relevant agencies, raising the cost of dramatic presidential interference.<sup>157</sup> Even more important, growing public attention affected both the cost of presidential interference and thus the incentives shaping presidential willingness to engage in such interference. Adding to other factors limiting the reality of presidential prerogative in this domain, what was once a blank canvas became a series of images reflective of a

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157. Cf. Mariano-Florentino Cuéllar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT'L L. 583, 696–701 (2006) (discussing “locked-in” organizational goals).

baseline commitment to enforcing the law and securing the border, which Presidents could not easily abandon. A closer look at presidential incentives and recent trends bears this out.

Like agency officials, presidents clearly have a measure of power to change certain details of immigration enforcement over time. The Obama administration, for example, has reportedly conducted fewer of the high-profile workplace enforcement actions that were commonplace in the latter part of the George W. Bush administration. The Obama administration also reversed the previous administration's trend toward removing an ever-shrinking proportion of criminals relative to civil immigration offenders. Nonetheless, political and organizational constraints essentially take off the table certain options that would otherwise, in principle, be available to have a systematic impact on the use of discretion in the immigration system.

Indeed, with just a few exceptions and caveats, broad trends in removals, investigation, and prosecution (with important but limited exceptions) have continued through different administrations and across parties, at least since after the second term of the Clinton administration. Thus, while the cumulative increase in total annual removals between 1994 and the present is quite striking (from about 46,000 removals to about 390,000), the increase occurred over several administrations.<sup>158</sup> Indeed, the extent and constancy of the increase, even during periods where average resources for interior enforcement were declining, is consistent with efforts from immigration authorities to pursue enforcement activities likely to consistently generate larger numbers of removable individuals, even if the specific individuals do not necessarily meet an explicit basis for concern (e.g., commission of a serious crime). If there is an exception showcasing the (limited but still potentially significant) role of changes in administrations, it is in the Obama administration's greater focus on removals of individuals committing crimes. After being on a downward trajectory over the latter half of the Bush administration (from 2005 to 2008), the percentage of formal removals involving individuals who committed crimes in the United States jumped to over forty percent in the first quarter (up from roughly twenty-five percent in 2009 and about thirty percent in 2008).<sup>159</sup> Even this shift, however, is relatively small in the broader context of a mechanism that has provided nearly linear consistent increases in removals across presidential administrations.

The Obama administration offers a further illustration of the constraints affecting the prospect for drastic changes in discretionary removal authority. Over two years into the presidential term, the administration announced further efforts

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158. See OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION STATISTICS 95 (2009).

159. See, e.g., *Current ICE Removals of Noncitizens Exceed Those Under Bush Administration*, TRAC IMMIGR. (Aug. 2, 2010), <http://trac.syr.edu/immigration/reports/234>.

to further focus removals under the controversial Secure Communities.<sup>160</sup> While the new measures to focus removals on priority targets are likely to have some measure of impact, they do not disturb the larger infrastructure allowing authorities to remove individuals. The measures instead reflect the considerable challenges that senior administration officials have encountered over more than twenty-four months in asserting control over the routine actions of lower-level enforcers who have increasing access (through state-federal cooperation arrangements) even to detained individuals who have not been found guilty of committing crimes. Senior officials are left to make a case for focusing scarce removal resources on higher-value targets (particularly immigration violators who have committed serious felonies). Given that the infrastructure for facilitating removal of individuals detained in state and local jails and prisons is in place, however, it would be difficult to argue that immigration violators should be immune from removal simply because they have not committed serious offenses. Meanwhile, it remains politically costly for the administration to dismantle the infrastructure for increased removals created in previous Republican and Democratic administrations, particularly given the administration's focus on demonstrating a commitment to interior enforcement even as it seeks legal changes in immigration reform.<sup>161</sup>

In some ways this degree of continuity should not be surprising. The presidential appointees who run immigration agencies face pressure from law enforcement employees and as a result are apt to resist interference from political superiors.<sup>162</sup> Lawmakers and agency officials concerned about curtailing discretion can leverage relatively widespread public concern about immigration enforcement to raise the political cost to a presidential administration of making drastic changes in immigration enforcement. While these constraints do not entirely limit an administration's capacity to make changes in its *ex post facto* enforcement strategy or use tools such as humanitarian parole, these constraints exert considerable influence over the choice set of a new administration, which can make *either*

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160. See *Enforcement and Removal: Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (July 28, 2011), [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Jul. 28, 2011) (discussing the nature and details of the Secure Communities program). The program relies on coordination between local authorities and ICE officials and the use of biometric data and federal database resources to identify individuals in local custody that may be subject to removal.

161. Cf. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (discussing how the creation of an administrative scheme can make it politically costly for a politician to dismantle that scheme at a subsequent time, even when many policymakers no longer support the goals of the scheme).

162. See, e.g., Jerry Markon, *Calls for His Resignation 'Just Part of the Territory'*, WASH. POST, July 19, 2010, at A13 (describing Assistant Secretary Morton as "apolitical" and noting criticism from lower-level ICE employees that he abandoned ICE's "core mission"); see also Jerry Seper, *Agents' Union Disavows Leaders of ICE*, WASH. TIMES, Aug. 10, 2010, at A1 (describing a "vote of no confidence" in Morton by the union representing rank-and-file ICE field agents, who claimed ICE had "abandoned" its core mission of protecting the public to support a political agenda favoring amnesty).

legislative reforms or milder changes in emphasis (e.g., raising the priority of removals of deportable individuals with criminal records) rather than drastic shifts in policy.

Separate trends involving the implementation and enforcement of immigration laws—including, for example, the increase in immigration-related federal criminal charges—reflect a degree of organizational inertia and institutional incentives that cut across multiple administrations. U.S. Attorney's Offices are receiving a greater number of referrals from the DHS bureaus flush with additional border enforcement resources, and they can increase their total cases and convictions. As a result, judicial districts along the Southwest border now account for just under fifty percent of annual federal prosecutions, even though they make up only nine percent of the national population. In Fiscal Year 2010, federal prosecutors undertook about 47,000 federal immigration felony prosecutions, compared to about 58,000 nonimmigration felony prosecutions. By contrast, even just three years ago, the number of federal immigration felony prosecutions was about 28,000, compared to roughly 60,000 nonimmigration felony prosecutions. During roughly the same period, staff for the CBP increased by thirty-five percent, while the staff for US Attorney's Offices increased by only nine percent.<sup>163</sup>

Relative continuity in enforcement policies is also evident in the Obama administration's approach to border enforcement. For example, in response to Arizona Senator John Kyl's questioning of the administration's commitment to border enforcement, the White House underscored its support for policies continuing, by and large, the ramp-up in border enforcement resources. Even as the administration's communications director emphasized that "securing the border will require a comprehensive solution to our broken immigration system," he also insisted that "there are more resources dedicated toward border security today than ever before."<sup>164</sup> Examples touted by the administration as of mid-2010 included 110 new special agents for the Border Enforcement Security Task Forces, and 116 new Border Patrol Agents—this after the border patrol itself doubled in size in the five previous years (since 2004).<sup>165</sup>

Some of the pressures limiting administrations from asserting control over a fragmented bureaucracy have originated in the engagement of Capitol Hill. As public concern about immigration has grown, Congress has devoted increasing attention to border and interior enforcement, with high-stakes consequences for the incentives of officials implementing immigration policy. Congress held hearings and pressed executive branch officials for commitments, limiting their

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163. See *Federal Criminal Enforcement and Staffing: How Do the Obama and Bush Administrations Compare?*, TRAC IMMIGR. (Feb. 2, 2011), <http://trac.syr.edu/tracreports/crim/245>.

164. Dan Pfeiffer, *The President's Record on Border Security*, WHITE HOUSE BLOG (June 21, 2010, 2:51 PM), <http://www.whitehouse.gov/blog/2010/06/21/presidents-record-border-security>.

165. *Id.*

flexibility on a relatively high-profile issue of some public salience (as reflected in news accounts, even ones that focus on the limited changes administrations do make). Examples also include congressional appropriations for, among other things, worksite enforcement that could—if entirely resisted—implicate impoundment-related fiscal jurisprudence.<sup>166</sup>

Given the weight of congressional influence, the treatment of Caribbean immigrants and the Bracero program seem relatively *exceptional* as examples where executive branch activity appeared to play a more substantial role in driving legal and policy change. Even with these examples, however, the story does not directly support the idea of preeminent presidential power. The Bracero program developed at least in part within the context of a national security emergency, and is best understood as an example of agency-initiated policy innovation. In addition, Congress soon “ratified” the Bracero program through appropriations.<sup>167</sup> It is also worth noting that the experience of managing Caribbean entrants played out against increasing concerns about the reactions of Congress.<sup>168</sup>

In response to perceptions of presidential efficacy in immigration law implementation, we can now reach the following tentative conclusions. A variety of presidential administrations sometimes have resources foisted upon them by Congress for particular enforcement activities such as worksite enforcement, even though the resources provided are not sufficient to meet public expectations.<sup>169</sup> In addition, the President and his senior advisors are often constrained in their capacity to forge their desired enforcement strategy by lawmakers, subordinate officials, and overall public concerns about immigration and national security. Accordingly, the broad historical trends—rising removals, a multi-faceted interior enforcement strategy heavily focused on some version of worksite enforcement,

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166. See, e.g., Mira Mdivani, *ICE Worksite Enforcement Chief: 'We Are Going After Employers,'* SOC'Y FOR HUM. RESOURCE MGMT. (July 23, 2010), <http://www.shrm.org/LegalIssues/FederalResources/Pages/ICEWorksiteEnforcement.aspx> (“[ICE enforcement official Brett] Dryer disclosed that fully 90 percent of the ICE enforcement briefing notebook recently presented to his director specifically addressed worksite enforcement issues. He said that Congress had appropriated \$134 million for worksite enforcement this year, and that ‘we fully intend to spend it on worksite enforcement.’”).

167. See generally KITTY CALAVITA, *INSIDE THE STATE* (1992) (discussing the role played by the INS and Congress in constructing the Bracero program).

168. The experience of managing Caribbean entrants played out against increasing concerns about the reactions of Congress and the substantial past involvement of lawmakers. See, e.g., Gilbert Loescher & John Scanlan, *Human Rights, U.S. Foreign Policy, and Haitian Refugees*, 26 J. INTERAMERICAN STUD. & WORLD AFF. 313 (1984) (describing the reactions of policymakers in the U.S., including lawmakers, to the threat and reality of Haitian migration at the time). Moreover, the lack of congressional action—particularly in light of congressional hearings and considerable interest in refugee flows among lawmakers—can also be understood as part of an equilibrium where executive branch action avoids provoking a sufficiently intense response from lawmakers that would impair executive branch flexibility.

169. See *Train v. New York*, 420 U.S. 35 (1975) (holding that the President may not countermand or defeat legislative goals by defunding activities through “impoundment”).



and increased use of the Border Patrol—cut across individual administrations. Congressional activity shows the extent of continuing lawmaker interest in enforcement issues, and even includes specific appropriations for worksite enforcement that become difficult for any administration to ignore. Even when formal powers may exist to achieve starker changes in immigration policy, the practical and political cost of using them can weigh heavily on administrations. An administration may be excoriated by lawmakers and members of the public for even considering measures to temporarily regularize the undocumented population. Within bureaucracies, ICE agents and other law enforcement personnel may resist wholesale ramp-downs in enforcement. Thus, while a mix of judicially acknowledged discretion and resource limitations leave presidential administrations with a measure of control over enforcement, their choices are limited by larger forces they are only partially able to affect. How those constraints evolve across presidential administrations depends heavily on underappreciated connections between statutes, organizations and the public—to which we turn below.

#### *D. Public Attitudes and Polarizing Implementation*

In reflecting on the implications of limited presidential control, it is important to recognize that policy changes rarely produce a single type of policy response over an extended period of time. Instead, as E.E. Schattschneider has noted, policy can create its own politics.<sup>170</sup> Earlier, we considered the core insight of the “policy feedback” literature in political science and political sociology, which builds on the idea that the public and policymakers respond to each other.<sup>171</sup> Hence, a program that garnered limited initial support can become increasingly entrenched as constituencies ranging from the employees who implement it to new local beneficiaries begin to respond to the potential consequences of losing the new initiative.<sup>172</sup>

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170. See SCHATTSCHNEIDER, *supra* note 88.

