

# IMMIGRATION REFORM AND THE DEMOCRATIC WILL

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*The character of the American immigration regime has remained remarkably stable over many decades. It changes, to be sure, sometimes granting migrants benefits and at other moments cracking down. However, the broad trend is unmistakable: immigration law and the way it is implemented is increasingly harsh and inhumane. This article argues that this long-term trend is likely to continue—even in the event of comprehensive immigration reform—unless the immigration reform agenda reconciles itself with the structural elements responsible for this trend and imagines ways to counteract them. In particular I urge a reconsideration of the relationship between the immigration reform agenda and the democratic will.<sup>1</sup> Rather than focus on finding ways to quash anti-migrant policies that are responsive to the democratic will, reformers should develop creative, democratically legitimate ways to alter the demands that citizens make.*

## INTRODUCTION

Scholars of the American immigration regime want it to change significantly. Change is needed because the regime in its current form does not serve the needs of American citizens or migrants particularly well.<sup>2</sup> This consensus is supported by a diverse array of critiques of immigration law practices—past, present, and planned<sup>3</sup>—and it has produced an equally varied set of

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<sup>1</sup> I use the term “democratic will” throughout this article to denote the pre-legislative political force composed of citizens that legal institutions are responsive to in varying degrees. In this formulation, and particularly in the immigration context, legislation is an expression of, or to some significant degree responsive to, the democratic will.

<sup>2</sup> This is a robust assertion that holds true from a variety of disciplinary perspectives. The simplest case is a liberal economic one. If maximization of *global* economic welfare is the aim, then barriers to entry produce classic instances of *global* dead-weight loss. See generally Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT’L L. J. 1 (2008). These losses are also felt within in the United States. See Howard F. Chang, *The Immigration Paradox: Alien Workers and Distributive Justice*, (U. Pa. L. Sch., Public Law Research, Working Paper No. 08-32, 2008), available at <http://ssrn.com/abstract=1171943> (citing evidence that restrictions on labor migration produce a national dead-weight loss, though conceding a small negative distributional effect on domestic low-wage workers). See also KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS, 137-67 (2007) (arguing that the economic benefit of open migration significantly exceeds the economic cost when considered from the perspective of the United States). The normative political and philosophical case for liberalization of migration is also well established. See, e.g., JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS (2010); Joseph H. Carens, *Aliens Citizens and the Case for Open Borders*, 49 REV. OF POL. 251 (1987); see also Mathias Risse, *On the Morality of Immigration*, 22 ETHICS & INT’L AFF. 25 (2008). However, the normative case for treating migrants with higher regard does not require a fully cosmopolitan view of state obligation. See Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37 (2008); Meghan Benton, *The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-Citizen Population*, 16 RES PUBLICA 397, 407 (2010).

<sup>3</sup> See generally KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS (2004); JUAN F. PEREA, ED., IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED

proposals to bring the regime in line with domestic and international normative commitments.<sup>4</sup> But the scholarship of reform has a blind spot: it fails to adequately appreciate that the harsh character of the immigration regime is the product of a variety of entrenched legal, political, social, and economic forces working over time. The problem is structural; the harshness is embedded in this web of forces, making it difficult to dislodge.

Law reflects and constructs social beliefs about immigration (for instance, that “illegal” migrants drain public resources) and those socio-legal beliefs create political demands that drive the passage of more laws (such as those that bar “illegal” migrants from Medicaid).<sup>5</sup> The conversion of social beliefs into law reproduces and magnifies those social beliefs over time, making those beliefs durable and lasting (hence the pervasive belief that “illegal” migrants drain our resources and thus do not receive Medicaid). Because the societal attitudes towards immigrants are generally negative, and prior laws set a floor for harsh treatment, the expression of social animosity through law requires new laws to be more punitive than prior laws.<sup>6</sup> For instance, newer legal measures bar both “illegal” and *legal* migrants from receiving Medicaid or food stamps.<sup>7</sup> This self-perpetuating process creates a regulatory regime of escalating harshness.<sup>8</sup> The feelings ex-

STATES (1997); VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2005); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1569 (2010); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 612 (2003); Mary De Ming Fan, *The Immigration-Terrorism Illusory Correlation and Heuristic Mistake*, 10 HARV. LATINO L. REV. 33, 35 (2007).

<sup>4</sup> See, e.g., Eleanor Brown, *An Addendum to Cox and Posner: A Visa to ‘Snitch’*, 87 NOTRE DAME L. REV. 973 (2012); Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N. C. J. OF INT’L LAW & COM. REG. 465, 469 (2002); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1710 (2010) (advocating overhaul of immigration adjudication); David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 673 (2000) (advocating better enforcement practices as the key to building support for pro-migrant immigration policies); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2012) (suggesting that *Padilla* can be read to pave the doctrinal path to a right to counsel in deportation proceedings); Eleanor Brown, *Outsourcing Immigration Compliance* (Harvard Univ. L. Sch. Pub. Law & Legal Theory Research, Working Paper No. 08-12, 2009) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1131022](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131022); Stephen Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel* (Wash. Univ. L. Sch. Legal Studies Research Paper Series, Paper No. 11-10-04, 2012) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1945831](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945831); Fan, *The Immigration-Terrorism Illusory Correlation and Heuristic Mistake*, *supra* note 3, at 50 (advocating that Congress pass nonbinding resolutions that express the empirical truth that immigration does not have a relationship to terrorism, as a counter to the circulation of the false correlation between immigration and terrorism in congressional debate); JOHNSON, *THE “HUDDLED MASSES” MYTH*, *supra* note 3 (advocating the abolition of border controls); STEVENS, *supra* note 2 (advocating free movement of persons, among other extensive changes to legal regulation as part of a comprehensive effort to create a viable set of local governments, but without the nation state).

<sup>5</sup> See Tanya Broder & Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NATIONAL IMMIGRATION LAW CENTER (last updated Oct. 2011), <http://www.nilc.org/overview-immeligfedprograms.html>.

<sup>6</sup> This process of socio-legal reinforcement, which makes legal structures and choices appear natural, is a staple argument of the Law & Society literature. See KITTY CALAVITA, *INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW* 17-24, 37 (2010) (“The ability of law to create social realities that appear natural by inventing many of the categories we think with, means that it insinuates itself invisibly into our everyday worlds and wields extraordinary power.”).

<sup>7</sup> See Broder & Blazer, *supra* note 5.

<sup>8</sup> This process is similar to the process that has resulted in the severity of our criminal law regime. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 199-201 (2005); DAVID GARLAND, *THE CULTURE OF CONTROL* 9, 13-14 (2002); Daniel Ibsen Morales, *In Democ-*

pressed in episodic political flare-ups continue in force long after the flare-up subsides.<sup>9</sup>

The harshness of immigration law in the United States goes uncorrected for another structural reason:<sup>10</sup> the affected migrants are not U.S. citizens. This difference has a number of important implications, including that migrants cannot vote,<sup>11</sup> and so go without formal political representation. From this disenfranchisement it follows that legislative or executive actions related to immigration lack the formal approval of many in the communities most affected by those actions. Additionally, when migrants do raise their voices in political debate, their views are significantly discounted because, as non-citizens, they are viewed as outsiders. Lastly, courts are arguably more vulnerable to criticism when they make counter-majoritarian decisions on behalf of non-citizens. Because a court's legitimacy in the eyes of the citizenry is crucial to its efficacy, and because non-citizens are not a part of that legitimating audience, courts are restricted in their ability to rescue migrants from the political process that produces the harsh immigration regime.

How should immigration law reform respond to the systemic harshness of the immigration regime? If reformers are dissatisfied with any or all of the structural qualities that sustain the character of the regime, how might those structures be changed? I develop these questions here, and sketch a partial answer. The key to moving the regime in a new direction is for immigration law reformers to *engage* the democratic will rather than fight to quash it, and to do so in ways that are precisely directed<sup>12</sup> at disrupting the processes that allow the regime to continue to develop in a punitive direction.

Take one example: a citizen jury—not an immigration judge—should decide the fate of certain long-standing resident migrants who are legally deportable.<sup>13</sup> Involving citizens in this way offers distinct advantages over the typical manner that immigration reformers seeks to persuade the citizenry that the immigration regime ought to become more migrant-friendly. This reform has three major benefits. First, a procedure like this allows for an ongoing public discourse

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*racy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 32 (2009), reprinted in 30 IMMIGR. & NAT'LITY L. REV. 547 (2010) (applying insights from James Whitman's work to the immigration regime).

<sup>9</sup> See, e.g., CHERYL SHANKS, IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890-1990 239 (2001).

<sup>10</sup> Other prominent structural factors include the United States' relative power over countries that send large numbers of migrants to its borders, and the United States' relatively idiosyncratic relationship to rights in general. See *infra* Part II.

<sup>11</sup> See, e.g., LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 94 (2006) (discussing the universality of the consensus against non-citizen voting rights). This exclusion from representation is not without powerful dissenters. See, e.g., Abizadeh, *supra* note 2, and accompanying text. See also Fan, *The Immigration-Terrorism Illusory Correlation and Heuristic Mistake*, *supra* note 3, at 35 (observing that unrepresented or underrepresented groups are unrealistically depicted in political rhetoric, in part because of their lack of political representation). Bosniaik also notes that voting in the United States was not always restricted to citizens. See BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 11, at 191.

<sup>12</sup> See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968-973 (1995) (presenting an array of government interventions intended to produce changes in social meaning of various sorts. The examples show that legal interventions seeking to change social meaning must be exquisitely sensitive to social context; intervenors must understand clearly how the behavior they seek to change operates in the social world and use law surgically if they are to shift the norm successfully.).

<sup>13</sup> I develop this idea as a concrete policy proposal in a companion piece. See Daniel I. Morales, *An Immigration Jury* (unpublished manuscript) (draft on file with author). In the manuscript I set out procedures through which a twelve-citizen jury would decide whether deportable immigrants eligible for discretionary relief from deportation under current law, would be granted such relief, and defend this model against potential criticisms.

about immigration. Rather than putting off until moments of crisis the discussion about who should or should not be a member of our community, a legal institution like the jury procedure would allow the conversation to continue even when immigration is not at the fore of public consciousness. Sustaining a rigorous and concrete conversation about membership is critical because acting with more generosity towards people who are not citizens hinges in part on expanding the boundaries of our society's moral concern. To create this expansion reformers must overcome deeply ingrained social intuitions, biases, and institutional structures that presently dictate who does or does not belong. That kind of change cannot happen episodically.

Second, empowering citizens to decide the fate of long-standing migrants in a legally regulated way makes concrete what is often a very abstract discussion. Providing citizens cause to understand the realities of deportation on migrants' lives is an important antidote to migrants' lack of formal political representation. This practice provides an alternative channel for on-the-ground knowledge of the regime's effects to enter into political discourse. Lastly, a procedure like an immigration jury engages citizens at the ground level, where they may be susceptible to reconsidering prejudices in a way they are not when told to do so by advocates, like national politicians, who are often perceived as socially remote and speak in general terms. Ideally, such exposure leads to knowledge, which may lead to action. If immigration reforms are to have a durable impact on the direction of the immigration regime, they will have to deploy legal tools in ways that provide a foundation for social movements to build upon from the bottom up.

Rather than rely principally on courts to quash the democratic will—through means such as *United States v. Arizona*,<sup>14</sup> and related suits<sup>15</sup>—or harness it every so often at moments of crisis (as with comprehensive immigration reform), reformers should imagine and advocate for legal procedures that are “little ‘d’” democratic: procedures that seek to build sustainable support for pro-migrant policies over time by persuading citizens that migrants are not the threat to citizens' welfare that the citizenry believes them to be, or that migrants are also members of society deserving citizens' moral and political concern. The immigration jury accomplishes this, for instance, by requiring citizens to take in a migrant's story along with her faults and unlawful acts and decide whether she is a member or not. This process, among other things, institutionalizes a civil discussion about membership norms.

My argument for a new relationship between immigration reform and the democratic will proceeds in four parts. Part I uses Justice Scalia's oral dissent in *United States v. Arizona*, in which he criticized President Obama's grant of discretionary relief to certain young undocumented migrants, to showcase the complexity of the immigration regime. In particular, the dissent highlights how marginal improvements in the character of the regime can stoke simmering anti-immigrant resentment among a broad swath of the polity. These reactions should not be ignored because they can eventually make their way into law. Part II surveys some recent legal and

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<sup>14</sup> 132 S.Ct. 2492 (2012). This was the case challenging Arizona Senate Bill 1070, a law enacted in 2010 that created policies that broadened the state's abilities to enforce immigration laws within the state. The Supreme Court nullified three sections of the law, which “were sections making it a crime to be in Arizona without legal papers, making it a crime to apply for or get a job in the state, or allowing police to arrest individuals who had committed crimes that could lead to their deportation.” *Case Files: Arizona v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/arizona-v-united-states/> (last visited Jan. 31, 2013).

<sup>15</sup> A coalition of organizations that includes the Mexican American Legal Defense and Education Fund continues to oppose the implementation the Arizona Law at issue in Arizona. See, e.g., *Friendly House v. Whiting*, 846 F.Supp.2d 1053 (D. Ariz. 2012) (showing that plaintiff's representation includes attorneys from organizations like the Mexican American Legal Defense and Education Fund, the National Immigration Law Center, and the Asian American Justice Center).

scholarly evidence that describes how the immigration regime perpetuates its harsh character over time. This analysis clarifies that the views of the citizenry about immigration compose the structural force most amenable to change because those views are potentially malleable and have political power. Part III develops and defends the claim that changing what citizens “know” about immigration is the key to moving the regime, discussing what role law ought to play in that process, and describing the forces that currently shape what citizens know about immigration. Part IV provides some guidance to reformers who are persuaded that the relationship between immigration reform and the democratic will should be reconsidered. In particular, I discuss some theoretical tools that might be used to help change what citizens know about immigration, and describe where application of such tools would be most effective at altering the trajectory of the regime.

Many, perhaps most, immigration scholars are convinced that allowing for more porous borders and more solicitous, citizen-like, treatment of migrants is in the best interest of all stakeholders and conforms to utilitarian norms like global economic welfare maximization, as well as headier norms like justice.<sup>16</sup> However, these scholars’ vision of change can become real only if the citizens of rich democracies are convinced of its merit. Persuasion in democratic societies happens through public discourse, and public discourse about immigration in the United States is remarkably deficient. Simple fiat, force-of-logic, Constitutional Law,<sup>17</sup> or international human rights principles cannot force this conversation to grow or channel it in a particular direction.<sup>18</sup> Moreover, political discourse about a group, like migrants, that is not a formal part of the polity requires careful and precise mechanisms for adequately representing the views and needs of such outsiders. Without those kinds of reforms the harsh, multi-decade trend in the immigration regime is likely to continue.

## I. THE ENTRENCHED IMMIGRATION REGIME AND THE DEMOCRATIC WILL: SYMPTOMS

### A. *The Shape of the Entrenched Immigration Regime*

Advocates of migrants’ rights or of immigration reform have recently witnessed two important victories in the United States. The Supreme Court largely overturned a law passed by the State of Arizona entitled Senate Bill 1070 (“S.B. 1070”) which sought to enact a state-directed

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<sup>16</sup> See Howard Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT’L L. & FOREIGN AFF. 371, 373 (1998-99).

<sup>17</sup> See, e.g., Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 1 (forthcoming 2013), available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1551898](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1551898) (tracing the decline of rights-based arguments as an effective legal strategy for securing better treatment of migrants and arguing that the decline “might reflect a decreased willingness to recognize non-citizens as members of civil society”).

<sup>18</sup> See Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 COLO. L. REV. 1361 (1999) (skeptically examining the use of international human rights norms to bolster pro-migrant arguments, and noting that a problematic feature of international human rights arguments is that they eclipse the interests of citizens). See also Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 152 (2001) (articulating that rights in the United States are in an important sense subordinate to the democratic will); Morales, *In Democracy’s Shadow*, *supra* note 8, at 51-53 (describing the internal logic of domestic American and international law that prevents the robust expression of human rights against the democratic will).

immigration enforcement policy labeled “attrition through enforcement.”<sup>19</sup> The intent of the law was to enforce federal and state law in a way that made Arizona a very unpleasant place to be an undocumented immigrant.<sup>20</sup> Significantly, the Supreme Court’s action potentially affects a wide swath of states that had passed laws copying S.B. 1070.<sup>21</sup>

A few weeks before the Supreme Court ruled in *Arizona*, President Barack Obama agreed to grant a form of executive relief from prosecution for immigration violations, called deferred action, to a group of young, educated immigrants, commonly referred to as DREAMers.<sup>22</sup> The executive action was designed to grant this most sympathetic group of “illegal” immigrants the ability to remain in the United States unperturbed by the threat of deportation.

These victories will improve the lot of migrants to some degree, but they may also produce political conditions that will ultimately further the harsh trajectory of the regime. We might initially be inclined to think of the President’s grant of deferred action and the decision in *Arizona* as wins for migrants’ rights. However, a closer examination reveals the harsh immigration regime reconstituting itself in response to such legal victories. Because majoritarian sentiments largely remain anti-“illegal” immigrant,<sup>23</sup> those sentiments—aided by the exclusion of migrants from electoral politics—may eventually create policies that push back against such pro-migrant legal victories, via the other structural forces operating in the regime. This sets the stage for the next ratchet in immigration harshness to be achieved.<sup>24</sup> The anecdote and analysis that follow illustrate

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<sup>19</sup> S.B. 1070 49<sup>th</sup> Leg., 2d Sess. (Ariz. 2010).

<sup>20</sup> For example the still-valid “show-me-you-papers” provisions mandate immigration status checks pursuant to lawful police stops, detentions or arrests where “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” See *Arizona*, 132 S.Ct. at 2515 (citing S.B. 1070 § 2(B)).

<sup>21</sup> Alabama, Georgia, Indiana, South Carolina, and Utah passed laws regulating undocumented migration that are similar to S.B. 1070. See Lawrence Downes, *When States Put Out the Unwelcome Mat*, N.Y. TIMES, Mar. 11, 2012, at SR10, available at <http://www.nytimes.com/2012/03/11/opinion/sunday/when-states-put-out-the-unwelcome-mat.html>.

<sup>22</sup> DREAMers are the intended beneficiaries of the Development, Relief, and Education for Alien Minors Act, a version of which is currently pending in the House and the Senate. See DREAM Act of 2011, H.R.1842, 112<sup>th</sup> Cong. (2011) (referred to H. Subcomm. on Immigration Policy and Enforcement, June 1, 2011); DREAM Act of 2011, S. 952, 112<sup>th</sup> Cong. (2011) (referred to S. Comm. on the Judiciary, Subcomm. on Immigration, Refugees and Border Security, June 28, 2011). The DREAM Act would authorize the Secretary of the Department of Homeland Security to grant lawful permanent resident status to an undocumented immigrant who “(1) entered the United States on or before his or her 15<sup>th</sup> birthday and has been present in the United States for at least five years immediately preceding this Act’s enactment, (2) is a person of good moral character, (3) is not inadmissible under specified grounds of the Immigration and Nationality Act, (4) has been admitted to an institution of higher education (IHE) in the United States or has earned a high school diploma or general education development certificate in the United States, and (5) was age 32 or younger on the date of this Act’s enactment.” H.R.1842 § 3.

<sup>23</sup> See *infra* note 194 (discussing the unfavorable disposition of Americans to immigrants who entered unlawfully).

<sup>24</sup> The prospect of the passage of comprehensive immigration reform that grants amnesty to the millions of migrants who lack legal status does not radically alter this analysis. Note that the possibility of granting any relief to migrants is a consequence of the years of record-level deportations under the administrations of George W. Bush and President Obama. See Alan Gomez, *Obama Administration Sets Deportation Record: 409,849* USA TODAY (Dec. 21, 2012, 5:27 PM), <http://www.usatoday.com/story/news/nation/2012/12/21/record-2012-deportations/1785725/> (noting that “[f]or the fourth year in a row, the Obama administration has set a record for the number of people it deported.” As of the press date the administration had deported 409,849 people in the year 2012 alone.); Molly O’Toole, *Analysis: Obama Deportations Raise Immigration Policy Questions*, REUTERS (Sept. 20, 2011, 8:21 AM), <http://www.reuters.com/article/2011/09/20/us-obama-immigration-idUSTRE78J05720110920> (documenting that the Obama administration has “deported about 1.06 million [people] as of September 12, [2011], against 1.57 million in [President George W.] Bush’s two full presidential terms).

these points.

On May 28, 2012, more than ninety immigration law professors (including this author) sent a letter to President Obama spelling out his authority to grant administrative relief to potential beneficiaries of the Development, Relief, and Education for Alien Minors “DREAM” Act that was then stalled in Congress.<sup>25</sup> The letter took no position “on the policy dimensions of a decision to exercise or to not exercise this authority,”<sup>26</sup> instead simply listing the multiple legal bases by which the President might do so if he chose. Choose he did. Two weeks later, in the White House Rose Garden, the President announced that exercising this authority was “the right thing to do.”<sup>27</sup> Speaking of the undocumented persons who would benefit, the President emphasized “[t]hey are Americans in their heart, in their minds, in every single way but one: on paper,” and that granting relief to these *de facto* citizens is in the interests of the whole country “because these young people are going to make extraordinary contributions, and are already making extraordinary contributions, to our society.”<sup>28</sup>

The Rose Garden speech made another appearance on June 25, 2012 when Justice Scalia quoted from it disapprovingly in the bench statement he delivered prior to issuing his written dissent in *Arizona v. United States*.<sup>29</sup> Justice Scalia stated that the President may believe that

exempting 1.4 million illegal immigrants [from prosecution] . . . is ‘the right thing to do’ in light of Congress’s failure to pass the Administration’s immigra-

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Additionally, any reform package will reaffirm the enforcement-first approach that the record deportation levels reflect. See Mark Lander, *Obama Hails Bipartisan Plan to Overhaul Immigration*, N.Y. TIMES, Jan. 30, 2013, at A1, available at <http://www.nytimes.com/2013/01/30/us/politics/obama-issues-call-for-immigration-overhaul.html?hp>. Both the Obama administration’s framework for immigration reform and that of the bipartisan group of senators includes more border enforcement, increased employer enforcement, along with temporary worker visas, an amnesty and other provisions. See Ashley Parker, *Senators Call Their Bipartisan Immigration Plan a ‘Breakthrough,’* N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/us/politics/senators-unveil-bipartisan-immigration-principles.html>. Office of the Press Secretary, *Fact Sheet: Fixing our Broken Immigration System so Everyone Plays by the Rules* (Jan. 29, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules> [hereinafter *Fact Sheet*]. This enforcement-first approach reinforces the negative social perception of immigrants, and that perception contributes to the broadly unforgiving character of the regime: the enforcement apparatus signals strongly that unlawful migration is morally reprehensible. See *infra* Part II.B. (discussing the phenomenon of an “enforcement feedback loop”); Morales, *In Democracy’s Shadow*, *supra* note 8, at 151. Enacting comprehensive immigration reform in the manner that is politically palatable at present would contribute to the structural dynamic that I argue works to maintain the harsh character of the regime over the long run. This dynamic must be disrupted through democratic channels, if the longer-term goals of the most ambitious immigration reformers, such as the free-movement of persons, are ever to be achieved.

<sup>25</sup> Letter from various law professors to President Barack Obama (May 28, 2012) (regarding Executive Authority to Grant Administrative Relief for DREAM Act Beneficiaries), available at <http://nilc.org/document.html?id=754>.

<sup>26</sup> *Id.*

<sup>27</sup> President Barack Obama, Remarks on Immigration (June 15, 2012) (transcript available at [www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration](http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration)).

<sup>28</sup> *Id.*

<sup>29</sup> Bench Statement of Justice Scalia at 5, *Arizona v. United States*, 132 S. Ct. 2492 (No. 11-182) (June 25, 2012), available at <http://www.scotusblog.com/case-files/cases/arizona-v-united-states/>. I agree with Lani Guinier that oral dissents like Scalia’s have a “distinctive potential to root disagreement about the meaning and interpretation of constitutional law in a more democratically accountable soil. [. . .] [And thereby] spark a deliberative process that [. . .] [produces an] ongoing dialogue between constitutional law and constitutional culture.” Lani Guinier, *The Supreme Court 2007 Term Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14 (2008-2009).

tion laws . . . though Arizona might not think so. But to say, as the court does, that Arizona *contradicts federal law* by enforcing applications of federal immigration law that the president declines to enforce boggles the mind.<sup>30</sup>

A modified version of these statements was included in the text of the dissent.<sup>31</sup>

Surprising as it was for Justice Scalia to invoke an executive action implemented *after* the conclusion of oral argument,<sup>32</sup> the move effectively channeled the furor of citizens who disagree with the President. An early sign of the potential breadth of this boiled-over anger came as the Rose Garden announcement unfolded, when Neil Munro, a reporter for the conservative news website The Daily Caller, interrupted the President repeatedly during his speech to ask “what about American workers who are unemployed while you import foreigners?”<sup>33</sup> The President did not respond—though Justice Scalia eventually did. At the close of his written dissent, the Justice noted that thanks to the President’s administrative reprieve “[t]housands of Arizona’s estimated 400,000 illegal immigrants . . . will be able to compete openly with Arizona citizens for employment.”<sup>34</sup>

After the dissent was issued, Richard Posner criticized Justice Scalia<sup>35</sup> for acting intemperately in a politically-charged case and for failing to cite any empirical support for his contention that “Arizona bears the brunt of the country’s illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy.”<sup>36</sup> Posner correctly notes that each of these claims run against the consensus view of empirical social scientists,<sup>37</sup> but misses something

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<sup>30</sup> Justice Antonin Scalia, *Bench Statement from Arizona v. United States* (June 25, 2012), <http://www.scotusblog.com/case-files/cases/arizona-v-united-states/>.

<sup>31</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2521 (Scalia, J., dissenting) (commenting on remarks made by the President on immigration).

<sup>32</sup> See David A. Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41, 46, (2012) (“The majority never mentions that DHS policy directly, but Justice Scalia excoriated it, both in his dissent and in the oral summary that he read from the bench on the morning the decision was handed down.”).

<sup>33</sup> President Obama, Remarks on Immigration, *supra* note 28; Brian Stetler, *Reporter Interrupts Obama’s Statement*, N.Y. TIMES, June 16, 2012, at A16, available at <http://mediadecoder.blogs.nytimes.com/2012/06/15/reporter-interrupts-obama-during-statement-on-immigration/?ref=us>.

<sup>34</sup> *Arizona*, No. 11-182, slip op. at 22 (Scalia, J., dissenting).

<sup>35</sup> Richard A. Posner, *Supreme Court Year in Review: Justice Scalia is Upset about Illegal Immigration. But Where is His Evidence?*, SLATE.COM (June 27, 2012, 10:21 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/\\_supreme\\_court\\_year\\_in\\_review/supreme\\_court\\_year\\_in\\_review\\_justice\\_scalia\\_offers\\_no\\_evidence\\_to\\_back\\_up\\_his\\_claims\\_about\\_illegal\\_immigration.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration.html).

<sup>36</sup> *Id.*

<sup>37</sup> Posner wrote:

There are 10 million to 11 million illegal immigrants (for rather obvious reasons no one knows the exact number), and illegal immigrants are thought to amount to about 5 percent of the total labor force. Because they tend to do jobs that few Americans want, and because their wages are below average, many (though by no means all) economists believe that the illegal immigrants actually increase the wages of Americans (including legal immigrants). The reason is that the existence of a large body of low-wage workers increases the demand for goods and services both by reducing the cost of production and by their own purchases as consumers, and increased demand for goods and services translates into increased demand for labor and hence higher wages. This is not a certainty but seems a good guess of the effect of illegal immigrants. Illegal immigrants do receive some social services, but fewer than citizens do. It is unclear whether they commit more crimes on average

essential: the Justice wrote that Arizonans “feel”<sup>38</sup> that these effects of undocumented migration are real—not that they actually are real. Feelings are subjective; they have a reality irrespective of their grounding in objective fact. This word choice, in the context of a dissent that elaborated a robust scope for Arizona’s sovereign power, permits another interpretation of Justice Scalia’s argument. Scalia does not need empirical evidence of migrants’ effects on the state economy because the people of Arizona have spoken through the law. Whether Arizonans’ beliefs are definitively true is beside the point because the democratic process is itself an authoritative source of migrants’ effects. The implication of Scalia’s point is that Arizonans, as popular sovereigns of a sovereign state, may act legitimately against non-citizens based on their feelings about social conditions, even if those feelings do not align with external and objective fact.<sup>39</sup>

Justice Scalia is correct on this point, and the majority acts in part on this belief as well. Not only did the majority choose<sup>40</sup> to allow Arizona to move forward with the portion of the law that was most critical to implementing Arizona’s immigration policy of “attrition through enforcement,” even though a credible doctrinal basis for striking down that provision was available,<sup>41</sup> but it also lent further doctrinal support to Congress’ plenary authority over immigration law. While in this particular case the effect of reinforcing plenary authority is relatively pro-migrant, considered in total, plenary authority grants a huge degree of latitude to a governmental apparatus that is many orders of magnitude more powerful than the state of Arizona.

Note, too, that the federal law that *Arizona* held largely to supersede S.B. 1070 was built of the same psychic stuff as that local bill;<sup>42</sup> the United States Congress is not immune to passing

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than citizens; they may commit fewer. Of course, some illegal immigrants are criminals, and the Obama administration has decided to focus the very limited resources of the federal immigration enforcement authorities on catching and deporting the criminals. Focusing on them and leaving the law-abiding (law-abiding except for the immigration law itself!) illegal immigrants seems a defensible policy. And certainly state and local law enforcement can assist the feds in apprehending illegal immigrants who commit crimes (being in this country without legal authorization is unlawful, but, with some exceptions, it is not criminal); nothing in the *Arizona* decision prevents that.

Posner, *supra* note 35 (referring to Justice Scalia’s dissent in *Arizona v. United States*). The reality of criminal incidence in Arizona is much better than Posner lets on. Over the same period that immigration significantly increased in Arizona the incidence of property and violent crime actually decreased at a rate higher than the national average. See Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 927-29 (2011) (discussing Arizona’s above average crime rate decline over the period of increased undocumented migration); Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 SOC. SCI. Q. 531, 532-33, 548-49 (2010); see also Matthew T. Lee & Ramiro Martinez Jr., *Immigration Reduces Crime: An Emerging Scholarly Consensus*, in IMMIGRATION, CRIME AND JUSTICE 3-16 (William F. McDonald ed., 2010).

<sup>38</sup> *Arizona*, 132 S.Ct. 2492, 2522 (Scalia, J., dissenting).

<sup>39</sup> See *id.* at 2511-22; for discussion, see generally Martin, *Reading Arizona*, *supra* note 32.

<sup>40</sup> You need not ascribe to the view that law is indeterminate to concede that the Supreme Court had the leeway to rule differently on the show-me-your-papers provision. After all, two respected Ninth Circuit judges found that portion of the Arizona law unconstitutional. See *United States v. Arizona*, 641 F.3d 339, 348-54 (9th Cir. 2011) (finding that the show-me-your-papers provision violates obstacle preemption principles).

<sup>41</sup> See *id.*

<sup>42</sup> See Rick Su, *The States of Immigration*, WM. & MARY L. REV. 30-33 (forthcoming 2013), available at <http://ssrn.com/abstract=2084397> (describing how the anti-immigrant animus that led to the passage of California Proposition 187 shaped the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, which adopted the cooperative state enforcement arrangements that the *Arizona* majority found did not preempt the show-me-your-papers provision of S.B. 1070).

objectionable immigration legislation in response to inflamed feelings. Moreover, *Arizona*'s majority is effectively inviting Arizonans to take their feelings of being under siege to the state legislature—and they are likely to. As Rick Su has recently demonstrated, this sort of reactionary legislating is exactly what has happened in the past.<sup>43</sup> The translation of local concerns into federal immigration law is a feature of immigration law's entrenchment. Federal immigration law is not an autonomous and rational construction governed by a national interest; it instead reflects the aggregation of the views of Arizona and other like-minded states, tempered somewhat by the relatively pro-migrant positions of representatives from urban areas.<sup>44</sup> Nothing in the *Arizona* majority will prevent the feelings Scalia identifies from seeping into federal law eventually.

If Scalia is right about the *Arizona* zeitgeist, then we can spot a serious socio-political flaw in the majority opinion, which eviscerates a legal product of anxiety with a formal fact of constitutional structure.<sup>45</sup> The *Arizona* majority answered fears of being besieged with the psychically empty invocation of superior legal authority, *i.e.*, the supremacy clause and the derivative doctrines of federal preemption.<sup>46</sup> Justice Kennedy closed his opinion for the majority by stating, "Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law."<sup>47</sup> By using this doctrinal ground and rhetorical strategy, the majority implicitly told a political movement motivated by anxiety and fear to take its frustrations to a higher legislative body, but extended the invitation without challenging the motives of Arizonans or contesting the empirical basis for their beliefs. Arizonans, then, were invited to make their uncontested feelings into federal law, and given a sense of grievance from their overall loss before the court that could impel them to do so. The failure to take on the animus motivating Arizona's actions is particularly troubling because the part of the law that most directly intrudes on migrants' lives remains in effect. This key provision—the show-me-your-papers requirement<sup>48</sup>—allows the policy of attrition through enforcement intended by S.B. 1070 to remain operable. Despite Justice Kennedy's recognition that a deficient political discourse is at the root of why such laws are passed, his opinion for the majority does little to steer that discourse in a more productive direction.<sup>49</sup>

But the socio-political impact of this decision was, in some important way, pre-determined. Scalia's dissent gets at something essentially true about the status of the people's will in our particular constitutional culture. We can read Scalia's nostalgic vision<sup>50</sup> of Arizona as

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<sup>43</sup> *Id.*

<sup>44</sup> See Su, *supra* note 42, at 44-47.

<sup>45</sup> Given the posture of the case—a facial challenge to an unimplemented law—it is not clear that the Court had much doctrinal flexibility on this point.

<sup>46</sup> See *Arizona*, 132 S.Ct. at 2500-01 (Kennedy, J., writing for the majority).

<sup>47</sup> *Arizona*, 132 S.Ct. at 2511 (Scalia, J., dissenting). Mary Fan has argued that these kinds of arguments constitute post-racial proxies that courts use in a "post-racial era to dance around race" in ways that are destructive—that inflame or tolerate racialized sentiment—or constructive, by mitigating "polarization by making shared interests and social cohesiveness salient." Fan, *Post-Racial Proxies*, *supra* note 37, at 905.

<sup>48</sup> Section 2(b) of Arizona S.B. 1070 mandates that immigration status be checked during any lawful Fourth Amendment stop by police. The majority in *Arizona* permitted that provision to go into effect. See *Arizona*, 132 S.Ct. at 2510.

<sup>49</sup> *Id.* For some time, scholars and commentators have noted the degree to which the discourse of immigration diverges from the facts on the ground. See, e.g., Fan, *The Immigration Terrorism Illusory Correlation and Heuristic Mistake*, *supra* note 3, at 52 (citing then President George W. Bush's call on Congress to "make sure [immigration] rhetoric is in accord with our traditions").

<sup>50</sup> The bulk of Scalia's dissent resurrects the vision of territorial sovereign power that the Supreme Court en-

a sovereign territory in the law-of-nations sense as expressing more than a dry interpretative conviction about originalism or the virtues of federalism; it is also a statement about the legitimate reach of the democratic will. The sovereign state, Arizona, is entitled to assuage feelings of the majority of its citizens by seriously impinging on the lives of human beings in Arizona who are not citizens, or who share a common ethnicity with those who are not citizens. Put in theoretical terms, the democratic sovereign is entitled to the rights of the sovereign archetype: the king who serves by divine authority.<sup>51</sup> The *Arizona* majority does not strongly dispute this sovereign discretion, it just points to the authority of a *different* democratic sovereign, leaving intact the core logic of plenary power over immigration law and policy. The reach of the democratic will is unbounded, but only if it is expressed in the proper forum (or level). Even migrants' ostensible victory in *Arizona* thus sets the stage for the provision of federal legislative action that will be accorded a still-greater degree of deference by the Supreme Court.