171. See CANES-WRONE, *supra* note 90.

172. See Pierson, *Increasing Returns*, *supra* note 88, at 252. Note that the changing pattern of responses to the implementation of a new law or policy could be exaggerated by the gain-loss valuation asymmetry that has become such a staple of scholarship and theory in economic psychology. The classic work here is Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 *ECONOMETRICA* 263 (1979). One potential implication of the conventional “prospect theory” view is that as policy changes arise and are no longer perceived by affected constituents as gains but rather as part of a recalibrated status quo, the stakeholders affected may expend an even greater effort to defend a subsequent change perceived as a loss than to enact what had previously promised a potential benefit. Although some recent work challenges the strongest versions of the loss aversion claims associated with prospect theory, individuals and organizations may nonetheless continue to reflect a degree of loss aversion under certain conditions. See Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 *AM. ECON. REV.* 1449 (2007).

But new laws are just half the equation; administrative implementation is the other. A point sometimes passed over in the policy feedback scholarship is the potential sensitivity of opinion leaders and the segments of the public they influence to the implementation of legal provisions—a process that not only implicates the initial legislative compromise and resulting statutory text, but also the incentives and value commitments of the officials in charge of turning the statute into an administrative program. If statutes and the public statements about them (at the time of enactment) create a public narrative about what a policy is supposed to achieve, then its implementation generates more explicit benefits and burdens among relevant constituencies. In the process, implementation can generate its own politics in a different way: by dramatizing gaps (even ones that in retrospect should have been anticipated before implementation) between expectations and realities that opinion leaders and policymakers then confront, or even exploit.

With this in mind, we can trace a sequence in the recent evolution of immigration law amounting to a form of *polarizing implementation*. The term is meant to capture how the creation of an administrative scheme can affect public reactions, and even heighten public division and controversy about a statutory scheme. The core idea of polarizing implementation concerns the ironic consequences of aggressive new enforcement-oriented statutory enactments in a world where immigration is becoming a higher-profile issue of widespread public concern. Instead of furthering the capacity of agencies to enforce the law, new agency responsibilities do not necessarily improve prospects for promoting observance of the law and could even make the problem worse. Rather, new responsibilities could simultaneously exacerbate existing enforcement and implementation problems while raising public expectations for aggressive action in response to illicit activity.

If implementation problems are actually capable of ratcheting up the tensions about immigration law, who exactly becomes more polarized? In this context, the idea of “polarization” refers to the growing gap between public enforcement expectations and agency capacity, coupled with frustration among some constituents about the agencies’ enforcement activities. Anger from the public, bolstered by reactions from lawmakers, anchor one aspect of polarization. At the same time, for some immigrant and civil rights advocates, the extent of discretion involved in interior enforcement is enough to emphasize the urgency of reform and perhaps discourage these constituencies from supporting piecemeal reform (viewed as making comprehensive reform less likely), even if the degree of enforcement activity is not sufficient to satisfy the public or change the political economy of employers’ calculus.

What follows is a brief stylized description of how this dynamic might play out. (1) In an environment where public concern with immigration policy is increasing, low enforcement nonetheless occurs relative to the amount of

lawbreaking associated with the existing immigration system. This makes it easier for some business interests to tolerate the existing system because they are less likely to pay the costs for not complying, which almost certainly erodes the legitimacy of the current system. (2) Lawmakers, seeking further changes in immigration policy exploit public frustration with enforcement problems. (3) Legislative changes since the 1986 IRCA framework expand the scope of the removable population. (4) Finally, agencies lack the capacity, resources, or incentives to drastically ratchet up enforcement, contributing to further political reactions arising from gaps in agency enforcement and further pressures for legislation complicating agencies' enforcement missions. Consider each of these elements in turn.

**Greater Salience in Public Opinion and Media Coverage.** We will begin with the vast change in public concern, media coverage, and lawmaker activity concerning immigration. Although mobilized interests continue to affect immigration policy, greater public attention to immigration is now commonplace, complicating the policymaking process. Specifically, public concern about immigration, and frustration with the system, have grown starkly since 1986, picking up in the 1990s after nearly a decade of the limited enforcement and internal contradictions built into IRCA. One relatively comprehensive review of public opinion trends involving immigration published in 2010 succinctly summarized the research by noting that “[s]panning what will now be over a decade, public opinion indicates an increasing concern over immigration issues in addition to a lack of confidence in the ability of the country’s leaders to address them.”<sup>173</sup> Immigration has of course long been a topic of intense public concern.<sup>174</sup> But surveys show differences in public attitudes about immigration over time, including particular concern about the federal government’s alleged failure to enforce immigration laws.<sup>175</sup> As a further reflection of the changing political milieu in which public opinion develops, moreover, news coverage of immigration in major U.S. newspapers indicates stark changes in the number of stories about immigration overall. Figure 1 indicates a relatively constant increase in the amount of immigration-related news coverage, even when compared to the period between 1986 and 1990 during which Congress passed two major pieces of immigration legislation.

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173. See Segovia & Defever, *supra* note 102, 375–76 (2010).

174. John S. Lapinski et al., *The Polls—Trends: Immigrants and Immigration*, 61 PUB. OPINION Q. 356 (1997) (reviewing survey data).

175. See Segovia & Defever, *supra* note 102. Among other things, immigration has almost certainly become a topic of greater interest in many communities seeing a new influx of undocumented immigrants. See Jennifer L. Hochschild, *International Migration at a Crossroads: Will Demography Change Politics Before Politics Impedes Demographic Change?* (July 13–15, 2010) (unpublished manuscript), [http://www.wcfia.harvard.edu/sites/default/files/International%20Migration%20at%20a%20Crossroads.sent\\_.pdf](http://www.wcfia.harvard.edu/sites/default/files/International%20Migration%20at%20a%20Crossroads.sent_.pdf) (discussing the potential consequences of demographic changes on debates about immigration).

It may be tempting to think about the swelling public concern over immigration entirely separately from the content and enforcement of immigration laws. But rising public concern and skyrocketing media coverage seem only partially explained by changing demographics in certain local areas, since the increase in coverage is apparent in national news sources, and rising public concern evident even in regions that had long experience with high levels of (legal and undocumented) immigration. It is telling, in fact, that public frustration with, and concern about, immigration policy has risen fairly constantly in the years since IRCA and its resulting enforcement problems. Meanwhile, the structure of immigration law essentially turns millions of Americans into lawbreakers by setting up labor market requirements that are onerous, yet only occasionally enforced.<sup>176</sup> In addition, politicians' repeated and intense focus on lack of enforcement—chronicled below—strongly suggests that such appeals resonate with the public.

In short, political debates about immigration and perhaps other regulatory domains almost certainly evolve in response to how laws are enforced. If immigration enforcement was irrelevant to public attitudes, we would probably see less focus in political rhetoric on immigration enforcement and more on the amount of immigration or other substantive issues involving immigration law. Concerns over enforcement, and particularly border security, have gained exponentially greater news coverage in recent years, suggesting some evolution in the politics of immigration relative to previous decades in the years since IRCA's dysfunctional scheme was implemented. Business reactions could also indirectly affect public attitudes about enforcement: a vastly different and more aggressive enforcement strategy—absent anything else—would almost certainly create a backlash from economic interests, which in turn would change the larger political context of debates over enforcement.

As a threshold matter, the potential for greater public concern about immigration does have some tentative implications that shed further light on the fate of immigration law reform efforts. When Ronald Reagan worked with Democratic and Republican lawmakers to enact a large-scale legalization program in 1986, lawmakers and the public were far less concerned about immigration. By contrast, immigration reform efforts strongly supported by presidential administrations were more likely to trigger the ire of an engaged public when they

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176. Pierrette Hondagneu-Sotelo even makes the case that affluent and middle-class Americans are critical players in a vast informal economy at the margins of immigration and labor regulation. See Pierrette Hondagneu-Sotelo, *Affluent Players in the Informal Economy: Employers of Paid Domestic Workers*, 17 INT'L J. SOC. & SOC. POL'Y 130 (1997). For a brief but interesting discussion of compliance challenges, see generally Kathleen A. DeLaney, *A Response to "Nannygate": Untangling U.S. Immigration Law to Enable American Parents to Hire Foreign Child Care Providers*, 70 IND. L.J. 305 (1994). Whether the link between existing U.S. immigration policy and widespread noncompliance becomes a significant political axis in public disputes over immigration policy depends in no small measure on the future of enforcement and the extent to which illicit labor market bargains become a potential trigger for social stigma among affluent and middle class families.

were attempted in 2006, 2007, and 2009–2010. Ironically, the greater the public's overall concern about immigration (particularly given a relatively limited grasp of all the subtleties), the easier it may be to undermine conventional (elite) bargaining that could cement conventional pluralist coalitions supporting reform, as occurred during successful rounds of immigration lawmaking in previous generations.<sup>177</sup>

**Increased Activity From Lawmakers and Policymakers.** Politicians have been increasingly drawn to the immigration issue as public concern has risen, and often focus on popular anger over the perceived failures of immigration policy, and in particular the lack of enforcement. In particular, there is a striking trend in growing congressional attention to immigration over time. As Figure 2 illustrates, the now-familiar pattern of extensive lawmaker interest in immigration was not so much the case in past decades. Instead the starkest increases emerged over the last twenty-five years, as the limitations of IRCA became increasingly apparent. As indicated in Figure 2, the percentage of congressional hearings focused on immigration rose fivefold in sixteen years, from just over 0.5% in 1990 to nearly 2.5% in 2006. Similarly, the percentage of *Congressional Quarterly Almanac* articles (describing single legislative initiatives) focusing on immigration has risen fourfold over a similar time period. The percentage rose from less than one percent in 1986, when IRCA was passed, to nearly four percent in 2006 (and over six percent in 2000). These developments show how public concern, news coverage, and congressional discussions of immigration all yield a converging picture of increasing concern about immigration. One should not overinterpret these figures, as they do not highlight the precise nature of congressional concerns. Nonetheless, changes in these measures shed some light on how lawmakers make decisions about the allocation of two scarce resources capable of driving the nature of the national lawmaking agenda—their time (as reflected in decisions about the content and frequency of committee hearings), and their willingness to introduce legislative proposals that compete for limited public attention.

The picture comes further into focus when we scrutinize policymakers' stated concerns about the lack of enforcement and the context of public opinion fueling such concerns. Specifically, political statements from lawmakers across a variety of contexts routinely focus ever-greater attention on the perceived need to facilitate removals and increase border enforcement resources.<sup>178</sup> Moreover,

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177. Accounts of immigration legislation during the 1960s and 1980s emphasize elite bargaining rather than mass mobilization of public support. For a discussion of the role of elite bargaining in the 1965 Immigration Act and the 1986 Immigration Reform and Control Act, see ZOLBERG, *supra* note 24, at 324–33 (discussing the legislative machinations and political deals culminating in the 1965 Act), and Tichenor, *supra* note 84, at 360 (discussing the 1986 Act, and concluding that “[b]y insulating policymaking from the views of the public, a constriction of alien admission and rights was averted”).

178. Although mere unlawful presence in the United States was already a civil offense before IRCA and the subsequent buildup in border resources, the federal government had yet to implement the statutes and resource commitments reflecting the policy goal of policing forcefully against

agency failures to live up to public expectations (as demonstrated by criticisms of the perceived slow start of Secure Communities, for example) probably contribute to a political atmosphere facilitating greater political frustration with the existing immigration system, and eventually encouraging further rounds of lawmaking that expands agency enforcement responsibilities (discussed in more detail below).