The effects of the President's action mirrored the effects of the *Arizona* majority opinion in important ways. With a lack of political consensus in Congress to grant legal status to young and educated undocumented immigrants, the President did grant such status, at least provisionally, on his own authority. President Obama is democratically accountable for invoking this power, of course, yet it was arguably exercised in this election cycle because it had the potential to win the votes of Latinos while leaving undisturbed the votes of others, whether or not they agreed with the decision to grant relief. This invocation of executive authority does not reflect democratic sentiment as well as legislation would. Furthermore, the extension of this reprieve to undocumented children through executive order does relatively little to challenge the beliefs expressed by the pushy—and emblematic—conservative reporter in the Rose Garden, to whom Justice Scalia gave voice in his dissent. The relief, ironically, may thus build political support in the long run for more immigration restrictions and harsher treatment of migrants.

The process of conferring relief on migrants fails to adequately address, resolve, or dissipate broad and simmering resentments among significant segments of the polity who believe these migrants to be undeserving of the nation's regard. Indeed, relief often helps stoke such resentments; Justice Scalia's mind surely boggled in synchrony with a wide swath of the electorate who, as he accurately described it, feel themselves under siege.<sup>52</sup> These resentments are legitimized when they are subsequently democratically incorporated into legislation. Judicial deference to the legislation produced by these sentiments is one example of the great respect paid to

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acted in the long-since superseded case of *Pennoy v. Neff* in 1877. 95 U.S. 714, 722 (1877). However, that vision of despotic territorial authority still prevails to a significant degree in immigration law in the form of the Plenary Power doctrine. For a review of the Plenary Power Doctrine see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (citing and critiquing the key cases out of which the doctrine developed).

<sup>51</sup> See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (arguing, among other things, that the dramatically excessive punishment practices of early-modern Europe bolstered the idea of the sovereign's omnipotence).

<sup>52</sup> Justice Scalia's dissent can be viewed as a reflection of broad political opinion. Paul Kahn defends the methodology of treating judicial texts as reflective and productive of broader sociological currents by pointing out that

[s]tudying the Justices is not the legal equivalent of studying the string theorists in the physics department. There are deep resonances between what the judges and professors say, on the one hand, and some very basic beliefs central to a broadly available American culture of the rule of law, on the other. We find the elements of this set of beliefs in much of our public rhetoric, regularly deployed for over 200 years.

Kahn, *supra* note 18, at 152.

the democratic will in our legal system. This deference and the way it plays out in law, politics, and society should not be ignored by reformers, but often is.

Scholars question the legitimacy of the democratic will as it pertains to immigration, following in the footsteps of civil rights litigators by urging that judges should not accord perceived majority opinion too much weight because it is likely to infringe on minority rights. Courts are then asked to quash expressions of majority rule in order to recognize domestic or international rights that migrants, who are un- or underrepresented by the majority, are thought to bear. However, courts and scholars regularly treat the general polity's tendency toward nativism (the conception of the existing citizenry as different from, superior to, and closed to outsiders) as natural and ineluctable in an effort to justify those counter-majoritarian actions.<sup>53</sup> This occurs despite the fact that nativism, a socio-legal construction, can change or be overcome.<sup>54</sup>

Treating nativism as fixed and the democratic will as something that needs to be stifled is the wrong way to change the trajectory of the immigration regime. The primacy of the democratic will over the rights of migrants should largely be treated as an unchangeable fact. Though socially constructed, it is so entrenched in our legal culture and so benefits from robust normative support that it must be worked around, not against. Conversely, nativism or the related feelings of siege that Justice Scalia describes in his dissent are socio-legal constructions that are changeable and should be challenged. The reverse approach has denigrated the power of law in this area. American courts are unlikely ever to be the counter-majoritarian force that human rights advocates would want,<sup>55</sup> but courts' failure to be the consistent standard-bearers for migrants' rights does not mean that law is unable to make change here. Law is deeply implicated in the construction of migrants' denigration. For instance, the Hart-Celler Act was a single legislative act<sup>56</sup> that

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<sup>53</sup> See generally Fan, *Post-Racial Proxies*, *supra* note 37. Though Fan is attuned to the plasticity of nativism, particularly the way in which it has taken on different forms and acted on different groups through American history, and urges that courts can play some role in mitigating the salience of the nativist framework in political debates about immigration, even her sensitive account suggests the ineluctability of nativist surges in multi-racial societies. Her reliance on Carl Schmitt's political theory, which centers political life on "the fundamental distinction . . . [between] friend and enemy" underscores this point. *Id.* at 910. See also Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 165, 171 (Juan F. Perea ed., 1997) ("The terminology [of 'illegal aliens' in the Southwest, which does not identify immigrant nationality,] better masks nativist sympathies than the popular vernacular that it replaced—'wetbacks'—which is even more closely linked to Mexican immigrants").

Following Roberto Unger and Jacqueline Stevens, I treat social, legal and political arrangements as having a high degree of plasticity, though I acknowledge, extending the metaphor, that society is a plastic with a high tolerance for heat and pressure. See generally ROBERTO M. UNGER, *THE SELF AWAKENED: PRAGMATISM UNBOUND* 138, 193 (2007) (suggesting that society can be and is rearranged through the course of history); STEVENS, *supra* note 2 (advancing theories for the reorganization of society to prevent violent conflict by dissolving birthright citizenship, among other thought experiments).

<sup>54</sup> See generally Lessig, *supra* note 12 (offering a taxonomy of methods by which state action can alter social meaning).

<sup>55</sup> The situation may be different in Europe, for instance, where the traditions of administrative state authority and "the leveling up" of privileged treatment once reserved for the aristocracy have allowed for criminal punishment practices to take root that are more consistent with human dignity and human rights. This "sociology of dignity" means that rights creation by non-majoritarian institutions has a more robust legitimacy in Europe than the United States, despite Europeans' and Americans' shared desire for strict punishment of criminality. James Q. Whitman, *'Human Dignity' in Europe and the United States: The Social Foundations*, in *EUROPEAN AND US CONSTITUTIONALISM* 108 (Georg Nolte ed., 2004); See also Kahn, *supra* note 18, at 156-57.

<sup>56</sup> See Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of

rendered a group of persons “illegal.” While it may be dispiriting that law is used as a tool for negative social construction, it suggests that the popular sentiment that supports the regime may be much more plastic than scholars usually imagine. To the extent law has constructed nativism, then, law may be able to undo it.

The difficulty of this social, legal, and political revision should not be understated. Undoing social meanings is difficult because once they are constructed, through law or other means, they tend to be robust and self-sustaining.<sup>57</sup> Still, greater challenges have been met.<sup>58</sup> The key is to think creatively, strategically, and surgically, about how law can facilitate the disruption of processes that produce the immigration regime’s entrenchment. As I will argue in detail in the sections that follow, legal processes can create conditions that challenge citizens’ existing beliefs about migrants, while reaffirming the superiority of citizens’ claims to belonging over migrants’. Designing these kinds of legal interactions has the potential to produce a discourse that can change the trajectory of the regime in the long-run.

### *B. Problematic Prescriptions: Ignoring the Democratic Will in the Immigration Reform Literature*

The immigration reform literature has paid insufficient attention to the way that law’s interaction with social and political processes constructs a perception of siege among the citizenry that in turn creates demand for harsher laws. This neglect is surprising, since the dynamic between law and social processes accounts significantly for the progressive hardening of American immigration law<sup>59</sup> over the last three decades, as exemplified by the ever-expanding list of criminal offenses that render a noncitizen deportable, the race-based targeting of individuals for immigration enforcement, the conflation of immigration and terrorism,<sup>60</sup> and the substantial narrowing of avenues for administrative relief. While Scalia and his fellows might fall at the extreme end of the spectrum of views on immigration law, the fact that the regime has become consistently less generous and inhumane over time shows that the nativist position exerts a strong influence on the character of the regime. Scholarly neglect of the interaction between law and society must be remedied because social movements cannot do the heavy lifting alone; they need law to aid the process of change. But the peculiar status of migrants in the polity demands creative ways for law’s power to be harnessed towards this aim.

This descriptive gap sustains a normative sclerosis that is evident in scholars’ contributions to two loosely related kinds of efforts. The first is due-process-focused, building out of the United States’ strong commitment to due process for *persons*—as opposed to citizens exclusively—to urge even-handed enforcement practices, more adjudicative immigration resources, or bet-

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8 U.S.C.). The Act equalized racially discriminatory quotas but at the cost of limiting legal routes for seasonal migration from South and Central America. For an extended discussion on the Hart-Celler Act, see MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 263 (2006).

<sup>57</sup> See Lessig, *supra* note 12, at 998.

<sup>58</sup> See, e.g., STEVENS, *supra* note 2, at 22-25 (discussing how the entrenched institution of slavery was overcome, not as a result of economic factors primarily, but through social movements and changed moral norms).

<sup>59</sup> See, e.g., Miller, *supra* note 3, at 611 (noting the increasing criminalization of immigrants under immigration law); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn. L. Rev. 1827 (2007) (discussing the dissolution of borders between immigration law and criminal law, especially after September 11, 2001).

<sup>60</sup> See Fan, *The Immigration Terrorism Illusory Correlation and Heuristic Mistake*, *supra* note 3, at 33, 37 (discussing the deliberate juxtaposition in congressional debates of undocumented immigration with terrorism).

ter representation for migrants in legal proceedings.<sup>61</sup> The second effort articulates bases upon which immigrants should be entitled—by virtue of political or legal norms—to the American public’s munificence or regard.<sup>62</sup> This agenda usually urges that membership norms be made more expansive or elastic. Many scholars who contribute to furthering this normative agenda believe that open borders would lead to the most just immigration regime and a large number of those who do not agree still concur that global and domestic welfare would be enhanced by a significant degree of liberalization.<sup>63</sup>

The trouble with the due process effort is that it advocates the expenditure of the highly limited political capital of non-citizens on reforms that will have little to no effect on substantive law. Having a lawyer represent you in deportation proceedings will not help you to stay in the country if the substantive law provides no avenues for relief. The membership effort, for its part, has persuasively articulated the philosophical, moral, and legal grounds for expanded membership, but has not provided a roadmap for how to get there. Political theorist Jacqueline Stevens has similarly observed that those immersed in the related literature of cosmopolitanism fail to “contemplat[e] the institutional steps necessary . . . for their [universalist] aspirations to be realized.”<sup>64</sup> Likewise the membership effort is philosophically persuasive, but has no sustained or even consistently sporadic political traction; when the membership effort meets the structural forces that make up the immigration regime, it withers.<sup>65</sup>

One way to bridge these gaps may be to merge the due process reform and membership efforts into one. For example, having citizens act as jurors to decide whether to grant long-standing relief from deportation synthesizes the membership and due-process efforts by leveraging the more strongly rooted and less contested commitment to due process (*Padilla v. Kentucky*,<sup>66</sup> which granted a process right, did not cause the public stir that *Arizona* did)<sup>67</sup> to create the conditions that could pave the way for the membership effort to become politically feasible. Citi-

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<sup>61</sup> See *supra* notes 2-3, and accompanying text.

<sup>62</sup> For examples of scholarship illustrating this second effort, see Abizadeh, *supra* note 2; JOHNSON, OPENING THE FLOODGATES, *supra* note 2; Kanstroom, *supra* note 4; Heeren, *supra* note 17.

<sup>63</sup> For an extensive discussion of these scholars, see generally BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 11.

<sup>64</sup> STEVENS, *supra* note 2, at 74.

<sup>65</sup> Again, the passage of comprehensive immigration reform granting a path to citizenship to most undocumented immigrants does not alter this logic. President Obama, the actor most committed to making undocumented people citizens, has framed the path to citizenship for undocumented migrants as a function of administrative convenience. The Obama Administration press release making the case for citizenship states, “It is just not practical to deport 11 million undocumented immigrants living within our borders.” *Fact Sheet*, *supra* note 24. Not only is the necessity of citizenship framed in a way that provides little sustained normative basis for treating migrants with more dignity and care in the long run, other aspects of the comprehensive reform package Obama offers reassert the longstanding emphasis on border enforcement, and the increased recent emphasis on restriction within the interior. This kind of logic must be displaced entirely if the more radical versions of the membership project are ever to be realized. See generally, JOHNSON, OPENING THE FLOODGATES, *supra* note 2; STEVENS, *supra* note 2.

<sup>66</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>67</sup> The media was largely silent in the wake of the decision, particularly in comparison with the extensive coverage in the aftermath of the *Arizona* decision. See, THE OPPORTUNITY AGENDA, MEDIA ANALYSIS: COVERAGE OF *ARIZONA V. UNITED STATES*, A CHALLENGE TO THE CONSTITUTIONALITY OF ARIZONA’S SB 1070 (May 2012), available at [http://opportunityagenda.org/files/field\\_file/az\\_us\\_media\\_may\\_2012.pdf](http://opportunityagenda.org/files/field_file/az_us_media_may_2012.pdf) (analyzing the extensive media coverage of the *Arizona* decision); see, e.g., Adam Liptak, *Court Splits Immigration Law Verdicts; Upholds Hotly Debated Centerpiece*, N.Y. TIMES, June 25, 2012, at A1, available at <http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?pagewanted=all>.

zens decide whether an “illegal” migrant who paid taxes, has citizen children, and worked hard for many years in the United States should be permitted to remain here, despite unlawful status. In this process, citizens’ initial views about migrants as a category can be challenged. The decision also creates an institutional site from which migrants can seek to contest membership norms through social movements. This kind of reform works with the democratic will to build support for a more generous conception of who belongs in our political community.

Why have scholars failed to see the potential for such a merger before? Why are the long-term limitations of the usual approaches to reform neglected? Perhaps because immigration law scholars are immersed in our adversarial legal culture. Scholars who do normative work in this area usually do so because they are persuaded that justice demands more regard for migrants in the legal system. While this normative perspective has an objective grounding, as much as any normative view can, the advocate’s mantle still exerts a hold, even for those who adhere to studious scholarly neutrality. And that mantle often blinds scholars to the hard political reality that migrants are not citizens—even though most scholars agree that the distinction between the two ought to matter. Still, the blindness to these key facts causes scholars to forget that the consent of those who benefit from the existing system is required—absent armed revolutions—to instigate pro-migrant changes to the regime. In the United States this means that loosening border enforcement or devoting more resources to immigration hinges on persuading a significant cohort of Scalia’s fellows in the polity that immigrants are not the threat that they believe them to be. Breaking down the negative socio-political construction of migrants, encapsulated by Justice Scalia’s laundry list of the “evils” of illegal immigration,<sup>68</sup> is a predicate to durably changing membership norms and to making the regime less harsh.<sup>69</sup> Those who feel under siege as a result of undocumented migration must be persuaded of the empirical view—which most scholars doing normative work in this field already ascribe to—that their imperilment by immigrants is an exaggeration or a fiction.

But why not simply leave all this persuasion to the political process? What does law and, particularly, legal scholarship have to do with this? After all, Obama’s Rose Garden speech was a moving call to fellow Americans to acknowledge that DREAMers are American in all but name. There is reason to be skeptical of the power of this high-level discourse. Obama’s plea engages the polity at a level of abstraction far too removed to be effective at alleviating the kinds of fears and concerns that motivated Arizona and other states and localities to act to enforce existing immigration laws or create their own. Social science research tells us that stereotypes break down through a series of interpersonal encounters, for instance, by working closely with someone who is a member of a disfavored group.<sup>70</sup> But language barriers and segregation by occupation

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<sup>68</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2519 (2012) (Scalia, J., dissenting) (“What I do fear—and what Arizona and the States that support it fear—is that ‘federal policies’ of nonenforcement will leave the States helpless before those evil effects of illegal immigration . . .”).

<sup>69</sup> The predicate also applies to the adoption of a European Union-like regional scheme that combines regional economic investment, free trade, and liberalized migration. See JOHNSON, OPENING THE FLOODGATES, *supra* note 2, at 160-66 (discussing a European Union-like arrangement for the Americas).

<sup>70</sup> See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1101 (2006) (detailing the “social contact hypothesis,” which suggests that stereotypes and prejudice can be broken down with face-to-face interactions of individuals from different social categories). See also Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 757-58 (positing the existence of availability cascades, whereby “media coverage of gripping and unrepresentative incidents” creates durable and empirically invalid social beliefs about social phenomena). Mary Fan has discussed the applicability of this theory to views about immigration. See Fan, *The Immigration-Terrorism Illusory Correlation and Heuristic Mistake*, *supra* note 3, at 40-47; Fan, *Post-Racial Proxies*,

and residence inhibit these interactions. Absent an ongoing practice of persuasion at a micro-level, or a radical reduction in the social distance between citizens and migrants, the President's ability to successfully persuade those who favor a restrictive approach to immigration policy is severely compromised. Persuasion is also about the effective cultivation of empathy. The President's view, or the Supreme Court's, can be dismissed by the citizenry as representing the self-interested acts of the political elite. Contrast that to a small group of citizens deciding to grant relief to an "illegal" immigrant. Such an act is not as easily dismissed by a fellow citizen.<sup>71</sup> The empathetic distance the public imagination has to travel is lower, and the story of ulterior motive is harder to sustain. A citizen that grants relief as a jury member is just like the besieged citizen on whose behalf Scalia claims to be speaking.

The fact also remains that the exclusion of migrants from participation in our representative democracy produces a classic and extreme political-process problem. The courts' ability to address this problem is hampered by the fact that the exclusion of migrants from the polity has strong normative support, meaning that courts would be taking unpopular, counter-majoritarian corrective actions.<sup>72</sup> However, this limitation does not mean that law is impotent in this arena. We must think of how law can create conditions that could help to construct a lasting political majority that favors treating migrants more generously. The existing structural conditions are not conducive to this possibility.<sup>73</sup>

Yet aren't migrants beginning to advocate on their own behalf and to form just those kinds of coalitions?<sup>74</sup> Won't the political problem be resolved through a purely political solution?<sup>75</sup> Hasn't the re-election of President Obama brought some new urgency to immigration re-

*supra* note 37, at 943-44.

<sup>71</sup> The psychologist Daniel Kahneman observes that the structure of our cognitive processing is biased in favor of quick, non-deliberative judgments. This structure produces a well-documented series of systematic biases in decision-making that are difficult to combat. Difficult, however, does not mean impossible, and the psychology literature has documented methods to deploy our heuristic decision-making process to combat incorrect judgments. For instance, "surprising individual cases" contradicting long-held beliefs have "a more powerful impact" because they require an individual to resolve "the incongruity . . . [via] a casual story." DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 174 (2011). Additionally, "[p]ersonal experiences, pictures, and vivid examples are more available than incidents that happened to others, or mere words, or statistics." *Id.* at 130.

<sup>72</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (advocating that the Supreme Court should devote itself to majority governance while advocating for minority rights).

<sup>73</sup> The only structural element of the immigration regime that consistently works in migrants' favor is the expansive interpretation of the Fourteenth Amendment's birthright citizenship provision. That interpretation has consistently prevented the perpetuation of a racially denominated, intergenerational caste labor regime. For discussion, see Morales, *In Democracy's Shadow*, *supra* note 8, at 79-82.

<sup>74</sup> See Room for Debate, *Is Getting on the 'UndocuBus' a Good Idea?*, N.Y. TIMES (Aug. 1, 2012), <http://www.nytimes.com/roomfordebate/2012/08/01/is-getting-on-the-undocubus-a-good-idea> (featuring different commentators discussing the UndocuBus phenomenon and the implications of undocumented immigrants publically advocating on their own behalf).

<sup>75</sup> I am skeptical of the view that the growth of the Latino population within the citizenry guarantees a *durable* increase in political regard for those of a similar ethnic or racial background. Human beings have proven quite capable of generating self-serving distinctions among their fellows in an effort to protect the existing distribution of entitlements, like land or citizenship. A shared ethnicity is no guarantee of fellowship. For instance, co-ethnic employers can take advantage of the vulnerability of their employees. See, e.g., Millian Kang, *Manicuring Intimacies: Inequalities and Resistance in Nail Salon Work*, in *INTIMATE LABORS: CULTURES, TECHNOLOGIES, AND THE POLITICS OF CARE* 217, 222-23 (Eileen Boris & Rhacel Salazar Parreñas ed., 2010) (discussing the potential for abuse that arises in a co-ethnic employment environment). Likewise, the global history of slavery and racial conflict shows the creativity that human beings ap-

form? It is true that political movements by migrants are making headway. With young, undocumented migrants dramatically “coming out” in recent years to challenge the legitimacy of their illegal status, movements like UndocuBus, a bus full of undocumented immigrants that travels around the country building support for immigration amnesty,<sup>76</sup> and events like A Day Without an Immigrant, a kind of categorical general protest,<sup>77</sup> undocumented people are becoming more visible and that visibility is challenging their social construction as criminals and “takers.”

These tactics are part of the picture of social change, but I am skeptical that they will be sufficient particularly at furthering reformers’ most ambitious long-term goals. The movement for status and formal inclusion on behalf of undocumented people has patterned itself on the African-American Civil Rights movement, but has not grappled adequately with the fact that African-Americans advocated for *de facto* inclusion in the polity from a starting position of *de jure* membership. It is very different to argue to your fellow citizens that you are not being treated like a citizen ought to be for some arbitrary reason, than to say: I came here in violation of the laws that make up your social contract, but I have contributed to your society and now you should recognize me as a citizen. The latter argument runs roughly against the grain of public intuitions and norms of sovereignty in a way that citizen-grounded rights movements do not.<sup>78</sup> In addition to the usual problems presented by securing public goods to benefit disfavored groups, it also requires challenging what Linda Bosniak calls “normative nationalism”: the core norm that anchors the modern international system of nation states—a tall order indeed.<sup>79</sup> While “earned” inclusion—the idea that migrants’ contributions to the polity earn them better treatment—is the case that ought to be made to citizens it is unlikely to succeed in altering the character of the regime over the long run unless that narrative takes root among ordinary citizens.<sup>80</sup> To do this requires more than a cyclical large-scale discussion about migrants’ treatment every few decades. What is needed is a sustained, smaller-scale, discussion about the boundaries of membership in the body politic. That kind of conversation requires an institutional anchor, like having a jury decide the fate of long-standing undocumented migrants. Reformers need to devote attention to conceiving of ways of grounding and sustaining discussion about non-citizens.

Moreover, the visibility that migrants are embracing does not have the same meaning as the visibility harnessed in the Civil Rights movement. Despite the rhetoric of non-violence that

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ply to turn superficial differences between them into meaningful markers of substantive flaws that lower the worth of those so stigmatized. Certainly, the fact that the ancestors of all U.S. citizens, excepting Native Americans, were once migrants has not prevented the development of a fairly ungenerous immigration regime.

<sup>76</sup> See, e.g., Lawrence Downes, *The UndocuBus*, N.Y. TIMES (Sept. 5, 2012, 1:45 PM), <http://takingnote.blogs.nytimes.com/2012/09/05/the-undocubus/> (describing the Undocubus phenomenon).

<sup>77</sup> See, e.g., Anita Hamilton, *A Day Without Immigrants: Making a Statement*, TIME (May 1, 2006), <http://www.time.com/time/nation/article/0,8599,1189899,00.html> (describing the national day of protest, involving marches and worker boycotts, meant to draw attention to the “essential [role] [that immigrants play in] the U.S. economy and [that they] deserve the right to continue living and working [in the country]”).

<sup>78</sup> The fact that the DREAMers did not succeed in the legislature despite their characterization as sympathetic innocents by the Supreme Court in *Plyler v. Doe*, and in the President’s Rose Garden speech, underscores the difficulty. See generally, *Plyer v. Doe*, 457 U.S. 202, 220 (1982) (holding that discriminating children based on the legality of their immigrant status, over which the children had “little control,” violated the 14<sup>th</sup> Amendment); President Obama, Remarks on Immigration, *supra* note 27. Those on the UndocuBus probably face an even greater struggle, as they were aware of their legal violation when they immigrated, making them more culpable in the eyes of the citizenry.

<sup>79</sup> BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 11, at 153.

<sup>80</sup> For more on this concept of “earned citizenship,” see Ayelet Schahar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 140 (2011).

the Civil Rights movement embraced, it was actually seeking out violence in a very particularly way by seeking to create pictures of African-Americans suffering peacefully at the hands of white oppressors. This required a kind of situational goading of white officials to violently abuse them, and the corresponding training of movement activists not to reciprocate.

The immigration regime deploys violence through quiet, out-of-view, administrative and legal processes that often end with the removal of a person from United States territory. This distinction makes the immigration regime significantly harder to attack through protest movements. And any violence that migrants might bring upon themselves is still colored by the fact of their own (or their parents') unlawful conduct. The normative strength of the case for migrants' exclusion discounts the violence done to undocumented people in the same way that conviction for a criminal offense does in the American criminal justice system: "illegal" provides the same excuse for poor treatment that "criminal" does. While law and legal institutions have a critical role to play in the process of changing the trajectory of the immigration regime, they will have to be deployed in unconventional ways to do so effectively. As of now the operation of law and legal institutions contribute to the regime's harsh character.<sup>81</sup>

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<sup>81</sup> Of course, I am not the first to notice that something is amiss in the reform literature, though my diagnosis and prescription are distinctive. For example, Linda Bosniak has recently called on pro-immigrant progressive scholars to turn the tools of "critical social and political theory" usually deployed to destabilize the foundation assumptions of the immigration regime, "on our own ideas and practices . . . [in order to] recognize them as part of the social world we are engaged with and that we are studying." Linda Bosniak, *Arguing for Amnesty*, LAW, CULTURE AND THE HUMANITIES 1-4 (Jan. 19, 2012), <http://lch.sagepub.com/content/early/2012/01/06/1743872111423181.full.pdf>. Bosniak's primary concern is the critical neglect of the "underside" of crafting normative arguments for immigration amnesty for undocumented people. "As [pro-immigrant progressive] scholars elaborate reasons for moral concern, we are implicitly excluding some classes of people and some reasons for concern." *Id.* at 6. This exclusion through construction is problematic because it can frame immigration problems and solutions in ways that "may tie our hands down the line." *Id.*

Bosniak unpacks several other examples of this phenomenon in the piece and ultimately attributes them to a realist impulse among pro-immigrant progressive scholars with cosmopolitan dreams. Joseph Carens, Bosniak notes, argued that this impulse to realism is a necessary part of an ethical practice of norm development in the immigration context: "whatever we say ought to be done about international migration should not be too far from what we think actually might happen [and from] what we think our community might do." *Id.* at 10 (quoting Joseph Carens, *Realistic and Idealistic Approaches to the Ethics of Migration*, 30 INTERNATIONAL MIGRATION REVIEW 156, 157-58 (1996)). Bosniak approves of this statement but wants for it not to swallow other possibilities; she wants scholars to continue to pursue more idealistic "efforts to critique national border control . . . deportation [and] the 'national imagination,'" which reinforce politically constructed divisions within society like that between the citizen and alien. Bosniak, *Arguing for Amnesty*, supra note 81, at 11.

I largely agree with this critique and count myself among Bosniak's intended audience, though I find the diagnosis incomplete and wish to offer at least a partial prescription. Bosniak wants to encourage a practice and leave open a space. She wants scholars to be self-aware about the form in which progressive migration norms take shape in socio-legal discourse. She suggests that scholars maintain or expand a space in this intellectual community that is immune from having to discipline its normative imagination, to where new norms can be imagined without limitations by contemporary social realities. This suggestion may be unnecessary, as that literature appears to be alive and kicking: Jacqueline Stevens, Arash Abizadeh, Ayelet Schahar, Audrey Macklin, not to mention Bosniak herself, are actively engaged in the space of idealistic theory that Bosniak fears losing.

So, the lack of space or commitment to the cosmopolitan imagination is not the most pressing problem for the audience Bosniak addresses. What is urgently wrong is that the literature fails to account for how these theoretical discussions are to relate to the real world. The compromised "practical" scholarly arguments that Bosniak critiques are flawed in part because they are not executed with an eye towards the endgame. They are inevitably ad hoc and incompletely theorized because there is no framework for thinking about how society should or can move from here—the national imagination—to there—the world with more porous borders.

The next section builds support for my claim that immigration law is becoming increasingly punitive, and describes the contours of this deep-rooted and problematic phenomenon. It begins with a brief discussion of the recent landmark case, *Padilla v. Kentucky*, in which the Supreme Court held that the right to effective assistance of counsel is violated where a defense attorney fails to advise a criminal defendant of immigration consequences likely to result from a criminal conviction.<sup>82</sup> Generally, *Padilla* is seen as a significant victory for the immigration rights movement, as well as a hopeful sign of the Supreme Court's increased willingness to expand migrants' rights.<sup>83</sup> However, as this article suggests, the decision is better viewed as a troubling symptom of the immigration regime's progress along a punitive trajectory. Following an examination of *Padilla*, this article provides a sketch of the crucial features of this trend by surveying the work of a demographer and two political scientists.

## II. THE SHAPE OF THE ENTRENCHED IMMIGRATION REGIME

The immigration regime is entrenched, but it is not static. The practices that make up the regime are changing all the time, yet the changes are the product of a stable structural dynamic. That stability has ensured that the character of the regime is stable, too. The immigration regime may change, but the long-term trend is for migrants to be treated more harshly. Scholars have noticed this,<sup>84</sup> though their reform programs have not sufficiently accounted for it.

In this section, I develop the claim that the immigration regime is entrenched for structural reasons, namely, the way that political, social, and legal forces interact in response to the continuing migration of South and Central American citizens to the United States without its express permission. This is an intricate story that I will not exhaust in this article. My aim is instead to provide enough detail to reveal the lever that can alter the forces that reproduce the character of the regime.

As I will show, the citizenry is the key lever in the process of change: it has the free will<sup>85</sup> and political authority to move the regime in the direction scholars believe it ought to go. But as of now, the other structural forces at play have given citizens a distorted view of the do-

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The trouble is that "realists" are not realistic enough because their prescriptions for immigration change fail to account for the social and political processes that are required to bring the change they advocate about. The failure of such scholars to reckon with the reciprocal effect of the arguments for immigration change on the discourse of those with opposing normative commitments, like the citizens for whom Scalia spoke in his Arizona dissent, is just one example of a more general myopia. Having President Obama grant deferred action to DREAMers because they cannot be thought responsible for violating the law as children, not only discounts the moral worth of the non-DREAMer, it also opens up space for an argument in the opposing camp that urges that the executive action was undemocratic or an act of bad faith. Feeding this argument also "tie[s] our hands down the line." Bosniak, *Arguing for Amnesty*, *supra* note 81, at 6. If pro-immigrant progressive scholars accept that democracy is something worth preserving and enriching, then they have to imagine paths to the cosmopolis that work within democratic norms. Prescriptions for immigration change must account for the social and political processes that will bring that change about. Immigration scholars, then, need to rely on a fuller account of social facts, but resist deferring to all of them as if they were laws of physics.

<sup>82</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

<sup>83</sup> See Kanstroom, *supra* note 4, at 1463.

<sup>84</sup> See, e.g., *supra* notes 59 and 60.

<sup>85</sup> I use the phrase "free will" to describe the ability of human beings to change their minds about the world and to convey the link between long-standing moral and religious views of human agency and the more contemporary discussion of social plasticity in the literature on social change. See, e.g., UNGER, *supra* note 53, at 138, 193 (theorizing on the processes underlying social change).

mestic impact of migrants' presence. Finding a way to correct this distortion and bring citizens' views into line with the empirical reality of migrants' effects may disrupt the structures that cause entrenchment.

#### A. *Padilla v. Kentucky: Evidence of Immigration Law's Harsh Trajectory*

The Supreme Court's grant of habeas corpus relief in *Padilla v. Kentucky* has been hailed as a landmark moment in the judicial recognition of immigrants' rights.<sup>86</sup> Yet, the Supreme Court's ineffective assistance finding still left José Padilla, a 40-year legal permanent resident of the United States and Vietnam War veteran, in legal limbo when it came to the relief that mattered most: the ability to remain in the United States.<sup>87</sup> And even the broader importance of the rule that *Padilla* ushered in, requiring defense counsel to advise clients on the clear deportation consequence of criminal convictions, has been deemed by at least one prominent scholar not to amount to meaningful procedural protection.<sup>88</sup> *Padilla* exemplifies the problem with the due-process approach: it has no effect on the substantive law that makes deportation a virtually automatic consequence of criminal conviction.

Whether *Padilla* is effective or not in its stated purpose is of less interest to me than what it reveals about the limits of migrants' rights in a democracy committed to the idea that citizenship should make a difference in the allocation of legal protections and social resources.<sup>89</sup> That *Padilla* is both so paltry in the actual protection it affords non-citizens—even long-standing ones who served their country honorably in the military—and yet can still be hailed as a great triumph of immigrants' rights, underscores that the courts lack the authority to serve the role in immigration reform that they did in the African-American Civil Rights movement. Without courts as a counter-majoritarian check, and with non-citizens unrepresented in electoral politics,<sup>90</sup> methods of changing the path of immigration law are highly constrained.

This constraint is clearly demonstrated in *Padilla*, in the way the Supreme Court grounded the right of a migrant to accurate advice on clear immigration consequences in the increasing harshness of the immigration regime. As Justice Stevens put it:

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses

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<sup>86</sup> Kanstroom, *supra* note 4, at 1463 (describing the Supreme Court's recognition as "pathbreaking" and "very significant").

<sup>87</sup> On remand from the Supreme Court the Kentucky Court of Appeals found that Padilla was prejudiced by his counsel's failure to give him correct advice about the immigration consequences of his guilty plea, and ordered the lower court to vacate the conviction. See *Padilla v. Commonwealth*, 381 S.W.3d 322 (Ky. App. Ct. 2012). Still, Padilla may be prosecuted anew on the same charges; if convicted he would again be deportable. See Cesar Garcia Hernandez, *KY CT APP: PADILLA'S CONVICTION VACATED*, CRIMMIGRATION (Oct. 25, 2012, 4:00 AM), <http://crimmigration.com/2012/10/25/ky-ct-app-padillas-conviction-vacated.aspx>.

<sup>88</sup> See Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1395 (2011) (noting that *Padilla* fails to improve the "limited procedural possibilities for avoiding or mitigating" the deportation consequences of a criminal conviction).

<sup>89</sup> See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 5 (2006) ("[N]oncitizens are not always treated like citizens. . . . 'all men are created equal' only if those 'men' are not noncitizens.").

<sup>90</sup> See Benton, *supra* note 2, at 407 (observing that non-citizens are "definitionally dominated in the [democratic] tradition as they are not citizens, and citizenship is necessary in order to be non-dominated").

and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.<sup>91</sup>

Stevens continued, cataloging in detail the legislative perambulations that have facilitated ever-higher level of deportations.

Changing times, laws, or practices, can of course produce responses by the Supreme Court meant to ensure that constitutional principles keep up with contemporary practices and mores. But such reactions also indicate that the state of affairs producing the constitutional reaction is relatively durable; the Court is unlikely to stake out a new right if the practice that produces the need for constitutional protection is temporary. Indeed, part of the rationale for finding the new right articulated in *Padilla* hinged on the fact that the defense bar had for many years been recommending that defense attorneys advise clients on the collateral immigration consequences of convictions, itself an indication that the problem was one of longstanding and increasing importance to criminal defendant clients. In *Padilla*, then, the fact that a majority of the Supreme Court felt that a constitutional innovation was required because of the progressively more ample grounds upon which deportation could be triggered, in addition to the increasingly restricted means by which those effects could be commuted, indicates that an ungenerous legal posture towards migrants is strongly anchored.

*Padilla* also showcases another problem with the migrants’ rights framework: it has a negative impact on social meaning. Because migrants cannot be full rights-holders as a result of their position outside the polity, the Court ties rights-generation to a small subset of statuses. In *Padilla*, the relevant status that triggers the right to accurate information from legal counsel is not “migrant,” but instead “criminal.” The right to advice about immigration consequences is thus a function of a migrant’s presence in criminal proceedings. A migrant does not have a right to legal advice in civil deportation proceedings commencing after a criminal sentence is served, for example.<sup>92</sup> *Padilla*, then, constructs migrants as *criminal* rights-bearers, not as rights-bearers in general.<sup>93</sup> That construction of migrants as rights-bearers in the criminal context is problematic, of course, because the social association of migrants with criminality is precisely what needs to be overcome if the character of the immigration regime is to change.

And *Padilla* is not the only “migrants’ rights” decision that came with a price. The Supreme Court’s last such landmark decision, *Plyler v. Doe*, took similar form.<sup>94</sup> While *Plyler* held that a Texas law which sought to prevent the enrollment of children in public schools based on

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<sup>91</sup> *Padilla v. Kentucky*, 130 S.Ct. 1473, 1478 (2010) (internal citations omitted).