Even the political rhetoric by itself, however, is likely to have an impact on voters. Scholars have examined the impact of political appeals on decision making, both in general contexts and in situations implicating immigration. Individuals exposed to political information shape their reactions and beliefs in response to that information, and in the context of immigration, will often respond to the particular mix of ideas communicated by policymakers.<sup>179</sup> These results appear to reflect not only the potential for information to have a genuinely persuasive effect on those exposed to it, but also the ways in which political appeals on subjects such as the insufficiency of immigration enforcement can affect the relative strength of an individual's preexisting concerns.<sup>180</sup>

**The Core of the Process: Statutory Change, (Worsening) Organizational Challenges, and Public Frustration.** Having documented swelling public concern and policymakers' increasing willingness to engage with immigration issues, we can now complete the picture by returning to the

immigration violations. Once those goals were established, politicians could criticize the gap between the putative goals of the immigration laws and their reality. Beginning in the 1990s and increasing over the last decade, federal, state, and local politicians have done precisely this. The following are just a few examples from a variety of contexts: *Proposals to Reform United States Immigration Policy, Hearing Before the Committee on the Judiciary, United States Senate, 103rd Congress (2nd Sess.)*, 20–22 (1996) (statement of Sen. Bob Graham) (proposing various bills aimed at reducing the fiscal impact that illegal immigration has had on immigrant receiving states such as Florida), Eric Schmitt, *GOP Fight with Clinton on Immigrants Splits Party*, N.Y. TIMES, at A16 (Oct. 22, 2000) (citing some lawmakers' concerns about legislation legalizing the status of many immigrants given the lack of enforcement of existing immigration laws), and Sam Howe Verhovek, *Texas Plans to Sue U.S. Over Illegal Alien Costs*, N.Y. TIMES, May 27, 1994, at A10 (describing the strategies of politicians in California and Texas supportive of lawsuits against the federal government asking for resources given insufficient and ineffective enforcement efforts). Note that sometimes prevailing public attitudes can form an equilibrium with political narratives offering a simple explanation for complex phenomena such as the changing role of the United States in the world or the causes and effects of migration flows to the United States. The prevailing public attitudes and political responses strengthen each other. Cf. Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597, 1629 (2003) (describing “a sort of equilibrium—politicians’ . . . rhetoric shapes public opinion, but that opinion in turn shapes what politicians choose to emphasize to please key constituencies.”). For just one example from the immigration context suggesting widespread public perceptions that laws are not enforced, see generally *Fox News Poll: 72 Percent Say Government Not Enforcing Immigration Laws*, FOXNEWS.COM (July 29, 2010), <http://www.foxnews.com/us/2010/07/29/fox-news-poll-percent-say-government-enforcing-immigration-laws/>.

179. See Ted Brader et al., *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 AM. J. POL. SCI. 959 (2008).

180. Cf. George C. Edwards III et al., *Explaining Presidential Approval: The Significance of Issue Salience*, 39 AM. J. POL. SCI. 108, 108 (1995) (discussing how changing issue salience can affect political outcomes, even if individuals are not persuaded to change their substantive views).

substance of immigration law and the organizations implementing it over the last quarter century. That picture is as revealing for what it conveys about the lack of fundamental change in the larger architecture of immigration as for what it reveals about the consequences of changes involving agency responsibilities, border enforcement, and public reactions.

For agencies operating in an environment of relatively high political scrutiny, grants of new authority also tend to generate new responsibility. This is plainly true when agencies gain authority to admit a larger number of migrants that require adjudication and processing (as under the 1990 Immigration Act), but it is also true in the context of enforcement. If some statutory changes expand agency powers or relieve agencies of procedural burdens,<sup>181</sup> in the immigration realm those changes are also coupled with expanded responsibilities and rising public expectations. New powers to remove an ever-expanding class of individuals—including lawful permanent residents—will often leave agency officials with a considerable gap between their enforcement capacity and public expectations. Even when lawmakers provide agencies new resources to fulfill expanded responsibilities, as occurred when lawmakers appropriated resources to fund expanded border enforcement efforts authorized in IRCA and subsequent legislation, those responsibilities in turn generate additional work for other agencies involved in detention, prosecution, and adjudication that have rarely received sufficient resources to keep up with the new work.<sup>182</sup> Finally, extraordinary changes in border enforcement encouraged by each major immigration statute since the 1990 Immigration Act appear to have discouraged circular migration and thus raised the proportion of longer-term undocumented immigrants, further adding to the burdens faced by interior enforcement bureaucracies.

Meanwhile, though agencies have been forced to implement statutes creating more expansive enforcement missions since 1986, bureaus often lack the resources or incentives to take on the widespread extent of illegal activity in the domestic labor market. Doing so would require agencies to incur considerable political risks, and agencies lack the resources required—particularly given a statute that limits the size of penalties save in narrow circumstances where extremely egregious behavior can be demonstrated. From this perspective, it is not so surprising that employer-focused investigations as a percentage of total interior enforcement investigations declined from nine percent of the total in 1991—early in the post-IRCA era, when there was still some uncertainty about the scope of employer responsibility—to two percent by 2003, when such uncertainty was

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181. *See supra* Part I.A.

182. *See supra* Part III.B (discussing agency coordination problems).

considerably minimized and agencies would have incurred greater risks in pursuing allegedly intrusive investigations against employers.<sup>183</sup>

Among the most striking features of immigration law's implementation is the trajectory of interior enforcement budgets. In fact, the apparent upward trajectory in nominal enforcement budgets for interior immigration enforcement is wildly misleading. An example, take a closer look at detention and removal operations for the critical decade and a half following passage of IRCA, during which immigration authorities put in place the modern system for interior enforcement of immigration laws. During the 1990s, interior enforcement agencies received the major new responsibility of removing a potentially vastly greater proportion of aliens because of the expanded criminal-related bases for removal.<sup>184</sup> Almost overnight, a far larger proportion of aliens—including lawful permanent residents—became subject to removal for offenses that could even encompass certain misdemeanors.

Yet if we leave aside these new responsibilities and focus only on the pre-existing detention and removal tasks that immigration authorities needed to carry out, the removal budget did not consistently keep up with increases in the undocumented population.<sup>185</sup> Figure 3 shows the progression. Between 1988 and 1993, removal resources per undocumented individual (in constant 1985 dollars) dropped nearly fifty percent. While resources began to increase somewhat once IIRIRA passed in 1996, by 1999 removal resources per undocumented individual were below 1986 levels, even as the scope of removal responsibilities skyrocketed because of the new law. Detention and removal resources rose again after roughly 2005, but only to the point where the most recent statistics barely equal levels during the 1980s.

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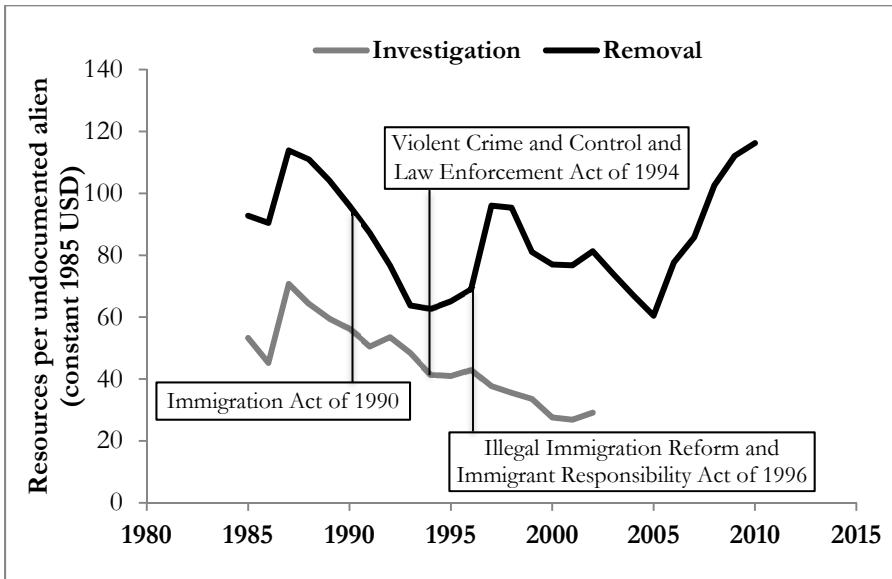
183. See MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA 6 (2005).

184. See generally Daniel A. Klein, *Validity, Construction, and Application of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)—Supreme Court Cases*, 53 A.L.R. FED. 2D 117, § 2 (2011) (discussing how IIRIRA expanded the types of conviction and criminal conduct constituting grounds for removal, restricted eligibility for relief, limited procedural rights in removal hearings, and restricted judicial review).

185. See *infra* Figure 3.



**Figure 3:** Immigration Investigation (1985–2002) and Detention and Removal Resources (1985–2010) (adjusted for size of the undocumented population, in constant 1985 dollars)<sup>186</sup>



Remarkably enough, the conventional story of staggering resource increases for immigration enforcement over the last two decades turns out to be misleading. Instead, during crucial periods in the modern history of immigration enforcement, new responsibilities and falling budgets exerted an impact on the implementation of immigration laws. Among other things, these resource constraints all but certainly exacerbated incentives for immigration authorities to execute routinized, dragnet-style approaches for removing large numbers of inmates and prisoners through initiatives such as the Secure Communities program, which sought to leverage coordination with state authorities.<sup>187</sup> Although such an approach may provide ICE certain structural advantages, given its position as an agency struggling to meet public expectations with limited resources, this approach can also engender harsh criticism from some jurisdictions craving greater control over removals. It also risks further expanding public expectations of ICE's capacity to

186. David Dixon, and Julia Gelatt, *Immigration Enforcement Spending Since IRCA*, MIGRATION POLICY INSTITUTE 7 (Nov. 2005), available at [www.migrationpolicy.org](http://www.migrationpolicy.org) (Office of Investigations budget); Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISPANIC CENTER REPORT (February 1, 2011), available at [www.pewhispanic.org](http://www.pewhispanic.org) (size of the undocumented population); TRACFed (ICE budgets for detention and removal); Dep't of Labor site used for inflation adjustment.

187. Cf. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1823 (1998) (discussing dragnet-style approaches to drug enforcement).

remove criminal aliens.

The federal government's budget for interior immigration enforcement-focused investigative functions shows an even starker drop-off compared to the removal budget. Amidst burgeoning interest in immigration fraud, removal of violent and drug gang members, and alien smuggling operations, the Office of Investigations retained the staggering responsibility of policing American workplaces. This is a trying task in the best of circumstances, because in principle, millions of businesses could be subject to employer sanctions.<sup>188</sup> We know from the structure of the INA and cases such as *Collins Foods* that the agency faces limits in its capacity to drastically reshape the regulatory environment.<sup>189</sup> The agency's capacity to live up to its responsibility thus depends crucially on budgets. Assuming a constant amount of resources (and using the existing undocumented population as a rough proxy for the challenges involved in policing the labor market), domestic enforcement capacity would still be strained by new enforcement initiatives involving fraud, and particularly by the expectation that after the 1996 passage of AEDPA and IIRIRA authorities could become more aggressive in removing aliens involved in criminal activity. What would be truly stunning is to assume that law enforcers could realistically have met their enforcement challenges as new responsibilities were added, and budgets relative to the undocumented population were shrinking.

That, however, was the trajectory of budgets for the Office of Investigations at INS in recent years, between 1985 and 2002.<sup>190</sup> Figure 4 also tells this story: in constant 1985 dollars, investigative resources relative to the size of the undocumented population rose substantially only for about a year immediately following the IRCA legalization (owing to the reduction in the undocumented population). After that, resources fell precipitously, with the 2002 total at less than half the 1987 total. Meanwhile, several pieces of legislation, most notably IIRIRA in 1996,<sup>191</sup> expanded investigative responsibilities even as resources declined further. Of course, these declines hardly diminish the considerable opportunity cost implicit in much of the budget allocation to interior investigations and removal operations associated with an immigration system that aims in principal to remove vast numbers of undocumented individuals. Even adjusted for inflation and relative to the size of the undocumented population, removal resources have risen sharply during much of the last decade (though in relative terms only to their level in the late 1980s). With a different allocation of resources, federal authorities

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188. See U.S. Census Bureau, *Statistics About Business Size (including Small Business)*, available at <http://www.census.gov/econ/smallbus.html> (last visited Feb. 25, 2012).

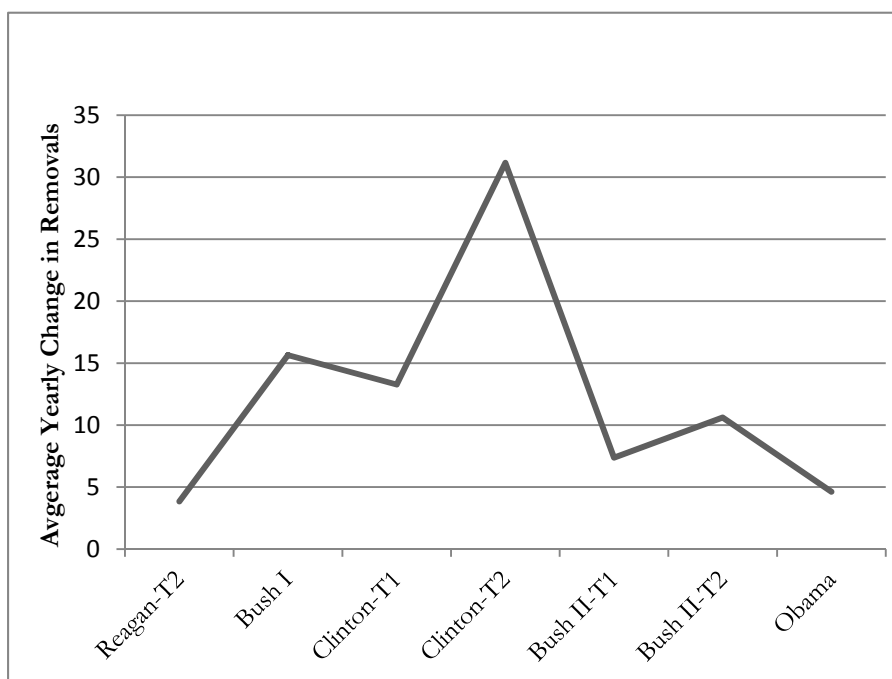
189. See *supra* Part I.A.

190. See *supra* Figure 3. The analysis becomes more difficult after the creation of DHS because the Office of Investigations within the newly constituted ICE assumed responsibilities for both immigrations and customs violations.

191. See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

could focus far greater resources on more urgent concerns such as counterterrorism. Despite the opportunity cost represented by the current situation, however, it is important to recognize that it has nonetheless left agencies in a difficult position relative to meeting public expectations engendered by their statutory responsibilities.

**Figure 4:** Percent Change in Formal Removals, by Presidential Term, Since Passage of the Immigration Reform and Control Act of 1986<sup>192</sup>



Even before IIRIRA, statutory changes foreshadowed the expansion of agency responsibilities that would be wrought in 1996 and, indeed, began expanding those functions. The 1990 Immigration Act added agency to enforcement responsibilities by enhancing IRCA-related regulations. The trend continued in the Violent Crime Control and Law Enforcement Act of 1994 and several other pieces of legislation since then.<sup>193</sup> Although the most immediate impact of border enforcement funding is on the Border Patrol, border

192. DHS Yearbook of Immigration Statistics, Table 36 (2009).

193. See WEISSBRODT & DANIELSON, *supra* note 28, at 28 (discussing how the Immigration Act of 1990 “augmented the regulations enacted by IRCA”); *id.* at 42 (explaining how the Violent Crime Control and Safe Streets Act of 1994 increased immigration enforcement authorities’ responsibilities through an enlarged definition of “aggravated felony” resulting in a larger removable population).

enforcement increases also create consequences for domestic law enforcement agencies, and specifically for criminal prosecutions undertaken by the Justice Department. More Border Patrol agents produce a larger crop of apprehensions, which in turn generates domestic investigations and prosecutions. In addition, the 1994 Act authorized faster removal procedures for some criminal aliens, contributing to a trend toward growth in the population eligible for removal. The trend became more pronounced as a result of legislation passed just two years later.<sup>194</sup>

The enactment of IIRIRA created a stark and now-familiar expansion in the scope of removal. While some of its statutory requirements could be viewed as helpful to immigration enforcers (by facilitating the removal of certain individuals through limitations on procedural constraints), the core effect of IIRIRA was to expand the size of the removable population. A core element of the INA is the definition of a removable alien, including any alien in the United States who enters without authorization or overstays a visa.<sup>195</sup> But IIRIRA starkly expanded the number of lawful permanent residents who were removable (the size of this expansion depending on the interpretation of the aggravated felony provisions in IIRIRA), and because this has an impact on agency activities and the public's expectations, it is worth briefly reviewing the scope of the changes. Following IIRIRA, even some misdemeanors are a sufficient basis for removing lawful permanent residents.<sup>196</sup> Moreover, recent statutory changes (and particularly IIRIRA) drastically restrict immigration judges' capacity to suspend deportation. The effect is a pronounced change, in the form of a vastly larger number of people subject to removal.<sup>197</sup> What was once the "drastic measure" of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.<sup>198</sup> In the immediate wake of IIRIRA, formal removals jumped to over 114,000 from about 50,000 in 1995.<sup>199</sup>

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194. *See id.*

195. *See* Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2006) (explaining that "an alien present . . . without being admitted or paroled . . . is inadmissible"); Immigration and Nationality Act § 237(a)(1)(A) (explaining that "any alien . . . inadmissible [at the time of entry] is deportable").

196. *See, e.g.*, Dawn Marie Johnson, Note, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477 (2001).

197. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1478–80 (2010) (discussing how the landscape of federal immigration law has changed dramatically over the last ninety years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, "immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences.").

198. *See* ARNOLD & PORTER, LLP, ABA COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 4-9-4-20 (2010) (describing the loss of judicial discretion in immigration cases and arguing that it should be restored); *see also* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (describing removal proceedings as "drastic measures").

199. *See* OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION STATISTICS

In short, by enlarging the size of the removable population, the 1996 laws have exacerbated (even after some increases in resources) public concerns about the failure of agencies to carry out their enforcement missions. Consider the following: even as the rate of removals skyrocketed from about 70,000 at the time of IIRIRA's passage to 200,000 by 2004 and nearly 400,000 by 2010, increasing attention focused on ICE's perceived failure to efficiently remove criminal aliens and other undocumented immigrants from the United States.<sup>200</sup> Even with record totals of removals, critics blasted the gap between the number of individuals removed by ICE and the scope of the removable population. Some lawmakers criticized ICE as showing "apathy toward robust immigration enforcement," and other observers decried what they described as a "sense of impunity."<sup>201</sup>

Admittedly, Congress has increased the interior immigration enforcement budget in the years since IIRIRA was enacted.<sup>202</sup> Yet those increases have not come close to enabling immigration authorities to fully meet the public's expectations, given the growth in the overall undocumented population and the expansive number of lawful permanent residents and other aliens potentially subject to removal in the wake of IIRIRA. Budgets for interior investigations tell part of the story. Figure 3 above demonstrates a dramatic decrease in actual resources for interior investigation in the critical period between IRCA's passage and 2002, at which point the INS was broken up and its pieces moved into the DHS. As the undocumented population has increased, immigration enforcement agencies have faced increasing pressure on a relatively meager interior

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159 (2004).

200. *Id.*; see also *News Release, DHS/ICE Reveal Highest Immigration Enforcement Numbers on Record in Fiscal Year 2010*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 8, 2010), <http://www.ice.gov/news/releases/1010/101008washingtondc.htm> (discussing total removals). For criticisms of ICE efforts, see generally Marc R. Rosenblum & William A. Kandel, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, CONG. RES. SERVICE REP. R42057 30 (Oct. 21, 2011) ("[T]he proportions of arrests involving Level 1 criminals declined [between FY2006 and FY2011]"), and U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-67, *IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING* (2007) (recommending expanded guidance for ICE personnel to exercise discretion on a case-by-case basis). Such reports also garner coverage in the media. See, e.g., *House Panel to Subpoena Homeland Security for Information in Illegal Immigrants*, FOXNEWS.COM, Nov. 2, 2011, <http://www.foxnews.com/politics/2011/11/02/house-panel-to-subpoena-dhs-for-information-on-illegal-immigrants/> (discussing the Congressional Research Service and noting lawmaker concern triggered by the report's information regarding the number of criminals eligible for removal that were not removed). Meanwhile, critics argue that ICE has achieved its record of removals only by sweeping into Secure Communities and similar efforts individuals with only minor (if any) infractions and even U.S. citizens. See, e.g., Anjali Raval, *U.S. to Target Criminals in Deportations*, FIN. TIMES (Nov. 13, 2011), <http://www.ft.com/cms/s/0/7c0b19b6-0a2f-11e1-85ca-00144feabdc0.html>.

201. See Peter Slevin, *Record Numbers Being Deported*, WASH. POST, July 26, 2010, at A1.

202. See generally *Immigration and Customs (ICE) Enforcement Budget Expenditures FY 2005–FY 2010*, TRAC IMMIGR. (2010), <http://trac.syr.edu/immigration/reports/224/include/3.html> (documenting ICE budget trends since 2005).

investigations budget (even one that has risen to some degree).<sup>203</sup>

Whatever else IIRIRA accomplished, it did not fundamentally change the legal regime governing employer sanctions or the architecture of overall immigration policy. In contrast, stark changes in border enforcement have been easier to achieve. As immigration has become an issue of greater public concern, lawmakers have increasingly sought to engage the issue—but for the most part, major changes in interior enforcement and even future flows have been more difficult to achieve. Instead, the present institutional political economy of immigration law favors border enforcement. In the specific context of immigration-related lawmaking, border security is different—figuratively and literally—from the other three major components of comprehensive reform: employer verification, legalization, and legal immigration.<sup>204</sup> Because it is simple to grasp as a “policy metaphor” and the political costs of enhanced border enforcement are lower than those of stepped-up interior enforcement for nearly all relevant constituencies,<sup>205</sup> enhanced border enforcement policies galvanize relatively strong support from the public (only a tiny fraction of whom experience the costs) and provoke relatively little interest-group opposition.<sup>206</sup>

From an analytical perspective, there may seem to be little fundamental difference between regulating migration by raising the costs of entry and doing so by decreasing the value of illegal entry. But a distinction almost certainly exists at the level of political psychology and public rhetoric. Voters and lawmakers routinely assume that the direct costs of entry can be easily affected by ratcheting up border enforcement. Notwithstanding some of the less visible complexities and unintended consequences, sending a message may be the paramount goal.<sup>207</sup> On

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203. Admittedly, the staff at ICE has pursued some administrative innovations resulting in the creation of initiatives such as Secure Communities to facilitate removal of criminal aliens. Yet even these efforts have a two-edged quality, by simultaneously facilitating the removal of large numbers of individuals (with the proportion of serious criminals varying on the basis of program capacity and priorities) and further raising public expectations that substantial numbers of criminals will be successfully removed. See *supra* Part III.C (discussing Secure Communities).

204. See MPI TASK FORCE, *supra* note 47, at 47, 53 (describing broadly accepted elements of comprehensive immigration reform).

205. See generally Richard R. Lau & Mark Schlesinger, *Policy Frames, Metaphorical Reasoning, and Support for Public Policies*, 26 POL. PSYCHOL. 77 (2005) (concluding that policy metaphors help constrain the beliefs of even the least politically aware members of the general public); Mark Schlesinger & Richard R. Lau, *The Meaning and Measure of Policy Metaphors*, 94 AM. POL. SCI. REV. 611 (2000) (discussing how policy metaphors help guide political reasoning among both elites and the general public).

206. See, e.g., Martin, *supra* note 125, at 545 (contrasting border enforcement to interior enforcement and noting that “[b]order measures, in contrast, step on almost no influential toes. Border crackdowns are therefore used to demonstrate enforcement seriousness, alienating few and placating many”).