<sup>92</sup> Some scholars maintain that this right might logically follow from the reasoning in *Padilla*. See, e.g., Kanstroom, *supra* note 4, at 1482 (“Deportation—which by itself is not protected by the Sixth Amendment—flows from and comes after a criminal conviction, but it is now viewed as an inextricable part of the criminal process.”). But see, e.g., Legomsky, *Transporting Padilla to Deportation Proceedings*, *supra* note 4, at 14 (“The Sixth Amendment is . . . expressly limited to ‘criminal prosecutions,’ and even the Supreme Court in *Padilla* depicted deportation proceedings only as a criminal-civil hybrid, not a subspecies of criminal proceedings.”).

<sup>93</sup> This could be said of any right. The difference with migrants is that the situations in which they bear rights in the United States are so narrow that the meanings of those particular contexts in which rights are granted has a defining effect.

<sup>94</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

their immigration status violated equal protection, this “ultimate”<sup>95</sup> migrants’ rights decision was “structured . . . around an opposition between the ‘innocent children’ and their culpable parents,” who “‘elect to enter our territory by stealth and in violation of our law,’ and who, as a result, ‘should be prepared to bear the consequences.’”<sup>96</sup> The right of children to attend public schools irrespective of immigration status was thus grounded not in their status as persons, *per se*, but in the fact that they lacked the scienter required to make them culpable lawbreakers—a state of mind that their parents clearly met, in the Court’s view.<sup>97</sup> The parents were painted by the court in starkly negative terms in order to make their children innocents worthy of rights.<sup>98</sup>

The elaboration of migrants’ rights via the Fourteenth Amendment’s applicability to persons—not only citizens—can obscure the difficulties presented in attempting to turn the domestic rights of persons into a species of international human rights. Additionally, we can see a pattern in judicial and executive acts of “rights” construction: granting relief to some sub-group of migrants usually requires the construction of another sub-group unworthy of the same munificence.

*Padilla* is a symptom of the immigration regime’s entrenchment. The fact that there is a need for a constitutional response to the inflexibility of the immigration regime is evidence that the inflexibility is relatively permanent. And the need to maintain a legal distinction between citizens and migrants in law and politics usually requires that relief from the immigration regime’s harshness be granted by drawing a line between “worthy” and “unworthy” migrants. This line-drawing has the negative *social* implication of generally re-affirming the case for the immigration regime’s harshness, because that character is grounded in the social belief that migrants are threatening or less worthy of citizens’ regard than fellow citizens. In this way, the process of counter-majoritarian rights-generation can involve the affirmation of social beliefs that make future rights-generation more democratically challenging. Drawing the line in this way eventually tarnishes migrants and migration in general because migrants are all “other,” in some sense, from the citizenry’s perspective.

### B. *The Enforcement Feedback Loop*

The Supreme Court’s assessment of immigration law’s entrenched punitiveness is supported by statistical analysis. Demographers Douglas Massey and Karen Pren cross-referenced legislative changes in immigration law over the past sixty years with an enormous data set of social statistics collected over the same period. From a series of regression analyses they conclude, among other things, that

the rise of illegal migration, its framing as a threat to the nation, and the resulting conservative reaction set off a self-feeding chain reaction of enforcement that generated more apprehensions even though the flow of undocumented migrants had stabilized in the late 1970s and actually dropped during the late

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<sup>95</sup> BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 11, at 66.

<sup>96</sup> *Id.* (quoting *Plyler*, 457 U.S. at 220, 224).

<sup>97</sup> *Plyler*, 457 U.S. at 220. Bosniak is correct to point out that the federal government also received judicial opprobrium, given its failure adequately to enforce the southern border or prevent migrants from obtaining jobs. However, that criticism is really the same side of the migrant/criminal coin: Increased border policing, as well as de-legitimizing migrant labor by forbidding employers to hire migrants who lack status, feeds into the social meaning of migrants as lawbreakers and criminals. See BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 11, at 66.

<sup>98</sup> BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 11, at 68.

1980s and early 1990s. . . After the late 1970s . . . anti-immigrant sentiment increasingly fed off itself to drive the bureaucratic machinery of enforcement forward to new heights, despite the lack of any real increase in illegal migration.<sup>99</sup>

The process that generates the escalating punitiveness noted by Justice Stevens in *Pardilla* is a feedback loop, whereby increased border apprehensions produce a threatened polity that demands more apprehensions. The problem is that the apprehensions do not mitigate the threat—they only confirm the rightness of feeling threatened. In this way, enforcement does little but stoke demand for more border apprehensions.

In response, the government devotes increasing amounts of resources or man-hours to border enforcement, “independently of the actual number of illegal border entries.”<sup>100</sup> Between 1977 and 1995, “the number of [Border Patrol hours] doubled, the number of Border Patrol Agents increased 2.5 times, and the Border Patrol budget rose by a factor of 6.5. During and after the 1970s . . . the border build-up was increasingly disconnected from the actual traffic in illegal migrants.”<sup>101</sup> Enforcement action breeds a desire for more enforcement, even as the underlying phenomenon that triggered the initial response declines in significance.<sup>102</sup> Strikingly, the fact of declining unlawful entries does not enter political or legal consciousness.

The dynamic Massey and Pren describe can also be elaborated by means of William Eskridge’s and John Ferejohn’s theory of statutory entrenchment.<sup>103</sup> Unlike the Massey and Pren model, which illustrates the dynamic reaction between popular sentiments and the political and administrative systems’ responses to it, statutory entrenchment theory focuses on the ways in which heuristics build up among legislators and fix legislative approaches to addressing particular social problems. A sufficiently reflexive approach to legislative problem-solving can be described as either morally or cognitively entrenched: cognitive entrenchment takes place “where a legal model is understood as appropriate and rational[;] . . . legislators perceive these cognitively entrenched models to make sense and represent smart lawmaking,”<sup>104</sup> although whether this is accurate from an external point of view is a different question.<sup>105</sup> Moral entrenchment, on the other hand, occurs “where lawmakers consider the model to be just and right.”<sup>106</sup> These types of models “at the least serve as a signal to supporters that the lawmakers are paying attention to their beliefs.”<sup>107</sup>

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<sup>99</sup> Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 *POPULATION & DEV. REV.* 1, 9 (2012).

<sup>100</sup> *Id.* at 13.

<sup>101</sup> *Id.* at 14.

<sup>102</sup> As Massey and Pren put it, their model suggests that between “1965 and 1995 rising apprehensions produced a conservative [pro-aggressive enforcement] reaction that led to strengthened enforcement and hence more apprehensions, further exacerbating the conservative reaction.” *Id.* For a legal-cultural description of this self-reinforcing phenomenon see also Morales, *In Democracy’s Shadow*, *supra* note 8, at 69.

<sup>103</sup> See generally John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 *YALE L. J. ONLINE* 325, 326 (2011) (adapting and extending the theory of statutory entrenchment developed in WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 7 (2010)).

<sup>104</sup> Skrentny & Gell-Redman, *supra* note 103, at 328.

<sup>105</sup> Skrentny & Gell-Redman, *supra* note 103, at 329 n.17.

<sup>106</sup> Skrentny & Gell-Redman, *supra* note 103, at 329.

<sup>107</sup> Skrentny & Gell-Redman, *supra* note 103, at 329.

In essence, there are different types of default heuristic responses among legislators, and the more entrenched the responses are, the more difficult it will be for interest groups who seek outcomes running against the assumptions embedded in these heuristics to mount arguments that can prevail in law. Scholars identify the border enforcement model as both “cognitively and morally entrenched, and the entrenchment is deep,”<sup>108</sup> despite the border enforcement model’s “obvious failure.”<sup>109</sup> The persistence of the approach in the face of its ineffectiveness is explained as a function of statutory entrenchment: “[T]he perceived moral entrenchment and imperative of border enforcement (by both lawmakers and much of the public) may be diminishing the perception of the reality of its failure.”<sup>110</sup> This conclusion accords with Massey and Pren’s feedback model, which shows that border apprehensions create a political response that produces a demand for more enforcement, and enforcement legislation, even as the rate of undocumented migration declines: it is now at net zero, yet border enforcement expenditures continue to increase.<sup>111</sup>

### C. Diagnostic Precision/Under-theorized Prescriptions

Against the grain of the immigration law literature, the scholars discussed above are thickly engaged with the social fact that the ungenerous trajectory of the immigration regime is entrenched, a product of legislative choices made long ago, and the accretion of political, social, and legal responses to the phenomenon of migration from Central and South America over the last half-century. To scholars committed to the normative rightness of open borders or immigration amnesty, Skrentny and Gell-Redman point out that those goals are “not entrenched at all.”<sup>112</sup> “The dearth of statutory precedents for mass categorical legalization of economic migrants, and the perceived failure of IRCA (the only mass legalization statute), ensure that there is no broad understanding of legalization as a rational or moral approach to immigration lawmaking.”<sup>113</sup> President Obama’s grant of deferred action to DREAMers underscores this point because it took place in the absence of legislative action.

Reformers could point out that while the barriers to amnesty are “morally and cognitively entrenched,”<sup>114</sup> that does not mean that amnesty is immoral or unjust. Indeed, there is a schol-

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<sup>108</sup> Skrentny & Gell-Redman, *supra* note 103, at 344.

<sup>109</sup> Skrentny & Gell-Redman, *supra* note 103, at 344.

<sup>110</sup> Skrentny & Gell-Redman, *supra* note 103, at 344.

<sup>111</sup> See *Securing the Borders and America’s Points of Entry: What Remains to Be Done: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary*, 111th Cong. 25-27 (2009) (statement of Dr. Douglas Massey, Professor of Sociology and Pub. Affairs, Princeton Univ.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55033/pdf/CHRG-111shrg55033.pdf> [hereinafter *Massey Senate Hearing Testimony*]. President Obama’s plan for comprehensive immigration reform continues to emphasize border enforcement noting that there is “more work to do” in order to secure the border. See *Fact Sheet*, *supra* note 24. The legislative plan proposed by a bipartisan group of Senators takes an even stronger position on the necessity of border closure calling for a commission of border state officials and citizens to declare the border secure before any amnesty can take place. Erica Werner, *Senate Group Focuses on Border Security*, U.S. NEWS & WORLD REPORT (Jan. 31, 2013), <http://www.usnews.com/news/politics/articles/2013/01/31/senator-outlines-obstacles-to-immigration-deal>.

<sup>112</sup> See Skrentny & Gell-Redman, *supra* note 103, at 344.

<sup>113</sup> Skrentny & Gell-Redman, *supra* note 103, at 344. One might contend that the statutory entrenchment model is a poor descriptive fit for mass categorical amnesty because they must of necessity happen infrequently. While recent political rhetoric has begun to articulate the case for immigration amnesty, it is significant that President Obama has been careful avoid couching that message in moral terms. See *Fact Sheet*, *supra* note 24.

<sup>114</sup> Skrentny & Gell-Redman, *supra* note 103, at 329.

arly consensus that the current immigration regime is unjust, unfair or sub-optimal.<sup>115</sup> Still, the problem remains: how to persuade those with power that this is true and that sustained action and attention are required to right the regime? Massey, Pren, Skrentny, and Gell-Redman offer some possibilities, but their approaches underscore the need for more creative thinking on these questions. Massey and Pren conclude their analysis by imagining a counterfactual scenario where a Congress that adequately considered “the underlying dynamics of the social processes involved”<sup>116</sup> in undocumented migration might have avoided creating millions of migrants living outside the law with more precise and thoughtful calibration of its policy response. In the face of the fact that “11 million persons [are] currently present without authorization” Massey and Pren point to the rightness of implementing a large scale categorical amnesty for the three million undocumented people who entered as children (including DREAMers), and “for those who entered the United States illegally as adults” they suggest an earned legalization program: “migrants could accumulate points for learning English, taking civics courses, paying taxes, and having US citizen children.”<sup>117</sup>

Skrentny and Gell-Redman offer that the way around the amnesty impasse is to adopt a European model of “a permanent statutory legalization process on an individual rather than categorical basis,”<sup>118</sup> along with a shift in the political discourse to turn undocumented migration into a question of free trade rather than sovereign violation.

Both of these prescriptive suggestions, however, fail to take seriously enough the structural constraints that the authors themselves describe. Massey and Pren have set out a compelling picture of an entrenched landscape of ungenerous immigration policy where the key force of propulsion is the views of the citizenry, and, more particularly, their inaccurate understanding of the threat undocumented migration poses. Yet Massey and Pren pine for a Congress—an institution ultimately accountable to the people—that might have acted more like the Philosopher King, perfectly calibrating its response to the underlying social and economic dynamics of migration. That vision of Congress is fantastical. Massey and Pren’s observation that “Congress . . . makes consequential policy decisions with scant consideration of the underlying dynamics of the social processes involved,”<sup>119</sup> is a structural flaw that is particularly acute in the immigration context because of another structural problem: immigrants are not represented in Congress. Massey and Pren’s failure to see this is emblematic of a more broadly observable blindness to structural dynamics that afflicts the immigration law reform literature.

Skrentny and Gell-Redman, though somewhat more innovative and properly attuned to the need for an ongoing process for legalizing people unlawfully present, are similarly in denial about the implication of their own descriptions of legislative entrenchment for their proposed reform. The United States has for many decades possessed a permanent individualized statutory legalization process<sup>120</sup> and it has been the subject of legislative anxiety and increasing restriction over the same period where Skrentny and Gell-Redman analyze congressional legislation to support their findings of cognitive and moral entrenchment for un-liberal policy responses. As for

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<sup>115</sup> See *supra* note 2 illustrating many examples of scholarship holding this view.

<sup>116</sup> Massey & Pren, *supra* note 99, at 24.

<sup>117</sup> Massey & Pren, *supra* note 99, at 26.

<sup>118</sup> Skrentny & Gell-Redman, *supra* note 103, at 345.

<sup>119</sup> Massey & Pren, *supra* note 99, at 24.

<sup>120</sup> A limited form of relief available to some immigrants who are in removal proceedings is provided for in the Immigration and Naturalization Act Section 240A, 8 U.S.C. § 1229(b) (2008). This relief, cancellation of removal, suspends the immigrant’s removal proceedings, potentially indefinitely, though it does not confer any sort of legal immigration status or provide any assurance of immunity from future removal proceedings.

their proposed frame-shift among legislators and the polity to view undocumented labor as a question of free trade rather than sovereign violation, it offers a discursive tool that is consonant with American economic values, but does not account for the fact that immigrants are feared in large part because they are thought to threaten the job prospects of low and middle class workers. Thus getting to the laissez-faire economic view on immigrant labor would require reversing an existing political frame that appears to be substantially entrenched. How that frame is to be shifted is left wholly unexplained.

These authors have developed helpful, though incomplete, accounts of how and why the current immigration system came to exist and how stable the existing dynamics are, yet their prescriptions suggest that even those who understand the structural characteristics of the regime find it difficult to articulate reforms which alter these structures. Nonetheless, close consideration of the landscape they describe is useful. The authors discussed here seem to see that the immigration law system is responsive to some significant degree to “We the People’s” concerns about undocumented migration; they also agree that legal responses inform the way in which the citizenry views the problem of undocumented migration. Law then, can shape citizens’ views, directly or indirectly, and it is the citizens’ views that ultimately produce immigration law.

While the reasoning just discussed may appear circular, the self-perpetuating feedback loop that Massey and Pren described has a specific entry point: citizens must make the first move because they have the authority to permit or to force change in the immigration regime. But moving, or even defining, the will of the citizenry is challenging in general and it is particularly challenging in the immigration context. The general difficulty is that the people’s will is not independent of all the structural forces that I have described, it is shaped by them: this accounts in part for the durability of the direction of the regime. For example, more immigration enforcement creates political demand for still more immigration enforcement, even as undocumented entries decline.

The difficulty specific to immigration is that migrants do not make up a part of the democratic will, nor are they full participants in democratic discourse, because they are not citizens. As a result, migrants’ own views of how the immigration regime should be structured are not fully incorporated into the shape of the regime. Reformers resist these facts in favor of trying to realize the aspiration of migrants’ full political inclusion or by quashing the citizenry’s desires. I urge a different approach to changing the direction of the immigration regime, one that advocates legal reforms that work with—not against—the superior claims of the citizenry to the realization of their political will.

One way to appreciate the benefits of such an approach is to understand that the democratic will is not simply a function of the citizenry’s fixed “interests”<sup>121</sup> but that interests and the political demands that interests make are based in part on what the citizenry “knows” about a particular problem. I call this form of knowing “democratic knowledge.” Democratic knowledge, as opposed to expert knowledge, is accorded a great deal of respect in our culture. Right now the citizenry “knows,” for example, that undocumented migrants steal jobs, leach social services, and commit a disproportionate amount of crimes, and legislation proceeds forward based on that knowledge. Knowledge can change, however; it is plastic. We can learn, or be persuaded. And changes in knowledge do not require the dramatic re-arrangement of political and legal agree-

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<sup>121</sup> This view of a fixed set of interests is often associated with public choice theory. See WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 65 (4th ed. 2007), (discussing how public choice theory assumes that “preferences are independent of and prior to political activity”).

ments or institutions, a particularly important fact given the constrained environment in which immigration reformers operate.

The next section will explain why the high *status* of democratic knowledge should not be directly challenged, why instead the goal should be to alter its content, and what law has to do with process. I then unpack an example of how democratic knowledge of undocumented migration was created in Arizona, in an effort to show how reformers could seek to change that knowledge.

### III. THE IMMIGRATION REGIME AND CITIZEN-MADE KNOWLEDGE

What citizens demand from politicians in response to migration depends in important part on what citizens “know” about immigration. Yet, what citizens know about immigration, as Judge Posner pointed out,<sup>122</sup> often deviates from what social scientists, for example, know about immigration. But when it comes to making laws the democratic form of knowledge trumps everything else. The authority of democratic knowledge is a feature of our legal and political culture generally, but democratic knowledge is particularly authoritative where immigration is concerned.