207. Cf. Kitty Calavita, *The New Politics of Immigration: “Balanced-Budget Conservatism” and the Symbolism of Proposition 187*, 43 SOC. PROBS. 284 (1996) (stating that “in the United States at least [in the mid-1990s] immigration is one of the few public policy issues in this contentious period on which most political leaders agree, with President Clinton and Newt Gingrich both calling for greater

the other hand, decreasing the value of undocumented entry depends on a mix of policy tools that include regulatory review of the work authorization process, ex post facto interior enforcement, and legal migration avenues to change the opportunity cost of illicit migration. Simpler arguments, not surprisingly, tend to be more persuasive—particularly among low-information yet emotionally engaged members of the public.<sup>208</sup> Indeed, voters whose exposure to information about seemingly lax enforcement on the border arouses strong negative reactions will tend to weigh that information more heavily,<sup>209</sup> and may have a far harder time accepting the more complex case for interior enforcement and legal immigration reform.<sup>210</sup> Individuals with strong affective responses often tend to have a harder time focusing on the policy nuances of a particular course of action rather than the symbolic content of a policy. In a political environment of rising concern about immigration and strong affective responses to the perceived erosion of sovereignty, the marginally simpler policy argument of fortifying the border is likely to have greater resonance among unsophisticated but concerned voters than the more complex idea of shaping the demand for migration through multiple regulatory strategies.

By contrast, other pieces of comprehensive reform are a harder sell. Lawmakers who are channeling public frustration with the immigration status quo are often unwilling to support the more substantial regulatory burdens associated with changes in employer verification. Employer verification is increasingly popular among the public, but relatively lax enforcement keeps the costs on business and individuals manageable. Drastic changes in employer verification—involving either increased enforcement or greater federal surveillance and control—would generate either interest group opposition or concern over civil liberties and the centralization of state power. Supporters of legalization include immigrant advocates, civil rights organizations, some employers, and a variety of constituencies including some representatives of law enforcement, local

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control of the borders”).

208. See Michael D. Cobb & James H. Kuklinski, *Changing Minds: Political Arguments and Political Persuasion*, 41 AM. J. POL. SCI. 88, 93 (1997). Reviewing a variety of empirical studies and placing their own results in context, Cobb and Kuklinski draw a distinction between arguments that are “long and complex” and “largely factual and argumentative in content” versus those that are “short, simple, and symbolic,” and find the latter far easier for relatively poorly informed voters to assimilate persuasively. Though Cobb and Kuklinski do not specifically discuss immigration and border policy, their categories readily map onto the distinction between arguments for increased border enforcement and those calling for a coordinated approach including regulation of domestic employers, border and interior enforcement, and changes in legal immigration opportunities, while also highlighting the unintended consequences of more enforcement (e.g., disrupting circular migration and encouraging longer-term undocumented stays in the United States).

209. See Joanne M. Miller, *Examining the Mediators of Agenda Setting: A New Experimental Paradigm Reveals the Role of Emotions*, 28 POL. PSYCHOL. 689 (2007).

210. Cf. Brader et al., *supra* note 179.

government, and religious groups.<sup>211</sup> But a substantial fraction of the public is skeptical that this will solve perceived immigration problems, so the larger public remains divided. Large-scale reforms of legal immigration pose risks to some stakeholders (e.g., those favoring high absolute levels of family-based migration, employers losing some control over employment-based migration, and organized labor concerned about future flows). Meanwhile, border security increases entail fiscal costs rarely borne by a concentrated group with political power in the United States.<sup>212</sup> The direct costs of increased border enforcement affect only a small fraction of residents close to the border, and this is offset by the greater interest from some members of those communities who instead favor more intense enforcement.

The legacy of the ramp-up in border enforcement is at least as complicated as the idea behind securing the border is simple. As Massey and other scholars report, the stark increase in border enforcement resources has coincided with a marked increase in the reluctance of Mexican-origin, U.S.-based, undocumented immigrants to return to Mexico in the wake of the surge in border enforcement. This development has almost certainly added to the cumulative size of the undocumented population in the United States.<sup>213</sup> More specifically, the border buildup appears to have dramatically changed migrants' willingness to attempt returning to Mexico as part of a pattern of circular migration. Based on analyses of decisions of undocumented Mexican migrants, the probability of return to Mexico within twelve months of undocumented entry fell from just over forty percent around 1986 to about twenty-five percent by 2002. Given that the rate of entry of undocumented immigrants remained fairly constant, the overall undocumented population predictably increased—in part, ironically, because of the border buildup's almost certain impact of discouraging return migration.<sup>214</sup>

The border buildup disrupts circular migration because of the costs imposed on circular migrants. As Massey puts it,

Raising the out-of-pocket costs of undocumented migration increases trip lengths because migrants have to work longer before the trip becomes profitable. [Also] by pushing migrants away from urban areas and into more remote sectors, operations Blockade and Gatekeeper increased the

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211. See, e.g., Amy Sullivan, *Religious Groups Push for Immigration Reform*, TIME, Apr. 30, 2010, <http://www.time.com/time/nation/article/0,8599,1986320,00.html>; Dennis Wagner, *Police Chiefs Press for Immigration Reform*, USA TODAY, July 23, 2009, [http://www.usatoday.com/news/nation/2009-07-23-police-chiefs-immigration\\_n.htm](http://www.usatoday.com/news/nation/2009-07-23-police-chiefs-immigration_n.htm).

212. The occasional protests of local cities in the Southwest whose landowners are affected by construction of border fencing constitutes an interesting exception that underscores the extent to which conventional border enforcement *fails* to garner concentrated opposition from economic interests. See *Texas Cities Join Suit Against Mexico Border Fence*, WASH. TIMES, May 29, 2008, <http://www.washingtontimes.com/news/2008/may/29/texas-cities-join-suit-against-mexico-border-fence>.

213. See Massey, *supra* note 114, at 136.

214. *Id.*



physical danger of border crossing. . . . The end result of the border buildup has thus been to lower the probability of return migration and push migrants toward permanent settlement.<sup>215</sup>

Migrants who *do* cross often end up in different places. A major consequence of the ramp-up in border enforcement appears to have been a change in migrants' crossing patterns—away from a high concentration on traditional border-crossing points and toward states such as Arizona that subsequently exhibited growing concern over illicit migration.<sup>216</sup> By driving illicit migrants crossing the U.S.-Mexico border *away* from the two historically most common border-crossing points (San Diego and El Paso) and *toward* a greater number of locations, the border buildup ironically helped beget the political backlash against immigrants that has been so critical in explaining recent American immigration policy.<sup>217</sup> When the ranks of the Border Patrol began swelling in the early 1990s, the proportion of U.S.-Mexico illicit border crossers *not* crossing at San Diego and El Paso began to skyrocket (rising to forty percent by 1993, from thirty percent in 1989). As migrants scattered from the original corridors, they moved toward states such as Arizona and New Mexico, where immigration soon became a far more prominent political issue. At the same time (whether simply because of new economic opportunities, or because the move away from crossing in Texas and California moved new migrants into different social and economic networks), illicit migrants crossing from Mexico increasingly ended up in different and less urban areas that had relatively limited if any previous experience with significant migration from Latin America.<sup>218</sup>

The relatively high salience of immigration today compared to 1986 is a major factor shaping the status quo and complicating policy change. When immigrants were more heavily concentrated in large immigrant-receiving states, the immigration issue held far less national resonance. Immigration sometimes became controversial in such states, as with California and the fight over Proposition 187 in the mid-1990s.<sup>219</sup> For the most part, however, these states tended to have long-term experience receiving large numbers of immigrants. Moreover, some states, as with California, were already on a long-term demographic trajectory that favored less aggressive policies against unlawful immigrants by making the issue less novel and fostering constituencies supportive

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215. *Id.*

216. *Id.* at 132 (“Operation Gatekeeper, by far the largest deployment of enforcement resources, deflected migrants away from California toward new crossing points in Arizona, New Mexico, and more dangerous sections of the Río Grande.”).

217. *See id.* at 134.

218. *See id.* (Changes in the location of border crossing for migrants may have contributed to an evolution in their eventual area of settlement. “Not only were undocumented migrants deflected away from traditional crossings, but once in the United States they kept on going.”).

219. *See generally* Adrian D. Pantoja et al., *Citizens by Choice, Voters by Necessity: Patterns in Political Mobilization by Naturalized Latinos*, 54 POL. RES. Q. 729 (2001).

of immigrants.<sup>220</sup> These states also often received a substantial share of their migrants in large, multiethnic cities rather than smaller towns and rural areas.

*E. How Statutory, Organizational, and Macropolitical Factors Interact*

As laws are interpreted by executive organizations, funded and overseen by lawmakers, and discussed in the public sphere, each of these activities can interact in significant ways and contribute to a larger explanation that could not be provided by a more parsimonious account. We can see this by considering how each set of factors leaves traces in the details of the immigration system, and how each factor blocks some avenues for change that would remain open even if the other two factors were present. Different statutory compromises could have bequeathed to Americans a very different set of immigrants and labor market responsibilities. The country caps and visa limits in the 1965 Act limited flexibility to legally accommodate migrants from Latin America, and the IRCA compromise carried within it the core of a system that engendered widespread political backlash.

Holding constant the statutory framework, the status quo would also be quite different with less organizational fragmentation. The creation of the DHS and consequent three-way split of most immigration-related functions within the DHS appears to have had some consequences for agency priorities and activities (underscoring the reality that organizational changes have consequences).<sup>221</sup> Fragmentation also changed agency incentives to address internal management priorities and longer-term issues, such as the shortfall in funding for immigration adjudication; these problems, in turn, further eroded support for the immigration system among some constituents. And the entanglements of bureaucratic jurisdiction and competing agency incentives further complicated presidential control by raising the costs of implementing policy changes (which need to garner a degree of support from multiple agencies, and can be modified or watered-down by a greater number of partially independent entities); limited presidential control, in turn, lowered each presidential administration's capacity to affect the current system through the use of enforcement discretion or parole.

In a different world, moreover, greater presidential control could mean some use of humanitarian parole authority and explicit enforcement discretion to address the status of the undocumented and to implement an alternative *ex post facto* immigration scheme.<sup>222</sup> Indeed, to the extent that smaller-scale

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220. In California's case, the experience with Proposition 187 itself may have accelerated the shifting political climate. Cf. Matt A. Barreto & Ricardo Ramirez, *Minority Participation and the California Recall: Latino, Black, and Asian Voting Trends, 1990–2003*, POL. SCI. POL. 11 (2004).

221. See, e.g., MEISSNER & KERWIN, *supra* note 140.

222. See Royce Bernstein Murray & Sarah Petrin Williamson, *Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti* (Ctr. for Global Dev., Working

organizational innovations could make a difference (such as coordinated labor and immigration enforcement that puts additional pressure on employers), they are less likely to succeed and more costly because of organizational fragmentation (e.g., disagreement between ICE and DOL, or between ICE and the CIS, or competition over matters such as internal affairs investigative jurisdiction between the CBP and ICE).

Finally, policymakers and the agencies shouldering responsibility for executing immigration policy confronted an increasingly polarized and unforgiving political context. Far from leaving agencies more capable of meeting public demands, the combination of new statutory authority and budget decisions have often left agencies in a more difficult position when it comes to meeting public expectations for immigration enforcement. Note that the existence of resource constraints relative to public expectations and agency goals would never entirely extinguish discretion. In recent years, immigration officials have still confronted a vastly greater number of removable individuals relative to their capacity to remove and detain them. Moreover, internal agency problems such as those encountered by the Obama Administration when seeking to focus the Secure Communities effort would leave lower-level operators with some room to decide how to set priorities. What the resource constraints do create, however, is pressure on agency leaders to perfect administrative schemes allowing for the removal (even if sometimes relatively free of careful screening) of larger numbers of individuals while managing the costs. It is in that context that the much-maligned Secure Communities effort developed in order to simplify the process of screening individuals detained by state and local authorities. Because most undocumented individuals are *not* detained, however, even the most sophisticated scheme faces impossible odds in making anything more than a relatively minor dent on the overall number of roughly ten million undocumented individuals in the United States.<sup>223</sup>

At the same time, as larger numbers of immigrants—particularly from Mexico—settled in the Southeast and other regions with little recent experience receiving immigrants from Latin America, controversies over immigration became more salient to the public. The growing interest in local measures helped mobilize immigrants and their supporters, further raising the issue's profile. As a consequence, grand elite-driven bargains marrying legalization, changes in work-related immigration of interest to employers, and enforcement were more susceptible to destabilizing attacks galvanizing otherwise scarce public attention. As Figure 2 illustrates, data on congressional hearings and *Congressional Quarterly Almanac* articles suggest that major policy changes on immigration *before* the last

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Paper No. 255, 2011) (discussing the potential economic and humanitarian impact of humanitarian parole for the Haitian economy following the January 2011 earthquake).

223. See text accompanying notes 158–60 (discussing Secure Communities and the difficulties faced by the Obama Administration in implementing substantive changes in the program's operation).

two decades were associated with less overall congressional activity and attention to the immigration issue. These changes help explain the different political context in which IRCA passed in 1986 with a large-scale legalization program, and how immigration reform efforts strongly supported by presidential administrations were more likely to trigger the ire of an engaged public in 2006, 2007, and 2009–2010.

These political developments, of course, did not occur in a vacuum, and in any event exogenous political changes do not tell the whole story of recent immigration law. Growing political interest in immigration changes policymakers'—and organized interests'—incentives to use aggressive rhetoric and support approaches appealing to the growing fraction of the electorate that is becoming interested in immigration. While a variety of additional factors unquestionably affected immigration law in the decades since the landmark passage of the 1965 INA amendments, a key element in modern immigration law's story is the process through which policy elites and the larger public have reacted to each other amidst growing interest in immigration. On three occasions between 2006 and 2010, lawmakers, organized interests, and executive branch officials made concerted efforts to pursue immigration reform.<sup>224</sup> Advocates for reform faced widespread and adverse public reactions.<sup>225</sup> If immigration issues were less prominent national political concerns or public reactions were less skeptical of the federal role, lawmakers would have faced a different calculus almost certainly favoring substantial immigration reforms. A different political context would also change presidential and agency incentives to use *ex post facto* enforcement and discretion, thereby potentially affecting the incentives of employers to comply with existing laws or support further changes, and addressing other features of the immigration system.

#### *F. Why Public Responses Complicate Statutory Change*

We can now reassemble the pieces of the puzzle. In part because of politicians responding to public anger, particularly in the period since 1990, Congress has indeed enacted laws that simultaneously *expanded* the removable population (particularly through IIRIRA in 1996), ran the risk of *keeping the removable population* in the United States through a ramp-up in border enforcement disrupting circular migration, and raised public expectations that undocumented aliens and lawful permanent residents involved in crimes would be removed. As public frustration has grown, lawmakers have had increased incentives to propose

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224. See Anthony Boadle, *Obama Sees Early 2010 Start on Immigration Reform*, REUTERS (Aug. 7, 2009), <http://www.reuters.com/article/2009/08/07/us-obama-immigration-idUSTRE5765Y420090807> (discussing failed immigration reform efforts in 2006 and 2007).

225. See *Aramark Facility Servs. v. Serv. Employees Int'l Union*, 530 F.3d 817 (9th Cir. 2008) (discussing reactions of policy elites and the mobilization of protest during the immigration reform debates of 2007).

further enforcement-oriented responsibilities, which have exacerbated the cycle and lead to further rounds of lawmaking. Lawmakers not only failed to provide increased resources to cope with these problems, they permitted a stark decline to occur in resources for interior enforcement during the crucial years following IRCA. Paradoxically, these trends have simultaneously exacerbated enforcement challenges while engendering a powerful political backlash because of perceived enforcement failures. And this, in a nutshell, is the backdrop for contested and often divisive legal disputes regarding the implications of IRCA and employer sanctions,<sup>226</sup> the role of state and local laws in immigration enforcement,<sup>227</sup> and the operation of programs such as the Secure Communities initiative designed to fulfill immigration authorities' broadened responsibilities for enforcement.<sup>228</sup>

Why would greater public frustration and eroding legitimacy for immigration law be an important feature of the status quo? More specifically, why would a discredited immigration law make it harder to pass reforms? For one, other things being equal, public frustration with perceived policy failures erodes trust in the government's capacity to perform such functions.<sup>229</sup> Eroding trust almost certainly increases the attractiveness of more drastic measures that send a message, raising the likelihood that enforcement-oriented measures such as a larger border patrol and fence construction would be enacted and supported, even if they do not meaningfully address the underlying problem. With lawmakers from different states interested in connecting with voters, public frustration about insufficient enforcement is thus the fertile soil in which one-sided responses to immigration policy develop. Without such frustration, it would be difficult to see how narrow and costly policies that do not address the full scope of the problem would be as likely to pass. In contrast, restructuring employer verification measures that could have a large impact on millions is prone to attract greater opposition from interests and stakeholders concerned about expansive federal labor market regulation (particularly if it is not coupled with other elements of desired policies, such as easier access to visas for high-skilled immigrants or a legalized workforce).

Moreover, public frustration probably interferes with more far-reaching reforms in a variety of subtle ways. Widespread public disappointments with federal regulation of immigration, even if sometimes engendered or exacerbated by limited information, raises the public profile of the issue and makes it more difficult for credible elite bargaining to occur. In addition, to the extent that some more far-reaching changes depend on successfully selling to the public the idea that new labor market regulations or enforcement measures will be successfully

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226. *See id.*

227. *See* *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010).

228. *See* *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement*, No. 10 Civ. 3488(SAS), 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011).

229. *See, e.g.*, Luke Keele, *Social Capital and the Dynamics of Trust in Government*, 51 AM. J. POL. SCI. 241 (2007).

implemented, more public frustration about the failures of existing enforcement makes the sale more difficult. And swelling public skepticism of the immigration system heightens the risk of entirely reopening the statutory bargains over immigration; a frustrated public relatively angry about the immigration system could entice lawmakers into supporting increasingly far-reaching statutory changes, including restrictions on family-based immigration or new limits on residents' progression toward citizenship.

These concerns helped sink reform in 2007 despite the considerable enthusiasm of many policy elites, including the President and his staff. Pivotal senators had agreed on a framework but needed to resolve a variety of details, such as how to operationalize the precise criteria to be used in allocating the majority of immigrant visas in the new scheme. The devil proved not only to be in the details, but in the social and political context at work while lawmakers and staff rushed to work out those details. In a world where public attention had for years increasingly focused on immigration, and Internet technology lowered the cost and time required for organizing vigorous public responses, lawmakers faced a vastly more politically treacherous environment in the tense hours and days during which they were scrambling to nail down the details of the framework agreement for a new immigration scheme.<sup>230</sup> For all these reasons, we can expect rising public frustration with the immigration status quo to contribute a great deal to keeping it in place.

#### IV. IMPLICATIONS: IMMIGRATION LAW, POLICY CHANGE, AND THE NATION-STATE

The preceding analysis shows how statutes and the organizations that implement them play an outsized role in a country defined largely by its capacity to weave immigrants into the fabric of its society. Our exploration of the current system underscores that it is not entirely without merit and leaves some interested parties better off than others. At the same time, many of its consequences are both costly and poorly understood—including in particular diminished economic opportunities, and a misallocation of resources relative to the country's overarching security concerns.

A focus on institutions, organizations, and statutes does not deny the importance of dramatic, unexpected events such as the September 11 attacks. Even if those attacks helped explain why the Bush Administration shelved its early interest in comprehensive immigration reform, spurred immigration detentions, and sought further legal changes at the intersection of immigration and national

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230. See Julia Preston, *Grass Roots Roared and Immigration Plan Fell*, N.Y. TIMES, June 10, 2007, at A1 (“[T]he legislation sparked a furious rebellion among many Republican and even some Democratic voters, who were linked by the Internet and encouraged by radio talk show hosts. Their outrage and activism surged to full force after Senator Jon Kyl, the Arizona Republican who was an author of the bill, suggested early this week that support for the measure seemed to be growing.”).

security law, the impact of such exogenous shocks on immigration law plays out against the backdrop of longer-term trends and institutional realities.<sup>231</sup> We have seen, for example, how the increase in border enforcement resources was on a steady upward trend well over a decade before September. Similarly, the expansive removal authority that characterizes much of immigration enforcement today was largely created by statutory changes in the mid-1990s.

To assess the implications of immigration law's institutional roots, this Part begins by connecting the preceding story of institutional constraints in immigration to broader themes involving legal and policy change in the United States. It then develops the idea that the American experience with immigration law may ultimately harbor larger implications involving national capacity to affect cross-border flows—particularly among relatively powerful states with a recognized ability to shape their broader context. Nation-states are the defining feature of our modern legal architecture. As developed below, their relevance to each other, and to the lives of individuals throughout the world, depends more than commonly acknowledged on bureaucratic safety valves managing the costs and benefits of legal commitments that may, for extended periods, appear to be worth accepting.

#### *A. (Negative) Policy Feedback, (Non)Delegation, and Implementation*

Modern immigration law is almost certainly a poor vehicle for serving the interests of most Americans. But a variety of simple accounts, rooted in conventional or institutional corruption,<sup>232</sup> or in a lack of public concern about immigration issues,<sup>233</sup> also falls short when it comes to explaining the situation facing immigration judges, lawyers, agencies, and the public. Subtler dynamics are at work, connecting statutory schemes, organizations, and the larger public. Earlier, I noted that American immigration law is in some respects a study in what political scientists have called “policy feedback,” or the process through which legal and policy changes create new political conditions. The progression developed here—from statutory contradictions and implementation difficulties, to harsh legislative and public reactions, and to further statutory and implementation

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231. See Michelle Mittelstadt et al., *Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade Since 9/11*, MIGRATION POLICY INSTITUTE: IMMIGRATION FACTS (2011). While the authors conclude that “the terrorist attacks of September 11, 2001 have molded an immigration system that is dominated by security and border-control considerations,” *id.* at 12, they also conclude that a variety of changes, including increases in worksite enforcement, electronic employment eligibility verification, and the rise in expedited removals were not changes “directly flowing from 9/11.” *Id.* at 2.

232. Lawrence Lessig, *Democracy After Citizens United*, BOS. REV., Sept./Oct. 2010, at 11–29.

233. Cf. Kathleen A. Dolan & Thomas M. Holbrook, *Knowing Versus Caring: The Role of Affect and Cognition in Political Perceptions*, 22 POL. PSYCHOL. 27, 28–30 (2001) (explaining how emotional, affective responses can drive political perceptions, and discussing how affect differs depending on the issue).

problems—is in some respects quite distinct from the typical policy feedback narrative.

To understand the distinctions, recall that the conventional policy feedback story tends to be more focused on stakeholder and civil society reactions, spurred by policy changes that foment some mix of social organizing, coalition-building, and complementary-policy changes that further entrench the original statute.<sup>234</sup> It is easy to see how policy entrepreneurs aspire to unleash such a cycle; it should be just as clear that nothing guarantees its success. Recently, Eric Patashnik and Julian Zelizer explained why this literature needs to better contend with the *limits* of policy feedback—including among others potentially poorly timed or insufficient institutional (organizational or financial) resources.<sup>235</sup>

While the argument here bears some relationship to the policy feedback literature (including the ideas emphasizing the *limits* of policy feedback advanced by Patashnik and Zelizer), it stands out in at least two respects. First, the focus is on the entrenchment of a statutory regime *bereft* of support (and indeed, in some respects all the more entrenched because the lack of support generates political consequences that exacerbate the difficulty of changing the status quo). Second, the focus is on the consequences of the statutory regime that arise as a result of enforcement and implementation. By placing the present argument in the broader context of the policy feedback literature, we can illuminate some underappreciated ways in which statutes and their enforcement shape the political context, which in turn makes some chunks of existing law more difficult to change and exacerbates changes in other areas.