Changing the trajectory of the immigration regime depends on changing what citizens know about immigration. Law has an important role to play in the production of migrant-favorable democratic knowledge, but because migrants are not members of the citizenry, the role of law will need to be different than in other contexts, like the African-American Civil Rights movement, which sought to change democratic knowledge relating to a group of citizens. In particular, law needs to create democratic knowledge from the bottom-up. The law can do this, for example, by creating legal procedures where citizens must confront the reality of the immigration regime’s effects on non-citizens, like the example of the immigration jury.<sup>123</sup> The grant or denial of relief to an “illegal” migrant by a jury of citizens creates democratically constituted knowledge about an undocumented migrant’s worthiness that is based on concrete facts provided to the jury by a flesh-and-blood person. And if such a jury grants relief, that grant becomes democratic knowledge of migrants’ worthiness, entitled to the respect that brand of knowledge receives in our culture. These conditions are more favorable to the kind of persuasive work that reformers must accomplish if the character of the regime is to durably change.

#### A. *The Supremacy of Democratic Knowledge*

Why does changing the trajectory of the immigration regime depend on what the citizenry knows about immigration? The answer has two parts. First, the democratic will is particularly authoritative over this area of law and policy, and the democratic will acts on democratic knowledge. Democratic knowledge, like the default models for legislative decision-making described by Skrentny and Gell-Redman, shapes the demands made by the democratic will. Second, as discussed in the preceding section, immigration reform operates in a highly constrained environment. So the question for reformers should be: what force operating in this system is susceptible to a reorientation? I urge that democratic knowledge is such a force: what humans know and what they think about the world is plastic. Just as what the citizenry “knew” about African-Americans changed over the course of the twentieth century, and just as immigration reformers have convinced themselves that common knowledge about immigration is incorrect, so the citi-

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<sup>122</sup> See Posner, *supra* note 35.

<sup>123</sup> See *supra* note 13.

zenry can come to know that migrants are not a threat and are worthy of inclusion in the body politic. Note, though, that changing democratic knowledge differs in an important way from replacing democratic knowledge with, say, expert knowledge. Expert knowledge does not have the same political authority as democratic knowledge. For expert knowledge to become democratic knowledge it must persuade the citizenry of its validity.

Earlier, I observed that when Justice Scalia argued in his *Arizona* dissent that Arizonans “feel themselves under siege,” he was not making an empirical claim about the impact of undocumented immigration on the state of Arizona.<sup>124</sup> Rather, he was elaborating on Arizonans’ subjective emotional state of being. By the force of his antecedent doctrinal analysis, which emphasized Arizona’s sovereign prerogative, Scalia was arguing that these feelings were proper grounds for legislation. Though Scalia did not command a majority, this was not because he was utterly wrong about Arizona’s ability to legislate from its “gut” and conform to the Constitution; on that he was mostly right. The problem for Arizona in its case before the Court was simply that the “gut” of the national legislature trumped its own. It is important for reformers to appreciate this difference. A supremacy skirmish, like *Arizona*, which decides which subset of the democratic will shall have the authority to do this or that to migrants, does not undermine the priority of the citizenry’s desires, and the knowledge that feeds these desires, over the needs or “rights” of migrants.

Paul Kahn has observed that popular sovereignty and its corollary, the popular will, are “uniquely” authoritative in the American culture of political legitimacy.<sup>125</sup> He makes this point in part by observing that rights in the United States do not exist independent of the democratic will—they are grounded by it: “We only get to the discourse of rights when we ask [by means of Constitutional analysis] what it is that the popular sovereign says . . . This relative priority of popular sovereignty over rights . . . points to a uniquely American culture of Law’s Rule.”<sup>126</sup> The priority of popular sovereignty has broad implications. One important implication is that the knowledge that composes manifestations of popular sovereignty, like legislation, is also held in high esteem.<sup>127</sup> This epistemological priority is clearest in the manner that the United States organizes its administrative state, which is strikingly subservient to the other branches of government, a reality that often undermines its purpose, which is in part to provide government with political action that is based on less-politicized expertise.<sup>128</sup>

If the people’s will is highly respected in general, it is even more respected when that will bears on non-citizens;<sup>129</sup> this is the basic logic behind the plenary authority doctrine, “[t]he single most salient feature of the government’s immigration power.”<sup>130</sup> That power over non-citizens is “substantially unconstrained as a constitutional matter.”<sup>131</sup> The lack of constraint is a central object of reform efforts, but it also should be seen to reflect the “uniquely American culture of law’s rule” taking shape in the immigration context.<sup>132</sup> Unpacking Kahn’s point, we see

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<sup>124</sup> See *supra* page 61.

<sup>125</sup> Kahn, *supra* note 18, at 156.

<sup>126</sup> Kahn, *supra* note 18, at 156. See also *supra* note 52 for discussion.

<sup>127</sup> See, e.g., Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 897, 912 (2005).

<sup>128</sup> For a thorough discussion of the administrative state’s devaluation, see Morales, *In Democracy’s Shadow*, *supra* note 8, at 36-41.

<sup>129</sup> See BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 11, at 51-52.

<sup>130</sup> BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 11, at 50.

<sup>131</sup> BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 11, at 50.

<sup>132</sup> Kahn, *supra* note 18, at 156.

that part of the reason for “the priority of popular sovereignty over rights” is that in our legal culture there are no culturally authoritative rights—like natural rights—prior to popular sovereignty, because the popular sovereign created a delimited set of rights—the Bill of Rights.<sup>133</sup> It follows, then, that membership in the political community, or the express consent of the political community, is a particularly important predicate to the granting of rights or privileges to anyone.<sup>134</sup> But the democratic will is still more important where the rights of political outsiders, like migrants, are concerned. In a political culture ultimately grounded in a democratic contract (the Constitution) the views of the citizenry will be particularly respected on the subject of who is or is not a member of the community entitled to rights, privileges, or other collective goods, because the political membership question is logically prior to any grant of rights. And again, the corollary point holds as well: democratic knowledge pertaining to political outsiders is likewise granted great authority.

This priority of the democratic will means that for the expanded membership project to succeed it must create a democratically constituted knowledge that migrants are entitled to legal inclusion. Of course, this is a social and political project as much as a legal one; it cannot occur through legal channels alone, nor can it occur without them. The legal intervention is particularly crucial because the political advocacy of migrants begins from a much more impoverished position of discursive legitimacy and inclusion than other marginalized groups that have sought civil equality: undocumented migrants’ voices are perceived to count less than those of citizens because of their prior unlawful entry. Creating an institutional anchor that creates citizen-crafted democratic knowledge under conditions that could be favorable to the norm-expanding project might provide a legitimate hook from which a broader norm-changing discourse could occur.

The example of the immigration jury entrusted with the power to change a long-standing migrant’s status meets these criteria. It capitalizes on the fact that due process is the most entrenched right that migrants are entitled to, and uses the entrenchment of that norm to build democratic knowledge that migrants are entitled to membership on an individualized basis. The democratic knowledge<sup>135</sup> that citizens create can, in turn, populate a broader political and social discourse with the assistance of social movements.

If the production of democratic knowledge is the key to changing the character of the regime, then it is critical to have a thorough understanding of the processes that currently make democratic knowledge. The next section examines select aspects of the conditions that led Arizona to adopt Arizona Senate Bill 1070, the law that was largely overturned by the Supreme Court in *Arizona v. United States*. Because what happened in Arizona has happened in many other ju-

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<sup>133</sup> Kahn, *supra* note 18, at 156.

<sup>134</sup> Counter-majoritarian shunting of the democratic will, through the judicial expression of constitutional rights or otherwise, usually expresses a judgment about the balance between different citizens’ rights, or different and competing rights. Sitting, as migrants do, outside the core boundary of constitutional concern, the expression of their rights, such as they are, is usually anchored in a judicially-cognized conception of the good from doing so that will accrue to the citizenry. Undocumented alien children must be permitted to go to public schools, not primarily because they are persons with rights, but because the American nation cannot deliberately countenance the presence of an illiterate underclass. See *Plyler*, 457 U.S. at 223 (“By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”).

<sup>135</sup> For an analytical review of the literature on the epistemic functionality of deliberative democratic practice see generally Peter Fabienne, *Democratic Legitimacy and Proceduralist Social Epistemology*, 6 POLITICS, PHILOSOPHY & ECONOMICS 329 (2007).

risdictions<sup>136</sup> in different forms, examination of the *Arizona* case allows for a significant degree of generalization about the processes that produce democratic knowledge about immigration.

### B. *The Shape of Democratic Knowledge: Unpacking the Siege Mentality*

If the citizenry has been conditioned to view the problem of undocumented migration through a distorted lens produced in part by legal changes that are now entrenched, then creating the conditions by which those distortions might be corrected requires a careful survey of the forces and beliefs that influence, reflect and create the citizenry's state of mind.<sup>137</sup> The metaphor of siege has become a significant way in which the demand by the citizenry for increased immigration enforcement is explained and characterized in legal, social and political argument; per Justice Scalia, Arizonans "feel themselves under siege." This section will unpack the siege metaphor to illustrate how citizens have come to know what they know about immigration. In particular, I will show that the principle thing that citizens know about immigration is that it is disordered, or out of control; accordingly citizens feel the need to exercise control over immigration in an effort to compensate.

Arizona's brief to the Supreme Court in *United States v. Arizona* depicts a besieged landscape: "Arizona and its 370-mile border are a conduit for rampant illegal entries and cross-border smuggling to a degree unparalleled in any other State. The public-safety and economic strains that this places on Arizona and its residents have created an emergency situation . . ."<sup>138</sup> Indeed, a swath of Arizona territory is subject to enough illicit border traffic that the federal government has seen fit to install road-side warnings adjacent to these areas, up to eighty miles inland from the border, that read: "Danger – Public Warning – Travel Not Recommended," "Active Drug and Human Smuggling Area," "Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed."<sup>139</sup> These signs not only indicate the presence of a territorially delimited social phenomenon; they also help to produce it as a fixture of the mental landscape of Arizonans who drive by these areas or who hear of the signs or see reproductions of them through social channels or the media. The federal origin of the signs also points to that superior government's inability or unwillingness to stem the phenomenon; the warning substitutes for a policy response that stops the traffic from occurring. The signs are perfectly emblematic of Arizona's contention that it had to act on behalf of its citizens in response to an indifferent federal power; they compose the democratic knowledge the Arizona legislature is seeking to vindicate.

The warnings also point to social phenomena which, at least when taken to their conceptual extreme, have the ability to render a place weak and vulnerable; ills that, left unchecked, would result in decline or, in the language of siege, surrender. "Armed criminals" sow fear and division and require police responses.<sup>140</sup> Drug use, and the addiction it spawns, saps the citizenry of industry and strength, increases the cost of medical care, and breaks up families. The illicit

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<sup>136</sup> See Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 591-96 (2008) (discussing state and local laws comparable to S.B. 1070 that have arisen in other jurisdictions); Su, *supra* note 42, at 34-36 (describing "state-mandated enforcement laws" such as S.B. 1070 and its corollaries in other states).

<sup>137</sup> See Lessig, *supra* note 12, at 1008 (discussing mechanisms by which social constructions develop and might be altered).

<sup>138</sup> Brief for Petitioner at 1, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

<sup>139</sup> *Id.* at 6 (quoting the text of JA 167-170, a photo of a warning sign that was presented as evidence in the case).

<sup>140</sup> *Id.*

traffic also degrades, denudes and threatens the viability of the land itself:

[p]rivate ranchers living near the border constantly face the epidemic of crime, safety risks, serious property damage, and environmental problems (including large deposits of trash and human waste, and cut water lines and fences) associated with a steady flow of illegal crossings on their land . . . . The illegal traffic and the hundreds of informal trails and roads associated with it also take their toll on the fragile desert habitat . . . .<sup>141</sup>

Arizona, in its brief, quantified the damage caused by undocumented immigrants, noting:

[The state] spends several hundred million dollars each year incarcerating criminal aliens and providing education and healthcare to aliens unlawfully present in the State, with local governments spending many millions more. The Arizona Department of Corrections estimates that criminal aliens now make up more than 17% of Arizona’s prison population, and the Maricopa County Attorney’s Office, which serves the City of Phoenix, estimates that 21.8% of the felony defendants in the County’s Superior Court are unlawfully present aliens. . . . Of Arizona’s total inhabitants, approximately 6%—an estimated 400,000 individuals—are aliens who are unlawfully present and not authorized to work. Nonetheless, more than half—230,000—work anyway. They compose 7.4% of all Arizona workers and drive down wages for citizens and legal residents in numerous job markets.<sup>142</sup>

Undocumented people are siphoning scarce dollars—jobs, jail beds, wages—from the people of Arizona. Arizonans are besieged, and undocumented people are the cause; that much Arizonans know.

My point here is to present this view, and not to undermine its empirical truth by citation to contrary statistics, or contextual information, that is excluded from this set of facts.<sup>143</sup> The picture painted in this opening brief reflects what Arizonans *believe* to be true about what undocumented people are doing to the territory which Arizona citizens own, or that is, in one way or another, under Arizona’s jurisdiction. Arizonans “feel themselves under siege”<sup>144</sup> and to the extent Arizonans feel this way, it is subjectively true; it is the lived reality of a significant proportion of Arizona’s citizens.<sup>145</sup>

What Arizonans feel, it is important to note, does have some real empirical basis. Arizona has experienced a 351 percent increase in border crossings during the same period that overall

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 6-7.

<sup>143</sup> See Posner, *supra* note 35 (summarizing this empirical viewpoint). See also JOHNSON, OPENING THE FLOODGATES, *supra* note 2, at 137-67.

<sup>144</sup> *Arizona*, 132 S. Ct. at 2522 (Scalia, J., dissenting).

<sup>145</sup> See Kahneman, *supra* note 71, at 144-45 (discussing the conflict between Cass Sunstein and Paul Slovic on how to react to the presence of systematic biases in the democratic will. Sunstein seeks a counter-majoritarian corrective through the use of the administrative state. Slovic argues that “widespread fears, even if they are unreasonable, should not be ignored by policy makers.” Kahneman advocates a middle ground: “Psychology should inform the design of risk policies that combine the experts’ knowledge with the public’s emotions and intuitions.”).

border crossings were dropping.<sup>146</sup> The dramatic shift was caused by the federal government's decision to focus enforcement resources along the more populated San Diego corridor beginning in 1993.<sup>147</sup> The increased surveillance was intended to move the flow of undocumented people to less-developed, more treacherous areas of the border region—including Arizona. Operation Gatekeeper, as the Immigration and Naturalization Service (INS) called it, was implemented with the goal of deterring entries along the entirety of the border by making passage more challenging.<sup>148</sup> The deterrent effect did not materialize.<sup>149</sup> Instead the policy resulted in a wealth transfer from migrants to smugglers as smuggling costs increased significantly.<sup>150</sup> The number of crossers changed relatively little because the wage premium between the United States and its southern neighbors remained so large. The policy also notably increased the rate of border deaths.<sup>151</sup>

But while Operation Gatekeeper was insignificant at a national level, it did not go unnoticed in Arizona. And within the state, the change was most perceptible to those who lived closest to the border: “Before Operation Gatekeeper, the ranchers [living on the Arizona border] would see less than 50 border crossers a *year* coming individually or in twos or threes.”<sup>152</sup> They were unperturbed by crossings at that rate; they were a fact of life at the border. But as the new INS strategy took hold, ranchers began to see “around 100 or more people a *day* coming across their ranch[es].”<sup>153</sup> “[N]arcotics traffickers also shifted their patterns because of border fortification in prioritized areas and would do ‘run-throughs,’ tearing across the ranch in vehicles, displaying an AK-47 to keep the ranchers quiescent.”<sup>154</sup> The picture painted in Arizona’s brief is what ranchers on the border actually saw.

The ranchers eventually responded with self-help by enlisting the members of a private immigration enforcement advocacy organization called the Minutemen, whose entreaties most ranchers rejected when the impact of migrant traffic was more modest.<sup>155</sup> They changed their minds as traffic increased and the presence of the Minutemen patrolling their property appeared to reduce crossings on their land.<sup>156</sup> Some of the ranchers also agreed to let the Minutemen build fencing along the Mexican border of their property.<sup>157</sup> While the ranchers were most interested in the Minutemen’s willingness to build livestock fencing (Mexican cows are not inoculated against hoof and mouth disease), they also permitted them to build tall metal fencing that was purportedly designed to keep out flows of people.<sup>158</sup>

Those who erected the fence were aware of the basic futility of these people fences, at least for preventing human flows overall. The fences are short, and traffickers and migrants can

<sup>146</sup> See Mary Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC’Y REV. 701, 709 (2008).

<sup>147</sup> See *id.* at 706-07.

<sup>148</sup> See *id.* at 701, 707.

<sup>149</sup> *Id.* at 707 (“[R]aising the costs and difficulty of border-crossing diverted rather than deterred.”).

<sup>150</sup> See *Massey Senate Hearing Testimony*, *supra* note 111, at 26 (noting that a “massive increase in enforcement . . . [and] militarization at the border increased the cost of border crossing from \$600 to \$2200”).

<sup>151</sup> See *Massey Senate Hearing Testimony*, *supra* note 111, at 26.

<sup>152</sup> Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 714.

<sup>153</sup> Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 714.

<sup>154</sup> See Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 714.

<sup>155</sup> See Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 714 (extensively discussing the Minutemen organization).

<sup>156</sup> See Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 714.

<sup>157</sup> See Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 715.

<sup>158</sup> Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 715.

easily divert their paths to enter another way. Even so, the fence building continues in the face of its known futility, Mary Fan urges, because of its therapeutic function.<sup>159</sup> As one Minuteman volunteer put it in explaining the significance of fence building, “[a]t least we’re doing something.”<sup>160</sup> Going further, he stated that:

This isn’t a people fence. Right now we can’t stop the illegals but we can stop the cows . . . . The fence symbolizes that citizens are doing something with this invasion, which is one, being the cows, and also slowing down the people invasion. It’s the most we can do with all the politics going on.<sup>161</sup>

The fence the volunteer built will at least prevent border crossers from “cutting across [that particular] rancher’s backyard.”<sup>162</sup>

The jump from the actions of individual citizens to those of local representative governments is not hard to make. Arizona’s Senate Bill 1070 is a futile but therapeutic response to a complex geopolitical phenomenon that mirrors the ineffectual individual gestures discussed above. Like the volunteers building fences on the Arizona border, the legislators who passed the bill were “at least doing something” in response to the increased flow of migrants through the state. It may be, as the United States pointed out in oral argument, that Arizona’s law will shift the migrant pathway to other States,<sup>163</sup> redistributing the flow, rather than arresting it. But the duty of Arizona’s legislators is to solve local problems and, like the fence builders passing the buck to another property, moving undocumented migrants to another jurisdiction has some locally recognized ameliorative effect.

The credit from constituents and the marginal prophylactic effects remains in place even after the Supreme Court struck down much of the law. The portion of the law the Supreme Court left standing requires immigration checks in the course of lawful stops for other infractions. If an infraction is located, then the Arizona authorities notify the federal government, which ultimately has to decide whether or not to deport the person. By bringing the migrant to the federal government’s attention, where she might not otherwise have been detected, Arizona does restructure the calculus of the federal government in favor of more deportations.<sup>164</sup>

S.B. 1070’s on-the-ground effects are meaningful. The most profound consequence of S.B. 1070 will likely be in the way it shapes the terms of the policy debate in Washington.<sup>165</sup> But even that translation will not allay the fear and concern that drove the Arizona legislation. Just as in the past, increased enforcement and harshness will translate into a feeling of greater insecurity. SB 1070 is a failure of legislation *as therapy*, quite apart from the failure of the legislative policy

<sup>159</sup> See Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 726 (describing in psychoanalytic terms how taking futile actions functions as therapy).

<sup>160</sup> Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 717.

<sup>161</sup> Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 717.

<sup>162</sup> Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 717.

<sup>163</sup> Transcript of Oral Argument at 68, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-182.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf).

<sup>164</sup> See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1851 (2011) (discussing how state and local law enforcement, by bringing arrested noncitizens to the attention of federal immigration authorities, broaden the impact of federal removal actions).

<sup>165</sup> See Su, *supra* note 42, at 60-61 (discussing how state measures like S.B. 1070 have impacted the national immigration policy debate).

when considered under the usual rubrics.

The action by Arizona and the border denizens looks even more futile when we peek behind the surface of their actions to look at the deeper motivation for building fences, or passing laws that seek “attrition through enforcement,” Arizona’s stated policy.<sup>166</sup> Mary Fan’s psychoanalytic inquiry into the state of mind of Minutemen fence project participants exposed a deeper source of worry. Middle class Americans feel themselves under siege by much more than people from the south, and that has surely only become more deeply felt and broadly distributed since the traumatic economic changes of the Great Recession. As one Minuteman volunteer put it in 2007:

I want my grandchildren to grow up and have a country to live in. I had that privilege. I’ve had a very nice life as a middle-class American. My bills are paid, I take in a movie, go to dinner once in a while. I don’t have a lot of needs. I want my grandchildren, my children, to have the same opportunities. I already see it with my children, not having the same opportunities that I had after World War II. As I grew up, we had nothing but opportunities. We could do anything we wanted, we could go to any college we wanted. We could get scholarships, we didn’t have to get Pell grants. So I had all these opportunities. And my children have to fight harder for these opportunities.<sup>167</sup>

So she helps build a fence that she knows will not solve those problems, and will have only an imperceptible effect on her more immediate fear of border crossers. Likewise Arizona, and the other states that have adopted local legislation<sup>168</sup> are simultaneously addressing the real problem of aliens being present in the state without authorization, and at another level are signaling that they will do what they can to protect a middle-class way of life when forces beyond the control of a single state—and even the whole nation—buffet or overcome existing social arrangements and expectations. Citizens reward politicians for acting in this way.

At both the micro and macro political level, then, citizens seek concrete ways to appear to exercise control over encompassing social forces in the face of siege, broadly construed. The trouble with this process in the immigration context is that exercising control at the macro level through increased state or federal enforcement ultimately *magnifies* the feeling of siege rather than ameliorates it; it is an unsuccessful coping mechanism. As Massey and Pren taught, more immigration enforcement created demand for more immigration enforcement. Channeling this desire for hands-on control in a productive way, however, may point the way forward. This micro-level desire among the citizenry to “do something” might be an opportunity to engage the democratic will in new ways.

#### IV. PRODUCING BETTER DEMOCRATIC KNOWLEDGE

The effects of undocumented migration are most concrete in the borderlands described by Fan in her ethnographic account and evoked by Arizona in its opening brief. The human detritus, the AK-47s, the border patrol, the march of migrants, the bodies of those who never reached

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<sup>166</sup> See *United States v. Arizona*, 641 F.3d 339, 343 (9th Cir. 2011).

<sup>167</sup> Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 723. See also Susan Fiske, ENVY UP, SCORN DOWN: HOW STATUS DIVIDES US 89 (2011) (“[F]eeling individually deprived . . . may alert a person to feeling collectively deprived . . . [and] this collective feeling leads to blaming out-groups.”).

<sup>168</sup> See Rodriguez, *supra* note 136, at 591-96.

their destination—border residents experience the social phenomenon of migration in these tangible ways that are rightfully and ineluctably upsetting. But as undocumented migrants move inland and interface with migrant networks they are integrated into the social fabric and whatever harms they may generate become more abstract. Undocumented migrants, in the estimation of those building a case for their exclusion, compete for jobs, reduce wages, siphon public resources, and commit crimes. But all of these social phenomena have multiple causes to which undocumented migration is—at most—a partial, and usually a marginal, contributor.

If we were in Judge Posner's alternate universe and immigration policy tracked the empirical view of undocumented people's effects in the world outside the borderlands we would not have the exaggerated and demonizing public vision of the problem that we see implemented in the law. If the legal response were empirically grounded we might, at a minimum, expect the populace to have the view of undocumented people that the Arizona ranchers had prior to the three-fold increase in traffic on their property. We can imagine, given their indifference to the occasional migrant, that the ranchers in that period were comfortable with cyclical flows of migrants, realized they entered to work, and recognized the migrants' movements as relatively benign products of broad social forces.<sup>169</sup> The past for the Arizona ranchers is the present empirical truth of the relationship between undocumented people and nearly every citizen of Arizona and the United States.<sup>170</sup> We need not accept that undocumented people are completely harmless to understand that the political response to their presence bears no reasonable relationship to migrants' impact on the nation's complex social ills. Getting ordinary citizens to be comfortable in the kind of world that the ranchers once accepted, a world that tolerates small-scale sovereign trespasses, would be a significant intermediate step towards changing the direction of the immigration regime. A reasonable political discourse about immigration can proceed from that belief.

#### A. *The Political Representation of Migrants: An Alternative?*

My exhortation to work through democracy to build out the more generous immigration regime does not preclude reforms designed to provide for the political representation of migrants; the immigration jury example, for instance, provides a species of limited political representation for migrants by giving individual migrants a voice before citizen—sovereign—decision makers. And, as I have mentioned, the exclusion of migrants from voting is a structural feature of the immigration regime's entrenchment; without political representation for migrants, politics cannot systematically account for migrants' interests.

The simplest structural correction for this political failure would be to allow formal representation for aliens—legal and “illegal”—in the political process. This would be a preferable alternative to devising and implementing mechanisms for prompting the existing citizenry to provide empirically accurate knowledge about migration for use in political debate. Political representation of aliens is the surest way to improve the quality of democratic knowledge about immigration. Moreover, the political representation of aliens is not opposed to democratic values; it emerges from them. Arash Abizadeh has argued persuasively that some kind of representation of non-citizens (even those not present in the territory in question) in the decision-making process related to border regimes *follows from* the foundational democratic norm that coercive political authority—which presumably includes the drawing and enforcement of borders—is illegitimate

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<sup>169</sup> See Fan, *When Deterrence and Death Mitigation Fall Short*, *supra* note 146, at 714-17.

<sup>170</sup> See generally JOHNSON, *OPENING THE FLOODGATES*, *supra* note 2 (cataloging the benefits and modest social costs to unlimited migration).

unless those subject to the border regime have a voice,<sup>171</sup> along with the citizenry bounded by the border, in the discourse that produces the coercive regime.<sup>172</sup>

Even accepting Abizadeh's theoretical elaboration of alien political representation, and the more instrumental informational benefits I have described, we must confront the obvious practical problem with alien political representation. Despite the historical fact that non-citizens used to be able to vote in the United States, "the denial to aliens of the right to vote . . . [is] a near universally accepted feature of even the most liberal democratic states today"—ours is no exception.<sup>173</sup> Indeed, Abizadeh concedes the impracticability of implementing the representation norm in the world as it now stands;<sup>174</sup> he means his argument to serve as "a standard for judging the extent to which any empirically existing demos and its political institutions fall short of full democratic legitimacy."<sup>175</sup>

Still, issues with implementation might be far more flummoxing than Abizadeh concedes because the coercion he describes is not confined to the borderlands. The cosmopolitan political control that must be enacted if coercion at physical boundaries between nation-states is to be legitimate is equally required of practices that regulate questions of citizenship, among others.<sup>176</sup> Whatever the theoretical merits of this view, control over membership, even more than control over physical borders, is central to the colloquial vision of the rights that attend domestic democratic control. Asking existing democracies to share decision-making authority over physical border regimes is one thing, asking them to share the right to determine the criteria for membership in the body politic is quite another. It may be that this is what democracy requires when properly understood, but that understanding deviates so dramatically from the average citizen's view of what democracy entails that it begs for an articulation of the institutions that could plausibly persuade common citizens to eventually relinquish their parochial understanding. That is, Abizadeh's argument ultimately provides still more evidence that the relationship between immigration reform and the democratic will ought to be a central object of analysis in the immigration reform literature. The gulf he describes between normative requirements and empirical fact is so wide that creative intermediary institutions will have to be imagined if it is ever to be bridged.

Additionally, Abizadeh's articulation of how the representation of all those subject to a border regime follows from democratic first principles is useful because it shows how my basic insight that reformers ought to think about how to work with democracy, rather than against it, can lead in more radical directions than the modest rationalization of democratic knowledge that my argument has thus far entertained. Abizadeh's argument also underscores that the implementation of a different and less antagonistic form of democratic engagement with immigration questions is a very preliminary step in righting the regime. More and better democratic knowledge is an important and necessary predicate to changing the orientation of the immigration regime, but it will fall short of the grandest cosmopolitan aspirations until some significant power over decision-making is conceded by those who currently possess it. Democratic knowledge about immigration

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<sup>171</sup> Abizadeh means "voice" in the strong sense of discursive power and political control. See Abizadeh, *supra* note 2, at 39.

<sup>172</sup> Abizadeh, *supra* note 2, at 55-56.

<sup>173</sup> BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 11, at 94.

<sup>174</sup> See Abizadeh, *supra* note 2, at 56.

<sup>175</sup> Abizadeh, *supra* note 2, at 56.

<sup>176</sup> Abizadeh, *supra* note 2, at 38 ("Anyone who accepts a genuinely democratic theory of political legitimation domestically is thereby committed to rejecting the unilateral domestic right to control and close the state's boundaries, whether boundaries in the civic sense (which regulate membership) or in the territorial sense (which regulate movement).").

can be improved, but it will never be perfect so long as migrants are denied that power. After all, it is unchecked democratic power over migrants that created the democratic knowledge that S.B. 1070 acted on, and that Justice Scalia gave voice to in his *Arizona* dissent. It is naïve to think that knowledge and persuasion alone can overcome completely differentials in political power. But, like other theorists of cosmopolitanism, Abizadeh has not concerned himself with showing us how to get from here to there—the question I urge immigration reformers to make central to their concerns.

What follows is a discussion of existing political science literature that could provide productive tools for addressing the deficiencies that I have identified in prior sections and a discussion of more specific targets for improving democratic knowledge about immigration.

### *B. Charting the New Immigration Reform*

My discussion of immigration reform has ranged, but a few themes unify the discussion and are worth setting out in summary form as I turn to offer guideposts to reformers as they think creatively about the future of immigration reform.

The first theme is the problem of migrants' rights. Not only are migrants' rights a challenge to vindicate because of structural problems and the idiosyncrasies of the United States' particular legal and political culture, but the provision and creation of such rights or benefits in ways that are less than robustly democratic may feed long-standing resentments in the populace that may end up making the regime harsher in the long run.

A second theme that emerges from this discussion is the extraordinarily constrained environment in which immigration reform must operate due to the structural features of the regime. This constriction suggests that reform scholars, in particular, should be thinking very carefully about identifying the best, most precisely-targeted mechanisms to build support for the creation of a normatively desirable immigration regime over time. I identify the citizenry's views about immigration as the force that is the most susceptible to creating the conditions for lasting change.

A third important insight has to do with the social strata at which reform efforts are presented. The usual aim is to persuade those with the most power—the Supreme Court, the President, Congressmen—but I urge that efforts should be aimed closer to the bottom of the democratic power-chain. There are a few reasons for this. First, the democratic knowledge that helps sustain the harsh immigration regime is in part the product of psychological anxiety among the populace that has to do with more than just immigration. As we saw with the Minuteman volunteer who discussed her fears for the next generation of Americans, the entirety of many citizens' social world appears in upheaval. For this broad swath of the citizenry, grand discourse about immigration, like President Obama's Rose Garden speech, will fall on deaf ears because it is so far removed from these concerned citizens' lives. Persuading high-level actors may produce some benefits for migrants, but it is unlikely to fundamentally change the character and direction of the regime. Smaller-scale engagement is what is needed.

The felicity of a lower level of engagement also emerges from Arizonans' response to the migrant influx. The citizens who built ineffective and symbolic fences at the border derived a therapeutic effect from those efforts, from the process of attempting to assert some control over what is viewed as a disordered social force overcoming the state. Reformers may want to find productive ways to tap into that desire to assert control by channeling it into institutions—like the immigration jury example—that create conditions under which just results, or better democratic knowledge can emerge from the exercise.

One might object that the Civil Rights movement's success was in large part the result of

top-down efforts: counter-majoritarian decisions by the courts, the confluence of highly unusual, and arguably democratically deficient, circumstances that produced the Civil Rights Act of 1964,<sup>177</sup> and forceful presidential actions<sup>178</sup> that ran counter to the majority interest, narrowly defined. Why not the same factors for migrants? They are not citizens; and that, I argue, will make all the difference in how social change proceeds in the long run.

The fourth theme suggests that the impulse to migrant's rights should shift its emphasis. Abizadeh's focus on the normative necessity of alien political representation clarifies what the ultimate procedural aspiration of immigration reform should be. Clarifying such aspirations can help to keep reformers trained on the right goals as they seek to enact change in the highly constrained environment that exists in the United States today.

Joseph Carens has urged scholars of immigration reform to follow an ethical practice: "whatever we say ought to be done about international migration should not be too far from what we think actually might happen [and from] what we think our community might do."<sup>179</sup> My argument has followed this suggestion, while pushing it away from the usual focus on substantive ends—amnesty, for instance—to procedural concerns that seek to reform the immigration regime through the creation of better democratic knowledge.<sup>180</sup> I have also pressed on Carens' point a bit to suggest that "what we think actually might happen" is too cramped if we do not work to expand the universe of "what we think actually might happen." Only by thoughtfully creating the conditions to expand the possibilities of what can actually happen will the immigration regime begin to

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<sup>177</sup> See ESKRIDGE, *supra* note 121, at 2-23, (Reviewing the unusual circumstances that led to the passage of the Civil Rights Act of 1964).

<sup>178</sup> I refer here to the history of affirmative action, which largely came into force through the actions of the Executive, such as with President Lyndon B. Johnson's Executive Order 11,246, which called for anti-discrimination policy for federal contractors. See Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965). President Richard Nixon further pushed forward the Equal Employment provisions of Executive Order 11,246, issuing Executive Order 11,478 four years later. See Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969) (calling for a policy of equal opportunity for federal employment, prohibiting "discrimination . . . because of race, color, religion, sex, national origin, handicap, or age," and calling for "continuing affirmative action program [with]in each executive department and agency").

<sup>179</sup> Joseph Carens, *Realistic and Idealistic Approaches to the Ethics of Migration*, 30 INTERNATIONAL MIGRATION REVIEW 156, 157-58 (1996)

<sup>180</sup> One of the primary claims of deliberative democratic theory is that decisions produced through deliberative practices "are more legitimate because they respect the moral agency of the participants. This benefit is inherent in the process . . . [and] is not appropriately subjected to empirical investigation." Dennis F. Thompson, *Deliberative Democracy Theory and Empirical Political Science*, ANNU. REV. POLIT. SCI. 497, 498 (2008). But the legitimating function of deliberative practices, particularly in the legal culture of the United States, discussed further *infra*, is also a reason for caution. If citizens merely rubber-stamp a regime that is unjust from an external point of view, then deliberative practice legitimizes the immigration regime in the pejorative sense. Deliberative practices are entitled to more legitimacy only to the extent they occur under ideal conditions, the scope of which are subject to some debate among theoretical practitioners. One of those conditions, for instance, is equality. "Background inequities in resources, status, and other forms of privilege upset the communicative equality that deliberation requires." Archon Fung, *Deliberation Before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World*, 33 POL. THEORY 397, 398 (2005). The immigration jury proposal I have outlined should go forward without anything resembling that level of equality because of the structural limitations I have described: in this arena the ideal is not possible. This position is consistent with Fung's ethical practice of deliberative democracy because the institution is designed to create a space where deliberation can happen (in a political context where it generally does not) and because the exchange is designed to conform to just deliberative conditions as much as possible given current social facts. See *id.* at 406-08. Additionally, I am not advocating this institutional change as a substitute for social and political movements. I see institutions providing sites that can enhance the efficacy of such organizing. See *id.* at 408-11.

inch towards reformers' ultimate goals.

I conclude this piece by pointing scholars to the deliberative democracy literature, which provides a number of useful and under-explored tools for imagining ways to go about changing the direction of the immigration regime, and by setting out some specific targets for change.

### C. *Deliberative Democracy: A Toolkit for the New Immigration Reform*

The deliberative democracy literature is skeptical of the legitimacy of law that is ground simply in the aggregation of the *ex ante* views of the citizenry. Deliberative democrats are suspicious of the usual republican democratic process for reasons evident in the gulf between citizens' perceptions of undocumented migration and the empirical analysis of harms and benefits. Deliberative democrats urge that legal and political legitimacy hinges on, among other things, subjecting political decision-making to objective reasoning. The legislative entrenchment of the border enforcement approach—even in the face of its abject failure—described by Skrentny and Gell-Redman is, in part, a symptom of the legislature's failure to adopt legislation that conforms to reason, in favor of distorted public opinion. Similarly, Massey and Pren's wish for a Congress that passes immigration legislation accounting for "the underlying dynamics and social processes involved"<sup>181</sup> is consonant with the kind of reason-based decision making that deliberative democrats favor. The processes used to create "the democratic will," deliberative democrats argue, has important effects on what the democratic will is; viewpoints are not process neutral. Changing the process can change the outcome. If the democratic process becomes more reason-based and deliberative, then outcomes may shift too. The example of the immigration jury reflects these deliberative democratic convictions.