In effect, the legacy of modern immigration law spawns a species of policy feedback that is created by a heavily maligned and poorly executed mechanism for interior enforcement, a political economy favoring attention to and growth in border enforcement (without fundamental changes in interior enforcement directed toward employers), and an increasingly engaged public. As we have seen, these factors ironically make changes to a poorly functioning system more difficult.<sup>236</sup> With immigration law, entrenchment grows in the sense of the regime's staying power, not because of growing support but for exactly the opposite reason—a state of affairs that almost certainly contributes to eroding

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234. See, e.g., Pierson, *When Effect Becomes Cause*, *supra* note 89.

235. See Eric M. Patashnik & Julian E. Zelizer, *When Policy Does Not Remake Politics: The Limits of Policy Feedback* (December 10–11, 2010) (unpublished paper), [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/Patashnik-Zelizer\\_YaleLawConference\\_2010.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/Patashnik-Zelizer_YaleLawConference_2010.pdf).

236. One consequence of the impediments to changes in immigration law may be to slow down the pace and process through which immigration leads to demographic shifts among voters, thereby disrupting the cycle through which immigration has historically impacted the democratic process. For an example of how immigration affects (sometimes in subtle ways) the democratic process, see generally ZOLBERG, *supra* note 24, at 10 (discussing the coalition between economic interests and “recent ethnics” made possible by immigration flows). For an account of how policy feedback could bear a relationship to demographic change, see Hochschild, *supra* note 175.



trust for policymakers and greater interest in measures ill-suited to address the problem in question.

These entrenchment dynamics, in turn, have a variety of consequences that begin with the nation's approaches to border enforcement policy. The border buildup is an example of how a system can become partially locked-in even as policy change continues to occur. Even the recent changes in border security (when combined with new rules since the mid-1990s governing the ease with which individuals can be removed) constitute fairly stark changes in policy. What this evolution has *not* accomplished is to drastically modify the overall architecture of the system. Thus, stark increases in border enforcement capacity appear to be leading many undocumented immigrants to stay in the United States longer, thereby playing a role in driving up, or at least keeping high, existing totals of undocumented migrants.<sup>237</sup>

Sociologists studying this population have documented a relatively widespread historical pattern of circular migration involving Mexican undocumented immigrants. Before the stark changes in border security policy set in motion by the early 1990s, undocumented individuals of Mexican origin routinely returned to Mexico with the intention of subsequently reentering the United States. Some of these individuals, however, though initially planning to return to Mexico temporarily, ultimately decide to remain in Mexico. More recently, scholars describe a predictable and growing unwillingness of many such undocumented migrants to leave the United States for fear of being unable to exercise the *de facto* (though not the *de jure*) option of returning. This pattern almost certainly helps explain the persistently large size of the undocumented population in the United States in the years since the border enforcement ramp-up, and showcases some of the subtle and potentially perverse links between border enforcement and the scope of domestic enforcement activities.<sup>238</sup>

Furthermore, the border buildup appears to have had a relatively meager impact on the architecture of interior enforcement. Its limited (though consequential) effects on patterns of illicit migration are not enough to change the larger context of the situation the country faces on immigration.<sup>239</sup> Prospects for

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237. See Massey, *supra* note 114, at 136 (discussing disruptions in circular migration).

238. See *id.*

239. Despite the ramp-up in border enforcement *and* in immigration-related criminal prosecution, some recent research suggests these factors have only weak effects on the ultimate willingness of migrants to illegally cross the deadly terrain on the border. See generally *The Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States: Field Hearing on Immigration in San Diego, California Before the H. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Wayne A. Cornelius, Director, Center for Comparative Immigration Studies at University of California-San Diego), available at <http://www.biddaily.com/pdfs/Cornelius%20testimony%2008-2-06.pdf> (showing through interviews with migrants that tightened border enforcement in urban areas has not halted unauthorized immigrants from entering the United States, and discussing complex, potentially perverse consequences from heightened border enforcement).

more substantial change probably depend on disrupting some of the circumstances holding the larger statutory scheme in place, including the relative lack of interest from many businesses in changing laws that many of them often ignore, because these laws are only partially, if ever, enforced.<sup>240</sup> Nor will much of the public be likely to support larger changes in immigration without confidence that the resulting legal arrangements will be more routinely and effectively enforced than the status quo.

In the meantime, public frustration with immigration will spur more state and local lawmakers to take action.<sup>241</sup> While local immigration power is sharply limited, particularly by federal statutes, existing law does leave room for some exercises of local control on this issue.<sup>242</sup> The evolution of the doctrine here leaves states and localities with some choices about their involvement—choices not entirely limited by the INA, judicial interpretations of it, or even other aspects of federal immigration law. It is difficult to envision a scenario involving substantially fewer efforts by state and local authorities to affect immigration policy without substantial changes in the federal scheme. Put simply, agencies given all but impossible tasks are hard-pressed to earn the measure of broad public support and legitimacy capable of forestalling local frustration and national disapproval.

Widespread cynicism about a bureau's mission is hardly an inspiring outcome for agency officials. Many agencies within the executive branch are not powerless in managing the threat of such negative policy feedback.<sup>243</sup> They can sometimes water down substantive requirements to avoid blatant noncompliance, in an effort to reframe public discussion regarding their efficacy in achieving popular goals. The implementation of the Adam Walsh Act, a new federal initiative designed to leverage federal resources in an effort to change states' supervision of sex offenders, is one example of how the gap between aspirations and compliance can engender discussion of whether substantive requirements should be made more permissive.<sup>244</sup> In other cases, agencies can dramatically

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240. See, e.g., Hannah Clark, *The Business of Immigration Reform*, FORBES (May 5, 2006, 6:00 AM), [http://www.forbes.com/2006/05/04/holzer-immigration-reform-cx\\_hc\\_0505QandA.html](http://www.forbes.com/2006/05/04/holzer-immigration-reform-cx_hc_0505QandA.html) (noting that businesses are not clamoring for immigration reform because “it’s not clear what benefits business will get out of it, because business benefits a lot from the status quo, [and] from relatively unlimited access to cheap labor”).

241. See, e.g., Michael W. Savage, *3 Other States Weighing Tough Immigration Bills*, WASH. POST, July 8, 2010, at A4; *Arizona-Style Immigration Bills Emerge in New Legislative Sessions*, FOXNEWS.COM (Jan. 29, 2011), <http://www.foxnews.com/politics/2011/01/29/arizona-style-immigration-bills-emerge-new-state-legislatures>.

242. See, e.g., Memorandum from Teresa Wynn Roseborough, the Office of Legal Counsel, Assistance by State & Local Police in Apprehending Illegal Aliens: Memorandum Opinion for the U.S. Att’y, Southern Dist. of Cal. (Feb. 5, 1996).

243. In this context, the term “negative” refers to a cycle that is capable of contributing to the erosion of support for a legal scheme.

244. See generally Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993 (2010) (discussing compliance-related challenges associated with the Adam Walsh Act, and the role that more realistic compliance requirements could play in

change prophylactic measures or penalty provisions, thus creating new incentives to spur greater compliance even when faced with constrained resources.<sup>245</sup>

These scenarios depend to a large degree on the extent of legislative delegations to agencies. Such delegations tend to be commonplace in conventional regulatory contexts. In those situations, lawmakers delegate considerable (though not infinite) authority to agencies to administer in accordance with one or more broad considerations that often allow administrators to consider the dilemmas of implementation. Most of the immigration landscape is better described as a domain of far more limited, or even nondelegation. Neither agencies nor the President have meaningful control over the overall visa allocation scheme or the number of visas.<sup>246</sup> Outside some fairly circumscribed bounds,<sup>247</sup> agencies also have a limited capacity to change the regulatory structure governing the enforcement of employer sanctions, either by starkly increasing penalties or addressing state-of-mind requirements through substantive changes or prophylactic rules.<sup>248</sup>

Although the relative rigidity of immigration law bears further scrutiny, it is almost certainly born from a congressional conclusion regarding the political complexity of a multidimensional issue that implicates social policy, labor markets, and security-related debates. With an issue harboring such complexity, broad delegations of authority may be unlikely to insulate Congress from adverse political reactions for agency decisions—thereby altering some of the incentives for lawmakers to delegate authority in the first place.<sup>249</sup> The result leaves agencies

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boosting state-level policy changes in the registration and supervision of sex offenders).

245. See, e.g., Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 693–98 (2003) (discussing USDA and FDA Hazard Analysis Critical Control Points (HACCP) regulations as an example of “management-based” regulations); Margaret O’K. Glavin, *HACCP: We’ve Only Just Begun*, 56 FOOD & DRUG L.J. 137, 138–39 (2001) (describing the structure of prophylactic HACCP food safety regulatory rules, and their initial apparent successes since implementation in the U.S. food regulatory context).

246. The executive branch does have some limited leeway in defining the scope of particular visa categories, and the longstanding compromise that governs the allocation of refugee visas. Furthermore, this allocation does involve a proposal from the executive branch to the legislature regarding the number of visas that the administration proposes to make available in any given year. These authorities are quite limited relative to the ability of the U.S. Department of Agriculture to reshape the food safety regulatory environment that governs meat, poultry, and egg processing establishments.

247. See, e.g., *Am. Fed’n of Labor v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007) (discussing ICE’s effort to use data from the Social Security Administration to issue “no-match” letters for certain employers).

248. For some examples of agencies implementing prophylactic requirements to advance substantive regulatory goals, see, for example, Proposed Rules: Department of Labor, Mine Safety and Health Administration—Pattern of Violations, 76 Fed. Reg. 5719 (Feb. 2, 2011) (to be codified at 30 C.F.R. pt. 104); Rules and Regulations: Department of Agriculture, Food Safety and Inspection Service—E. coli O157:H7 Contamination of Beef Products, 67 Fed. Reg. 62325 (Oct. 7, 2002) (to be codified at 9 C.F.R. pt. 417).

249. See generally DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* (1999) (discussing the dynamics of congressional choices to delegate policymaking authority to executive

less capable of managing implementation dilemmas, including the potential for negative policy feedback dynamics that erode agencies' legitimacy over time.

True, agencies and the White House can play an important role in deciding on the allocation of scarce enforcement resources or the content of new immigration policy initiatives. As we have seen, however, the cauldron of law and politics that defines immigration goes a long way toward tying the hands of the executive branch.<sup>250</sup> This perspective stands in some contrast to the conclusions of Adam Cox and Cristina Rodríguez in their recent work on the presidency and immigration. Their illuminating account offers a useful historical perspective on the presidential role in immigration, highlighting in particular the long precedent for substantial presidential involvement in immigration policymaking through the use of inherent or delegated powers. My account, however, highlights the somewhat more constrained nature of presidential power in recent decades. Some of these constraints simply reflect the congressional reluctance to delegate broader formal authority over immigration to either agencies or the President,<sup>251</sup> given a "polarizing implementation" dynamic, and the extent to which this is explained by legal rules and institutional constraints rather than administrative procedures or explicit discretionary choices. The ideas developed here show how organizations, statutes, and political responses interact to shape the direction of the law. In

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agencies); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

250. Cox and Rodríguez make a number of interesting arguments about the presidency and immigration law. They note that historically, legal doctrines that govern immigration not only recognize Congress's power to regulate migration, but also a robust (and perhaps unique) role for the President, stemming from foreign affairs powers and legal domains "incident" to the United States' status as a sovereign nation. In fact, notwithstanding the increasingly widespread view that congressional power is preeminent in immigration, the history of the Bracero program and the treatment of Caribbean migrants reflects a high degree of presidential control of immigration policy (particularly through the ex post facto regulation of removal). Expansions in the size of the removable population have exacerbated the trend towards presidential power (in a manner similar to what appears to have occurred in the context of criminal law, as substantive criminal law has expanded to cover a growing proportion of conduct). Ex post discretion, however, does have drawbacks—such as the executive branch's lack of capacity to change the criteria for admission of lawful immigrants, or the association of illegality and immigration among voters who may perceive discretionary enforcement choices as essentially condoning illicit activity. Accordingly, there is a case to be made in support of more expansive delegations of ex ante screening power to the executive branch. *See generally* Cox & Rodríguez, *supra* note 14, at 483–519 (arguing that the President's authority to screen immigrants through enforcement decisions creates an asymmetry that has consequences which Congress could address by formally giving the President the power to adjust quotas and admission criteria).

251. Leave aside for present purposes the extent to which the President can or should play a preeminent role in deciding how authority explicitly delegated to executive departments should be exercised. *Compare* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (arguing against presidential assumption of responsibility for, and assertion of control over, regulatory decisionmaking), *with* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (concluding that presidential control of many regulatory actions is defensible on accountability and pragmatic efficiency grounds).

contrast, legal scholars and lawyers sometimes play down the role of public reactions,<sup>252</sup> and political scientists who study policy feedback rarely focus on the potentially critical role of legal implementation in shaping responses.<sup>253</sup>

### *B. Nation-States and the Control of Cross-Border Flows*

The story of America's recent immigration law also shows how much nation-states' capacity to control transnational forces depends on the organization of their laws and public agencies, not on macrolevel national decisions that implement themselves automatically. Powerful nation-states can control some of the forces affecting immigration. They run risks if they overestimate what they can control, however, as this can trigger polarizing implementation, use up resources that could have more useful effects, reduce willingness to accept migration that can serve as a safety valve relieving pressure for unauthorized migration, and signal ineffectiveness to domestic and external players. Ultimately, what they are able to control depends on the organization of their laws and public agencies, not on macrolevel national decisions that implement themselves automatically.

Taking a different tack focused on the changing nature of cross-border flows, some scholarly observers increasingly question how much the United States can control patterns of immigration activity.<sup>254</sup> Yet immigration policy does explicitly and implicitly shape the direction and global position of the United States, a uniquely vast immigrant democracy. Consider just a few examples: (1) U.S. immigration policy changes helped spur substantial downward pressure on visa admissions to the United States in the wake of the September 11 attacks. (2) Immigration policy changes affect the number of refugees admitted to the U.S. and the terms of their admission. (3) As we have seen, while a variety of factors affect patterns of immigration from Mexico, U.S. policy changes in implementing the law (including, for example, the dramatic increases in the Border Patrol coupled with open-ended discretionary provisions facilitating removal) are associated with rising smuggler fees. (4) U.S. immigration policy affects the flow of legal immigrants, the mix of family- and employment-based immigrants, and therefore the future makeup of the American electorate (as well as the capacity of the United States to continue attracting talented, innovative individuals to the country).

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252. For example, Richard Stewart's classic treatment of the evolving character of American administrative law has relatively little to say about the role of the mass public in precipitating or otherwise impacting the changes he described. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

253. See, e.g., Pierson, *Increasing Returns*, *supra* note 88. Pierson's otherwise illuminating overview of major mechanisms for policy feedback does not devote significant attention to the role of bureaucracies responsible for implementing statutes and their potential for shaping the implementation process through interpretive and administrative choices.

254. See Massey, *supra* note 114 (discussing North American integration and the difficulty of managing migration).

True, state power to police migration flows across a vast border is not without its limits. Those limits are starkly apparent in an advanced industrialized country that shares nearly 1000 miles of border, and strong economic and social ties, with a developing nation that is experiencing substantial emigration pressures. Yet the focus on allegedly inexorable human movements runs the risk of understating the practical and human impact of immigration and border policymaking, even in a country such as the United States. The degree of activity by interest groups and throughout civil society more generally that is aimed at shaping immigration policy reflects the stakes riding on the substance and implementation of immigration law. Choices about immigration law at the border over the past thirty years have had striking consequences for the choices of many immigrants, including how much risk of death or serious injury to assume.<sup>255</sup> Policy responses to change the degree of interior enforcement allocate costs and benefits to migrants, employers, and others. Meanwhile, a substantial and continuing gap exists between the number of people who emigrate to the United States (lawfully or not) and those who reportedly want to—a gap reflected not only in long queues for visas in some countries but also in the willingness of would-be illicit migrants to pay increasingly high sums to evade border controls.<sup>256</sup>

Ironically, it is the government's meaningful, if limited, capacity to regulate immigration that generates the dilemma of how to control flows of migrants. Instead of showcasing regulatory futility, these outcomes reflect something subtly different—a mix of considerable state efficacy hamstrung by political and implementation constraints. By showcasing the significance of interactions between enforcement choices and public reactions in a pluralist democracy, the evolution of the INA and its enforcement emphasizes how much nation-states' capacity to control transnational forces depends on the organization of their laws and public agencies, not on macrolevel national decisions that implement themselves automatically. Valuable insights emerge from a variety of crisp analytical models of immigration policymaking, including among others Trebilcock's account of optimal immigration policy, and Cox and Posner's analysis of the "second-order" structure of immigration law.<sup>257</sup> These insights should be applied with caution, however, as the presence of political interference and implementation constraints can limit a more abstract model's explanatory

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255. See Cornelius, *supra* note 46.

256. See *supra* note 48 (discussing the impact of implementation changes, including changes in the price of border-crossing and the proportion of migrants using ports of entries); see also Mexican Migration Project, Graph 1: Border Crossing Costs (U.S. Dollars adjusted to 2011-CPI), available at <http://mmp.opr.princeton.edu/results/001costs-en.aspx>.

257. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007); Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. REV. 234, 235 (2006) (assuming that "emigration and immigration states both implement policies aimed at maximizing their domestic social welfare").

power and policy implications.<sup>258</sup> Indeed, constraints and implementation problems are everywhere in immigration law. They confront the President in deciding how (or how much) to enforce immigration provisions. They confront agency headquarters in disciplining field offices with their own ideas about how aggressively to enforce immigration laws. They confront lawmakers who are designing policies that pivot on ambiguous information, or on unrealistic degrees of compliance from the public.

#### CONCLUSION

As the United States is a self-described nation of immigrants, it is perhaps fitting that immigration law's far-reaching consequences touch such a vast number of lives. The legal allocation of citizenship and migration opportunities touches hardworking and occasionally undocumented college students whose parents held their tiny hands when they arrived in the United States. It leaves engineers and doctors in the clutches of interminable queues for permanent residence that would have startled even Kafka. Through its own structure and its subtle effects on the international policymaking process, immigration law profoundly affects people around the world who dream of moving to an advanced industrialized country and believe they have a plausible legal basis for doing so. Among those with seats at the table in the national conversation about the fate of immigration law are millions of ordinary Americans who do not know a great deal about immigration but nonetheless have an opinion about it and feel (even if indirectly and not in a manner they can fully articulate) they are subject to its effects. They confront a system that is neither particularly coherent organizationally nor especially rational, but rather one forged in fits and starts over many decades, slow to change, and riddled with internal contradictions.

This Article explored the deep institutional forces contributing to those contradictions. Immigration law remains uniquely important because it continues to address foundational questions about the constitution of a national community. In the process, that scheme simultaneously allocates benefits and burdens to millions of people and the groups who represent them.<sup>259</sup> This uniqueness has not gone unnoticed in judicial opinions that address matters such as the relationship between national sovereignty and immigration,<sup>260</sup> and plays its part in the preceding analysis. At the same time, while my focus is on the recent structure and

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258. Cf. Hiroshi Motomura, Comment, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857 (2007).

259. See *supra* Part II.A; see also ZOLBERG, *supra* note 24 (discussing the capacity of immigration law to shape economic benefits and burdens along with the cultural character of communities).

260. See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

staying power of immigration law, the case study also sheds light on more general questions, such as how statutes and the organizations that implement them affect each other as well as the public, and how nation-states wield scarce but meaningful power in a changing world.

In shedding light on those questions my account shows how, for all its distinctiveness, immigration law is *not* unique in two crucial respects. First, the substantive core of immigration law reflects a continuing entanglement between normative aspirations (concerning values such as orderly continuing flows of immigrants, family unity, and a relatively unimpeded path from legal residence to citizenship) and the realities of pluralist politics—where political and legal actors that harbor competing goals repeatedly engaged in conflict and bargaining to shape an often-contradictory statutory core. Second, the relevance of immigration law—constituting an elaborate regulatory scheme—is largely forged through an implementation process fraught with fragmented agency players, limits in organizational capacity, and public frustration. Both of these features help us address the puzzle of why Americans are burdened by a self-defeating system that has few supporters and almost no defenders.

By investigating the entrenchment of immigration law in this larger institutional context, the Article makes several scholarly contributions. Conceptually, my analysis shows the importance of interactions between three distinct but related political economies affecting modern American immigration law—statutory bargains driven by accommodation among organized interests, organizational practices reflecting a fragmented cast of bureaucratic players and increasingly weak presidential control, and public attitudes reflecting social developments as well as reactions to each of the first two political economies. An example of how these domains interact is found in what I have described as *polarizing implementation*: where lawmakers face a nearly irresistible temptation to ratchet up border enforcement and internal agency responsibilities while feeding increasingly ambitious public expectations that agencies fail to satisfy. Lawmakers thus contribute to swelling public expectations while doing little more than tinkering with a system incapable of meeting those expectations.

With fragmented agencies burdened by statutory compromises carrying out their missions, the agencies' relationships to lawmakers, interest groups, and the public also shed light on the broader dynamics of statutory entrenchment. On the one hand, the Civil Rights Act, the Food, Drug, and Cosmetic Act, and the Goldwater-Nickles Defense Department reforms are examples of statutory schemes that developed a far-reaching network of roots linking organized interests, civil servants, lawmakers, and public perceptions while fostering increasing perceptions of public legitimacy.<sup>261</sup> Not so with immigration, where the story shows how statutory schemes can also become essentially glued to an

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261. Cf. ESKRIDGE & FEREJOHN, *supra* note 12.



unattractive status quo that is bereft of public legitimacy, through a similar entanglement of players and perceptions blocking virtually every practical avenue for changing that status quo. In the case of immigration, the increasingly shrill responses to a rickety scheme originally born from expansive and unrealistic promises have also engendered strong and growing constraints on presidential control of immigration policy. In particular, my argument underscores the relatively limited control the President can achieve over internal immigration enforcement given the aforementioned polarizing implementation dynamic, and the significance of legal rules and institutional constraints instead of administrative procedures or explicit discretionary choices in explaining this.

Finally, my account underscores how IRCA and similarly significant immigration law changes were easier to achieve than the major immigration reforms proposed in 2006, 2007, and 2009–2010, all of which were supported by presidential administrations, powerful stakeholders, and substantial segments of the general population. In contrast, earlier reforms benefited from lower public salience, a more supportive interest group context, and a system not burdened by the legacy of a major statutory scheme built to fail.

Some aspects of that system are undoubtedly shaped by the broader arc of American history. But the regulatory bargains struck since the 1980s had powerful consequences for agency officials, immigration adjudicators, Article III judges, and millions of people every day. Changes from the status quo, in turn, depend on the intersecting political economies of lawmaking, implementation, and public responses that now drive much of what immigration law has become. In light of these dynamics, perhaps hard-fought statutory or implementation changes could change the costs of the status quo for organized interests with a stake in immigration policy. Perhaps policy changes increasing the public's perceptions of immigration policy's efficacy and legitimacy could gradually lower the issue's profile and increase the electorate's inclination to support broader changes in the federal role. No doubt further demographic change will also continue to shape the political context in which immigration laws are written and evaluated.<sup>262</sup>

An evaluation of the present state of the law, however, yields a disquieting picture. At the center of it is an emerging cycle of eroding public legitimacy and polarized public responses. That cycle renders more difficult the statutory and administrative changes that promise greater coherence in immigration law, and raises at least the prospect of endangering amidst swelling public frustration key, longstanding features of American immigration law, including the relatively large number of legal immigrants admitted each year and their routine access (after several years) to citizenship. Still, while this interplay of statutory law,

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262. See generally Hochschild, *supra* note 175 (discussing the potential of demographic change to drive developments in immigration policy even as it increases the risk of short-term political conflict over immigration and related issues).

implementation, and public responses reveals much about American pluralism, nothing in this account traces its roots to immutable features of American history or even the inviolable internal logic of nation-states. Instead, the most recent chapters in the story of how Americans regulate our national community harbor at their core an irony of laws that simultaneously engender exceedingly high public aspirations while making it all but impossible for agencies to live up to them.