Focusing on normative procedure rather than normative substance also addresses a flaw in the normative political and legal theory literature that is seldom remarked upon. The procedural or representational turn underscores the importance of aliens (subalterns in the coinage of post-colonial theory) speaking for themselves. While I am aware of the gross inequality that shapes to some degree the content and reception of migrant speech, the majority of scholars developing normative political and legal theory in this area are working and thinking, as I do, from positions of extreme economic, social, and intellectual privilege. It behooves us from an ethical and epistemological point of view at least to be self-conscious of that fact, and to make it part of our creative endeavor to find ways to allow migrants to speak for themselves in the process of constituting norms that make claims to universality.<sup>182</sup>

Engagement with the deliberative democracy literature should prove useful to immigration law scholars for reasons beyond its epistemic sophistication; it has also inspired a rich and varied set of institutional designs intended to make real its theoretical promise.<sup>183</sup>

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<sup>181</sup> Massey & Pren, *supra* note 99, at 24.

<sup>182</sup> Iris Marion Young makes a related point: "[T]he structure and norms of ideal deliberative democracy . . . provide the epistemic conditions for the collective knowledge of which proposals are most likely . . . to promote results that are wise and just [for a multicultural society]." IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 30 (2000).

<sup>183</sup> See, e.g., Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUBLIC ADMIN. REV. 66, 66-75 (2006) (describing appropriate ways public participation can be used to develop democracy); Archon Fung, Survey Article: *Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338, 339 (2003) (discussing the development of "minipublics," which encourage more participation of the public in a democracy); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 340 (2003) (analyzing the appropriate contexts for implementing a "deliberative democracy" or "discourse" theory-based approach, injecting "face-to-face" interactions into political dialogue).

#### D. *The New Immigration Reform: Targets for Change*

Below, I set out some prominent factors that skew democratic knowledge about immigration in a way that helps that knowledge feed into other structural elements that keep the immigration regime moving in a harsh direction. Targeting these factors for intervention, potentially with deliberative democratic methods, should help begin to improve the quality of the democratic knowledge that immigration politics acts upon. After cataloging these factors, I show how they are all addressed to some degree by the exemplary immigration jury reform I have discussed.

##### 1. Race and Otherness

How does an American citizen residing in Phoenix perceive the fact of undocumented migration first-hand? In Alabama or Georgia? The primary identifier is race, closely followed by language, and then occupation. Citizens may imagine the militarized crossings that ranchers on the border actually see, but they perceive “illegals” in their communities through the proxy of race. The use of race or language in this way is problematic for reasons obvious and not. For a country with a history of race-based labor regimes, tying race to unlawful work or unlawful presence poses dangers in the long term, in part because this association conditions citizens to think of entitlements—like the right to work—as functions of race.<sup>184</sup> That kind of thinking can easily mutate into a trait that marks a race, creed, or national origin as unworthy more generally, and irrespective of legal status.

The subtler problem with the social use of race as a proxy for undocumented migration is that the United States radically diversified the origins of *authorized* migrants in 1964 with the passage of the Hart-Celler Act.<sup>185</sup> Undocumented migration from Mexico, Central America, and

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<sup>184</sup> Fan describes this phenomenon in psychological terms:

The salient feature of racial distinctiveness in minorities can contribute to distorted perceptions of correlation with negative traits such as criminality. This formation of what is called in the social psychology literature an ‘illusory correlation’ is due to how distinctiveness and infrequency distort our judgment, leading us to link racially salient people with salient negative behaviors and overestimate the association because both are infrequently encountered and strikingly salient in their joint infrequency. Illusory correlations in perception are aggravated by expectancy-based mechanisms and confirmation biases that render us resistant to data contrary to our stereotypes and selectively attuned to belief-confirming information while discounting or discarding information that does not fit the view. We are particularly susceptible to hostile misperception in times of social strain and national self-doubt like that precipitated by our present economic turmoil because, as social psychologists have posited, ‘ego threat’ to self-regard activates negative ethnic stereotypes to bolster self-regard.

Fan, *Post-Racial Proxies*, *supra* note 37, at 944.

A related cognitive model through which we might productively explain what is problematic about the workings of these heuristic responses is that they prey upon Americans’ cultural-constituted bias to be “dispositionist,” that is to attribute behavior like unlawfully immigrating to an unchangeable reflection of a person’s low-moral worth, when in fact psychological research tells us that people’s behavior is more accurately viewed as a product of circumstances. See Jon Hanson & David Yosifon, *The Situation: An Introduction to The Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 251-62 (2003). Hanson & Yosifon also discuss how dispositionism assisted Americans in relieving the cognitive dissonance of slavery in an America that claimed to value freedom, individual autonomy, and human rights. See *id.*

<sup>185</sup> See NGAI, IMPOSSIBLE SUBJECTS, *supra* note 56, at 258-59.

other non-European countries grew precipitously during the same period as did *authorized* migration from Mexico and Central America.<sup>186</sup> That is, since 1964, America has become dramatically more diverse by almost every measure. Even so, citizens' anxiety about social or cultural change in general is largely attributed to undocumented migration.<sup>187</sup> Thus citizens feel themselves to be under siege by the significant increase in the racial, ethnic and linguistic diversity of all immigrants, legal and undocumented.<sup>188</sup> But since the citizenry cannot tell who is legal or illegal simply by looking at him, individual observations are likely to give citizens an exaggerated sense of how many "illegals" there actually are.<sup>189</sup> And this socially problematic ambiguity is mostly the result of legally authorized changes to the immigration regime.

## 2. Social Distance

Social science research has shown that developing personal or professional relationships with people who belong to disfavored social or racial groups lowers bias.<sup>190</sup> These de-biasing interactions seldom occur between citizens and undocumented migrants because undocumented migrants keep their distance from citizens or are guarded about their legal status around strangers for self-protective reasons. Even if citizens did get to know undocumented people in formal or informal ways, language barriers would pose a significant obstacle to creating the kind of relationship that would help individual citizens break through the exaggerated view of the "evils" that undocumented migrants visit upon the nation.

## 3. Political Distance

One of the instrumental reasons that democracy is a superior form of government is because citizens provide consistent feedback on the effects of laws, regulation, and governance in the real world. Though large-scale republican democracy does pose obstacles to effective implementation of that feedback, these can sometimes be overcome. John Hart Ely's political process theory,<sup>191</sup> for instance, sees courts as vehicles for ensuring that minority views get due consideration in the political system.

Immigration, alienage, and naturalization laws are different from other laws in an important way because those most affected by the laws have no formal control over their passage or implementation.<sup>192</sup> One of the most important instrumental benefits of democracy then, is entirely absent from this area of law. If few in the political debate know how these laws affect their targets, it should be no surprise that immigration law, or public views of immigration, do not square with empirical reality: there is no sufficient structural mechanism to keep immigration law

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<sup>186</sup> See Massey & Pren, *supra* note 99, at 17-21.

<sup>187</sup> See Jens Hainmueller & Daniel J. Hopkins, *The Hidden American Immigration Consensus: A Conjoint Analysis of Attitudes Toward Immigrants* 1, 22, (MIT Pol. Sci. Dept., Working Paper No. 22, 2012), available at <http://ssrn.com/abstract=2106116>; Morales, *In Democracy's Shadow*, *supra* note 8, at 61.

<sup>188</sup> The anxiety of demographic change became more visible in the aftermath of President Obama's election to a second term. See, e.g., Steven Hahn, *Political Racism in the Age of Obama*, N.Y. TIMES, Nov. 10, 2012, at SR6 (discussing the white American's unease with the increasingly successful claims of non-whites to political inclusion).

<sup>189</sup> See Fan, *Post-Racial Proxies*, *supra* note 37, at 944.

<sup>190</sup> See Kang & Banaji, *Fair Measures*, *supra* note 70, at 1064; Jerry Kang & Kristen Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 501-03 (2010).

<sup>191</sup> See ELY, *supra* note 72, at 103.

<sup>192</sup> See discussion of Abizadeh, *supra* Part IV.A.

grounded.

And the Supreme Court, as discussed above, cannot play the politically protective role it sometimes does with respect to disfavored discrete and insular minority citizens, at least to the same degree. This is both because the Court has, of its own accord, ceded authority over immigration largely to Congress,<sup>193</sup> and because, as a result of the Court's position in relation to the other political branches and the popular sovereign, it cannot exert the same degree of authority over the rights of migrants.

#### 4. The Criminal Taint

Elsewhere I have written extensively about how and why immigration laws deploy the stigma of criminality and to what effect.<sup>194</sup> It suffices here to acknowledge the entrenched social perception that undocumented migrants are categorical criminals. Just as the basic stigma of being undocumented bleeds into other categories of noncitizens, so too does the criminality associated with undocumented migrants taint immigrants in general. Placed in the context of the citizenry's unsympathetic disposition to citizen-criminals, it is not difficult to understand why amnesty for undocumented people is so challenging to achieve. If "illegals" are perceived as criminals, then amnesty—particularly with a path to citizenship—is the admission of criminals into the body politic.<sup>195</sup>

#### 5. Work as a Property Right

Prior to 1986 it was perfectly legal for an employer to hire an undocumented migrant, and being an undocumented worker posed no additional legal problem beyond whatever legal violations attended entry into the United States.<sup>196</sup> Today it is unlawful for employers to hire undocumented migrants and, for the migrants' part, getting a job usually involves brandishing a citizen's social security number and some other false document. These acts can, in turn, lead to severe criminal penalties under federal law. This legal shift turned the workplace from:

[a] location where immigrants, through sweat and toil "earned" their social right to remain present in the United States into the locus of criminal endeavor and fraud. Work went from a marker of belonging to a species of theft. Correspondingly, the ability to work in the United States became [a] . . . property right belonging exclusively to citizens and legal aliens.<sup>197</sup>

But the property analogy fits poorly with the commonplace understanding of property as an exclusive good—"buy land; they're not making it any more."<sup>198</sup> Jobs are not usually zero-sum.

<sup>193</sup> See BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 11, at 50.

<sup>194</sup> See generally Morales, *In Democracy's Shadow*, *supra* note 8 at 56 (discussing how the law uses the stigma of criminality and its attachment to certain races as a strategy to limit socially disfavored groups' claims on social, economic, and political resources).

<sup>195</sup> See Morales, *In Democracy's Shadow*, *supra* note 8, at 72.

<sup>196</sup> Prior to 1986 this was true at the federal level, though at the time, a number of states were already regulating the employment of undocumented migrants. See Su, *supra* note 42, at 21.

<sup>197</sup> Morales, *In Democracy's Shadow*, *supra* note 8, at 65.

<sup>198</sup> This popular saying is attributed to American author Mark Twain. See Douglas A. McIntyre, *Memo to Congress: "Buy Land, They Ain't Making Any More of It"*, TIME, Jan. 28, 2009, <http://www.time.com/time/business>

Having more workers can boost demand for goods and services, thus creating more jobs.<sup>199</sup>

## 6. The Bewildering World

Every aspect of contemporary life is shifting at an accelerated pace; technology, social mores, economic possibility, and job requirements continue to change markedly and rapidly. As compared to other developed nations, the American government insulates its citizens less from these disruptive forces, a failure that can lead to a socially and emotionally frayed populace. In this general climate of upheaval, and without adequate insulation from the state, citizens simply have fewer resources—emotional, social, and cognitive—to devote to understanding the complexity of undocumented migration.<sup>200</sup>

These factors drive the gap between how citizens think about immigration and the consensus empirical view. Imagine, however, how these factors might be challenged if a jury of citizens had to decide the fate of a long-standing “illegal” migrant without criminal convictions. Such an encounter would, to some degree, close the political distance between migrants and citizens. In such a proceeding, a migrant would address the citizen jury in a formal setting, recount their personal migration story, and ask the jury to find them worthy of becoming a formal member of the polity, despite having entered the country without permission. That encounter would, in an imperfect way, be a political discussion about who should have the right to belong in the United States and allow the migrant to represent his own interests to members of the popular sovereign. The proceeding would bridge social distance, and the face-to-face encounter would at least acknowledge the shared humanity between migrant and citizen juror. Stories the migrant tells about his life, both in the United States and prior to his entry, would create a kind of temporary, though obviously freighted, intimacy between the jury and the migrant. While the differential of power between citizen juror and migrant could mitigate the positive effects of such an exchange, this hierarchical constraint can only be changed over an extended period of time. The social effect may be marginal, but it remains important in this context precisely because such social mixing is rare.

Race, the criminal taint, and work as a property right, can also be challenged in this encounter. Regarding race, citizen jurors will be giving individualized membership consideration to a migrant who runs, at least to some degree, counter to racial stereotypes. The same line of reasoning extends to the criminal taint, as citizens will encounter migrants whose only significant unlawful act was the initial unlawful entry. As for the conceptualization of work as a property right, a significant proportion of these migrants will have substantial work histories. The opportunity for migrants to share stories of effortful contribution through work may not attack directly the idea that migrants steal jobs, but in the context of a larger narrative, may at least show that migrants work for the same reasons that citizens do: to provide a fulfilling life for themselves and their families. This might to some degree erode the commonplace view that jobs are zero-sum.

The immigration jury is just one example of the kinds of reforms that can help address, from the bottom up, some of the issues identified in this article. Surely, however, there are many other reforms that can have similar effects.

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/article/0,8599,1874407,00.html.

<sup>199</sup> See Posner, *supra* note 35.

<sup>200</sup> See generally Myron Rothbart & Oliver P. John, *Intergroup Relations and Stereotype Change: A Social Cognitive Analysis and Some Longitudinal Findings*, in PREJUDICE, POLITICS, AND THE AMERICAN DILEMMA 32 (Paul Sniderman et al. eds., 1994).

## V. CONCLUSION: THE RESERVOIR OF COSMOPOLITAN SENTIMENT

I conclude by providing some of the reasons to believe that changing the underlying character of the harsh immigration regime is possible. While getting to that end point requires the creation of a cosmopolitan moral ethic in the citizenry, the United States is in a unique position to achieve this ethic given its history and values. Our culture has already accepted certain tropes that are widely invoked by the polity and can be readily drawn upon. The most frequently cited examples include statements characterizing America as a “melting pot” and a “nation of immigrants.”<sup>201</sup> Further, recent quantitative empirical work has shown that beneath the bluster, Americans favor the immigration of people perceived as contributing to American society by working,<sup>202</sup> and that trouble arises because undocumented people are perceived as non-contributors because they entered without permission.<sup>203</sup> Additionally, rather than take a racial-cultural approach to the concept of citizenship, the United States takes a radically Lockean and contractual view.<sup>204</sup> This is not to say that race plays no part in the polity’s thinking about migration. To the contrary, racial issues have historically played a substantial role in structuring and creating demand for immigration restrictions,<sup>205</sup> and that trend continues to today.<sup>206</sup> Yet, notwithstanding these restrictions, the United States is now, nonetheless, a very diverse nation. And norms have shifted such that it falls well outside mainstream social mores to explicitly invoke race as a justification for exclusion.

The upshot to these structural qualities of American nationhood suggests that we have the potential to become much more cosmopolitan than peer countries. The country is more fertile soil for cultural and democratic change than countries like Sweden, Austria, or Ireland, which currently have larger foreign-born populations as a percentage of total population than the United States.<sup>207</sup> This suggests that if the structural entrenchment described above can be turned around, the United States citizenry could be willing to absorb more immigrants. Further, over time, the United States may be able to reach a position where it could accept the free movement of persons through its borders with minimal restrictions.

This last point follows from the contractual character<sup>208</sup> of our national ties: the law structures our sense of nationhood. As a result, laws affecting aliens have a profound impact on how Americans conceive of themselves as a people. In their text, their exercise, and their contestation, immigration laws tell a story about whom United States citizens are or wish to be. The

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<sup>201</sup> See Schahar, *Earned Citizenship*, *supra* note 80, at 111, 135 (illustrating the use of these terms).

<sup>202</sup> See Hainmueller & Hopkins, *supra* note 187, at 22 (“Immigrants who are positioned to be more successful in the U.S. labor market or to make contributions to the country’s well-being are viewed more positively, while those who do not speak English, do not plan to work, or have entered without authorization are viewed negatively.”).

<sup>203</sup> *Id.*

<sup>204</sup> See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 26 (1985) (discussing Locke’s concept of civic governance that requires the consent of citizens, and its treatment of illegal aliens).

<sup>205</sup> See generally NGAI, *IMPOSSIBLE SUBJECTS*, *supra* note 56, at 21-55 (tracing the origins and history of the “illegal alien” in American law and society).

<sup>206</sup> See generally Morales, *In Democracy’s Shadow*, *supra* note 8 (discussing how the negative racialization of socially disfavored minorities, especially with regards to Latino and Mexican persons, influences immigration policy).

<sup>207</sup> See ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, *SOCIETY AT A GLANCE 2011: OECD SOCIAL INDICATORS 46-47* (2011), available at <http://www.oecd.org/berlin/47570020.pdf>.

<sup>208</sup> See generally SCHUCK & SMITH, *supra* note 204 (discussing the contractual character of American citizenship).

laws, in an important sense, define us,<sup>209</sup> and this centrality of law in American self-definition can be a source of hope for the rational regime. It means identity definitions are relatively plastic, and may be changed or rationalized through legal, rather than purely social, channels.

All of these characteristics should buoy reformers to carefully chart a new course for immigration reform while keeping their ultimate aspirations in sight.

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<sup>209</sup> This function can be appreciated most readily by acknowledging that until the 1964 Hart-Celler Act, which equalized global quotas for immigrants, managing the racial composition of the immigration pool to favor white northern Europeans over less desirable groups was the direct goal of immigration regulation. The seminal cases of constitutional immigration and alien law all involved, to one degree or another, the issue of socially undesirable ethnicity. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, *supra* note 50, at 256-58 (documenting these seminal cases).